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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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| Hess Bakken Investments II, LLC; Arkoma Drilling II, LP; and Comstock Oil & Gas, LP,<br><br>Plaintiffs and Appellants,<br><br>-vs-<br><br>AgriBank, FCB; Intervention Energy, LLC; and Riverbend Oil & Gas VI, LLC,<br><br>Defendants and Appellees. | **Supreme Court No. 20190352**<br><br>**Mountrail County District Court**<br>**No. 31-2018-CV-00245** |

APPEAL FROM ORDER PARTIALLY GRANTING MOTIONS TO DISMISS, DATED JULY 24, 2019, AND JUDGMENT, DATED SEPTEMBER 16, 2019
CASE NO. 31-2018-CV-00245
COUNTY OF MOUNTRAIL, NORTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE STACY LOUSER PRESIDING

# APPELLEE'S BRIEF
# (AGRIBANK, FCB)

**ORAL ARGUMENT REQUESTED**

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## ISSUES PRESENTED

[1] Whether the district court properly construed the continuous drilling clauses contained within two oil and gas leases such that the phrase "actual drilling operations" required more than acts merely preparatory to drilling, which when applied to the undisputed spud[1] dates of the applicable wells demonstrated that Plaintiffs had not engaged in "actual drilling operations" so as to extend the term of these leases.

[2] Whether the Appellants' failure to raise articulable arguments in district court regarding the regulatory force majeure clauses within the two oil and gas leases precludes a meaningful review of this issue in appeal.

## ORAL ARGUMENT REQUESTED

[3] Defendant-Appellee AgriBank, FCB ("AgriBank"), joins in Plaintiffs-Appellants' request for oral argument in connection with this matter. AgriBank agrees that the precise issue presented with respect to the continuous drilling clause in the instant case is one of first impression within the State of North Dakota, and oral arguments may prove helpful in fully addressing and reaching an ultimate holding, which will likely have a considerable impact upon North Dakota's oil and gas industry and mineral interest owners throughout the state.

## STATEMENT OF THE CASE

[4] This appeal arises out of the district court's interpretation of the term "actual drilling operations" within two oil and gas leases that form the basis of this dispute. By way of background, AgriBank owns certain mineral interests lying in Mountrail

[1] AgriBank concurs with Plaintiffs-Appellants' definition of the term "spud" as set forth on page 17, at footnote 2, of the Appellants' Brief; AgriBank adopts this definition when the term "spud" is used within this briefing.

County, North Dakota. Appx. at 95-96. On April 2, 2004, AgriBank entered into two oil and gas leases with Diamond Resources, Inc. ("AgriBank-Diamond Leases"), for the relevant Mountrail County interests, both of which carried a five-year primary term, subject to various provisions including a habendum clause[2], a Pugh clause, and a continuous drilling clause. Appx. at 18-23. Prior to the expiration of the AgriBank-Diamond Leases' primary term and absent any actual drilling operations or paying production on any part of the leased premises, AgriBank entered into an agreement extending the primary terms of the AgriBank-Diamond Leases for an additional three-year period. Appx. at 24-26. Therefore, the AgriBank-Diamond Leases (by virtue of their respective extensions) would terminate on or about April 2, 2012, provided that no circumstances, such as "actual drilling operations," served to trigger their secondary terms.

[5] The continuous drilling clause in the AgriBank-Diamond Leases are identical to one another and read as follows:

> "**Continuous Drilling Clause** – . . . However, this lease 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. Such operations shall continue to maintain this lease in force and effect beyond the primary term for so long as *actual* drilling operations are being conducted with no cessation of more than one hundred twenty (120) consecutive days from the date of the running of the final induction electrical survey of one well and the *actual* drilling operations of another well . . . ."

[2] The term "habendum clause" in this instance refers to a provision common to oil and gas leases, under which a secondary term of the lease is created, typically under circumstances where some portion of the interests subject to the lease are developed and in turn create paying quantities of production. *See, e.g., Johnson v. Statoil Oil & Gas, LP*, 2018 ND 227, 918 N.W.2d 58.

(Emphasis added). Appx. at 19; 22.

[6] Consistent with the fact pattern offered to the district court in the course of the underlying litigation, the Appellants' Brief, at paragraph 4, provides that Appellants Hess Bakken Investments II, LLC ("Hess"), Arkoma Drilling II, LP ("Arkoma"), and Comstock Oil & Gas, LP ("Comstock"), all of whom are collectively referred to as the "Hess Group," assert they engaged in certain acts preparatory to actual drilling, by way of the alleged construction of a drill site, but candidly and unequivocally acknowledge that the actual drilling of the wells themselves did not occur until approximately "a month" after the expiration of the primary term. Appellants' Brief, at 8.

[7] After the expiration of the AgriBank-Diamond Leases' primary term, AgriBank made available for lease the acreage formerly encumbered by the AgriBank-Diamond Leases (referred to herein as the "open acreage" or "Subject Lands"), by inviting competitive bids for the open acreage. Appx. at 97. In response, AgriBank received several competitive bids for the open acreage including a bid from a representative of Hess, demonstrating that Hess was not only aware of, but participated in, the competitive bid process for the open acreage that it now claims it rightfully possesses under the AgriBank-Diamond Leases. Appx. at 97.

[8] Ultimately, at the conclusion of the competitive bid process, on April 11, 2012, AgriBank entered into two oil and gas leases for the said open acreage with Defendant-Appellee Intervention Energy, LLC ("AgriBank-Intervention Leases"). Appx. at 47-52[3]; 97. After entering into the AgriBank-Intervention Leases, several wells were

[3] While the photocopies of the referenced oil and gases leases discussed here are, indeed, true and correct copies of these instruments, AgriBank objects to the description and characterization of these leases as the same appear in the Table of

drilled upon the leased lands, and thereafter, in connection with the production derived therefrom, AgriBank has been paid royalties under the terms of the AgriBank-Intervention Leases, and not those of the AgriBank-Diamond Leases.[4] Appx. at 98.

[9] Approximately six and a half years after the termination of the AgriBank-Diamond Leases (and their related extensions of primary term), the Hess Group filed an action to quiet title, among other claims, under which the Hess Group alleged that the AgriBank-Diamond Leases remained valid and effective and were superior in title to the AgriBank-Intervention Leases. Appx. at 4-5; 8-17. AgriBank timely answered the Hess Group's Complaint, and asserted its own counterclaims, maintaining that the AgriBank-Diamond Leases terminated at the conclusion of their primary terms on April 2, 2012, and that the AgriBank-Intervention Leases served as the valid, effective, and controlling leases, which were superior in title to the AgriBank-Diamond Leases on which the Hess Group relied for its action. Appx. at 82-101. Likewise, Defendant Riverbend Oil & Gas VI, LLC ("Riverbend") timely filed an Answer to the Hess Group's Complaint, similarly asserting the validity and superiority of the AgriBank-Intervention Leases and counterclaiming against the Hess Group accordingly. Appx. at 102-117.

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Contents Appellant's Appendix. The Appendix characterizes the AgriBank-Intervention Leases as "top leases," which is incorrect. These leases do not carry any verbiage suggesting such a characterization or classification is accurate or appropriate.

[4] After the institution of the instant litigation, Continental suspended a portion of the royalty due to AgriBank under the AgriBank-Intervention Leases; the value of the royalties held in suspense by Continental amounts to the difference between 3/16ths (*i.e.*, the royalty stated under the expired AgriBank-Diamond Leases) and 20% (*i.e.*, the royalty stated under the controlling AgriBank-Intervention Leases).

[10] Thereafter, Intervention Energy, LLC ("Intervention") and Riverbend filed Rule 12(b)(6), N.D.R.Civ.P., motions to dismiss the Hess Group's action. Appx. at 81;127 (this entry within Appellant's Brief includes only the motions, and not the parties' supporting briefs submitted in connection with the same); for full briefing, *see* AgriBank's Appendix at 3-15; 50-58. AgriBank joined the motions to dismiss to the extent that the motions addressed and relied upon the interpretation and application of the continuous drilling clause, agreeing that the AgriBank-Diamond Leases plainly terminated on April 2, 2012, and therefore the AgriBank-Intervention Leases were valid, effective, and superior. Appx. at 118-119. The Hess Group responded to the motions to dismiss. AgriBank's Appx. at 16-40; 59-66.

[11] After a hearing was conducted on the motions to dismiss, the district court issued an Order dismissing the Hess Group's quiet title and declaratory relief claims. After a thorough analysis of the arguments of the parties, the contents of the continuous drilling clause within the AgriBank-Diamond Leases, the canons of construction, and the available caselaw on point, the district court determined:

> "Considering the parties' arguments and relevant caselaw and giving meaning to each word in the phrase 'actual drilling operations,' this Court finds that '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.
> . . . .
>
> Under the 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 Clause, 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."

In light of the undisputed facts regarding the earliest spud date of the applicable wells (*i.e.,* May 5, 2012, according to the Hess Group's own pleadings, *see*, Appx. at 5), coupled with the well-founded legal conclusion regarding the meaning of "actual drilling operations," the district court properly determined that Hess Group's quiet title and declaratory relief claims could not survive the standing Rule 12(b)(6), N.D.R.Civ.P., challenge. Appx. at 7-8. After the dismissal of the quiet title and declaratory relief claims, the Hess Group voluntarily dismissed the remainder of their claims, with prejudice, by stipulation. Appx. at 140-143. The district court entered its Judgment of Dismissal on September 16, 2019. Appx. at 146-147.

[12] The Hess Group has timely appealed the district court's dismissal of its quiet title and declaratory relief claims, asserting the district court erred in its interpretation of the continuous drilling clause, and more specifically, the district court's interpretation and construction of the term "actual drilling operations." Alternatively, the Hess Group asserts that there are "questions of fact regarding an extension of the primary term" allegedly arising out of the regulatory force majeure clause, which make the district court's dismissal improper. Appellant's Brief, at 11. AgriBank maintains that the district court's construction of the continuous drilling clause was correct – both in its analysis and authorities and in its ultimate legal conclusions. AgriBank maintains that the regulatory force majeure clause is of no consequence or applicability when measured against the undisputed facts that present in this case as well, but the merits of such arguments cannot be reached on appeal in any event because they were not raised in the district court. The district court properly dismissed the Hess Group's

quiet title and declaratory relief claims and the judgment (and reasoning) of the district court should be affirmed.

## STATEMENT OF THE FACTS

[13] AgriBank owns certain mineral interests lying in and under the following described property, located in Mountrail County, North Dakota:

> Township 154 North, Range 94 West
> Section 21: S½SW¼, SE¼SE¼
> Section 28: N½NE¼, Lots One (1), Two (2), Three (3) and Four (4), including all accretions and riparian rights

(the "Subject Lands" or "Subject Property"). Appx. at 95-96. On April 2, 2004, AgriBank entered into two oil and gas leases (*i.e.,* Lease nos. 17171 and 17174) for the Subject Lands, which are referred to above as the AgriBank-Diamond Leases. Appx. at 18-23. The AgriBank-Diamond Leases included a five-year primary term, which would expire on April 2, 2009, subject to various provisions in a habendum clause, Pugh clause, and continuous drilling clause. The continuous drilling clause in the AgriBank-Diamond Leases reads, in relevant part, as follows:

> "**Continuous Drilling Clause** – . . . However, this lease 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. Such operations shall continue to maintain this lease in force and effect beyond the primary term for so long as *actual* drilling operations are being conducted with no cessation of more than one hundred twenty (120) consecutive days from the date of the running of the final induction electrical survey of one well and the *actual* drilling operations of another well . . . ."

(Emphasis added). Appx. at 19, 22. The AgriBank-Diamond Leases also contained a regulatory force majeure clause, titled "Compliance with Laws," which reads as follows:

> "In all operations under this lease or on demised premises, Lessee shall promptly comply with any and all laws, ordinances, rules, regulations, requirements and orders whatsoever, present or future, of the national, state, county or municipal government, and 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, notwithstanding any other provision hereof; provided that the provisions of this paragraph are not to be construed as relieving Lessee from the payment of delay rentals for the maintenance of this lease during the primary term or any extended term as herein provided."

Appx. at 20, 23.

[14] Thereafter, on September 9, 2008, AgriBank executed an Extension of Lease Term agreement, under which the AgriBank-Diamond Leases were extended for an additional three-year period, meaning that such leases were deemed to expire on April 2, 2012, subject to the provisions of the habendum clause, Pugh clause and continuous drilling clause.

[15] The Hess Group, in its own Complaint, sets forth the following events and activities leading up to the termination of the AgriBank-Diamond Leases:

a. On December 2, 2010, the North Dakota Industrial Commission ("NDIC") issued Order no. 14461, which established a 2560-acre spacing unit that included the Subject Property; this unit was pooled by NDIC Order no. 20198. Appx. at 10.

b. During January and February, 2012, Continental Resources, Inc. ("Continental") submitted four Applications for Permit to Drill Horizontal Well forms to the NDIC, for the Sorenson 1-21AH, Sorenson 2-21AH, Thronson 1-28AH and Thronson 2-28AH. All of these wells lie within the 2560-acre spacing unit that included the Subject Property. Appx. at 10-11.

c. March 20-23, 2012, NDIC issued permits for the wells. Appx. at 11.

d. On April 2, 2012, the date of the termination of the primary term, Continental filed a series of Form 4 sundry notices with the NDIC, under which Continental requested permission to move the proposed surface hole locations for the wells. Appx. at 11.

e. The first wells to be spudded were the Sorenson 1-21AH, the Sorenson 2-21AH, which the Hess group agrees were not spudded until May 5, 2012, approximately one month after the primary term of the lease expired. The Thronson 1-28AH well was spud on May 8, 2012, and the Thronson 2-28AH on May 12, 2012, more than a month after the expiration of the primary term. Appx. at 12.

By the Hess Group's own timeline of events as articulated above, it is abundantly clear that no drill touched the dirt or penetrated the soil on or before, April 2, 2012 in connection with the Subject Property. Thus, no actual drilling operations took place timely in accordance with the AgriBank-Diamond Leases, which in turn caused their terminations on April 2, 2012.

[16] In light of the termination of the AgriBank-Diamond Leases, AgriBank made available for lease the open acreage, inviting competitive bids for the Subject Lands. Appx. at 97. In response to its invitation, AgriBank received several competitive bids for the open acreage including a bid from Brian Sherman of Hess, demonstrating that Hess was not only aware of, but actively participated in, a competitive bid process for the open acreage that they now claim they rightfully possess under the AgriBank-Diamond Leases. Appx. at 97. The outcome of the bid process led AgriBank to enter into two oil and gas leases for the Subject Lands with Defendant Intervention Energy, LLC, on April 11, 2012, which were referred to above as the AgriBank-Intervention Leases.

[17] In the years that followed the development of the Sorenson and Thronson wells, AgriBank enjoyed royalties for production under the terms of the AgriBank-Intervention Leases because the AgriBank-Diamond Leases had terminated on their own terms. Appx. at 98. More than six years after the expiration of the primary term in the AgriBank-Diamond Leases (and the related termination of those leases), the Hess Group brought an action to quiet title, among other claims, seeking a judgment determining the superiority of title as between the AgriBank-Diamond Leases and the AgriBank-Intervention Leases, and alleged damages relating thereto. Appx. at 8-17.

[18] During the course of the underlying action, as more particularly described in the "Statement of the Case" above, the parties appeared before the district court on motions to dismiss the Hess Group's claims; the motions asserted that the Complaint failed to state a claim on which relief could be granted in light of the undisputed facts that presented in this case, coupled with the continuous drilling clause, which required "actual drilling operations" in order to hold the AgriBank-Diamond Leases. Appx. at 81, 120, 127; AgriBank's Appx. at 3-15; 50-58. After submission of all briefing and hearing on the motions, the district court dismissed the Hess Group's claims for quiet title and declaratory relief, finding the undisputed facts, when measured against the proper construction of the continuous drilling operations clause as set forth by the district court, rendered these claims incapable of survival. Appx. at 128-139. Thereafter, the balance of the Hess Group's claims were dismissed with prejudice by stipulation, which resulted in the final Judgment dispensing with the case in total on September 16, 2019. Appx. at 146-147. The Hess Group then timely appealed the dismissal of its quiet title and declaratory relief claims. AgriBank maintains on appeal

that the district court's decision was proper in that it engaged in a rigorous review and correct construction of the continuous drilling clause, which was applied to undisputed material facts, leading to the singular conclusion that despite the high burden imposed by Rule 12(b)(6), N.D.R.Civ.P., the Hess Group's claims for quiet title and declaratory relief were fundamentally flawed so as to preclude any of the relief sought in those claims. AgriBank respectfully requests that this Court affirm the decision of the district court.

## LAW AND ARGUMENT

### *A. Jurisdictional Statement*

[19] The Hess Group timely appealed the September 16, 2019 final Judgment in this matter in accordance with N.D.R.App.P. 4(a). The district court had jurisdiction under N.D.C.C. § 27-05-06. This Court has jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 28-27-01.

### *B. Rule 12(b)(6), Contractual Interpretation and Standard of Review*

[20] The Hess Group's briefing properly sets forth the standard of review that is applied in the context of reviews arising out of a Rule 12(b)(6) dismissal of claims. With respect to Rule 12(b)(6), N.D.R.Civ.P., motions and dismissals, and appeals that review the same, this Court has explained as follows:

> "A motion to dismiss under N.D.R.Civ.P. 12(b)(6) tests the legal sufficiency of the claim presented in the complaint. *Nandan, LLP v. City of Fargo*, 2015 ND 37, ¶ 11, 858 N.W.2d 892. On appeal, 'we construe the complaint in the light most favorable to the plaintiff and accept as true the well-pleaded allegations in the complaint.' *Id*. (quoting *Brandvold v. Lewis & Clark Pub. Sch. Dist. No. 161*, 2011 ND 185, ¶ 6, 803 N.W.2d 827). This Court will affirm a judgment dismissing a complaint for failure to state a claim under N.D.R.Civ.P. 12(b)(6) if we cannot discern a potential for proof to support it. *Nandan*, at ¶ 11. We

> review a district court's decision granting a motion to dismiss under N.D.R.Civ.P. 12(b)(6) de novo. *Id*."

*Martin v. Marquee Pac., LLC*, 2018 ND 28, ¶ 9, 906 N.W.2d 65. This Court has further explained that "determinations on the merits are generally preferred to dismissal on the pleadings" and Rule 12(b)(6) motions are typically viewed with "disfavor." *Ziegelmann v. DaimlerChrysler Corp*., 2002 ND 134, ¶ 5, 649 N.W.2d 556 (citations omitted). However, so long as the district court appropriately scrutinizes a Plaintiff's pleadings with deference, if such deferential review of the pleadings "disclose[s] with certainty the impossibility of proving a claim upon which relief can be granted[,]" dismissal pursuant to Rule 12(b)(6) is appropriate. *Id*. This Court will affirm a judgment dismissing a Complaint on Rule 12(b)(6) grounds if, like the district court, the Supreme Court "cannot 'discern a potential for proof to support it.'" *Id*. (quoting *Towne v. Dinius*, 1997 ND 125, ¶ 7, 565 N.W.2d 762).

[21] The Appellants' briefing properly sets forth the standard of review for contractual construction, noting that the standard of review to be applied in this context is, likewise, de novo, meaning that the lower court's interpretation of the continuous drilling clause (and all other contractual language) is fully reviewable on appeal. *See* Appellants' Brief, at 15-16. In discussing the standard of the review applicable to contractual construction, the Hess Group articulates various canons of construction to be applied to the interpretation of contracts.

[22] "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 (citing *Johnson v. Mineral Estate, Inc.*, 343 N.W.2d 778, 780 (N.D. 1984)). "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." *Johnson v. Statoil Oil & Gas, LP* 2018 ND 227, ¶ 7 (citing *Grynberg v. Dome Petroleum Corp*., 1999 ND 167, ¶ 10, 599 N.W.2d 261). "A contract must be read and considered in its entirety so that all of its provisions are taken into consideration to determine the parties' true intent." *Id*. (citing *Miller v. Schwartz*, 354 N.W.2d 685, 688 (N.D. 1984)). In construing contracts, to include oil and gas leases, the Court attempts to harmonize all provisions within agreement and further attempts to give meaning to every word, clause and term. *Schwarz v. Gierke*, 2010 ND 166, ¶ 16, 788 N.W.2d 302. In construing a contract:

> "'[E]ach term of a contract is construed to avoid rendering other terms meaningless.' [] 'A construction that attributes a reasonable meaning to all the provisions of the agreement is preferred to one that leaves some of the provisions without function or sense.' [] 'Where the language of a contract is unambiguous, the intent of the parties is to be gathered from the contract alone, and a court will not resort to construction where the intent of the parties is expressed in clear, unambiguous language.' [] 'Extrinsic evidence may not be introduced to vary or contradict the terms of an unambiguous agreement or to create an ambiguity.'

*Schwarz v. Gierke*, 2010 ND 166, ¶ 16 (internal citations omitted). "When possible, we look at the language of the contract alone to determine the parties' intent." *Northstar Founders, LLC v. Hayden Capital USA, LLC*, 2014 ND 200, ¶ 45, 855 N.W.2d 614 (citing N.D.C.C. § 9-07-04; *Caldas v. Affordable Granite & Stone, Inc.*, 820 14 N.W.2d 826, 832 (Minn. 2012)). In instances where a contractual term is unambiguous, its interpretation and construction is a question of law and not one of fact; whether a contract (or its terms) is ambiguous is, likewise, a question of law and is fully reviewable on appeal. *Northstar,* 2014 ND 200, ¶¶ 46-47.

### C. The AgriBank-Diamond Leases' Continuous Drilling Clause

[23] On appeal, the Hess Group contends that the district court misconstrued the term "actual drilling operations" within the AgriBank-Diamond Leases in addressing the motions to dismiss, arguing that the definition reached by the court was overly "narrow" in that it failed to encompass all of the activities the Hess Group asserts should amount to "actual drilling operations." Appellants' Brief, at 17-18. That failing, the Hess Group contends that the provision was not one that could be construed as a matter of law and without aid of extrinsic evidence, asserting the phrase is ambiguous, and therefore the perpetuation of litigation should have been permitted in order to develop facts to aid in ascertaining the intent behind and meaning of this language. Appellants' Brief, at 17-18. In support of its position, the Hess Group maintains that it actually engaged in certain "'drilling preparations' performed with a good-faith intent to complete a well" which it asserts satisfies the term "actual drilling operations" as set forth in the applicable leases.[5] *Id*. AgriBank disagrees; the district court properly determined that the term is not ambiguous, and the district court properly interpreted its meaning. The Hess Group's interpretation is incorrect and would eliminate the use of the word "actual" in the phrase, rendering the word "actual" meaningless and without consequence, which runs in gross contradiction to core canons of construction.

[5] To be clear, as noted earlier in the Statement of the Facts above, the Hess Group is not the operator of the wells on the Subject Lands; the operator in this context is Continental Resources, Inc. To the extent that this briefing blurs those lines, it is unintentional, and means to indicate that the Hess Group relies on the preparatory work conducted by Continental in making arguments in favor of reviving the AgriBank-Diamond Leases, which terminated on April 2, 2012.

[24] Unlike typical boilerplate oil and gas leases, the AgriBank-Diamond Leases contained modified and limiting language in the continuous drilling clause; the language in the AgriBank-Diamond Leases requires "*actual* drilling operations" to invoke the secondary term, whereas the typical and more expansive boilerplate language requires only "drilling operations" in order to invoke a secondary term under the continuous drilling clause. This Court has acknowledged 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.'" *Abell v. GADECO, LLC*, 2017 ND 163, ¶ 10, 897 N.W.2d 914 (citing 3 H. Williams and C. Meyers, Oil and Gas Law, § 618.1 (2016)). In *Abell*, this Court went on to examine an "instructive" opinion which addressed the definition of "drilling operations," stating:

> "In *Anderson v. Hess Corp.*, 733 F.Supp.2d 1100, 1106 (D.N.D. 2010), aff'd, 649 F.3d 891 (8th Cir. 2011), the federal district court recognized that although this Court had not specifically interpreted the phrase "drilling operations," in *Serhienko v. Kiker*, 392 N.W.2d 808, 812 (N.D. 1986) we relied on principles for determining what constitutes "drilling operations" to decide what constitutes "reworking operations." The federal court explained:
>
> > "Drilling 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. *It is not necessary that the drill bit actually penetrate the ground*." *Murphy [v. Amoco Prod. Co.]*, 590 F.Supp. [455, 458 (D.N.D. 1984)] (internal citations omitted). The Alabama Supreme Court held in Sheffield, "The key element" in determining what constitutes drilling operations "is whether the operation is associated or connected with the physical site of the well or unit." *Sheffield [v. Exxon Corp.]*, 424 So.2d [1297, 1302 (Ala. 1982)]."

2017 ND 163, ¶ 10 (emphasis added).

[25] AgriBank does not dispute that the term "drilling operations" has been given a particularly broad, well-developed definition, which must be considered within the contours of this case. Nor does AgriBank dispute that the Hess Group engaged in "drilling operations," especially when its pleadings are viewed in their most favorable light. However, whether the Hess Group engaged in "drilling operations" is not the question that controls the outcome of this appeal.

[26] The essence of the Hess Group's arguments are somewhat circular and avoid the true construction of the clause at issue. The Hess Group argues that it actually engaged in "drilling operations" or, in fact, conducted "real and substantial" activities in preparation of actual drilling, and therefore asserts it engaged in "actual drilling operations" within the meaning of the leases. That is simply not correct. Such a construction would effectively read the term "actual" out of existence and make "actual drilling operations" synonymous with the term "drilling operations" as aptly pointed out by the district court. The reality is that the Hess Group suggests an absurd result in its reading of the language at hand. If the Hess Group's interpretation is adopted, one must agree that the terms "actual drilling operations" and "drilling operations" are, for all intent and purposes, synonymous terms when clearly they are not (had that been the case, the boilerplate language would not have provoked modification). This reality further bears out when we consider that "imaginary" or "pretend" drilling operations have never been held to invoke a secondary term of an oil and gas lease under a continuous drilling clause. All drilling operations are "actual" in the sense that they have, in fact, been conducted when they trigger such a standard "drilling operations" clause, but that truism does not make the two phrases identical terms. They are not

identical terms on their faces. "Actual drilling operations" is not the typical or boilerplate language of continuous drilling clauses, and as a result, it clearly intends to create a trigger that is unique and distinct from the standard language. The Hess Group's tunnel-like focus on the definition of "actual" in its briefing, while interesting, does not give way to the conclusion that the district court misconstrued the language of the continuous drilling clause because the district court assigned appropriate weight and usage to a word that the Hess Group would presumptively like to avoid.

[27] The Hess Group asserts that the district court's interpretation of the phrase "actual drilling operations" creates a nullity of the word "operations." Again, this deduction is flawed. Indeed, as the district court explained:

> "Considering the parties' arguments and relevant caselaw and giving meaning to each word in the phrase 'actual drilling operations,' this Court finds that '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."

The district court carefully considered and parsed each word and its meaning to reach the appropriate definition of the term at issue. It did not disregard or nullify the word "operations;" instead, the district court gave weight to each word in the phrase and avoided making any word within the phrase superfluous, as is required by longstanding canons of construction. The Hess Group's activities fall within the typical "drilling operations," which this Court has already defined. The Hess Group concedes the issue surrounding this unique and distinct language is an issue of first impression but attempts to answer this novel legal inquiry by resorting to a definition offered in cases which do not carry the precise contractual language provided here. The Hess Group has

not pled any activities that exceed the typical "drilling operations" definition (in fact, the litany of activities they offer fall squarely within the confines of the definition of that term) and instead suggests that such acts, as a practical matter, should suffice even where black and white lease language calls for something greater or, at a minimum, something different than mere "drilling operations." The fact is that if this Court adopts the definition offered by the Hess Group, mineral interest owners will have little or no practical ability to negotiate and implement terms pertinent to continuous drilling clauses by way of requiring more specific developmental activities in order to avoid forfeiture of the lease, at least without a tortured exercise in the contortions of grammar, rather than a common sense reading of plain language.

[28] AgriBank agrees that the certain authorities relied upon by the district court construed the continuous drilling clause language within their respective cases by using, at least in part, a contractual definition of "actual drilling operations" contained within the leases themselves. *See* Appx. at 134 (citing *Exxon Mobil Corp. v. Alabama Dept. of Conservation and Natural Resources*, 986 So.2d 1093 (Ala. 2007); *Peironnet v. Matador Resources Co.*, 144 S.3d 791 (La. 2013); and *Rippy Interests, Inc. v. Nash*, 475 S.W.3d 353 (Tex.App. 2014)). However, another cannon of construction makes such caselaw no less informative or valuable to the inquiry here. As noted by the Hess Group, N.D.C.C. § 9-07-10 provides: "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense." While the district court applied the "common sense" canon contained within N.D.C.C. § 9-07-04, analyzing the meaning of each word within its ordinary and popular sense to reach its conclusion as discussed above, the district

court's reference to the use of the term within industry itself serves to bolster the court's decision, rather than detract from it as the Hess Group suggests.

[29] When the term "actual drilling operations" is accompanied by a contractual definition (as created and developed within the industry itself), the contractual language tracks directly with the definition and conclusion reached by the district court, and it competes directly with the Hess Group's proposed interpretation. In *Exxon Mobile Corp.*, 986 So.2d at 1120, the Supreme Court of Alabama set forth the contractual definition of the term "actual drilling operations," which was defined as "actual drilling (commenced by spudding in) of a new well . . .". Similarly, in *Peironnet*, 144 S.3d at 798, the Louisiana Supreme Court noted the differences between "drilling operations" and "actual drilling operations." The *Peironnet* lease defined "drilling operations" or "operations" as "operations for and any of the following: actual pad construction, drilling, testing, completing reworking, recompleting, deepening, side-tracking, plugging back or repairing of a well . . . ". *Id*. However, in defining the term "actual drilling operations" the relevant lease in *Peironnet* provided that the term meant "having the [drill] bit in the ground and rotating the same." *Id*. Likewise, in *Rippy Interests, Inc.*, 475 S.W.3d at 360, the Texas Appellate Courts examined an assignment of oil and gas lease under which the term "actual drilling operations" was defined as "the penetration of the surface with a drilling rig capable of drilling to the anticipated total depth of the well."

[30] Taken together, a reading of these cases demonstrates that the industry itself consistently makes the clear and plain distinction between mere "drilling operations" and "actual drilling operations" within the confines of oil and gas leases. A collective

reading of these authorities also demonstrates that the industry's apparent contractual parlance consistently requires "actual drilling operations" to exceed acts that are merely preparatory to drilling (i.e., "drilling operations"), requiring the "spudding" of a well, which under the definition offered by the Hess Group means, "start[ing] the drilling process by removing rock, dirt and other sedimentary material with the drill bit." Appellants' Brief, at 17, footnote 2. Finally, a collective reading of these authorities demonstrates the interpretation ultimately reached by the district court (albeit through a different course and canon of construction) is nearly identical to those contractual definitions and usages common to the larger oil and gas industry.

[31] The Hess Group further offers the argument that the contents of the Extension of the AgriBank-Diamond Leases alters the plain language of the AgriBank-Diamond Leases so as to annihilate the phrase "actual drilling operations" contained therein. Appellant's Brief, at 29. This assertion is incorrect and defies the language of the Extensions, which stated, in pertinent part, as follows:

> "[T]he primary terms of the said leases . . . shall be and are hereby extended with the same tenor and effect as if such extended terms had been originally expressed in such leases, for a period of three (3) years from the dates of expiration thereof, *subject however, in all other respects to the provisions and conditions of said leases*. . . .

Appx. at 24 (emphasis added). The Hess Group attempts to create a conflict between the faces of the AgriBank-Diamond Leases and the face of the Extension of their primary terms, but such a conflict simply does not exist. The extension of primary term was specifically and expressly subjected to the "provisions and conditions" of the AgriBank-Diamond Leases, which included a requirement for "actual drilling operations" in order to trigger the continuous drilling clauses. The Extension of the

AgriBank-Diamond Leases clearly served only to extend the primary terms of these leases for a period of three years and to increase any prospective royalty that may arise out of the AgriBank-Diamond Leases, which did not occur because these leases expired on their own terms at the conclusion of the stated primary term.

[32] Assuming for the sake of argument that some form of conflict could be derived by reviewing the AgriBank-Diamond Leases' continuous drilling clauses against their respective Extension of primary term, the fact still remains that the Hess Group utterly failed to raise and therefore preserve such arguments on appeal. This Court has repeatedly provided that arguments may not be presented for first time on appeal. See, e.g., *Cody v. Cody*, 2019 ND 14, ¶ 15, 921 N.W.2d 679 (reiterating "[t]he requirement that a party first present an issue to the trial court, as a precondition to raising it on appeal"). A review of the totality of the Hess Group's supporting briefs reveals the total absence of any such arguments regarding any alleged conflict between the AgriBank-Diamond Leases and their extension. AgriBank's Appx. at 16-40; 59-66. The Hess Group's failure to raise such arguments in the district court precluded consideration of the argument prior to the issuance of the district court's order partially dismissing the Hess Group's claims, and it is likewise barred from consideration on appeal.

[33] Finally, the Hess Group suggests that "other parol evidence could bear on the meaning of 'actual drilling operations.'" Appellant's Brief, at 30. In its briefing, the Hess Group puts forth a fleeting remark rather than a substantive argument on this point, suggesting that there is some merit or value in the review of AgriBank's history of lease forms revisions, though they do not suggest with any particularity what value

or relevance to this matter a historical review would provide. Without the benefit of more substantial detail and argument on this point, it is difficult for AgriBank to meaningfully address this attempted passing blow. That said, as the Hess Group explained in its underlying briefing in the district court, AgriBank's oil and gas lease form, as available online, was revised at some point after the AgriBank-Diamond Leases were in effect. AgriBank's Appendix, at 35. Notably, in the updated lease form, AgriBank sets forth a contractual definition of "drilling operations" under which *actual* drilling operations (i.e., the spudding of a well) are required in order to trigger the continuous drilling clause. AgriBank's revised and updated online oil and gas lease form, as captured by the Hess Group in its district court briefing, dictated that "*[d]rilling operations shall be deemed to have commenced* when a rig and machinery capable of drilling to a depth sufficient to test a prospective oil or gas horizon has been erected, and *when such well has been spudded in and the bit is rotating under power*." AgriBank's Appx. at 35. The revised lease form does not use the term "actual drilling operations" like the instant leases, but instead required actual drilling operations within the meaning of the term "drilling operations." There is no room to consider The consideration of parol evidence is not proper in this case because the phrase "actual drilling operations" is not ambiguous. In the alternative, even if it was, AgriBank's revised oil and gas lease form only validates the current interpretation and the interpretation reached by the district court by placing the same requirement on its lessees in both instances. Under both the terms of the AgriBank-Diamond Leases and its revised lease, AgriBank consistently requires more than mere acts preparatory to

drilling in order to satisfy the continuous drilling clause. The two leases validate each other rather than create any ambiguity.

[34] For all of the foregoing reasons, the Hess Group's pleadings, even when viewed in their most favorable light, do not demonstrate that "actual drilling operations" were conducted on or before April 2, 2012, and as a result, the district court's dismissal of their quiet title and declaratory relief claims was proper under Rule 12(b)(6), N.D.R.Civ.P.

**D. The AgriBank-Diamond Leases' Regulatory Force Majeure Clause**

[35] On appeal, the Hess Group raises *prospective* arguments surrounding the regulatory force majeure clause contained within the AgriBank-Diamond Leases. Appellant's Brief, at 31-32; *see also* AgriBank's Appendix, at 30-31 (providing the complete responsive Rule 12(b)(6) briefs of the Hess Group in the district court). The Hess Group appears to argue that the mere existence of the clause within the AgriBank-Diamond Leases, coupled with the information in their pleadings regarding the timeline of events surrounding Continental's interactions with the NDIC, *may* have ultimately given way to another basis on which to oppose the motions to dismiss (though there is no clear indication in its current brief, or in the district court, as to precisely what may have occurred in that respect). The Hess Group contends the force majeure clause and *potential* undefined issues with regulatory matters involving Continental and NDIC should have precluded dismissal pursuant to N.D.R.Civ.P. 12(b)(6). As a primary matter, this Court has repeatedly explained:

> "The purpose of an appeal is to review the actions of the trial court, *not to grant the appellant an opportunity to develop and expound upon new strategies or theories*. The requirement that a party first present an issue to the trial court, as a precondition to raising it on appeal, gives that

> court a meaningful opportunity to make a correct decision, contributes valuable input to the process, and develops the record for effective review of the decision. It is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Accordingly, issues or contentions not raised . . . in the district court cannot be raised for the first time on appeal."

*Cody v. Cody*, 2019 ND 14, ¶ 15 (citing *Hoff v. Gututala-Hoff*, 2018 ND 115, ¶ 10, 910 N.W.2d 896). A review of the Hess Group's underlying responsive briefs demonstrates that the Hess Group did note the *existence* of the regulatory force majeure clause at paragraph 34 of their initial responsive briefing, but did *not* provide any relevant facts that would suggest its application:

> "Alternatively, if the Court is doubtful that the construction of the surface location constituted operations sufficient to extend the lease, then discovery is needed to determine *whether* all of the circumstances surrounding the drilling were sufficient to constitute actual drilling operations . . . . Here, the Hess Group did not operate the wells drilled on the Subject Leases, but rather elected to participate as a non-operating working interest owner. As such, the Hess Group requires discovery to confirm *if* such circumstances delayed Continental's operations."

AgriBank's Appendix, at 30-31 (emphasis added). This passing reference to the regulatory force majeure clause contained within the AgriBank-Diamond Leases translates to: The Hess Group was not in possession of any facts that suggested the application of this clause during the time this case and the 12(b)(6) motions were before the district court. Reading their current briefing, it does not sound as though they are in possession of any such facts now. *See* Appellant's Brief, at page 31-32 (arguing that the Hess Group should have avoided 12(b)(6) dismissal in that it "should" have been permitted to fish for facts to determine "*whether* the force majeure clause was triggered"). Put differently, the Hess Group has no known facts that support the application of this clause but would like an opportunity to see if any might exist. Not

surprisingly, the district court did not address the issue within the confines of its order dismissing certain claims because the Hess Group did not provide any pleadings or facts (or even some indicia of evidence suggesting the probability of such facts) that would have triggered the clause and allowed for such analysis. Appx. at 128-139. Thus, the Hess Group failed to preserve this argument on appeal, because it offered no ability for the district court to review and analyze the clause against any facts or pleadings, which similarly forecloses this Court's ability to review this issue on appeal.

[36] "Judges, whether trial or appellate, are not ferrets, obligated to engage in unassisted searches of the record for evidence to support a litigant's position." *Earnest v. Garcia*, 1999 ND 196, 601 N.W.2d 260 (citing *Anderson v. A.P.I. Co. of Minnesota*, 1997 ND 6, ¶ 25, 559 N.W.2d 204). A supposition that there *may* be some fact or legal theory within the *prospective* reach of the Hess Group does not lend to the reversal sought here. A litigant "must also explain the connection between the factual assertions and the legal theories in the case and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief." *Earnest*, at ¶ 10 (citing *Peterson v. Zerr*, 477 N.W.2d 230, 234 (N.D. 1991)).

[37] The pleadings state that Continental received approval for its proposed 2560-acre spacing unit in early December of 2010, and then waited more than a year to apply for its drilling permits in January and February of 2012. Shortly thereafter, by March 20, 2012, the NDIC approved those permits. Thereafter, Continental, and not the NDIC (who serves as alleged regulatory body at issue here), filed Form 4 sundry notices requesting relocation of the surface holes – on the final day of the primary term of the AgriBank-Diamond Leases. Appx. at 43-46. Again, the NDIC acted expediently,

approving the request the day after the notices were filed – and the day after the primary term expired – on April 3, 2012. There is no indication whatsoever, that the NDIC dragged its feet, so to speak. In fact, the record suggests precisely the opposite. Even after the NDIC promptly approved the relocation of the surface holes, Continental took more than a month to spud the first well (there is no dispute that the spudding of the first well occurred on May 5, 2012). There is every indication that the NDIC acted promptly and without delay – once Continental got around to making its filings and requests. These undisputed facts simply do not suggest "regulatory delay," and consequently the force majeure clause contained within the AgriBank-Diamond Leases were not triggered.

[38] The very case on which the Hess Group relies for its arguments here is, for lack a better term, an entirely different animal. This Court analyzed a regulatory force majeure clause in *Pennington v. Continental Resources, Inc.*, 2019 ND 228, 932 N.W.2d 897, as the Hess Group suggests. In doing so, this Court explained:

> "We have defined a force majeure clause as "[a] contractual provision allocating the risk of loss *if performance becomes impossible or impracticable*, esp[ecially] *as a result of an event or effect that the parties could not have anticipated or controlled*." *Entzel v. Moritz Sport and Marine*, 2014 ND 12, ¶ 7, 841 N.W.2d 774 (quoting Black's Law Dictionary 718 (9th ed. 2009))."

*Pennington*, at ¶ 12 (emphasis added, bracketing in original). In *Pennington*, the Court went on to explain that in order to invoke the provisions of the force majeure clause, it "must be accompanied by proof that a failure to perform *was proximately caused* by a contingency and that, in spite of skill, diligence, and good faith on the promisor's part, performance remains impossible or unreasonably expensive." *Id*. at ¶ 18. The gist of the *Pennington* Plaintiffs' argument was that the delay was caused by Continental's

efforts to obtain the drilling permit for the 2,560-acre spacing unit, which was unreasonable because Continental could have obtained a permit for a smaller spacing unit during the primary term of the lease. *Id*. at 17. In *Pennington*, the record established that the wells at issue in that case required interaction with the Bureau of Land Management ("BLM") and U.S. Fish and Wildlife Service, which caused significant delay due to the presence of habitat for an endangered butterfly species. *Id*. at ¶ 3. Moreover, in *Pennington*, as a result of the particular regulatory issues that presented with respect to Continental's efforts to obtain its permitting, Continental prepared and filed an affidavit of regulation and delay. *Id*. at ¶ 4. In contrast to the instant case, the spacing unit itself was approved more than a year prior to the expiration of the primary term, and Continental did not apply for the drilling permits until approximately two months prior to the expiration of the primary term. In the instant case at hand, there is no record of a unique regulatory issue, such as habitat belonging to an endangered species, which requires input from multiple agencies, and which would naturally encumber the permitting process. Finally, in the instant case, there is no affidavit from Continental suggesting any sort of regulatory delay. The *Pennington* case is very distinct from the instant proceeding and, when viewed for what it actually was, does not support the arguments made by the Hess Group in the context of this appeal.

[39] Likewise, the full language of regulatory force majeure includes the following clause, which was not referenced in the Hess Group's appellate briefing:

> "notwithstanding any other provision hereof provided that *the provisions of this paragraph are not construed as relieving Lessee from the payment of delay rentals for the maintenance of this lease during the primary term or any extended term as herein provided*."

Appx. at 20, 23 (emphasis added). The Hess Group has not alleged that any delay rental payments were tendered by any party to AgriBank in connection with this clause (and such evidence does not exist), which might also have suggested its application through some other form of evidence. A failure to make the delay rental payments would also serve to cripple the effect of this provision (due to the noncompliance of the party attempting to invoke it), which the Hess Group does not address. Again, the Hess Group has offered no fact within its pleadings or otherwise that would suggest the invocation of the force majeure clause.

[40] Essentially, the Hess Group seeks a holding that implies that no title or contract dispute can be dismissed through Rule 12(b)(6), N.D.R.Civ.P, means, because perhaps, somehow, through some means, one of its clauses *might* be made applicable through some form of evidence located somewhere outside of the record that *may* preclude such action. Such a holding would thwart the very purpose of the Rule at issue and would challenge notions of common sense and judicial economy. For all of the reasons set forth above, the Hess Group's arguments on this point must fail.

## CONCLUSION

[41] For all of the foregoing reasons, Defendant-Appellee AgriBank respectfully requests that this Court affirm the district court's September 14, 2019 Order on Motions to Dismiss.

Dated this 23rd day of April, 2020.

*/s/ Elizabeth L. Pendlay*

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**ATTORNEY'S CERTFICATE OF COMPLAINCE**
**(N.D.R.App.P 32(a))**

The undersigned attorney for Defendant-Appellee AgriBank, FCB, herein states that this Appellee's Brief contains 36 total pages, in compliance with N.D.R.App.P. 32(a)(8)(A), inclusive of this Certificate of Compliance and the Certificate of Service that immediately. The undersigned further certifies that the typeface and type style contained within this Brief complies with this rule in that the Brief has been prepared using Microsoft Word, in 12-point Times New Roman font, with correct and proportionate line spacing and page margins throughout.

Dated this 23rd day of April, 2020.

*/s/ Elizabeth L. Pendlay*

Elizabeth L. Pendlay (ID# 06372)

## CERTIFICATE OF SERVICE

I, Elizabeth L. Pendlay, do hereby certify that a true and correct copy of the foregoing **Appellee's Brief (AgriBank, FCB) and AgriBank's Appellee's Appendix** was, on the 23rd day of April, 2020, emailed to the following-named individual at the email address appearing below his/her/their name(s):

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