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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Hess Bakken Investments II, LLC; Arkoma Drilling II, L.P.; and Comstock Oil & Gas, LP, Plaintiffs/Appellants, vs. AgriBank, FCB; Intervention Energy, LLC, and Riverbend Oil & Gas VI, L.L.C., Defendants/Appellees.	**SUPREME COURT NO. 20190352** Civil No. 31-2018-CV-00245

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

DEFENDANT/APPELLEE RESPONSE BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE FACTS

[¶1] Hess Bakken Investments II, LLC ("Hess") alleges, as fact, several facts that are unsupported or entirely absent from the record. Hess alleges that Continental Resources, Inc. ("Continental") was on location and ready to drill its wells in order to continue holding the Subject Leases on April 2, 2012. There is no support for this in the record provided by Hess. Other than Hess's conclusory assertions of facts, there is nothing in the record indicating that Continental was capable of drilling its wells on April 2.

[¶2] In its brief, Hess states that Continental submitted four applications to the Industrial Commission to drill wells in January and February 2012. *Hess Appellants' Brief* ("Hess Brief") at ¶ 14. The Industrial Commission granted the permits for these wells on March 20, 2012, only 13 days before the Subject Leases expired. Then, on April 2, Continental filed a series of Form 4 sundry notices with the Industrial Commission requesting permission to move the surface hole locations for the wells, which Hess argues hold the leases. *Hess Brief* at ¶ 15. While the wells were not drilled by April 2, even though Continental had permits to drill, they were still filing applications to move the wells with the Industrial Commission on the day the leases expired.

[¶3] There is nothing in the Form 4 sundry notices indicating that Continental was capable of drilling the wells that Hess argues hold the Subject Leases. How could there be, as Continental was requesting permission in these applications to move the surface location for its wells. That permission is necessary to drill the wells. Without the Industrial Commission's permission, Continental could not drill its wells. The sundry applications are not facts of anything other than Continental not having timely drilled the wells by April

2. There is nothing in the sundry notices identifying any tangible steps taken by Continental related to the drilling of the wells.

[¶4] Hess admits that Continental did not drill the wells on time in order to hold the Subject Leases under the "actual drilling operations" requirement in the leases. It is undisputed that Continental did not drill these wells until May 5 and 8, 2012, more than a month after they filed their sundry notices with the Industrial Commission, on April 2, requesting permission to move the surface location for the wells. *Hess Brief* at ¶ 16. The fact that more than a month lapsed from when the Subject Leases expired, on April 2, to when Continental actually began drilling the wells on May 5 and 8, underscores the fact that Continental was not ready to drill these wells as Hess claims.

[¶5] Finally, Hess indicates they agreed to participate in the wells, and paid their share of the well costs. Even assuming this fact is relevant, which it is not, there is nothing in the record supporting Hess's claim that they paid any share of the drilling costs to Continental. Regardless, this fact has no bearing as to whether Continental timely drilled the wells so as to extend the Subject Leases beyond their April 2 expiration date.

[¶6] Oral argument would be helpful to address the District Court's ruling as to the definition of "actual drilling operations," and how the cases Hess cites are distinguishable because they define only "drilling operations," and not "actual drilling operations"

LAW AND ARGUMENT

I. The District Court properly held that "actual drilling operations" is not the same thing as "drilling operations," and as a result, the Subject Leases expired as a matter of law because the wells were not actually drilled by April 2, 2012, the end of the leases' primary term

[¶7] As a matter of law, the District Court correctly interpreted the term "actual drilling operations," holding that it was not the same thing as "drilling operations," and as a

consequence, the Subject Leases were not extended beyond the primary term because actual drilling operations were not conducted by April 2. *See* Order on Intervention Energy and Riverbend's Motion to Dismiss ("Order") at ¶ 23. The case law Hess relies on is distinguishable because none of those cases interpreted the term "actual drilling operations," they only interpreted the term "drilling operations." The authorities cited by the District Court and Intervention Energy ("Intervention"), including Summers Oil and Gas ("Summers"), which is cited in the cases Hess relies on, are decisive. Summers, and those cases cited by Intervention, defined "actual drilling operations" as requiring the actual drilling of the surface, as held by the District Court, rejecting arguments that preparatory work of the sort Hess points to qualifies as "actual drilling operations." See 2 Summers Oil and Gas § 18.3 (3d ed.).

A. The District Court properly granted Intervention's motion to dismiss, as a matter of law, because the parties introduced matters outside of the pleadings, including the Subject Leases

[¶8] The District Court does not say that it's applying a Rule 56 standard to Intervention's Motion to Dismiss as opposed to the Rule 12(b) standard. Notwithstanding, given the Order, its focus on the interpretation of the lease language, and the parties agreement that the interpretation of a contract is a question of law, the District Court properly granted Intervention's motion. Even though Intervention's motion was to dismiss Hess's complaint, because matters outside of the pleadings were introduced by the parties, including Hess, and considered by the District Court, the motion is treated as a summary judgment motion under Rule 56. "If matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." *Munson v. Indigo Acquisition Holdings, LLC*, 2019 ND 197, ¶ 6, 931 N.W.2d 679

(citing N.D.R.Civ.P. 12(d) and *White v. T.P. Motel, L.L.C.*, 2015 ND 118, ¶ 15, 863 N.W.2d 915). *See also Nandan, LLP v. City of Fargo*, 2015 ND 37, ¶ 11, 858 N.W.2d 892 (stating, "A motion to dismiss under N.D.R.Civ.P. 12 (b)(6) is based on the pleadings, and if matters outside the pleadings are considered, the motion must be treated as a motion for summary judgment under N.D.R.Civ.P. 56.")

[¶9] In this case, Hess introduced matters outside of the pleadings. Hess's Appendix contains multiple documents outside of the pleadings introduced at the District Court, including: Exs. 1 – 3 (oil and gas leases) at Hess App'x. 18 – 26; Ex. 4 (application for permit to drill to Industrial Commission) at Hess App'x. 27 – 34; Ex. 5 (Industrial Commission well permits) at Hess App'x. 35 – 42; Ex. 6 (Form 4 sundry notices) at Hess App'x. 43 – 46; Exs. 7 – 8 (oil and gas top leases) at Hess App'x. 47 – 52; and Ex. 9 (Assignment and Bill of Sale) at Hess App'x. 53 – 80. All of these exhibits were cited in, and attached to, the Amended Complaint. *See* Hess App'x. 9 – 12. The District Court considered these exhibits in ruling on Intervention's motion. *See* Order at ¶¶ 4 – 7, 9, and 13. *Cf. Munson*, 2019 ND 197 at ¶ 8 (stating, "In this case, materials outside the pleadings, including IAH's answer and attached exhibits, were presented to and not excluded by the district court. Because the court considered materials outside of the pleadings, the motion must be treated as one for summary judgment under N.D.R.Civ.P. 56.")

[¶10] The first portion of the Order, dealing with the meaning of "actual drilling operations" focused entirely on the interpretation of the Subject Leases based on the language in the leases. *See id.* at ¶¶ 4 – 24. Because Hess did not object to the parties' presenting evidence outside the pleadings, and for its part, presented all of the evidence outside of the pleadings that are part of the record on appeal, Hess cannot object to the

application of Rule 56 to this appeal, or argue they did not have an opportunity to complete the record when the District Court considered Intervention's motion.

[¶11] Summary judgment is appropriate under Rule 56 for resolving a matter, on its merits without a trial, if there are no genuine issues of material fact, or if the only issue to be resolved is a question of law. *See Munson* at ¶ 7. The sole issue before the Court on appeal is the interpretation of the Subject Leases, and the meaning of the term "actual drilling operations." In *Egeland v. Cont'l Res. Inc.*, the Court explained the well-established rule governing summary judgment and the interpretation of oil and gas leases.

> The same general rules that govern interpretation of contractual agreements apply to oil and gas leases. The construction of a written contract to determine its legal effect is a question of law for the court to decide, and on appeal, this Court will independently examine and construe the contract to determine if the trial court erred in its interpretation of it. Words in a contract are construed in their ordinary and popular sense, unless used by the parties in a technical sense or given a special meaning by the parties.

Egeland, 2000 ND 169, ¶ 10, 616 N.W.2d 861 (citations omitted). The interpretation of a contract to determine its legal effect is one suited for summary judgment. "Interpretation of a written contract to determine its legal effect is a question of law, fully reviewable on appeal." *Kittleson v. Grynberg Petroleum Co.*, 2016 ND 44, ¶ 10, 876 N.W.2d 443 (citing *City of Moorhead v. Bridge Co.*, 2015 ND 189, ¶ 10, 867 N.W.2d 339). *See also Burk v. State by & through Bd. of Univ. & Sch. Lands*, 2017 ND 25, ¶ 9, 890 N.W.2d 535 (stating, "The interpretation of a written contract generally is a question of law for the court, making summary judgment an appropriate method of disposition in contract disputes.") (citing *Myaer v. Nodak Mut. Ins. Co.*, 2012 ND 21, ¶ 10, 812 N.W.2d 345).

[¶12] The Court is not required to review Hess's appeal under the framework that only requires them to survive a Rule 12(b) challenge because Hess introduced matters outside

of the pleadings. The interpretation of the Subject Leases, and the term "actual drilling operations," is a question of law appropriate for summary judgment under Rule 56.

B. The cases Hess relies on are distinguishable because the leases in those cases did not require "actual drilling operations."

[¶13] Hess cites to a line of cases defining the term "drilling operations." *See Abell v. GADECO, LLC*, 2017 ND 163, 897 N.W.2d 914; *Wold v. Zavanna, LLC*, No. 4:12-CV-00043, 2013 WL 6858827 (D.N.D. Dec. 31, 2013); *Anderson v. Hess Corp.*, 733 F. Supp. 2d 1100 (D.N.D. 2010), *aff'd*, 649 F.3d 891 (8th Cir. 2011); and *Murphy v. Amoco Prod. Co.,* 590 F. Supp. 455 (D.N.D. 1984). None of these cases interpreted the term "actual drilling operations." Hess also fails to note that in these cases, the Court cites favorably to the Summers treatise. This respected authority defines "actual drilling operations" by citing the Interior Board of Land Appeals cases that considered what constituted "actual drilling operations." Uniformly, these cases held that the preparatory work cited by Hess does not satisfy a lease's requirement for "actual drilling operations."

[¶14] Hess invites the Court to reject applicable legal authority, cited by the District Court and Intervention, including Summers and the IBLA cases, because those authorities define "actual drilling operations" as requiring the actual spudding of a well.

> Likewise, there is no dispute that the wells on the subject property were not spud until no earlier than May 5, 2012. See, *Complaint* at ¶26. … Under this Court's interpretation of the phrase "actual drilling operations," the 2004 leases were not extended beyond the end of the primary term of the leases by the Continuous Drilling Clauses, because "actual drilling operations" were not being conducted on April 2, 2012. As a consequence, the 2004 leases terminated on April 2, 2012, and the Intervention leases, executed on April 11, 2012, are valid and enforceable.

Order at ¶ 23 (emphasis added). The Court held that, "In cases from other jurisdictions where leases have included a definition of "actual drilling operations," the phrase has been defined to require the bit in the ground." *Id*. at ¶ 19 (citing *Rippy Interests, Inc. v. Nash*,

475 S.W.3d 353 (Tex. App. 2014); *Peionnet v. Matador Resources Company*, 144 So.3d 791 (La. 2013); and *Exxon v. Mobil Corp. v. Alabama Dept. of Conservation and Natural Resources*, 986 So.2d 1093 (Ala. 2007)). These authorities support Intervention's interpretation of "actual drilling operations." The cases cited by Hess, though, are all distinguishable.

[¶15] In *Abell*, the court looked only at the term "drilling operations," and did not consider or define the term "*actual* drilling operations." The District Court also held that *Abell* was distinguishable because the lease there included a definition of the word "operations" that expressly included preparatory work such as "building of roads, preparation of the drill site, moving in for drilling, drilling, deepening, plugging back, reworking or recompleting and also secondary recover operations benefitting the leased premises." *See* Order at ¶ 11 (citing *Abell,* 2017 ND 163 at ¶ 2). The decision in *Anderson* is similarly distinguishable. In *Anderson*, the Court considered the meaning of the term "drilling or re-working operations," *see id*. at 1106, not actual drilling operations. Likewise, in *Murphy*, the Court looked only at whether "drilling operations" had commenced, and did not consider the meaning of the term "actual drilling operations." *Murphy*, 590 F.Supp. at 458.

[¶16] Unlike these cases, in *Wold*, while not defining the term "actual drilling operations, the Court recognized the importance of the word "actual" in modifying the term "drilling operations." The term at issue in *Wold*, like *Anderson*, was "drilling or re-working operations." *Wold*, 2013 WL 6858827 at *2. The *Wold* Court relied on *Anderson* in holding that Hess conducted drilling or re-working operations to satisfy the lease. "Much of what was decided in *Anderson* is ultimately dispositive here, given the similarity of the issues."

Id. The Court, however, noted that it was handcuffed by the term "drilling or re-working operations." The Court gave two examples of how to prevent the same outcome in *Anderson,* instructing parties to do one of two things – either "including a definition of 'drilling operations'" in the lease or "inserting language requiring some other benchmark, such as *actual* drilling." *Wold* at *11 n. 8 (emphasis added). The Subject Leases did just that by modifying the term drilling operations with the word "actual."

[¶17] The inclusion of the word "actual" in the Subject Leases is significant because it differs and distinguishes the leases from the standard, boiler plate language in leases – like those in *Abell*, *Wold*, *Anderson*, and *Murphy* that required only "drilling operations." The Court in *Wold* called the term "drilling or re-working operations" standard, boiler plate language. The inclusion of the word "actual" changes that.

> 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.

Wold at *11 n. 8. That matters. The Court must reject Hess's argument that "actual drilling operations" means the same thing as "drilling operations," satisfied by the same preparatory activities noted in *Anderson* and *Murphy*, because that interpretation neuters the word "actual" of its meaning and significance, reading it right out of Subject Leases.

C. The District Court properly interpreted the word "actual" in the context of the term "actual drilling operations" in the Subject Leases.

[¶18] Hess's interpretation of "actual drilling operations" removes the word "actual" from "actual drilling operations." They are two different terms:

"*<u>actual</u> drilling operations*" vs. "*drilling operations*"

The word "actual" modifies the term "drilling operations." Every word in a contract must be given meaning. "To the extent possible, we give effect to every provision of the contract. Unambiguous language will be given its clear meaning." *Dakota Partners, L.L.P. v. Glopak, Inc.*, 2001 ND 168, ¶ 19, 634 N.W.2d 520 (citing N.D.C.C. §§ 9-07-02, 9-07-06). The same Court that decided *Wold* and *Anderson* has cautioned against interpreting legal text in a manner that renders language surplusage and "functionally meaningless." *See Packer v. Turman & Lang, Ltd.*, 2016 WL 5339652 (D.N.D. Mar. 30, 2016) (the Court applied the "principle of statutory construction that avoids creating mere surplusage.") This is consistent with the requirement in Chpt. 9-07, N.D.C.C., regarding interpreting contracts, requiring that every word in a contract be given meaning. The word "actual" in the term "actual drilling operations" must be given meaning.

[¶19] If "actual drilling operations" was the same as "drilling operations," there would have been no reason to include the word "actual" as modifying the term "drilling operations" in the leases. Hess's interpretation makes the word "actual" mere surplusage. *Cf. Vanderhoof v. Gravel Prod., Inc.*, 404 N.W.2d 485, 491 (N.D. 1987) (reversing the trial court, holding in relevant part, "If the parties intended that Paragraph 4d would apply to all possible claims of any nature whatsoever there would be no reason to include a specific provision regarding liability for injuries to cattle. The trial court's construction of the lease renders Paragraph 4c mere surplusage.") *See also Bridston by Bridston v. Dover Corp.*, 352 N.W.2d 194, 197 (N.D. 1984) (rejecting an interpretation that rendered language mere surplusage. "YMCA's interpretation would render this requirement mere surplusage because, even without the insurance provision, UND would be entitled to restitution for any damages it might incur as a result of its vicarious liability for YMCA's acts of

negligence.") Like *Vanderhoof* and *Bridston*, the Court must reject Hess's interpretation that renders the word "actual" meaningless as mere surplusage.

[¶20] The term "actual drilling operations" requires the drilling of a well. As explained by the Eighth Circuit Court of Appeals, "when interpreting and defining terms in oil and gas agreements, the North Dakota Supreme Court has consistently relied on the *Williams & Meyers Oil and Gas Law Manual of Terms*." *Northern Oil and Gas, Inc. v. Moen*, 808 F.3d 373, 377 (8th Cir. 2015). Notably, Williams & Meyers distinguishes the term "drilling operations" from "actual drilling operations," and rejects the argument that the preparatory work described by Hess constitutes "actual drilling operations."

[¶21] According to Williams & Meyers, actual drilling operations "*requires the actual penetration of the ground by the drill bit*." P. Martin & B. Kramer, Williams & Meyers Oil and Gas Law, Manual of Oil & Gas Terms 996 (2011). Williams & Meyers is clear. Work done prior to penetrating the ground, like "grading roads and well sites and moving equipment onto the leased land," is not "actual drilling operations." *Id*. What's more, in *Wold* and *Anderson*, the Court cited approvingly to Summers, which comports with Williams & Meyers. While Hess implores the Court to ignore the federal decisions involving the definition of "actual drilling operations," the Summers treatise relies on those very decisions for its definition of "actual drilling operations." Summers cites, as authoritative, the Interior Board of Land Appeals decision in *In Santa Fe Energy Res., Inc.*, where the IBLA rejected the sort of preparatory work relied on by Hess as constituting "actual drilling operations."

> Most appeals which have arisen with respect to this provision have dealt with aspects of the first requirement. Thus, there have been a number of cases in which the Board has explored what constitutes "*actual drilling operations*" in the context of determining whether or not qualifying activities commenced prior to the end of

> the lease's primary term. *See, e.g., Nevdak Oil & Exploration Co., supra* at 140 (rig present but no drilling occurring held not qualifying); *Estelle M. Wolf*, 37 IBLA 195, 197 (1978) (site preparation and attempts to move a drilling rig onto lease which were frustrated by a blizzard held not qualifying); *Burton W. Hancock*, 31 IBLA 18, 19 (1977) (untimely commencement of drilling as a result of mechanical mishaps and inclement weather held not qualifying); *Inexco Oil Co.*, 20 IBLA 134, 139 (1975) (preliminary steps towards drilling held not qualifying); *Michigan Oil Co.*, 71 I.D. 263 (1964) (site preparation and grading held not qualifying).

In Santa Fe Energy Res., Inc., 138 IBLA 133, 135, 1997 WL 123570, *3 (Int. Bd. L. App. 1997) (cited for definition of "actual drilling operations" in 2 Summers Oil and Gas § 18:3 (3d ed.), What constitutes "commencement" of drilling operations). So, the very treatise the courts in *Wold* and *Anderson* relied on for their definition of "drilling operations," – Summers – specifically defines "actual drilling operations" as *not* including the sort of pre-drilling preparatory work that qualified as "drilling operations" in those cases.

[¶22] Instead, "actual drilling operations" requires the actual physical drilling of the well into the ground. "The Department has held that 'actual drilling operations' does not include such preparatory work as grading roads and well sites, and moving equipment onto the leased land. … We adhere to the position that 'actual drilling operations' as used in 30 U.S.C. § 226(e) (1976), and 43 CFR 3107.2-1(a) do not commence until penetration of the ground by a drilling bit." *Estelle Wolf et al.*, 37 IBLA 195, 197, 1978 WL 27716, * 2 (Int. Bd. L. App. 1978). This is supported by decisions from courts that have considered the definition of "actual drilling operations," as noted by the District Court.

> In cases from other jurisdictions where leases have included definitions of "actual drilling operations," the phrase has been defined to require the bit in the ground. *See e.g.*, *Exxon Mobil Corp. v. Alabama Dept. of Conservation and Natural Resources*, 986 S.2d 1093, 1120 (Ala. 2007) ("actual drilling operations" means "actual drilling (commenced by spudding in) of a new well … "); *Peionnet v. Matador Resources Company*, 144 So.3d 791, 798 (La. 2013) (defining "actual drilling operations" to mean "having the bit in the ground and rotating the same."); *Ripply Interests, Inc. v. Nash*, 475 S.W.3d 353 (Tex. App. 2013) (assignment

> defined "actual drilling operations" as the penetration of the surface with a drilling rig capable of drilling to the anticipated total depth of the well.")

Order at ¶ 19. *See also Hall v. JFK, Inc.*, 893 P.2d 837, 842 (Kan. Ct. App. 1995) (holding that modifications to the drilling operations clause to require something more than "drilling operations" must be given effect, stating, "Under the plain terms of the lease, actual drilling was required prior to the termination date.") These cases, like the IBLA decisions, all considered the definition of "actual drilling operations," and held that actual drilling operations required some form of penetrating the surface with a drill.

[¶23] The United States government is one of the largest, if not the largest, mineral owners and lessors in the country. According to the Congressional Research Service, "the BLM administers more than 700 million acres of federal subsurface mineral estate throughout the nation." [1] In 2019, lands owned by the United States produced over 1 billion barrels of oil, and the government collected over $12 billion in royalties for its mineral interests. [2] Hess cannot sweep a definition of "actual drilling operations" from such a significant player in the oil and gas industry under the rug and ask the Court to give it no weight. It is on-point authority defining the term that is in dispute here as that term is used in many oil and gas leases.

[¶24] Hess admits that actual penetration of the ground by drill bit did not start until May 5, 2012, more than a month after the Subject Leases expired on April 2. *See* Hess App'x. 12 at ¶ 26. Because it is undisputed that "actual drilling operations" did not occur until

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[1] Congressional Research Service, Federal Land Ownership: Overview and Data, at p. 4. The report can be viewed at https://fas.org/sgp/crs/misc/R42346.pdf (the report itself was updated February 21, 2020).

[2] See U.S. Department of Interior, Office of Natural Resources Revenue, data for 2019, available at https://revenuedata.doi.gov/?tab=tab-revenue (last updated April 21, 2020).

more than a month after April 2, the date required by the clear and unambiguous terms of the Subject Leases, as a matter of law, the District Court correctly held that the Hess leases expired, and as a result, the Intervention leases from AgriBank are the valid leases.

[¶25] There is nothing ambiguous about the word "actual" in "actual drilling operations," requiring the Court to remand this back to the District Court. As the Court explained in *Wold*, and as the sources cited herein demonstrate, there is a very meaningful distinction between "actual drilling operations" and "drilling operations." When language in a contract is plain and unambiguous, extrinsic evidence is inadmissible to alter, vary, explain, or change the contract. "If a written contract is unambiguous, extrinsic evidence is not admissible to contradict the written language." *Langer v. Bartholomay*, 2008 ND 40, ¶ 12, 745 N.W.2d 649. *See also VND, LLC v. Leevers Foods Inc*., 2003 ND 198, ¶ 41, 672 N.W.2d 445 (stating, "Given the aforementioned cases and the rules of contract construction, we conclude the language of the contract should govern. The language of the contract is clear and explicit and does not involve an absurdity.") If the language of a contract is unambiguous, there is no room for further interpretation. "If the language of the contract is clear and unambiguous, and the intent is apparent from its face, there is no room for further interpretation." *Habeck v. MacDonald*, 520 N.W.2d 808, 811 (N.D. 1994).

[¶26] That Hess disagrees with the District Court and Intervention's interpretation of the meaning "actual drilling operations" does not mean the term is ambiguous. Mere disagreement between parties does not create an ambiguity. *See e.g.*, *Care Grp. Heart Hosp., LLC v. Sawyer*, 93 N.E.3d 745, 753 (Ind. 2018) (stating, "But the parties' disagreement over the plain meaning does not create ambiguity."); *Alexander v. Stibal*, 161 Idaho 253, 260, 385 P.3d 431 (2016) (holding that mere disagreement between the parties

as to the meaning of a term does not automatically create an ambiguity); *Cunningham Energy LLC v. Ridgetop Capital II, LP*, No. 5:13-cv-78, 2014 WL 4385875, *5 (N.D.W. Va. Sept. 4, 2014) (stating, "The mere fact that parties do not agree to the construction of a contract does not render it ambiguous, … ."); and *Krajacich v. Great Falls Clinic, LLP*, 2012 MT 82, ¶ 19, 276 P.3d 922 (stating, "However, a conclusion of ambiguity is not compelled by the fact that the parties to a document, or their attorneys, have or suggest opposing interpretations of a contract, or even disagree as to whether the contract is reasonably open to just one interpretation.")

[¶27] Hess argues there's an ambiguity based on its position that "actual drilling operations" means the same thing as "drilling operations." The cases make it clear that there is a difference between "actual drilling operations" and "drilling operations." Even if the cases did not, the use of English grammar does. They are two different terms distinguished by the word "actual," which denotes something more than "drilling operations" was required. If Hess were correct, every lease would be loaded with ambiguity traps because parties could later argue over agreed upon terms, circumventing the principle that the interpretation of contracts is a question of law, not one of fact.

[¶28] Hess's ambiguity argument faces a higher hurdle because oil and gas leases are standard form agreements. The Court rejected the lessor's ambiguity argument in *Wold*, holding that when it comes to leases, because they are standard form agreements, the definition of terms is particularly susceptible to interpretations as a matter of law.

> Again, the court disagrees. Among other things, plaintiffs' argument oversimplifies the process of contract interpretation when dealing with standard form agreements, particularly those replete with language reflecting the judicial gloss of prior court interpretations like the printed-form oil and gas leases at issue here. In construing agreements of this nature, courts frequently rely upon prior judicial constructions

> of the contract language, particularly when there has been no actual bargaining over the disputed language.

Wold at *10. In reaching its decision, the Court explained its process for holding that the lease was not ambiguous.

> The court then reviewed the case law from other jurisdictions, noting that the "major treatises on oil and gas law demonstrate the unsettled nature of the law concerning the interpretation of the term 'market value at the well' "and that there were competing "majority" and "minority" positions as to its meaning. *Id.* at ¶¶ 13–16. The court then discussed why it found persuasive an Eighth Circuit decision applying North Dakota law that had adopted the majority position. *Id.* at ¶¶ 19–20. Finally, and only after consideration of these points, the court declared the term to be unambiguous, adopted the majority interpretation, and concluded that the trial court had not erred in granting summary judgment with respect to the issue. *Id.* at 21.

Wold at *11 (citing *Bice v. Petro-Hunt, L.L.C.*, 2009 ND 124, 768 N.W.2d 496). Hess has not offered any authority on the meaning of "actual drilling operations" that stands for the proposition that it means anything other than requiring the drill to penetrate the ground as explained in *Hall*, *Estelle Wolf*, *Exxon Mobil Corp*., *Peionnet*, *Ripply Interests, Inc.*, *In Santa Fe Energy Resources, Inc.,* Summers, and Williams & Meyers.

[¶29] The Summers definition, and its reliance thereon *In Santa Fe Energy Res., Inc.*, is particularly damning to Hess's argument because the courts in *Wold* and *Anderson* relied on Summers for defining "drilling operations." The significance of the word "actual," when used to describe particular conditions or capacity was noted in *Gronfur v. N. Dakota Workers Comp. Fund*. In *Gronfur*, the Court held that, "Gronfur's attempt to equate *actual wages* with *earning capacity* is misplaced." *Gronfur*, 2003 ND 42, ¶ 13, 658 N.W.2d 337 (emphasis added). *Cf. Sickler v. Pope*, 326 N.W.2d. 86, 93 (N.D. 1982) (stating, "The [leases] executed by Sickler and her predecessors, while evidence of possession, do not constitute *actual possession* sufficient for adverse possession of the severed mineral

interest.") (emphasis added). The Court has recognized that the word "actual" narrows the subject term, it does not broaden it as Hess argues. "It is at once apparent that the two items in comparison are not quite the same. Actual earnings are a relatively concrete quantity. … Earning capacity, however, is a more theoretical concept." *Gronfur* at ¶ 13. Hess's interpretation of the word "actual" is, like Gronfur's interpretation of "actual wages," misplaced. The Subject Leases required that wells be drilled by April 2 in order to hold the leases beyond their primary term. There is no ambiguity, or genuine issue of fact. Hess admits there were no wells drilled by April 2.

[¶30] Finally, absent from Hess's grammatical interpretation of "actual drilling operations", that renders the word "actual" mere surplusage giving it the same meaning as "drilling operations," is an explanation of cumulative adjectives and how they build meaning in a phrase. The fact that "actual drilling operations" employs cumulative adjectives illustrates why Hess is wrong, even grammatically.

[¶31] Cumulative adjectives, like those in the phrase "actual drilling operations," do not modify a common noun separately as Hess suggests. Rather, cumulative adjectives modify a noun by building meaning across a rigid order that cannot be changed without destroying meaning. [3] While not every classification of cumulative adjective appears in every sentence, and while the classifications often wear different labels, the order of cumulative adjectives follows a generally established pattern: article, quantity, opinion, size, age, shape, color, origin, material, and purpose. [4]

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[3] Linda A. Furey, Awakening from Comma Coma, New Jersey Lawyer, the Magazine, 150 Jan. N.J. Law 144.

[4] See Simon and Schuster "Quick Access Reference for Writers." 4th ed., Prentiss-Hall, 2003.

[¶32] Native speakers of English have no difficulty with the rigid order of cumulative adjectives and would never say, for example, "baseball young player" rather than "young baseball player." Just like parties to a lease would not say "drilling actual operations" rather than "actual drilling operations." The glaring weakness of Hess's position is that words do not convey meaning by acting alone. The role of "actual" in the adjectival phrase is to not to leave the words "drilling operations" wholly unchanged, as Hess argues. Nor is it to differentiate the requirements of the leases from those that might be ostensibly created by "illusory drilling operations" or "imaginary drilling operations."

[¶33] No one could seriously believe the addition of "actual" to the adjectival string was made to emphasize that the "drilling operations" described in *Anderson* would suffice to hold the Subject Leases. Rather, "actual" highlights the last and most distinguishing adjective in the string, the one conveying purpose — "drilling." The addition of "actual" and, with it, the creation of a cumulative string supplants the meaning of "drilling operations" by modifying the grammatical structure altogether. To argue the contrary is to ignore what cumulative adjectives are, and what they do. In this respect, the *Anderson* and *Wold* decisions prove Intervention's point as to the meaning of "actual drilling operations." Just like the Court in *Wold* stated that the meaning of the lease would change by adding the word "actual" to the phrase "drilling operations."

[¶34] As a matter of basic English grammar, the role of "drilling or reworking" in the phrase "drilling or reworking operations," the phrase at the heart of both *Anderson* and *Wold*, is not to build meaning cumulatively. The two adjectives are naturally

disjunctive, as signaled by the disjunctive coordinating conjunction "or." [5] The phrases "drilling or reworking operations" and "actual drilling operations" are grammatically dissimilar, and Hess's reliance on *Anderson* and *Wold* actually supports the District Court and Intervention's interpretation. Had the parties wanted the outcome in *Anderson* and *Wold*, the Subject Leases would have only required "drilling operations," rather than "actual drilling operations."

II. Force majeure does not excuse Continental's failure to timely obtain any necessary permits.

[¶35] Hess does not cite to any specific government order, regulation, rule, or law that prevented Continental from timely obtaining permits to drill its wells. Force majeure is a creature of contract, and provides a limited defense, not the broad shield Hess raises to counter Continental's failure to timely obtain any permits from the Industrial Commission to drill its wells. "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 v. Moritz Sport & Marine*, 2014 ND 12, ¶ 7, 841 N.W.2d 774 (citing 30 Williston on Contracts § 77.31, at 365 (4th ed. 2004)). *See also Nissho-Iwai Co. v. Occidental Crude Sales*, 729 F.2d 1530, 1540 (5th Cir. 1984) (stating that, "force majeure has traditionally meant an event which is beyond the control of the contractor.") Timely submitting its permits to the Industrial Commission was within Continental's control, and their delay in doing so is not a force majeure event that excuses Hess's obligation to perform under the Subject Leases.

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[5] *See generally,* The Chicago Manual of Style, The University of Chicago Press, 17th ed., 2017 at 5.91.

[¶36] Continental did not submit its permits to drill the wells to the Industrial Commission until January and February 2012, as the April 2 deadline in the Subject Leases was fast approaching. Continental, and Hess, are presumed to have knowledge that they needed the permits to drill the wells, and knowledge of the process for obtaining those permits. "Where governmental action is alleged to be the cause of delay, the parties to the lease are presumed to have contracted with knowledge of any preexisting law that could have caused delay." *Erickson v. Dart Oil & Gas Corp.*, 474 N.W.2d 150, 155 (Mich. Ct. App. 1991) (citing *Hughes v. Cantwell*, 540 S.W.2d 742, 745 (Tex. App. 1976)). *See also Goldstein v. Lindner*, 648 N.W.2d 892, 899 (Wis. Ct. App. 2002) ("Parties to a lease are assumed to know what laws and regulations will affect the company's ability to win permits. For that reason a lessee's failure to secure a permit is not deemed an event of force majeure.").

[¶37] By Hess's own admission, the Subject Leases (including the lease extension) were executed in 2004 and 2008. Hess App'x. 9-10 at ¶¶ 9 – 16. The Industrial Commission approved the spacing units for the wells in 2010. *Id*. at ¶ 17. Despite the fact the leases' primary term was rapidly approaching, and despite the Industrial Commission issuing its Order approving the spacing unit in 2010, Continental waited until January and February 2012 to submit its applications to drill the wells. The delay in submitting their drilling applications is solely on Continental's shoulders, and is not a force majeure event.

> The purpose of a force majeure clause is to relieve the lessee from the harsh termination of the lease due to circumstances beyond its control that would make performance untenable or impossible. See *Edington, supra,* 213 Mont. p. 119, 690 P.2d 970. A lessee may not invoke a force majeure clause to excuse performance where the force majeure itself was created by the lessee. *Id.,* p. 120, 690 P.2d 970.

Erickson, 474 N.W.2d at 156 (citing *Edington v. Creek Oil Co.*, 213 Mont. 112, 690 P.2d 970 (1984) (in affirming, the Court held the District Court correctly decided that "the force

majeure clause did not apply because the problem which caused the well to be shut in, and its solution, were not beyond the control of [the defendants].")) Continental waiting until shortly before the lease expired when it submitted its permits to the Industrial Commission was, like *Erickson* and *Edington*, entirely within their control and should not excuse Hess's performance under force majeure.

[¶38] Further, the Industrial Commission issued the permits to Continental on March 20 – 23, 2012, *before* the leases expired on April 2. Hess App'x. 11 at ¶ 22. If Hess's contention is right, Continental still had its permits and was capable of drilling in March 2020 when the permits were issued, but before the leases expired. They did not. As such, force majeure cannot excuse Hess's failure to perform under the terms of the leases.

[¶39] The facts in *Pennington v. Cont'l Res., Inc.*, are distinguishable. In *Pennington*, it was undisputed that "despite Continental's efforts to develop the Subject Lands …, 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 []." *Pennington*, 2019 ND 228, ¶ 20, 932 N.W.2d 897. Continental's permits were delayed because "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." *Id*. Hess has raised no similar reasons for Continental's delay in submitting its permits to the Industrial Commission, and there was no decision by any governmental entity – like there was in *Pennington* from the U.S. Fish and Wildlife Service – that delayed the issuance of the well permits here.

[¶40] Continental applied for its permit in May 2012, more than three years before the leases expired. *Id.* at ¶ 3. The Court noted that the issues with Continental's permits were

caused because the lands were "inhabited by the Dakota Skipper butterfly, which is listed as threatened under the Endangered Species Act." *Id*. Because of that, "Continental could not begin drilling operations until receiving federal approval." *Id*. Continental went so far as to submit proposed measures responding to the U.S. Fish and Wildlife Service's biological opinion relating to the impact of its drilling on the Dakota Skipper. *Id*. Such a contingency, related to governmental approvals required for endangered species under federal law, is not present here. Nor has Hess pointed to anything in the record that shows there is a state law or regulation that held up, or otherwise delayed, Continental receiving its permit. In *Pennington*, Continental also applied for its permits more than three years before the lease in question expired. Such is not the case here, as Continental applied for its permits less than several months before the Subject Leases expired.

[¶41] Finally, in *Pennington*, Continental took the additional step, before the lease expired, of recording an affidavit indicating that its failure to obtain federal regulatory approval to drill was due to these issues. *Id*. at ¶ 4. After filing the affidavit, again, before the lease expired, Continental "applied to terminate the 2,560-acre spacing unit and create a 1,920-acre spacing unit to remove the Dakota Skipper habitat," which was approved by the Industrial Commission. *Id*. There is nothing in the record comparable to this myriad of regulatory issues encountered by Continental in *Pennington*. Quite to the contrary, in this case, Continental received its permits to drill before the lease expired, there is nothing out of the ordinary in the record regarding the permitting process with the Industrial Commission, and there were no regulatory burdens or environmental issues (like the Dakota Skipper habitat) that delayed or obstructed their permits.

[¶42] The alleged "delay" here is not a force majeure qualifying event because it was entirely caused by Continental submitting its well applications in such close proximity to when the Subject Leases expired. There is nothing in the record, as there was in *Pennington*, showing that the government delayed in processing drilling permits, had additional requirements before the wells could be drilled, or that the review exceeded the typical time frame for the permit approval process. Like *Erickson*, *Edington*, *Goldstein*, and *Nissho-Iwai Co.*, force majeure does not apply to save the Subject Leases from expiring because Hess "may not invoke a force majeure clause to excuse performance where the force majeure itself was created by the lessee." *Erickson* at 156. As a matter of law, the force majeure clause does not apply, and does not save the Subject Leases from expiring.

CONCLUSION

[¶43] The Court should affirm the District Court, and hold that, as a matter of law, the Subject Leases between Hess and AgriBank terminated because of Continental's failure to conduct "actual drilling operations" by April 2, 2012, and that as a result, the leases between AgriBank and Intervention Energy, subsequently assigned to Riverbend, are valid.

Respectfully submitted this 22nd day of April, 2020.

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CERTIFICATE OF COMPLIANCE

[¶1] Pursuant to Rule 32 of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 28 pages

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CERTIFICATE OF SERVICE

[¶1] I hereby certify that on April 22, 2020, I served the following documents:

1. Defendant/Appellee Intervention Energy LLC's Response Brief

on the following by electronic mail transmission, pursuant to N.D.R.App.P. 25 and 31:

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