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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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

BRIEF OF APPELLEE RIVERBEND OIL & GAS VI, L.L.C.

ORAL ARGUMENT REQUESTED

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[¶ 1] **I. STATEMENT OF THE ISSUES**

[¶ 2] The District Court properly concluded that the Subject Leases terminated because "actual drilling operations" were not being conducted at the end of the primary term.

[¶ 3] **II. STATEMENT OF THE CASE**

[¶ 4] Appellee Riverbend Oil & Gas VI, L.L.C. (herein "Riverbend") agrees in principle with the Statement of the Case outlined by the Appellants (herein the "Hess Group") in its Brief of Appellant, except those statements contained in paragraph 6. Appellant Brief ¶¶ 4-6.

[¶ 5] **III. STATEMENT OF THE FACTS**

[¶ 6] Riverbend owns a mineral estate under the following lands located in Mountrail County, State of North Dakota:

> Township 154 North, Range 94 West
> Section 21: S1/2SW1/4, SE1/4SE1/4
> Section 28: N1/2NE1/4, Lots 1, 2, 3, and 4, including all accretion and riparian rights

(herein "Subject Lands") Appellant's Appendix Page 9 (herein "App. 9").

[¶ 7] On April 2, 2004, Appellee AgriBank, FBC (herein "AgriBank") executed two separate oil and gas leases covering the Subject Lands. App. 9, 18, & 21 (herein "Subject Leases"). Each of the Subject Leases provided for a five-year primary term. Id. Both Subject Leases contained the same "Continuous Drilling Clause," that states, in part:

> 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, (such unit having been approved on size and conformity with any duly authorized authority having jurisdiction thereof) **are being conducted at the end of the primary term**….

App. 10, 19, & 22 (**emphasis added**).

[¶ 8] On September 9, 2008, AgriBank executed the "Extension of Lease Term" that extended the primary terms of the Subject Leases to April 2, 2012. App. 10 & 24.

[¶ 9] On December 2, 2010, the North Dakota Industrial Commission (herein "NDIC") issued Order No. 14461, which established a 2560-acre spacing united that included the Subject Lands. App. 10. In January and February 2012, Continental Resources, Inc. (herein "Continental" or "operator") submitted applications to the NDIC seeking permits to drill wells in the spacing unit. App. 3, 4, and 27-34. On March 20, 2012, the NDIC granted the permits necessary to drill the wells. App. 11 and 35-38. On April 2, 2012, Continental filed a series of sundry notices with the NDIC, requesting permission to move the surface hole locations of the wells. App. 11 and 43-46. These sundry notices indicate that the "[l]ocation has been built." App. 43-46.

[¶ 10] On April 11, 2012, after the expiration of the primary term, AgriBank executed leases for the Subject Lands with Appellee Intervention Energy, LLC (herein "Intervention"). App. 12 and 47-52 (herein collectively referred to as the "Intervention Leases"). On July 1, 2018, Intervention assigned its interest in the Intervention Leases to Riverbend. App. 12 and 53-80.

[¶ 11] Continental began drilling the wells on May 5 and May 8, 2012. App. 12 & 135.

[¶ 12] The dispute in this action and appeal is quite simple. Which leases are valid – the Subject Leases or the Intervention Leases?

[¶ 13] Intervention and Riverbend filed Motions to Dismiss and briefed the same, which Appellants resisted. App 81 and 127 and Dkt. # 41, 57, 61, 68, 72, & 77. Oral argument was held May 16, 2019. The District Court was called upon to determine whether or not Continental had conducted "actual drilling operations" by the Subject Leases' expiration

date – April 2, 2012. On July 24, 2019, the District Court granted Intervention and Riverbends' Motions to Dismiss (in part). App. 134, 135, & 138. The District Court, as a matter of law, determined that Continental had not "conducted" "actual drilling operations" because the drill bit had not been placed in the ground and "penetrating the soil." Id. As such, the Subject Leases expired on April 2, 2012 resulting in the Intervention Leases being valid. Id.

[¶ 14] The Hess Group appealed. App. 148 & 149.

[¶ 15] **IV. LAW AND ARGUMENT**

[¶ 16] **A. Standard of Review**

[¶ 17] "This Court reviews a district court's decision granting a motion to dismiss under N.D.R.Civ.P. 12(b)(6) de novo." Nandan, LLP v. City of Fargo, 2015 ND 37, ¶ 11, 858 N.W.d2d 892.

[¶ 18] "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.

[¶ 19] **B. The Hess Group's grammatical analysis of "actual drilling operations" is flawed.**

[¶ 20] The Hess Group attempts to educate the Court on grammar rules without using any rules. The Hess Group's brief states that "[t]he word 'actual' is an adjective, meaning that it modifies a noun." Appellant Brief ¶ 36. The Hess Group continues by stating that, "[i]n the phrase 'actual drilling operations,' the words 'actual' and 'drilling' are both adjectives that modify the noun 'operations.'" Id.; see The Chicago Manual of Style, § 5.68 (17th ed. 2017) (stating that an adjective is a word "modifying a noun or pronoun; it is often called a describing word"). The Hess Group is correct that both "actual" and "drilling" are

adjectives. The accuracy of their English lesson ends there. The Hess Group goes on to state without any authority that "the phrase at issue employs the paired adjectives "actual" and "drilling," both modifying the noun "operations." Appellant Brief ¶ 37. This is simply wrong.

[¶ 21] In Willis v. Adams and Smith, Inc., 443 P.3d 1239, 1245 (Utah App. 2019), the Court of Appeals of Utah was called to review the district court's interpretation of a stock agreement. The language at issue in Willis was the meaning of the terms "last audited financial statement." Id. In affirming the district court, the court of appeals found that "[t]he absence of a comma or 'and' between 'last' and 'audited' signified that they are not coordinated adjectives modifying the same noun." Id. at 1246 (citing The Chicago Manual of Style §§ 5.91, 6.36) (additional citations omitted). The court went on to state that "the syntax indicates that the adjective "audited" modifies the noun (or, more precisely, the adjective-noun pair) "financial statement" and the adjective "last" modifies the idea expressed by the combination of the first adjective and the noun." Id. (citing Chicago Manual of Style § 5.91).[1] The court concluded that "[i]n other words, "audited financial

1 The Chicago Manual of Style § 5.91 describes coordinate adjectives as follows:

A coordinate adjective is one that appears in a sequence with one or more related adjectives to modify the same noun. Coordinate adjectives should be separated by commas or by *and* {skilled, experienced chess player} {nurturing and loving parent}. If one adjective modifies the noun and another adjective modifies the idea expressed by the combination of the first adjective and the noun, the adjectives are not considered coordinate and should not be separated by a comma. For example, *a lethargic soccer player* describes a soccer player who is lethargic. Likewise, phrases such as *white brick house* and *wrinkled canvas jacket* are unpunctuated because the adjectives are not coordinate: they have no logical connection in sense (a white house could be made of many different materials; so could a wrinkled jacket). The most useful test is this: if *and* would fit between the two adjectives, a comma is necessary.

statement" is an adjective-noun unit and the adjective "last" modifies the entire unit." Id. (citing Chicago Manual of Style § 6.36).[2]

[¶ 22] Additionally, the differences between coordinating and cumulative adjectives are described in The Practical Writer with Readings. Edward P. Bailey & Philip A. Powell, The Practical Writer with Readings (Thompson Wadsworth 7th Ed. 2008). It defines coordinate adjectives as "sets of adjectives that independently modify a noun." Id. at 460. "In 'The valley had numerous short, swift streams,' *short* and *swift* are coordinate adjectives that independently modify *streams*. As the sample shows, a comma is used to separate coordinate adjectives." Id.

[¶ 23] Adjectives can be cumulative, as opposed to coordinate. "When an adjective's modification is cumulative, the adjective modifies not only a noun but the whole adjective-

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2 The Chicago Manual of Style § 6.36 describes the difference between coordinate and cumulative adjectives, the latter containing an essential adjective to form an adjective-noun unit:

As a general rule, when a noun is preceded by two or more adjectives that could, without affecting the meaning, be joined by *and*, the adjectives are separated by commas. Such adjectives, which are called coordinate adjectives, can also usually be reversed in order and still make sense. If, on the other hand, the adjectives are not coordinate—that is, if one or more of the adjectives are essential to (i.e., form a unit with) the noun being modified—no commas are used. See also 5.91.

- Shelly had proved a faithful, sincere friend. (Shelly's friendship has proved faithful *and* sincere.)
- It is going to be a long, hot, exhausting summer. (The summer is going to be long *and* hot *and* exhausting.)
- *but*
- She has many faithful friends.
- He has rejected traditional religious affiliations.
- She opted for an inexpensive quartz watch.

noun phrase it precedes." Id. at 461. "For example, in 'Governments today are concerned about illegal drug trafficking,' *illegal* modifies the phrase *drug trafficking* rather than just *trafficking*." Id. No comma is used between adjectives when the modification of the first adjective is cumulative. Id. "Cumulative adjectives have a particular order" and the order cannot be changed without destroying the meaning. Richard Nordquist, Cumulative Adjectives: Definition and Examples, https://www.thoughtco.com/what-is-cumulative-adjectives-1689815 (last updated Nov. 2019). Cumulative adjectives "build-up meaning from word to word as they get closer to the noun." Id.

[¶ 24] The Hess Group, contrary to basic grammar rules, has made an egregious grammatical error by jumping to the conclusion that "actual" and "drilling" are coordinate adjectives by stating that "the Subject Leases in this case were extended beyond their primary terms if there were 'drilling operations' and 'actual operations' on the leased lands as of April 2, 2012." Appellant Brief ¶ 37. Their entire grammatical analysis is based upon this incorrect conclusion that the word "operations" is modified by both "actual" and "drilling". Appellant Brief ¶ 39. (stating operations "is the noun being modified by 'drilling' and 'actual'"). The grammatical rules do not allow for this result. The Hess Group is reading the phrase "actual drilling operations" as if "actual" and "drilling" are separated by a comma or an "and" when they are not. Their flawed analysis taints the Hess Group's entire reasoning because it is through this lens from which they make their argument. Appellant Brief ¶ 38 (stating that the Hess Group "employ[s] this grammatical analysis" to argue that its interpretation is the only viable one based on the English language and caselaw).

[¶ 25] The correct analysis leads to the conclusion that the adjective "actual" modifies the idea expressed by the adjective-noun unit "drilling operations." As such, placement of the adjective "actual" in front of "drilling operations" changes the meaning of "drilling operations." It is no longer the term of art that was defined in Anderson v. Hess Corp., 733 F. Supp. 2d 1100 (D.N.D. 2010), aff'd, 649 F.3d 891 (8th Cir. 2011) and Wold v. Zavanna, LLC, 2013 WL 6858827 (D.N.D. Dec. 31, 2013). It now has a new meaning. One cannot possibly believe that the addition of "actual" to the phrase "drilling operations" was made to emphasize that "phony" drilling operations would not suffice to hold the Subject Leases.

[¶ 26] The District Court agreed with Riverbend and Intervention that "actual drilling operations" meant something different than the definition of "drilling operations" as set out in Anderson and Wold. The District Court looked to the authorities cited by Riverbend and Intervention to conclude that "actual drilling operations" means the actual turning of the drill bit into the ground. The District Court properly gave meaning to the word "actual" in "actual drilling operations." Therefore, the District Court should be affirmed.

[¶ 27] **C. The District Court properly concluded that the Subject Leases had expired because "actual drilling operations" had not been commenced prior to the expiration of the leases.**

[¶ 28] "The general rules governing contract interpretation apply to the interpretation of leases." Kittleson, 2016 ND 44, ¶ 10. Contracts are to be interpreted according to the rules of construction contained in Chapter 9-07 of the North Dakota Century Code. Langer v. Pender, 2009 ND 51, ¶ 14, 764 N.W.2d 159. "The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity." N.D.C.C. § 9-07-02. Courts "construe contracts to be definite and capable of being carried into effect, unless doing so violates the intention of the parties." Lire, Inc. v. Bob's Pizza

Inn Restaurants, Inc., 541 N.W.2d 432, 434 (N.D. 1995); N.D.C.C. § 9-07-03 (stating a "contract must be so interpreted as to give effect to the mutual intention of the parties"). "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); see N.D.C.C. § 9-07-04 (stating "the intention of the parties to a written contract is to be ascertained from the writing alone if possible").

[¶ 29] A contract must be construed as a whole to give effect to each provision, if reasonably possible. N.D.C.C. § 9–07–06. "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." N.D.C.C. § 9-07-08. "The words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." N.D.C.C. § 9-07-09. "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." N.D.C.C. § 9-07-10.

[¶ 30] This District Court properly applied the rules of construction and determined that "actual drilling operations" requires the placing of 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." App. 135.

[¶ 31] **a. The District Court properly determined that "drilling operations" and "actual drilling operations" have different meanings.**

[¶ 32] The Hess Group argues that "drilling operations" has been broadly defined and that it is "undisputed" that Continental had engaged in such "drilling operations" as of the

Subject Leases' termination date - April 2, 2012. Appellant Brief ¶¶ 31-35. In essence, the Hess Group argues that "actual drilling operations" means nothing more than "drilling operations" thereby allowing the Hess Group to rely on caselaw that liberally interprets phrases such as "drilling operations" or "drilling or reworking operations" as including preparatory work done before the well is actually drilled. See generally Abell v. Gadeco, LLC, 2017 ND 163, 897 N.W.2d 914 (discussing that a requirement of operations is met, which extends the lease beyond the primary term, by work done preparatory to drilling); Anderson v. Hess Corp., 733 F. Supp. 2d 1100 (D.N.D. 2010), aff'd, 649 F.3d 891 (8th Cir. 2011) (stating that, as a matter of law, the operator engaged in "drilling operations" because of preparatory work done before the well was actually drilled). The Hess Group argues that the District Court erred because its "conclusion ignores the broad general meaning of 'drilling operations' endorsed by [Abell]." Appellant Brief ¶ 34.

[¶ 33] While courts applying North Dakota law have interpreted the phrase "drilling operations" to include preparatory work, the parties "are always free to negotiate other language," striking out phrases such as "drilling and re-working operations" and "inserting language requiring some other benchmark, such as, actual drilling or including a definition of 'drilling operations' that accomplishes the same thing." Wold v. Zavanna, LLC, 2013 WL 6858827 at *11 n. 8 (D.N.D. Dec. 31, 2013). The parties here, in the Subject Leases, did just that, using the phrase "actual drilling operations" instead of merely "drilling operations." The District Court properly determined that "actual drilling operations" has a distinct and different meaning than "drilling operations."

[¶ 34] **b. The District Court properly determined that "actual drilling operations" requires the drill bit penetrating the ground.**

[¶ 35] The Hess Group, just like it did before the District Court, seemingly acknowledges that the word "actual" in "actual drilling operations" ultimately requires more than if the lease required the bare "drilling operations" which courts have liberally interpreted. The Hess Group argues that, in the Subject Leases, "actual" means "existing in fact" or "real." Hess admits that the inclusion of the word "actual" requires it to be interpreted to exclude certain preparatory and preliminary work because certain work is not "actual" or "real" enough. The Hess Group goes on to define what activities are "drilling operations" and, with no statutory or caselaw support, defines what activities meet the more stringent "actual drilling operations." Appellant Brief ¶ 38 & Doc. ID # 72, ¶ 7. Not surprisingly, to the Hess Group, the operator's conduct in question meets the Hess Group's own, invented definition of "actual drilling operations." Appellant Brief ¶ 38. Unfortunately for the Hess Group, the District Court, and now this Court, gets to determine the interpretation of the Continuous Drilling Clauses.

[¶ 36] The problem for the Hess Group is that their grammar analysis, as set forth above, is wrong – they do not appear to understand the difference between coordinate and cumulative adjectives. The Hess Group's entire argument regarding their interpretation of "actual drilling operations" is based on their faulty grammatical analysis that the words "actual" and "drilling" both individually modify only "operations." This faulty grammatical analysis is fatal to their entire argument for their grammatical analysis is the foundation upon which their entire argument is built.

[¶ 37] As a threshold matter, Wold, which was discussed supra, gives this Court guidance. Wold stands for the proposition that parties to a lease can use language to preclude a lease

from being interpreted to allow pre-drilling activity to extend a lease by "inserting language requiring some other benchmark, such as actual drilling" or by defining "drilling operations" in the lease. 2013 WL 685827, at *11 n. 8. This is what the parties did; rather than using the usual "drilling operations" language in the Continuous Drilling Clause, the word "actual" was inserted thereby requiring the drill to penetrate the ground.

[¶ 38] Additionally, in this Court, and countless other jurisdictions, Williams & Meyers' treatise and manual of oil and gas terms have been the gold standard when it comes to oil and gas jurisprudence and for definitions of oil and gas terms. See generally Reese v. Reese-Young, 2020 ND 35, ¶ 18, 938 N.W.2d 405; Abell, 2017 ND 163 at ¶ 10; Melchior v. Lystad, 2010 ND 140, ¶¶ 8 & 9, 786 N.W.2d 8; Western Gas Resources, Inc. v. Heitkamp, 489 N.W.2d 869, 873 (N.D. 1992); Acoma Oil Corp. v. Wilson, 471 N.W.2d 476, 481 (N.D. 1991); Holman v. State, 438 N.W.2d 534, 538-40 (N.D. 1989); Anderson, 733 F.Supp.2d at 1106. Williams & Meyers treats "drilling operations" and "actual drilling operations" as separate and distinct. P. Martin & B. Kramer, 8 William & Meyers Oil and Gas Law, Manual of Oil & Gas Terms, 18 & 288 (Lexis Nexis Matthew Bender 2018). "Actual drilling operations" is defined as "requiring the actual penetration of the ground by the drill bit" and specifically states that preliminary work, such as road and site grading, is insufficient. Id. at 18.

[¶ 39] Riverbend acknowledges that it (nor any other litigant in this action) has not be able to locate a single case in North Dakota or any other state interpreting a Continuous Drilling Clause that requires "actual drilling operations." The Hess Group disingenuously suggests that it found one case – Enduro Operating LLC v. Echo Prod., Inc., 413 P.3d 866 (N.M. 2018) – that champions its cause suggesting that it "supports the Hess Group's

interpretation and goes squarely against the Appellees' arguments." Appellant Brief ¶ 41. This claim is false.

[¶ 40] The Hess Group attempted to persuade the District Court with this same argument which the District Court disregarded in total. Dkt. # 40, ¶ 40 and App. 133-134. The Hess Group cites to dicta and suggests to this Court that the New Mexico Supreme Court determined that on-site preliminary work without a drilling permit, like digging a slush pit, can "suffice to show an operator has 'actually commenced drilling operations'" and that "actual drilling … is not necessary." Appellant Brief, ¶ 41. The Hess Group misstates the facts. First, Enduro did not involve a Continuous Drilling Clause. Rather, the New Mexico Supreme Court was called upon to interpret a Joint Operating Agreement (herein "JOA") between an operator and a working interest owner. Second, the Court was called upon to interpret a phrase contained in the JOA, which required the operator to "actually commence the proposed operations." Enduro, 413 P.3d at 868 & 871. The word "drilling" is not found in the disputed phrase.

[¶ 41] Here, the operator, pursuant to the Continuous Drilling Clause, was required to conduct "actual drilling operations" by April 2, 2012 rather than "actually commence the proposed operations" as was required under the JOA in Enduro. Therefore, Enduro offers no guidance to the instant action because it has no factual similarities. Although the litigants in this action have found no state or federal cases wherein a court was called upon to decide what conduct amounts to "actual drilling operations," the Interior Board of Land Appeals (herein "IBLA") has been called upon, on numerous occasions, to determine what is required to hold a lease beyond its primary term when the lease requires "actual drilling operations." The Interior Board of Land Appeals (IBLA) is an appellate review body that

exercises the delegated authority of the Secretary of the Interior to issue final decisions for the Department of the Interior.

[¶ 42] In Estelle Wolf, three lessees of federal minerals appealed a determination that their leases had expired. In order for the leases to be extended beyond the primary term, "actual drilling operations" had to be prosecuted before the term expired. 37 IBLA 195, 195 (Oct. 12, 1978). All governmental approvals had been obtained and all site work had been done, but, due to bad weather, actual drilling started three hours after the primary term expired. Id. at 196. The lessees argued that preliminary work was "actual drilling operations" thereby extending the leases. The majority opinion, however, held that "actual drilling operations" requires actual drilling, i.e. the drill bit penetrating the ground. Id. The dissent, just like the Hess Group in the instant appeal, argued that "'actual' means 'real' and 'present' as opposed to 'nominal.'" Id. at 197 & 204. The majority reasoned that "actual drilling means real, present drilling." Id. at 197 (stating that the Department of Interior has, for years, interpreted "actual drilling operations" to mean real, present drilling); see also Nevdak Oil and Exploration, Inc., 104 IBLA 133 (Sept. 2, 1988 (finding that preparatory work was not "actual drilling operations"); Inexco Oil Company, 20 IBLA 134 (May 5, 1975) ("actual drilling operations" does not include preliminary steps toward drilling but requires actual drilling); Burton W. Hancock, 31 IBLA 18 (June 17, 1977) (finding the phrase "actual drilling operations" requires physical drilling); 43 C.F.R. § 3100.0-5(g) (defining "[a]ctual drilling operations" to include "not only the physical drilling of a well, but the testing, completing or equipping of such well for production.").

[¶ 43] Riverbend acknowledges that the IBLA decisions are not binding on this Court, but their analysis certainly can be persuasive considering the exact same phrase was

interpreted. In Estelle Wolf, the Interior Board of Land Appeals decision discusses in detail how cases dealing with leases for private lands have wrestled with phrases like "drilling operations" but never the term "actual drilling operations" which, at that time, was a "peculiar" phrase found only in federal leases. The majority opinion in Estelle Wolf found no inconsistency between its interpretation that "actual drilling operations" requires physical drilling and "drilling operations" including preliminary work before the physical act of drilling. 37 IBLA at 198. The Hess Group claims that the Estelle Wolf decision stands for the proposition that it is wholly inappropriate to rely on federal authorities when interpreting private fee leases. Estelle Wolf does not stand for this claimed bright line rule that the Hess Group posits, for the decision says nothing of the sort.

[¶ 44] Here, the District Court, like the IBLA decisions, determined that "actual drilling operations" requires a drill bit penetrating the ground. Additionally, the District Court found it constructive to note that cases from other jurisdictions, although not called upon to determine what conduct meets the threshold of "actual drilling operations," did involve litigation surrounding leases wherein "actual drilling operations" was defined in said leases to require a drill bit in the ground. See Exxon Mobil Corp. v. Alabama Dep't of Conservation & Nat. Res., 986 So. 2d 1093, 1120 (Ala. 2007) ("actual drilling operations" means "actual drilling (commenced by spudding in) of a new well…); Peironnet v. Matador Resources Co., 144 So.3d 791, 798 (La. 2013) (defining "drilling operations" to include preparatory work and "actual drilling operations" as "having the bit in the ground and rotating same"); Rippy Interests, Inc. v. Nash, 475 S.W.3d 353, 359 n. 4 (Tex. App. 2014) (assignment defined "actual drilling operations" as the penetration of the surface with a drilling rig capable of drilling).

[¶ 45] The Hess Group wants the Court to interpret the Continuous Drilling Clause as if the word "actual" was not there. The Court is to give effect to every clause, sentence, and provision in a contract. N.D.C.C. § 9-07-06. The District Court properly gave meaning to the word "actual." Therefore, the District Court should be affirmed.

[¶ 46] **D. The Continuous Drilling Clauses in the Subject Leases are unambiguous.**

[¶ 47] The Hess Group has argued that "should the Court decline to adopt the Hess Group's interpretation as a matter of law, then the contract is ambiguous." Appellant Brief ¶ 50. N.D.C.C. § 9-07-04 requires that the intention of the parties to a written contract must be ascertained from the writing alone, if possible. Des Lacs Valley Land Corp. v. Herzig, 2001 ND 17, ¶ 9, 621 N.W.2d 860. "Where a written contract is complete in itself, is clear and unambiguous in its language and contains mutual contractual covenants agreed upon, such parts cannot be changed by parol testimony, nor new terms added thereto, in the absence of a clear showing of fraud, mistake or accident." Syversen v. Hess, 2003 ND 118, ¶ 5, 665 N.W.2d 23 (citations and quotations omitted); see also Herzig, 2001 ND 17, ¶ 9, 621 N.W.2d 860 (stating "[i]f a written contract is unambiguous, parol evidence is not admissible to contradict the written language").

[¶ 48] The North Dakota federal district court, in Wold v. Zavanna, 2013 WL 6858827 (D.N.D. Dec. 31, 2013), addressed whether ambiguities exist when two interpretations are being proffered by the parties. The district court determined that summary judgment was appropriate even though the parties both suggested differing interpretations of "drilling or re-working operations." Id. at 12; see generally Anderson, 733 F.Supp.2d at 1107 (granting summary judgment on the unambiguous phrase "drilling or reworking operations" even though parties offered alternative meanings); Wolter v. Equitable

Resources Energy Co., 979 P.2d 948 (Wy. 1999) (affirming the district court's grant of summary judgment because the reservation in an assignment of an oil gas lease was unambiguous and opining that a "disagreement between the parties as to the contract's meaning does not give rise to an ambiguity"); Amera-Seiki Corp. v. Cincinnati Ins. Co., 721 F.3d 582 (8th Cir. 2013) (affirming the district court's grant of summary judgment and stating that a contract is not ambiguous "just because the parties disagree as to the meaning of its terms"); URI, Inc. v. Kleberg County, 543 S.W.3d 755, 763 (Tex. 2018) (stating that a "contract is not ambiguous merely because the parties disagree about its meaning").

[¶ 49] This Court, in Bice v. Petro–Hunt, L.L.C., 2009 ND 124, ¶ 12, 768 N.W.2d 496, addressed the competing definitions of the term "market value at the well" in an oil and gas lease. Both parties had asserted the term was unambiguous, but the plaintiffs argued that if the court did not accept their definition of the term "market value at the well", then the term was ambiguous. Id. The Hess Group is doing the same thing in the instant case. Appellant Brief ¶ 50. In Bice, this Court analyzed the case law from other jurisdictions as well as secondary sources and found that there are both "majority" and "minority" positions regarding the definition of "at the well." Id. at ¶¶ 13–16. This Court ultimately adopted the majority position. Id. at ¶¶ 19–20. The term was found unambiguous and concluded that the trial court had not erred in granting summary judgment regarding interpretation of the term "market value at the well." Id. at ¶ 21.

[¶ 50] Here, the Hess Group only postulates their own interpretation based on its faulty grammatical analysis. Conversely, Riverbend has set forth the accepted definition of "actual drilling operations" in Williams & Meyers, IBLA decisions, and the Code of Federal Regulations, all of which reach the same conclusion as to the phrase's meaning.

To ascribe a new meaning would be contrary to having uniform interpretations and certainty of meaning.

[¶ 51] The District Court, in relying on the accepted definitions of "actual drilling operations," did not find the Continuous Drilling Clauses of the Subject Leases ambiguous and ruled as a matter of law that the Subject Leases had expired because "actual drilling operations" required a drill bit penetrating the ground.[3] Therefore, the District Court should be affirmed.

[¶ 52] **E. The Hess Group failed to state a claim with respect to their force majeure argument.**

[¶ 53] The Hess Group argues that the District Court erred by not considering its force majeure argument. Appellant Brief ¶¶ 54-56. The Hess Group did not allege, aver, plead or complain that regulatory delays triggered the force majeure clause in its Amended Complaint. App. 8. In fact, the Amended Complaint, while rife with other facts that doom their case, is completely devoid of any facts surrounding the issue of force majeure.

[¶ 54] The Subject Leases contain identical force majeure clauses which states, in part:

> 14. **Compliance with Laws** – In all operations under this lease or on the demised premises, Lessee shall promptly comply with 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

3 The Hess Group also argues that the rule of last resort – N.D.C.C. § 9-07-19 – should apply and that the lease form in this case "should be interpreted strongly against the party who caused the uncertainty to exist." The Hess Group's argument on this point takes place in a vacuum and ignores (other than mere citation to five of them in paragraph 27 of their brief) the seventeen rules of contract interpretation that are to be used to remove uncertainty before using the rule of last resort. See N.D.C.C. §§ 9-07-01 through 9-07-18 (N.D.C.C. § 9-07-11 has been repealed).

> producing oil or gas from the leased premises, the time which such Lessee is so prevented shall not be counted against Lessee, and this lease shall be extended for a period of time equal to that during which such Lessee is so prevented from conducting drilling or reworking operations on, or producing oil or gas from such leased premises . . . .

App. 20 & 23 (**emphasis added**).

[¶ 55] The language of the lease triggering force majeure states that the lease will not be terminated "if compliance is **prevented** by any such law, order, rule or regulation." Id. (**emphasis added**). The argument that Continental, the operator, in Sundry Notices, requested permission to move the surface hole location on the last day of the lease term does not, as posited by the Hess Group, even hint at a regulatory delay preventing compliance. The facts as pled by the Hess Group prove the exact opposite. On March 20, 2012, the NDIC had given Continental all the regulatory approvals needed to drill a well and perpetuate the Subject Leases. App. 11 and 35-38. Continental then decided to move the surface location. App. 11 and 43-46. This is not a regulatory or compliance with law issue, but rather a business decision made by Continental that it was free to make. The fact that the operator was not concerned with the Hess Group's Subject Leases validity does not suggest or create a regulatory delay. The Amended Complaint does not imply that the Hess Group was prevented from complying with the Subject Leases. As such, they have failed to state a claim that the lease should be extended pursuant to paragraph 14 of the Subject Leases.

[¶ 56] "A motion to dismiss a complaint under N.D.R.Civ.P. 12(b)(vi) tests the legal sufficiency of the claim presented in the complaint." Brandvold v. Lewis & Clark Pub. Sch. Dist. No. 161, 2011 ND 185, ¶ 6, (803 N.W.2d 827). On appeal, we construe the complaint in the light most favorable to the plaintiff and accept the well-pleaded allegations

as true. In re Estate of Nelson, 2015 ND 122, ¶ 5, 863 N.W.2d 521. Here, if we look at the complaint in the light most favorable to the Hess Group, the Court is left with the fact that, on April 2, 2012 (the Subject Leases' expiration date), the operator submitted a request, in the Sundry Notices, to the NDIC requesting that the surface hole locations be moved. As already stated, this fact does not suggest that lease compliance was "prevented" by a law, order, rule, or regulation.

[¶ 57] This Court "will affirm a judgment dismissing a complaint for failure to state a claim if we cannot discern a potential for proof to support it." In re Estate of Dionne, 2013 ND 40, ¶ 11, 827 N.W.2d 555 (quoting Ziegelmann v. DaimlerChrysler Corp., 2002 ND 134, ¶ 5, 649 N.W.2d 556). In this case, the Hess Group has put forth no proof to support its force majeure claim as nothing is alleged that implies compliance with the lease was prevented by a rule or regulation. Therefore, the District Court's determination that the Subject Leases expired should be affirmed.

[¶ 58] **V. REQUEST FOR ORAL ARGUMENT**

[¶ 59] Riverbend requests oral argument. The matter before the Court with regards to what is required for "actual drilling operations" is a matter of first impression making oral argument of utmost importance so that questions can be asked and answered.

[¶ 60] **VI. CONCLUSION**

[¶ 61] For the reasons contained herein, Riverbend respectfully requests that the Judgment of the District Court be affirmed.

[¶ 62] Dated this 24th day of April, 2020.

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[¶ 63] **CERTIFICATE OF COMPLIANCE ON PAGE COUNT**

[¶ 64] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8); the page count is 26.

Dated this 24th day of April, 2020.

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[¶ 65] **CERTIFICATE OF WORD PROCESSING PROGRAM**

[¶ 66] The word-processing program is Microsoft Office Word 2016.

Dated this 24th day of April, 2020.

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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

CERTIFICATE OF SERVICE

[¶1] I certify that on the 24th day of April, 2020, the following documents:

1. Brief of Appellee Riverbend Oil & Gas VI, L.L.C.; and
2. Certificate of Service

were electronically filed with the North Dakota Supreme Court through the North Dakota Supreme Court E-Filing Portal in Docket No. 20190352, and an E-mail Service Notification will be sent to the following:

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