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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

DAVID A. BLASI AND PAULA J. BLASI, as TRUSTEES OF THE BLASI LIVING TRUST, on behalf of themselves and a class of similarly situated persons, Plaintiffs/Appellants, v. BRUIN E&P PARTNERS, LLC, et al., v. LIME ROCK RESOURCES OPERATING CO., INC., et al., v. KRAKEN DEVELOPMENT III LLC, et al., v. CONTINENTAL RESOURCES, INC., v. EOG RESOURCES, INC., Defendants/Appellees.	)	Supreme Court Nos. 20200327-20200331 U.S. District Court Nos. 3:20-cv-00085 3:20-cv-00091 3:20-cv-00092 3:20-cv-00093 3:20-cv-00094

On Appeal from the Order for Certification dated November 30, 2020
United States District Court for the District of North Dakota
The Honorable Chief Judge Peter D. Welte Presiding

BRIEF OF DEFENDANT/APPELLEE CONTINENTAL RESOURCES, INC.

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Paragraph

TABLE OF AUTHORITIES

Paragraph

Cases

Statutes

Other Authorities

Statement of Jurisdiction

[¶1] This proceeding is pending pursuant to an Order for Certification from The Honorable Peter D. Welte, Chief Judge of the United States District Court for the District of North Dakota in which he asked this Court to answer a question of law.

[¶2] As outlined in its Response to Motion to Decline to Answer Certified Question at this Time, Continental Resources Inc. ("Continental") respectfully submits that, if the Court is not inclined to follow the jurisprudence from other jurisdictions and scholars interpreting the pertinent oil royalty clause, it should decline to answer the certified question so that the parties can put together a limited factual record to aid the Court's interpretation.

Oral Argument

[¶3] Continental requests oral argument. This case presents the first time the Court will be addressing the in-kind oil royalty clause contained in the Blasi Trust leases. Because many North Dakota leases contain this royalty clause, the Court's answer could have a widespread impact on North Dakota lessors and lessees. Consequently, Continental believes oral argument will be both helpful and worthwhile.

Issue Presented

[¶4] The issue presented is stated in the Order for Certification.

Statement of the Case

[¶5] In May 2020, Appellant, Blasi Living Trust, ("Blasi Trust") filed five lawsuits in the Eastern Division of the District of North Dakota. In each lawsuit, Blasi Trust alleges the lessee underpaid oil royalty under a form royalty provision. Blasi Trust generally contends that each defendant lessee incorrectly deducted post-production costs when paying oil royalties under the form oil royalty clause.[1] Blasi Trust also asks the district court to certify a class of royalty owners to pursue royalty underpayment claims against each lessee and appoint Blasi Trust as the representative of each proposed class.

[¶6] Pursuant to Federal Rule of Civil Procedure 12(b)(6), each defendant filed a motion to dismiss Blasi Trust's Complaint. Continental also filed an alternative motion for a more definite statement identifying the location at which Blasi Trust contends its oil royalty should be valued and, consequently, which post-production costs it alleged Continental deducted improperly. *See* Continental's Response to Motion to Decline to Answer Certified Question at This Time at Ex. A ¶¶1, 43, 66. Blasi Trust's Complaint is artfully vague and non-committal on this point, complaining about "various costs," "other costs," and declining to specify what Blasi Trust contends is a "pipeline." *See id.*; *see also* Blasi Appx. 55-57 ¶¶11, 15, 20(a). Though the Complaint references "various costs such as gathering or moving the oil" and "unloading, gathering costs, or other costs," it repeatedly quotes the "free of cost" portion of the oil royalty clause as if that small portion is dispositive of *all* post-production costs. *See* Blasi Appx. 53, 55-59 ¶¶2, 6, 11, 12, 14, 15, 20(b), 25, 29.

[¶7] On October 30, 2020, the district court held a status conference in all five cases and *sua sponte* discussed the possibility of certifying a question of law to this Court.

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1 Royalty interests generally do not bear "production costs." *See West v. Alpar Res., Inc.*, 298 N.W.2d 484, 489 (N.D. 1980); *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121-22 (Tex. 1996) ("[r]oyalty is commonly defined as the landowner's share of production, free of the expenses of production"); *see also* 3 H. Williams & C. Meyers, OIL AND GAS LAW § 645 (15th ed.) (royalty interests "are usually defined as interests which are free from production costs"). Blasi Trust does not contend that Continental has deducted production costs.

After that status conference, the district court allowed the parties to submit a response regarding the propriety of certifying a question and the proposed form of question. In its Response to Possible Certification of Question to North Dakota Supreme Court, Continental explained why it was premature and unnecessary to certify a question and outlined its objections to the initial draft question. *See* Continental's Response to Motion to Decline to Answer Certified Question at This Time at Ex. B.

[¶8] In its Order for Certification, the district court addressed Continental's (and several other defendants') objections and phrased the question in terms of where the oil royalty should be valued. *See* Order for Certification. The Order for Certification summarizes certain of Blasi Trust's unproven allegations and certain of the defendants' responses to those allegations. However, because the parties have not conducted any discovery, the Statement of Facts in the Order for Certification only contains allegations and contentions.

STATEMENT OF FACTS

[¶9] Blasi Trust's Complaints against Continental and the other defendants allege that Blasi Trust's claims are based on leases signed by Blasi Trust's predecessor-in-interest. Blasi Trust's predecessor signed these leases over a five-year time period. Blasi Trust's Appx. 16-19, 39-41, 61-65, 85-90, 111-14. The details of those leases are:

Named Lessee	**Date**	**Acres**	**Lease Form**	
Oxy USA Inc.	3/25/2011	480.00	Producers 88-PAID UP Rev. 5-60, No. 2	Blasi Appx. 16-19
Sundance Oil & Gas, L.L.C.	6/22/2007	320.00	Producers 88-PAID UP Rev. 5-60, No. 2	Blasi Appx. 39-41
Continental Resources, Inc.	10/26/2006	320.00	Producers 88-PAID UP Rev. 5-60, No. 2	Blasi Appx. 61-63

Continental Resources, Inc.	6/11/2007	40.00	Producers 88-PAID UP Rev. 5-60, No. 2	Blasi Appx. 64-65
Sundance Oil & Gas, L.L.C.	9/25/2007	1766.72	Producers 88-PAID UP Rev. 5-60, No. 2	Blasi Appx. 85-87
John H. Holt Oil Properties, Inc.	7/27/2006	640.00	Producers 88-PAID UP	Blasi Appx. 89-90

[¶10] Though the face of each lease indicates it is a form lease, some of the Blasi Trust leases have handwritten modification or an exhibit amending provisions of the form lease. *See* Blasi Appx. 40 ¶14; Blasi Appx. 19. However, all of the leases attached to Blasi Trust's Complaints have the unaltered, form royalty clause. *See* Blasi Appx. 61 ¶3, 64 ¶3.

[¶11] In addition to providing an exclusive lease of the "land hereinafter described" to Continental for the purpose of exploring for and producing oil and gas, Blasi Trust's leases provide Continental "with rights of way and easements for laying pipelines, and erection of structures thereon to produce, save and take care of said products" on the lease premises. Blasi Appx. 61, 64. Continental expressly agreed that, "when requested by [Blasi Trust], [Continental] shall bury [Continental's] pipe line below plow depth." Blasi Appx. 61 ¶7, Blasi Appx. 64 ¶7.

[¶12] With respect to royalties from oil wells, Continental agreed in the leases:

> 1st. To deliver to the credit of [Blasi Trust], free of cost, in the pipeline to which [Continental] may connect wells on said land, the equal one-sixth (1/6) part of all oil produced and saved from the leased premises.[2]
>
> 3rd. To pay [Blasi Trust] for gas produced from any oil well and used off the premises or in the manufacture of gasoline or any other product a royalty of one-sixth (1/6th) of the proceeds, at the mouth of the well, payable monthly at the

[2] This type of royalty clause is referred to as an "in kind" clause. It allows the lessor to "take his fractional part of the oil produced and saved from the premises and use or dispose" of that oil. 3 H. Williams & C. Meyers, OIL AND GAS LAW § 659 (15th ed.).

prevailing market rate.[3]

Blasi Appx. 61 ¶3, 64 ¶3.

[¶13] The oil royalty provision in the Blasi Trust leases has been standard in lease forms for over 100 years. *See* W.W. Thornton, THE LAW RELATING TO OIL AND GAS at 869-70 (1904); *Murray v. Barnhart*, 42 So. 489, 489-90 (La. 1906) (interpreting a 1901 lease with this oil royalty provision and explaining the "parties used the blank form given at page 869 of Thornton 'The Law Relating to Oil and Gas'"). Furthermore, it can be found in leases throughout the United States. By way of example:

- *Deihl v. Ohio Oil Co.*, 30 Ohio Cir. Dec. 750, 750-51 (Ohio Cir. 1892) (interpreting an 1890 Ohio lease);
- *Henne v. South Penn Oil Co.*, 43 S.E. 147, 148 (W. Va. 1903) (interpreting an 1898 West Virginia lease);
- *Guffey Petroleum Co. v. Oliver*, 79 S.W. 884, 885 (Tex. Civ. App. 1904) (interpreting a 1901 Texas lease);
- *Silurian Oil Co. v. Neal*, 115 N.E. 114, 114 (Ill. 1917) (interpreting a 1906 Illinois lease);
- *Dunaway v. Galbraith*, 214 S.W.33, 33-34 (Ark. 1919) (interpreting a 1913 Arkansas lease);
- *Kretni Dev. Co. v. Consolidated Oil Corp.*, 74 F.2d 497, 497 (10th Cir. 1934) (interpreting a 1918 Wyoming lease);
- *Barksdale v. Marcum*, 7 Tenn. App. 697, 700-01 (Tenn. Ct. App. 1928) (interpreting a 1919 Tennessee lease); and
- *MacMaster v. Onstad*, 86 N.W.2d 36, 39-40 (N.D. 1957) (interpreting a 1956 "standard form[] of oil and gas lease" in North Dakota with the in-kind oil royalty language in Blasi Trust's leases).

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3 This royalty clause pertains to casinghead gas, which is the gas produced from oil wells as the oil is extracted. *Hurinko v. Chevron, USA, Inc.*, 69 F.3d 283, 284 (10th Cir. 1995).

[¶14] Because of the "physical and economic differences between the production, utilization and marketing of oil and gas," oil and gas leases commonly "employ separate royalty clauses for those two substances." A.W. Walker, Jr., *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 10 TEX. L. REV. 291, 292 (1932). "Oil can be stored upon the surface after it has been produced, and is readily marketed under normal conditions even in small amounts." *Id.* at 293. Additionally, oil can be transported by a lessor after delivery in kind. 3 H. Williams & C. Meyers, OIL AND GAS LAW § 659 (15th ed.). By contrast, gas "cannot be stored upon the surface after it has been produced." A.W. Walker, Jr., *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 10 TEX. L. REV. at 292. It is also more complicated to transport than oil. 3 H. Williams & C. Meyers, OIL AND GAS LAW § 659. As a consequence, "[t]ypical oil royalty clauses provide that under certain circumstances the lessor shall be entitled to receive his royalty in kind" and typical gas royalty clauses require gas royalty to be paid with money. *Id.*; *see also* A.W. Walker, Jr., *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 10 TEX. L. REV. at 299 (because "payment of a royalty upon gas in kind is impracticable . . . leases almost uniformly provide for a money payment").

[¶15] Like gas, oil increases in value as it moves downstream (*i.e.*, away from the wellhead). D. Pierce, *Royalty Jurisprudence: A Tale of Two States*, 49 Washburn L.J. 347, 352 (2010). At least two factors drive a higher downstream value: (1) the expenses and investments required to provide or procure facilities or services to move the production downstream and (2) an increased value based on the oil being in a particular form (*e.g.*, treated, refined, etc.) in a particular market or location (*e.g.*, a market with many buyers versus a market with only a few buyers). *Id.* Professor Pierce referred to this "reality" as "the 'linear enhancement of production value.'" *Id.*

[¶16] Disputed "fact" alleged in Blasi Trust's Brief: "Defendants, or their predecessors, drafted the lease language at issue in all the leases." Blasi Brief ¶10; *see also* Blasi Brief ¶26 (alleging that "lessees drafted all the leases" and Blasi Trust is not a sophisticated landowner). This is not supported by any evidence and contradicted by Blasi Trust's own admission that the leases are "form contracts." Blasi Brief ¶¶4, 22, 26.

[¶17] Disputed "fact" alleged in Blasi Trust's Brief: "[V]ery few wells, and none in this case, have an oil pipeline connected." Blasi Brief ¶19. There is no evidence of this. And, unless Blasi Trust is using a definition of "pipeline" that differs from its ordinary meaning, Blasi Trust's allegation is incorrect.

SUMMARY OF ARGUMENT

[¶18] Continental respectfully submits that the answer to the question certified by the district court is "yes." Blasi Trust's oil royalty must be valued at or near the well on the lease premises—a location that is clear, certain, and predictable. This interpretation of the oil royalty clause is consistent with this Court's guidance that leases are to be construed as a whole and interpreted according to their express language. Likewise, this interpretation is consistent with the other courts and scholars who have addressed this form oil royalty provision over the last 100 years.

[¶19] By contrast, Blasi Trust's Brief and proposed lease interpretation presents at least two red flags. First, as it did in the trial court, Blasi Trust avoids clearly stating the location at which it contends its royalty share of the oil should be valued. Instead, it (i) criticizes the definition of "pipeline" provided in the well-respected treatise quoted by Continental to the district court, albeit by mischaracterizing the definition as something

Continental itself wrote (Blasi Brief ¶21), and (ii) shifts from its position in the Complaint against Continental and vaguely alludes that the location is somewhere far downstream of the oil wells, after "gathering or moving" (Blasi Brief ¶¶20, 28).[4]

[¶20] Second, despite the fact that the oil royalty clause in Blasi Trust's leases has been used throughout the United States for over 100 years, Blasi Trust has not cited any case or authority supporting Blasi Trust's argument that the royalty share of the oil must be valued at some point after "gathering and moving" occur. The lone case cited by Blasi Trust that construes this royalty clause actually supports Continental's position; not Blasi Trust's.

ARGUMENT

[¶21] To the extent oil is sold downstream of the well, the location where royalty production must be valued for royalty calculation purposes (called the "royalty valuation location" or "royalty valuation point") will determine which post-production costs Blasi Trust must share with Continental. This is due to the "linear enhancement of production value" reality described in paragraph 15 above. If Continental sells oil downstream, for a higher value than it would receive in the wellhead market but after incurring post-production costs to reach the downstream market, a wellhead royalty valuation location permits Continental to account for Blasi Trust's proportionate share of the post-production costs when determining Blasi Trust's oil royalty payment. *See, e.g.*, *Bice v. Petro-Hunt, L.L.C.*, 2009 ND 124, 768 N.W.2d 496, 501-02 (N.D. 2009). Alternately, when

[4] Interestingly, the Amicus Brief filed by White River Royalties, LLC and Sara Cammack presents an alternate definition of "pipeline"—"a well-known pipeline, far away from the wellhead, and at least at the tailgate of a processing facility." Amicus Brief ¶15.

Continental sells the oil at or near the Blasi Trust wells, a wellhead royalty valuation location confirms that Continental may pay royalty to Blasi Trust based upon that sales value, as opposed to a downstream price Continental did not receive.[5]

[¶22] The lease interpretation roadmap provided by this Court's precedent confirms that, like the other courts and scholars who have interpreted this clause over the last century, the Blasi Trust oil royalty provision sets a wellhead royalty valuation location.

I. North Dakota enforces oil and gas leases as written

[¶23] In interpreting oil and gas leases, North Dakota applies the general rules of contract construction:

- A court must read and consider the lease in its entirety so that all its provisions are taken into consideration. *Id.* If possible, every clause, sentence, and provision should have effect. *Tank v. Citation Oil & Gas Corp.*, 2014 ND 123 696 ¶10, 848 N.W.2d 691, 696; *see also* N.D.C.C. § 9-07-06.

- Unless used by the parties in a technical sense or given a special meaning by usage, the words selected by the parties are to be understood in their ordinary and popular sense rather than according to their strict legal meaning. *Johnson v. Statoil Oil & Gas LP,* 2018 ND 227 ¶8, 918 N.W.2d 58, 61 (N.D. 2018); N.D.C.C. § 9-07-09.

- Technical words should be interpreted "as usually understood by people in the profession or business to which they relate, unless they are clearly used in a different sense." N.D.C.C. § 9-07-10.

- Leases may be explained by reference to the circumstances under which they are made and the matter to which they relate. N.D.C.C. § 9-07-12; *see also Delzer Const. Co. v. New Marian Homes Corp.*, 117 N.W.2d 851, 856

[5] As Professor Pierce explains, lessors typically want to push the calculation point away from the wellhead because that will "force the lessee to carry all the costs associated with obtaining the downstream price." D. Pierce, *Royalty Jurisprudence: A Tale of Two States*, 49 Washburn L.J. at 352. However, lessees want royalty to be "calculated at the wellhead because that is the point at which the lessor/lessee relationship, as to the extracted production, ends." *Id*. The royalty valuation location "will often turn to the extent to which courts are willing to give effect to express terms, such as 'at the well,' found in the lease contract." *Id.*

(N.D. 1962) (describing consideration of surrounding circumstances as "axiomatic"). Extrinsic evidence may not change the plain meaning of a written contract, but "meaning can almost never be plain except in a context." *Matter of Jawaski*, 446 N.W.2d 258, 260 (N.D. 1989) (quoting the Restatement (Second) of Contracts § 212 comment b (1981)).

- When a contract is reduced to writing, the court should (if possible) ascertain the parties' intent from the writing alone, subject to the other provisions of North Dakota Century Code chapter 9-07. N.D.C.C. § 9-07-04.

[¶24] The Court's prior opinions interpreting oil and gas leases provide a solid roadmap for how these rules are applied. For example, in *Fleck v. Mo. River Royalty Corp.*, 2015 ND 287, 872 N.W.2d 329 (2015), the Court interpreted the meaning of "production" as used in a lease provision determining when the lease terminated. The lease did not specifically define "production." *Id.* at ¶11, 333. So, as evidence to how this "technical word" was "usually understood by persons in the profession or business to which they relate," the Court looked at treatises (WILLIAMS & MEYERS MANUAL OF OIL AND GAS TERMS and SUMMERS OIL AND GAS) and the definitions used by other oil and gas-producing states (*e.g.*, Texas, Kansas, Oklahoma, West Virginia). *Id.* The Court followed the same approach in determining what operations would perpetuate a lease (and to what extent). *Tank*, 2014 ND 123 ¶¶12, 18, 848 N.W.2d at 648-49. Specifically, the Court looked to the definitions in the WILLIAMS & MEYERS MANUAL OF OIL AND GAS TERMS and in other oil-producing states. *Id.*[6]

[6] The Amicus Brief filed by White River Royalties, LLC and Sara Cammack (the "Amicus Brief") argues the Court should "disregard" the oil and gas industry's understanding of technical terms. Amicus Brief ¶¶13-14. That not only runs contrary to Century Code section 9-07-10, it is directly contrary to this Court's pattern of consulting treatises and other states' jurisprudence in determining how the industry defines the terms used in oil and gas leases.

[¶25] All of the Court's lease interpretation opinions demonstrate the same objective: enforcing the lease as written and avoiding absurd results the parties did not contemplate. *See Egeland*, 2000 ND 169 ¶¶27, 29, 616 N.W.3d 861, 869-70 (N.D. 2000). The Court will only declare an ambiguity in light of "no clear precedential guidance" and competing, rational interpretations "based on understandings of English grammar and industry usage." *Hess Bakken Inv., LLC v. AgriBank, FCB*, 2020 ND 172 ¶¶12-13, 946 N.W.2d 746, 750 (N.D. 2020); *see also West v. Alpar Res., Inc.*, 298 N.W.2d 484, 489-90 (N.D. 1980) (finding an ambiguity when the royalty provision failed to specify a royalty valuation point and "[t]he major treatises on oil and gas law demonstrate the unsettled nature of the law in this area"). And, contrary to Blasi Trust's suggestion, the Court has not defaulted to the pro-lessor interpretation in every situation where there is room for reasonable agreement. *See, e.g. AgriBank*, 2020 ND 172 ¶¶12-13, 946 N.W.2d at 750; *Johnson v. Mineral Estate, Inc.*, 343 N.W.2d 778, 780 (N.D. 1984).

[¶26] The Court's royalty interpretation opinions follow the same guiding interpretation principles and focus on the parties' written agreement, as opposed to implied covenants. *Bice*, 2009 ND 124 ¶21, 768 N.W.2d at 502. By way of background, courts analyzing whether a particular cost is a "post-production cost" that may be shared with the lessor follow one of two philosophies: (1) those that give full effect to the written provisions of the parties' contract (described by the North Dakota Supreme Court as following the "at the well" rule), and (2) those that follow some version of the first marketable product doctrine and presume, absent an express written rejection of the doctrine in the lease, that the lessee bears sole responsibility for paying all costs to make oil or gas marketable. *E.g.*, *Bice*, 2009 ND 124 ¶¶13-16, 768 N.W.2d at 500-02. In *West* *v. Alpar*, the Court previewed that North Dakota would fall into the first category. *See West*, 298 N.W.2d at 490 (explaining that the question in "any case" involving permissible deductions must be answered by referring to the terms and provisions of the lease at issue, the nature of the claimed deductible items, and the precise character of the royalty).

[¶27] And, in *Bice*, the Court confirmed that North Dakota "join[s] the majority of states adopting the 'at the well' rule and rejecting the first marketable product doctrine." *Id.* ¶21, 768 N.W.2d at 502.[7] In rejecting the first marketable product doctrine, the Court noted the difficulty in determining when production has become "marketable"—a problem highlighted by the fact that states following the first marketable product rule "'have failed to articulate a clear standard for determining when a marketable product has been created.'" *Id.* ¶17, 768 N.W.2d at 502. By comparison, lessors and lessees in states that apply the "at the well" rule like North Dakota have a simpler task with more predictable results. The quality of the production (oil or gas) is irrelevant and does not factor into the court's analysis. Instead, if the lease sets a wellhead valuation point (by using the words "at the

[7] Blasi Trust's Brief suggests that courts apply different royalty interpretation principles depending on whether the royalty provision pertains to oil or gas. Blasi Brief ¶¶29, 38. That suggestion is incorrect and Blasi Trust has not cited any supporting authority.

It is true that many royalty interpretation opinions pertain to gas royalty clauses. However, that is a function of at least two things. First, as noted above, the physical differences between gas and oil lead to different types of disputes. Second, as the Williams & Meyers treatise notes, "[t]he vast majority of the cases dealing with the use of the netback methodology involve natural gas royalties," because "many oil royalty clauses provide for a delivery obligation and not a payment obligation" and parties understand the significance of a delivery point "to the pipeline to which the well is connected" or "at the well." 3 H. Williams & C. Meyers, OIL AND GAS LAW § 645. Regardless, courts do not employ completely different interpretation canons simply because they are construing an oil royalty clause instead of gas.

well" or something similar), a lessee can "use one of two methods to calculate the gas or oil's market value at the well." *Id.* ¶14,768 N.W.2d at 502

[¶28] Under one method, the comparable sales method, the lessee averages the prices that it and other producers are receiving at the same time and in the same field for oil or gas that is comparable in quality, quantity, and availability. *Id.* Under the other method, the work-back or netback method, the lessee calculates the wellhead value by taking the downstream sales price and subtracting reasonable post-production costs (such as transportation, gathering, compression, processing, treating, and marketing) incurred after the oil or gas left the wellhead. *Id.* In *Bice*, the gas at issue was not sold (and not saleable) at the wellhead, which meant the comparable sales method was not a viable way to determine wellhead value. *Id.* ¶20, 768 N.W.2d at 502 (explaining that the lessee "cannot use the comparable sales method to calculate royalty because, at least under the facts in this case, no comparable sales exist"). Thus, the Court held the lessee could utilize the work-back method to determine wellhead value (*i.e.,* "deducting post-production costs from the plant tailgate proceeds"). *Id.*

[¶29] Similarly, in accordance with the objective of interpreting the parties' lease as written, the parties may alter an "at the well" royalty valuation location (and its implication on post-production cost sharing) by including "specific 'no deductions' language." *Kittleson v. Grynberg Petroleum Co.*, 2016 ND 44 ¶15, 876 N.W.2d 443, 447 (N.D. 2016). *Kittleson* provides an example of sufficiently specific "no deductions" language that overrides a conflicting wellhead valuation point. *Id.* Though the lease initially provided a wellhead valuation location, this express prohibition immediately followed: "provided however, that there shall be no deductions from the value of Lessor's royalty of any required processing, cost of dehydration, compression, transportation, or other matter to market such gas." *Id.* ¶¶2, 13, 876 N.W.2d at 445, 447. The Court found the wellhead valuation point conflicted with the specific prohibition on post-production deductions and applied the rule of contract interpretation that a specific provision qualifies and prevails over a general provision. *Id.* ¶¶14-15, 876 N.W.2d 447.

[¶30] In sum, though this Court has not previously interpreted the precise royalty clause in the Blasi Trust leases, the Court's consistent adherence to the parties' lease provisions and the well-accepted definitions of terms used in those leases (from both treatises and other oil and gas-producing states) provides a roadmap for affirmatively answering the question posed by the district court.

II. The roadmap provided by the Court's prior opinions leads to the conclusion that the Blasi Trust oil royalty provision provides a wellhead royalty valuation location

[¶31] The express language of the oil royalty clause in Blasi Trust's leases requires a delivery of oil, not the payment of money. The express words are:

> To deliver to the credit of lessor, free of cost, in the pipeline to which Lessee may connect wells on said land the equal one-sixth (1/6th) part of all oil produced and saved from the leased premises.

Blasi Appx. 61¶3, 64¶3.

[¶32] The plain language only requires the lessee to deliver the royalty owner's share of the oil to the specified location. 3 H. Williams & C. Meyers, OIL AND GAS LAW § 659. Its words describe the historic nature of a royalty: an interest that is only free from expenses incurred prior to the specified location. If the clause is followed literally and royalty oil is delivered to the royalty owner, the royalty owner must take its in-kind share of the oil and bear any costs it incurs to sell its share of the oil downstream of the delivery point.

[¶33] The parties' respective obligations pursuant to the in-kind royalty clause in the Blasi Trust leases do not change simply because the lessee does not take its production in kind and, instead, is paid royalty in money. *See* 3 H. Williams & C. Meyers, OIL AND GAS LAW § 645. If the lessee does not provide facilities for taking its share of the production or otherwise instruct the lessee on the proper disposal of the royalty share, the lessee simply sells the lessor's share and pays the lessor for its proportion. *Id.* § 659; *see also Molter v. Lewis*, 134 P.2d 404, 406-407 (Kan. 1943) (collecting treatises and reaching the same conclusion); *First Nat'l Bank in Weatherford v. Exxon Corp.*, 597 S.W.2d 783, 787 (Tex. Civ. App.—El Paso 1980) (explaining that, if the lessor waives its right to receive its production in kind, it places title to the production in the lessee and the lessee is only obligated to market it prudently).

[¶34] Accordingly, the relevant question for this Court is: where is the royalty oil to be delivered under the express terms of the leases? Following the roadmap of the Court's prior opinions and interpreting the express language of the entire lease, in conjunction with the well-accepted definitions of the terms used therein, leads to one conclusion: Continental's oil royalty obligation to Blasi Trust ends at or near the wellhead on the Blasi Trust lease premises.

A. The royalty provision expressly limits the "free of cost" obligation

[¶35] Though Blasi Trust heavily emphasizes the "free of cost" portion of the oil royalty provision, the phrase must be interpreted along with the remainder of the royalty provision and lease. *Johnson*, 2018 ND 227 ¶8, 918 N.W.2d at 61. When viewed in context, as opposed to being plucked from its surroundings, it is abundantly clear that "free of costs" is subject to an express limitation—the royalty oil is only "free of cost" until "the pipeline to which lessee may connect wells on said land." *See* O. Anderson, *Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, or Realistically?"* (Part II), 37 Nat. Res. J. 611, 650 (1997) (explaining that "free of cost, in the pipeline" specifies the point at which the lessee's obligation to bear all costs ends and the lessor's obligation to share costs begins).

[¶36] Thus, "free of costs" refers to production costs, *i.e.* the costs associated with producing the oil from the ground, as opposed to post-production costs such as gathering, transporting, or moving oil after production. 3 H. Williams & C. Meyers, OIL AND GAS LAW § 642.3 (including this language in examples of oil royalty clauses specifically providing "the royalty interest is free of the costs of production"); 3 H. Williams & C. Meyers, OIL AND GAS LAW § 645. Indeed, the United States Supreme Court has noted that a royalty clause requiring oil delivery "'free of cost, in the pipe line' to which the wells are connected," referred only to "expenses incurred in producing the oil and conducting it to the pipe line." *Barwise v. Sheppard*, 299 U.S. 33, 35, 40 (1936).

[¶37] Having determined that the form lease expressly limits Continental's "free of cost" obligation with respect to Blasi Trust's oil royalty, the question becomes the location at which Blasi Trust's share of the oil is to be valued and, if a netback calculation is required, where Blasi Trust becomes obligated to share in its proportional share of post-production costs: "the pipeline to which [Continental] may connect wells on said land."

B. "Pipeline" includes all types of lines that exist on lease premises

[¶38] In interpreting the word "pipeline," the Century Code provides two possible sources: (i) how the word is understood in its "ordinary and popular sense" (N.D.C.C. § 9-07-09), or (ii) "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). When interpreting terms used in oil and gas leases, the Court routinely (and correctly) turns to oil and gas treatises and the interpretation accepted by other courts interpreting the same terms. *E.g., Fleck*, 2015 ND 287 ¶11, 872 N.W.2d at 333; *Tank*, 2014 ND 123 ¶¶12, 18, 848 N.W.2d at 648-49. Those treatises, along with long-standing case law discussing oil "pipelines," confirm that "pipelines" are (contrary to Blasi Trust's assertion) routinely present at or near the wellhead.

[¶39] One of the treatises frequently cited by the Court defines "pipeline" as "a tube or system of tubes used for the transportation of oil or gas." 8 H. Williams & C. Meyers, MANUAL OF OIL AND GAS TERMS. The treatise then lists "types of oil pipelines": "lead lines, from pumping well to a storage tank; flow lines, from flowing well to a storage tank; lease lines, extending from the wells to lease tanks; gathering lines, extending from lease tanks to a central accumulation point; feeder lines, extending from leases to trunk lines; and trunk lines, extending from a producing area to refineries or terminals. *Id.*

[¶40] Blasi Trust's Brief derides Continental's prior reference to this definition, which is quoted directly from the treatise, as "erroneous," not supported by any court, inconsistent with the industry definition, and contradictory to "commonsense understanding." Blasi Brief ¶21. But a review of other authorities using the term "pipeline" and other provisions within the Blasi Trust leases supports the treatise definition and directly contradicts Blasi Trust's very narrow proposed interpretation.

[¶41] For example, the Century Code defines "underground gathering pipeline" as "an underground gas or liquid pipeline . . . which is designed for or capable of transporting, crude oil . . . ." N.D.C.C. §38-08-02(18). The term itself acknowledges that "gathering" lines are "pipelines." *Id.* Furthermore, it includes *any* pipeline capable of transporting crude oil and does not limit itself to post-refinery pipelines, pipelines far away from the well, or any of the other limitations Blasi Trust asks this Court to adopt.

[¶42] Similarly, in 1949, the United States Supreme Court taxation of an entity that owned and operated "pipe lines which are used to transport oil from lease tanks in various oil fields . . . to loading racks adjacent to railroads elsewhere in the state" at which point the oil was "pumped into railroad tank cars for shipment outside the state." *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662, 663 (1949). Despite the fact the lines flowed directly from the lease tanks and flowed unrefined oil to pre-railroad loading racks, they were "pipelines." *Id.* Similarly, "trunk lines" and "gathering lines, without regard to [their] size, the distance or the amount of oil carried through such line to the trunk or main pipeline, or to . . . storage tanks, or to a tank farm" are "pipelines." *Alexander v. Cosden Pipe Line Co.*, 290 U.S. 484, 492 (1934). The Eighth Circuit has also described gathering lines, trunk lines, and other pre-refinery pipes transporting oil as "pipelines." *Motter v. Derby Oil Co.*, 16 F.2d 717, 719 (8th Cir. 1926).

[¶43] Furthermore, the other provisions in Blasi Trust's leases confirm that the parties expressly contemplated that a "pipeline" may exist on Blasi Trust's lease premises (as opposed to some point distant from the lease premises and downstream of the well). Specifically, the leases grant Continental "rights of way and easements for laying pipelines . . . to produce, save and take care of said products [*i.e.,* "oil and all gas of whatsoever nature or kind]." Blasi Appx. 61, 64. They also require Continental to, upon request by Blasi Trust, "bury [Continental's] pipe line below plow depth." Blasi Appx. 61 ¶7, 64 ¶7. These provisions, which must be considered by the Court, confirm that the treatise definition quoted by Continental represents both the industry understanding of "pipeline" and any other "ordinary and popular" definition of that term (to the extent there is a difference between the two, which there is not).

[¶44] In sum, the definition of "pipeline" is not as narrow as Blasi Trust asks this Court to accept. And the further description in the royalty clause of "the pipeline *to which lessee may connect wells on said land*" (emphasis added) confirms that "pipeline" as used in this provision includes far more than pipe that "move[es] oil hundreds or thousands of miles." *Contra* Blasi Brief ¶20.

C. The use of "may" indicates the parties' intent to refer to a wellhead location

[¶45] Because the oil royalty clause uses the word "may," it is clear that Continental was not required to build a pipeline on the lease premises—a fact that further confirms the intent to provide a royalty valuation point at the wellhead (or on the lease premises) regardless of whether a pipeline actually existed. "May" is defined as "to be permitted to" or "to be a possibility." Black's Law Dictionary (11th ed. 2019). Particularly when viewed together with the parties' expressed intent that Continental may be permitted to construct "a pipeline" on the Blasi Trust lease premises (Blasi Appx. 61¶7, 64¶7), it is clear that Continental's obligation to deliver oil royalty ends on the lease premises and at or near the wellhead. The fact that a pipeline may not actually exist on the lease premises does not alter this obligation. *See, e.g., Molter*, 134 P.2d at 406-07 (explaining that the lessee's duty ends at the wells, even when the lessee was unable to get pipe lines on the lease premises).

D. "Connect" and "said land" confirm close proximity to wells

[¶46] The word "connect" in the oil royalty clause further reflects the parties' intention that the royalty valuation point is at the wellhead. The point of valuation is where the lessee may "connect" a pipeline to the well or wells on the said lands. The word "connect" is defined as "to join, fasten, or link together . . . ." *Connect*, MERRIAM-WEBSTER UNABRIDGED; *see also Connect*, MERRIAM-WEBSTER COLLEGIATE. The only place where a pipeline and a well can become physically joined is at the well.

[¶47] Additionally, "said land" is a defined term in the respective leases. It is defined in each lease as the land that is subject to the Leases and on which Continental has the right to explore for and produce oil and gas. Blasi Appx. 61, 64. Under the express language of the royalty clause, the royalty oil is to be delivered "in the pipeline to which lessee may connect wells *on said land* . . . ." This can only mean wells and pipelines on the land, *i.e.* the land that is subjected to the leases. *See* 3 E. Kuntz, TREATISE ON THE LAW OF OIL AND GAS § 40.5 (1989).

[¶48] Reading each of the phrases and words used in the oil royalty clause together, giving each effect, and viewing them in the context of the treatises and other authorities regularly used by the Court leads to one conclusion: Continental may require Blasi Trust to take its royalty share of the oil at the wellhead. If Blasi Trust fails to take delivery of its oil, Continental may sell Blasi Trust's oil and value Blasi Trust's oil royalty at the wellhead.

III. Other courts and well-respected scholars confirm that the in-kind royalty clause provides a wellhead royalty valuation location

[¶49] Even though this oil royalty clause has been used for over 100 years, the number of opinions discussing it are relatively limited, presumably because oil lessors and lessees have understood its rather straightforward meaning.

A. Other courts interpret the language in this royalty clause to set a wellhead royalty valuation location

[¶50] As the Williams & Meyers treatise explains "[b]y the weight of authority in cases involving language . . . providing for delivery 'free of cost *in the pipe line* to which Operator may connect his wells,' the expense of transportation or of treating oil or gas . . must be shared by the owner of the nonoperating interest." 3 H. Williams & C. Meyers, OIL AND GAS LAW § 646.2. The following cases are illustrative of "the weight of authority":

[¶51] ***Molter v. Lewis:*** In *Molter*, Kansas Supreme Court interpreted the lessee's obligation under a royalty provision in which it agreed "to deliver to the credit of lessor, free of cost, in the pipe line to which he may connected his wells, the equal one-eighth part of all oil produced and saved from the leased premises." 134 P.2d at 404-05. The lessee transported the produced oil by truck from the leased premises to a market where the oil was sold. *Id.* at 405. After the lessor refused to pay its share of the transportation costs, the lessee sued the royalty owner to collect the royalty owner's share of the transportation costs. *Id*. The Kansas Supreme Court held that the royalty owner must share in the transportation costs. *Id*. at 406.

[¶52] The court explained that, while the lessee had a duty to market the production, it did not have to pay the lessor's share of the transportation costs. *Id*. Instead, the lessee's duty under this royalty clause was "to deliver the oil to the lessor at the well." *Id*. In its opinion, the *Molter* court stated that it believed two prior cases involving the same royalty clause and reaching the same conclusion were correctly decided. *Id.* at 405-06 (discussing *Voshell v. Indian Territory Illuminating Oil Co.*, 19 P.2d 456 (Kan. 1933) and *Scott v. Steinberger*, 213 P. 646 (Kan. 1923)). The court also quoted and agreed with the then-current oil and gas treatises that adopted the same interpretation of the lessee's royalty obligation under the operative royalty clause. *Id.* (citing Merrill on Covenants Implied in Oil and Gas Leases, Second Edition, § 86; Mills and Willingham, Law of Oil and Gas §§ 129, 130; 2 Summers, Oil and Gas, Permanent Edition, § 590).

[¶53] ***Scott v. Steinberger:*** In *Scott*, the Kansas Supreme Court discussed the meaning of an obligation to "deliver to the credit of party of the first part free of cost in the pipe lines to which he may connect his wells." *Scott*, 213 P. 646. The court explained the provision demonstrated that the parties contemplated that the royalty value should be determined "at the place where the wells were connected with pipe lines, and not at some distant market that might be found at the end of a pipe line remote from the field." *Id.* at 647.

[¶54] ***Burlington Resources v. Texas Crude Energy, LLC:*** Similarly, in this case, the Texas Supreme Court was confronted with a dispute concerning the royalty valuation location. *Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC*, 573 S.W.3d 198, 202 (Tex. 2019). The overriding royalty clause required the producer to deliver the production "<u>into the pipelines</u>, tanks or other receptacles with which the wells may be connected, free and clear of all development, operating, production and other costs." *Id*. at 201 (emphasis added by the court). The overriding royalty owner contended it was owed royalties based on the sales price obtained away from the wells. *Id*. at 202. The producer contended it was entitled to deduct the overriding royalty interest owner's share of post-production costs from the sales price before paying royalties. *Id*.

[¶55] After reviewing the clause, and agreeing the producer's interpretation was both "sensible" and consistent with available secondary authorities and the parties' other contracts, the court held that the point of valuation was at the well. *Id*. at 211. Specifically, the court found the only royalty obligation was to deliver the production to the overriding royalty interest owner free of the cost of production at or near the well. *Id*. If the producer sold the royalty interest owner's share at some other location, the royalty owner was required to share in the costs incurred between the well and the sales point. *Id*. Thus, it was proper for Burlington Resources to deduct post-production costs. *Id*.

[¶56] Blasi Trust inaccurately suggests the Texas Supreme Court's interpretation of the "into the pipelines" provision in the Burlington-Texas Crude overriding royalty assignments hinged upon the use of "actual net proceeds" in the parties' joint operating agreement. Blasi Brief ¶37. To the contrary, the *Burlington* opinion states the court found Burlington's interpretation persuasive *Burlington Res.*, 573 S.W.3d at 207-08. Only then did the court explain the "net proceeds" language in the parties' joint operating agreement was "consistent with our interpretation of the assignments." *Id.* at 209. *Burlington* demonstrates that more recent decisions are consistent with the long-standing interpretation of the in-kind royalty clause, placing the royalty valuation point at or near the well.[8]

[¶57] ***Martin v. Amis:*** In this 1926 Texas case, the lease required the lessee "[t]o deliver to the credit of the lessors, free of cost, in the pipe line to which lessee may connect the well or wells, the equal one-eighth part of all oil, gas, casing-head gas and gasoline …." *Martin v. Amis*, 288 S.W. 431 (Tex. Comm'n App. 1926, jdgm't adopted). The lessee sold gas at the well to a natural gas processor who paid the lessee a percentage of the proceeds

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[8] The District Court of North Dakota reached a similar conclusion in 2018. *See El Petron Ent., LLC v. Whiting Res. Corp.*, No. 1:16-cv-090, 2018 WL 1322391, at *1 (D.N.D. March 14, 2018).

obtained from the downstream sales of the processed products. *Id.* In calculating royalty, the lessee used the proceeds received from its wellhead sale to the processor. *Id.* at 432. The royalty owner sued, claiming his royalty must be calculated on the proceeds from downstream sales of processed products. *Id.* at 433. Because the "in the pipeline" language specified the point at which the lessee had fulfilled its obligation (*i.e.*, at the well), the court held that royalty was due on the value at that location. *Id.* at 433-34.

B. Likewise, treatises and scholars have consistently explained the meaning of this royalty provision

[¶58] Scholars interpreting oil royalty clauses at issue concur that the lessee's cost-bearing obligation to the royalty owner ends as soon as the oil is delivered to the pipeline to which the wells are or may be connected. For example, Professor A.W. Walker, Jr., an oil and gas scholar, explained the parties' obligations when royalty is payable in kind and the lease states the royalty oil shall be delivered "free of cost, in the pipe line to which the lessee may connect the wells." A.W. Walker, Jr., *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 10 TEX. L. REV. at 312-13. Pursuant to that language, "the lessee's obligations are at an end when he has made a delivery at the place designated, and . . . the expense of storage and transportation thenceforth must be borne by the lessor." *Id.*

[¶59] Consistent with that interpretation, Professor Eugene Kuntz's treatise explains "[i]f the royalty clause provides for delivery of royalty gas to the lessor's credit free of cost in the pipeline to which the well is connected, the parties contemplate a delivery of royalty gas at the well." 3 E. Kuntz, TREATISE ON THE LAW OF OIL AND GAS § 40.5. The "at the well" royalty valuation location results from the close proximity between the wells and the "pipeline to which Lessee may connect wells on said land" described in the royalty provision. *Id.*; 3 H. Williams & C. Meyers, OIL AND GAS LAW § 645.

[¶60] According to Professor Owen Anderson, a proponent of the first marketable product rule, "[c]onsistent with nearly all case law," a provision requiring delivery "free of cost, in the pipeline" specifies the point where the royalty payor's obligation to absorb all costs to deliver the oil or gas ends and the royalty payee's cost obligation begins. O. Anderson, *Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, or Realistically?* (Part II), 37 NAT. RES. J. at 650.

[¶61] Professors Martin and Kramer likewise agree that, when royalty must be paid in kind at the well, the lessor is obligated to bear expenses incurred thereafter. 3 H. Williams & C. Meyers, OIL AND GAS LAW, § 642.3.

[¶62] Elsewhere in the treatise, they reiterate that, even though a lessee may have the duty to market the royalty share of the production, the duty "will not include the burden of bearing the expense of treating, compressing or transporting such share of production. *Id.* § 646.

[¶63] Moreover, as demonstrated by the treatises cited and quoted in *Molter*, scholars have long understood the meaning of the in kind obligation at issue in this case. *See Molter*, 134 P.2d at 405. The lessee's only duty under this royalty clause is "to deliver the oil to the lessor *at the well*." *Id*. at 406 (emphasis added).

IV. Blasi Trust's interpretation contradicts the express lease language and has no supporting legal authority

[¶64] In stark contrast to the authorities supporting Continental's interpretation of the royalty valuation location, Blasi Trust's interpretation rests upon a willingness to set aside this Court's well-accepted lease interpretation framework. And, because there is no case supporting Blasi Trust's interpretation of the royalty provision, Blasi Trust asks this

Court to follow a federal district court that, when faced with a different pleading and different arguments, merely held another plaintiff lessor's claim was "plausible."

A. Blasi Trust focuses myopically on "free of cost"

[¶65] Blasi Trust's Complaint, while vague, implies that Blasi Trust's oil royalty must be paid on some far downstream value and would never bear any post-production costs. *See* Blasi Appx. 53, 55-59 ¶¶2, 6, 11, 12, 14, 15, 20(b), 25, 29. Now, in its Brief, Blasi Trust may have slightly stepped back its claim. *See* Blasi Brief ¶19. However, other portions of Blasi Trust's Brief indicate Blasi Trust may still try to make its initial argument. For example, Blasi Trust argues "the phrase 'free of cost' means what it says—without cost to the royalty owner" and argues lessors cannot bear "gathering, treating, and other costs." *Id.* ¶11. In any event, the phrase "free of cost" cannot be viewed in isolation. As explained above in paragraphs 35 and 36, the surrounding words in the oil royalty provision make clear that Blasi Trust's oil royalty is free of cost only until the location at which Continental is obligated to deliver its share of the oil to Blasi Trust—at the well.

B. Blasi Trust's narrow definition of "pipeline" has no sound basis

[¶66] Blasi Trust points to an online Oilfield Glossary as supportive of its interpretation that a "pipeline" can only include state or federally-regulated pipes that move "oil hundreds or thousands of miles." Blasi Brief ¶20. However, the quoted definition does not support Blasi Trust's argument. Instead, the definition expressly contemplates that a "tube or system of tubes used for transporting crude oil . . . *from the field*" is one type of "pipeline." *Id.* (emphasis added). Continental acknowledges that long-distance pipelines are one type of "pipeline." It does not necessarily follow that all pipelines must be long-distance pipelines. The authorities cited in paragraphs 39 through 42 above illustrate this point.

[¶67] The other definition cited by Blasi Trust is from LearnersDictionary.com, which the publisher, Merriam-Webster, says is intended for non-native speakers of English. In their book READING LAW: THE INTERPRETATION OF LEGAL TEXTS, Bryan Garner and the late Justice Antonin Scalia explain that not all dictionaries are equal. A. Scalia and B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS at 415-19 (Thomson/West 2012). The Merriam-Webster Learner's Dictionary is not on their list of well-researched dictionaries. *Id.* at 419-24. Further, by its own publisher's description, it does not fit criteria set by Century Code sections 9-07-09 or 9-07-10.[9]

C. Blasi Trust incorrectly asks the Court to treat these form leases as ambiguous, individually negotiated instruments

[¶68] Blasi Trust urges the Court to construe the leases in favor of Blasi Trust simply because Blasi Trust is the lessor. Blasi Brief ¶17(4). However, Blasi Trust bases this argument on the demonstrably incorrect proposition that Continental (or any of the other defendants) drafted the form leases at issue in Blasi's lawsuit. *See* Blasi Brief ¶11 (claiming that the defendants "alone drafted [the leases] using sophisticated counsel"). As the cases and authorities cited herein and the face of Blasi Trust's leases demonstrate, the Blasi Trust leases are a standard form lease and contain a form oil royalty clause that has existed for over 100 years. *See* paragraphs ¶¶ 13-14. Furthermore, though Blasi Trust

[9] Another edition of Merriam Webster defines "pipeline" as "a line of pipe with pumps, valves, and control devices for conveying liquids, gases, or finely divided solids." *See Pipeline*, MERRIAM-WEBSTER UNABRIDGED; MERRIAM-WEBSTER COLLEGIATE.

suggests otherwise, any presumption against the lessee (or in favor of the lessor) does not apply unless the Court finds the royalty provision is ambiguous.

[¶69] In this context, it is not appropriate to simply jump to the conclusion that any doubt must be resolved against Continental. *See Wold v. Zavanna, LLC*, No. 4:12-cv-00043, 2013 WL 6858827, at *10 (D.N.D. Dec. 31, 2013). In *Wold*, the court was interpreting the "Producers 88-PAID Up, Rev. 5-60 No. 2" form, which is the same form as Blasi Trust's leases. *Id*., at *1. Among other things, the plaintiffs argued that the court should find the term "drilling operations," as used in the lease, ambiguous. Noting that the lease was a standard form agreement, the court flatly rejected the plaintiffs' argument. The court explained the argument "oversimplifies the process of contract interpretation when dealing with standard form agreements, particularly those replete with language reflecting the judicial gloss of prior court interpretations like the printed-form oil and gas leases here." *Id*., at *10. When interpreting such agreements, it is appropriate to rely on prior judicial interpretations, particularly when the parties did not bargain over the disputed language. *Id*., at *10-11 (observing that the Court followed this approach in *Bice*).

D. Blasi Trust draws inaccurate conclusions based on the different oil and gas royalty provisions

[¶70] Blasi Trust's Brief emphasizes that the difference in the various oil and gas royalty clauses and argues the difference supports Blasi Trust's interpretation that the parties cannot have contemplated a wellhead valuation location. Blasi Brief ¶¶ 24-25. However, that argument ignores that, historically, oil and gas royalty provisions were separated and used different language because of the products' different physical characteristics and marketing options. *See* A.W. Walker, Jr., *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 10 TEX. L. REV. at 292, 299; 3 H.

Williams & C. Meyers, OIL AND GAS LAW § 659. This has been the case since at least 1932 when Professor Walker, Jr. observed the distinction was "common" and "almost uniform."

[¶71] It is misleading to claim that the differences in these form royalty provisions suggest the parties deliberately chose to have completely different royalty obligations for casinghead gas (*i.e.*, gas produced from oil wells along with the oil) and oil produced from the same wells. Consistent with the mandate to harmonize and construe all provisions together, Continental's interpretation of the oil royalty provision sets a uniform valuation location for both casinghead gas and oil. *See* B. Kramer, *Interpreting the Royalty Obligation by Looking at the Express Language: What a Novel Idea*, 35 TEX. TECH L. REV. 223, 253 (2004) (explaining that "[t]he words 'at the well' or their equivalent sufficiently indicate" royalty is due on the production "in its raw commodity state"). Blasi Trust's argument that the Court should construe these clauses as inconsistent would contravene the rule that contracts are to be construed in their entirety and harmonized. *Johnson*, 918 N.W.2d at 61.

E. Neither *Kretni* nor *White River Royalties* helps Blasi Trust

[¶72] Blasi Trust argues two opinions—a 1934 Tenth Circuit opinion and a 2020 order from the Western Division of the District of North Dakota denying a motion to dismiss—instruct the Court to accept Blasi Trust's proposed interpretation of the oil royalty clause. Neither opinion carries the day.

[¶73] The Tenth Circuit opinion referenced by Blasi Trust involved a royalty provision in which the lessee "agrees to deliver to the credit of the lessors . . . free of cost at the pipe lines, to which he may connect his wells, one-eighth part of the oil or gas produced and saved from said premises or the proceeds derived from the sale of one-eighth part of said oil or gas." *Kretni Dev. Co. v. Consol. Oil Corp.*, 74 F.2d 497, 497 (10th Cir. 1934). The appellate court reviewed the trial court's determination of the proper amount of royalty owed under that provision. *Id.* The trial court found that royalty provision definitely fixed the point at which delivery should be made in kind at "the point of connection with the pipeline," which was located "in the field." *Id.* at 499. The court explained that delivery location required the lessor to pay its proportionate share of any transportation costs because the parties "certainly could not reasonably have contemplated that the lessee, either alone or in conjunction with another, would provide it to a far removed point of consumption." *Id.* at 500. In other words, *Kretni* does not further Blasi Trust's argument. *Contra* Blasi Brief ¶36 (proclaiming that the case "shatter[s] the premise of Defendants' arguments). It actually supports Continental's position that the contemplated royalty valuation location is not some location far downstream of the wellhead and ordinary gathering lines in the field are also "pipelines."

[¶74] Along the same lines, Blasi Trust's Brief relies on an order from *White River Royalties, LLC v. Hess Bakken Inv. II, L.L.C.*, for the incorrect proposition that "North Dakota Federal Courts have Recognized the Importance of 'in the Pipeline' Language." *See* Blasi Brief ¶27. That opinion has not been followed by any other court and did not accept Blasi Trust's interpretation or say that Blasi Trust's interpretation was "reasonable." *See White River Royalties, LLC v. Hess Bakken Inv. II, L.L.C.*, No. 1:19-cv-00218, 2020 WL 6231893, at ¶30 (D.N.D. May 20, 2020). Instead, the district court stated Blasi Trust's interpretation was merely "plausible" in light of that defendant's alleged acknowledgement that no pipeline existed "on said land." *Id.* Continental is not a party to *White River*

Royalties and flatly denies any allegation that pipelines do not or cannot exist on the premises covered by Blasi Trust's leases with Continental.

CONCLUSION

[¶75] Accepting Blasi Trust's theory of the royalty valuation location will require the Court to deviate from the express written provisions of the oil and gas leases and re-write the parties' agreement.

Blasi Trust's oil royalty clause requires Continental:

> To deliver to the credit of lessor, free of cost, in the pipeline to which Lessee may connect wells on said land the equal one-sixth (1/6th) part of all oil produced and saved from the leased premises.

[¶76] Continental's interpretation, which sets a royalty valuation location at the wellhead and on the lease premises is (i) faithful to the express language of the parties' written contract and (ii) consistent with the authorities who have interpreted this clause since it became a fixture in form oil and gas leases more than 100 years ago.

[¶77] On the other hand, moving the valuation location far downstream as Blasi Trust suggests would require the Court to redefine Continental's contractual obligation as:

> To deliver to the credit of lessor, free of cost, ~~in the pipeline to which Lessee may connect wells on said land~~ **at a pipeline that moves oil hundreds or thousands of miles**[10] the equal one-sixth (1/6th) part of all oil produced and saved from the leased premises.

[¶78] Alternately, the Court would have to consider the words "free of cost" in isolation and equate them to the very specific, express prohibition in the *Kittleson* lease, which explicitly stated "there shall be no deductions from the value of Lessor's royalty of

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[10] Amici White River Royalties, LLC and Sara Cammack would replace the bolded and underlined portion with "at a well-known pipeline, far away from the wellhead, and at least at the tailgate of a processing facility." Amicus Brief ¶15.

any required processing, cost of dehydration, compression, transportation, or other matter to market such gas." North Dakota law does not accommodate Blasi Trust's desired result. Thus, Continental submits that the correct answer to the certified question is that the Blasi Trust oil royalty provision sets a royalty valuation location at the wellhead of the Blasi Trust wells, consistent with the long-held and universal understanding in the oil and gas industry.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

[¶78] The undersigned hereby certifies, in compliance with N.D. R. App. P. 32(a)(8)(A), that this Brief of Defendant/Appellee Continental Resources, Inc. was prepared with proportional typeface, 12 pt. font, and that the total number of pages in the above Response, excluding the certificate of compliance, and certificate of service, is 38 pages.

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CERTIFICATE OF SERVICE

[¶79] On February 22, 2021, the Brief of Defendant/Appellee Continental Resources, Inc. was submitted to the Supreme Court of North Dakota and thereby served upon the following listed attorneys via the North Dakota Supreme Court E-Filing Portal:

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