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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,)
) Supreme Court No.
Plaintiffs/Appellants,) 20200327-20200331
)
v. Bruin E&P Partners, LLC, et al.,)
v. Lime Rock Resources Operating Company, Inc.,)
et al.,)
v. Kraken Development III LLC,)
v. Continental Resources, Inc.,)
v. EOG Resources, Inc.,)
)
Defendants/Appellees.)

Certified Question of Law Submitted November 30, 2020
Case Nos. 3:20-cv-85; 3:20-cv-91; 3:20-cv-92; 3:20-cv-93; 3:20-cv-94
United States District Court for the District of North Dakota
The Honorable Peter D. Welte, Chief Judge

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INTRODUCTION

[¶1] The certified question (presented at the motion to dismiss stage, before any discovery has occurred) asks whether an oil royalty provision providing that the royalty paid is "free of cost, in the pipeline" should be interpreted to mean "free of cost, at the well." It is undisputed that not all oil subject to these leases is taken from the wells on the leased lands by pipeline. To substitute "at the well" for "in the pipeline" when the two do not coincide does violence to the contract's plain language, defies common sense, and is contrary to the language's ordinary meaning (as set forth in dictionaries). In contrast, all three of these reasons cement Plaintiffs' reading that the parties agreed there would be no costs charged until the oil entered the first pipeline (hence the phrase used, "free of cost, in the pipeline"). This textual construction holds true whether the pipeline was brought to the well or not. To have the valuation point "at the well," Defendants simply have to bring the pipeline to the well, but if Defendants choose to gather oil from the well by other means, they must pay royalties based on the value when the oil is placed into the first pipeline, as the contract requires.

[¶2] No matter how much Defendants try to change the facts alleged (which is forbidden at the motion to dismiss stage), add Big Oil-funded amicus briefing, or make legislative policy arguments, they cannot rewrite the contract's plain language. Under the plain language, Plaintiffs prevail. But even if the lease is ambiguous (a standard that requires "rational arguments" in favor of Plaintiffs' reading), then the royalty owner wins ***as a matter of law***—removing any need to wade into the factual slog Defendants try to create. *See West v. Alpar Res., Inc.*, 298 N.W.2d 484, 490–91 (N.D. 1980). That Defendants spend so little time making contract construction arguments and nearly all of their hundreds of pages of briefing on policy and historical analysis, they must think the contract is ambiguous. And for them, any ambiguity spells doom—North Dakota law is settled that the royalty owner wins, full stop, if they put forward a rational reading. *Id.*

[¶3] Defendants suggest that the lease provision really means free of cost "at the well." But such a reading ignores the fact that when Defendants wanted valuation at the well, they used explicit language to do so in the same contract in the *gas* valuation provision. Defendants, in other lease forms, also used "at the well" language in the oil royalty clause itself, but did not do so here. Appellant App. 52 (Doc. No. 19, Ex. 4). Defendants all had a choice when they drafted the adhesion leases imposed on North Dakota royalty owners, and now they have to live with the agreements they chose to make. As this Court held in *West*, oil companies choose the form leases presented to landowners and have the ability (and staff of lawyers) to tailor the language to make sure it reflects the agreement struck by the parties. 298 N.W.2d at 490–91 In contrast, Plaintiffs and the other North Dakota lessors are not sophisticated industry participants, nor are they proficient in industry terminology. For these reasons, North Dakota law commands that the lease be "construed most strongly against" Defendants. *Id.* at 491. Here Defendants not only ask the Court to ignore this well-settled legal rule, they ask the Court to rewrite the plain language of the leases under the guise of construction by relying on industry evidence and industry expert opinions from treatises. Yet again, however, North Dakota law makes these authorities irrelevant because "we must ultimately decide this case upon the express language of the lease using appropriate rules for interpreting contractual agreements." *Id.* at 490 (refusing to consider give weight to treatises and other states' case law in an unsettled area of law).

[¶4] Ultimately, Defendants fail to grasp that the issue before this Court is not a battle to recount the history and industry dynamics of the oil and gas industry (an endeavor that is off-limits at the motion to dismiss stage, in any event). Instead, it is a contract interpretation question involving a clause of an oil and gas lease for which North Dakota case law (and statutes) provide a methodical order of operations. Plaintiffs cite and obey these rules; Defendants ignore them. We start with the plain language and look within the four corners of the contract. Doing so shows that Plaintiffs' reading is the only one that is rational. If the Court finds the leases ambiguous but Plaintiffs' reading rational, then under *West*, the analysis ends and the royalty owners win as a matter of law. *Id.* As a last resort, if the lease is ambiguous and lessors' reading is not rational, then and only then should a court look to extrinsic evidence and considers historical analysis and industry dynamics. If this evidence is necessary, then it would be premature to make any determination as a matter of law.

[¶5] For these reasons and the reasons set forth in Plaintiffs' opening brief, Plaintiffs respectfully ask this Court to follow the plain text of the oil royalty clause and rule that the valuation location is "in the pipeline," wherever that is based on Defendants' choices—at the well, at a central delivery point, or at the refinery.

ARGUMENT

I. By following North Dakota rules of construction, the plain language of the oil royalty provision prohibits the imposition of any costs prior to the oil entering the first pipeline.

[¶6] In this putative class action, Defendants' leases in question all include the command that the oil royalty will be "free of cost." The three prepositional phrases that follow that command provide information on where the valuation occurs and provide permission for gathering activity: "free of cost, **in the pipeline to which Lessee may connect wells** ***on said land***." Where is the oil free of cost? It is free until it is "in the pipeline." Which pipeline? The one "to which Lessee may connect wells." Which wells? Those located "on said land." Where is the lessor allowing the lessee to bring the pipeline? Onto the lands described in the lease. Contrary to Defendants' suggestion, the phrase does not read as "free of cost on said lands" or "free of cost on said lands regardless of whether a pipeline is ever connected to those lands." Instead, it includes both an explicit command of what costs will not be borne by the royalty owner (costs until the oil is in the pipeline) and an explicit permission so lessee "may" bring a pipeline onto the land without the need to secure additional agreements, if it chooses to do so. But that former easement does not change the plain language valuation point: where the oil enters the first pipeline.

A. Oil leases are interpreted based on their express language and construed in favor of the lessor.

[¶7] Despite the pages and pages of linguistic gymnastics dependent upon non-binding treatises and slanted articles written by oil and gas attorneys pontificating on what the law should be in their opinion (in an effort to turn courts into noble legislatures), this case involves a basic form contract with straightforward language. As former Chief Justice Erickstadt advised in *West*, the case "must ultimately [be] decide[d] . . . upon the express language of the lease using appropriate rules for interpreting contractual agreements." *West v. Alpar Resources, Inc.*, 298 N.W.2d 484, 490 (N.D. 1980); *accord Newfield Exploration Co. v. State Exhibit Rel. North Dakota Board of University and School Lands,* 2019 ND 193, ¶5, 931 N.W.2d 478 ("The same general rules that govern interpretation of a contract apply to oil and gas leases.") (quoting *Johnson v. Statoil Oil & Gas LP*, 2018 ND 227, ¶¶

7-8, 918 N.W.2d 58). 298 N.W.2d at 490. Critically, "the intention of the parties must, if possible, be ascertained from the writing alone" and it is only if "a contract is of doubtful or ambiguous meaning" that it becomes "proper" to "search for its true meaning in the light of the extraneous facts and circumstances." *Berry v. Heinz*, 139 N.W.2d 145, 148 (N.D. 1965).

[¶8] As a result, extraneous facts, treatises, and case law from other jurisdictions can "provide background and helpful insight," but ultimately it is up to the Court "to independently examine and construe the written contract." *West*, 298 N.W.2d at 490.

[¶9] If a treatise is to be considered, the bedrock Williston treatise on contracts is more appropriate (and was not funded by Big Oil or any other industry). See 11 WILLISTON ON CONTRACTS § 31:5, *Courts May Not Rewrite the Contract* (4th ed.); *Horob v. Zavanna*, LLC, 2016 ND 168, ¶ 10, 883 N.W.2d 855, 859–60 (same) (citing N.D.C.C. § 9–07–03).

[¶10] "A contract is ambiguous when rational arguments can be made for different interpretations." *Hess Bakken Invs. II, LLC v. AgriBank, FCB,* 2020 ND 172, ¶ 13, 946 N.W.2d 746, 750 (quoting *Nichols v. Goughnour,* 2012 ND 178, ¶ 12, 820 N.W.2d 740). Because the contract in question is a form oil and gas lease, any ambiguity is construed as a matter of law "in favor of the lessor and against the lessee"; this is because "the lessee usually provides the lease form or dictates the terms thereof and if such lessee is desirous of more complete coverage, the lessee has the opportunity to protect itself by the manner in which it draws the lease." *West*, 298 N.W.2d at 490-91 (quoting *Gilmore v. Superior Oil Co.,* 388 P.2d 602, 603 (Kan. 1964)).

[¶11] Recognizing the force of this rule, Defendant Continental suggests that this Court has walked back its commitment to construing ambiguity in form leases in favor of the lessor and points to *Hess Bakken Invs. II, LLC v. AgriBank, FCB,* 2020 ND 172, ¶ 1, 946 N.W.2d 746, 747. But the parties did not raise that issue in that case, and thus it was not decided. And it was neither raised nor addressed because the rule was inapplicable: all parties were sophisticated corporate industry participants (Hess Bakken Investments II, LLC; Arkoma Drilling II, L.P.; Comstock Oil & Gas, LP; AgriBank, FCB; Intervention Energy, LLC; and Riverbend Oil & Gas VI, L.L.C.) and not unsophisticated royalty owners.

[¶12] Bruin and Kraken Defendants point to a North Dakota federal court opinion suggesting that when analyzing standard form oil and gas leases, courts should rely on previous judicial constructions from other jurisdictions and treatises rather than "oversimplify[ing]" by looking at plausible plain meaning interpretations. Bruin and Kraken Br. ¶¶ 25-26. But *West* expressly rejected this path four decades ago, marking it off-limits under North Dakota law:

> The lessor usually knows nothing of the law applicable to such instruments; while the operator is usually well informed. Years of experience have shown the operator how to draw a lease giving him many advantages, of which the lessor has not even thought. For this reason the courts have adopted a rule to the effect to construe an oil or gas lease most favorably to the lessor, where its terms can be so construed without doing violence to the language used.

West, 298 N.W.2d at 491 (*quoting Ladd v. Upham,* 58 S.W.2d 1037 (Tex. Civ. App. 1933), *aff'd*, 128 Tex. 14, 95 S.W.2d 365 (1936)). Rather than confront *West* and provide a reason why this Court's established law should be changed (uprooting the expectations of oil and gas participants who have executed leases since 1980), Defendants ignore it.

[¶13] Similarly, policy justifications for an interpretation (such as advocating for this Court to choose an interpretation to avoid farmer and rancher royalty owners receiving "windfalls") are irrelevant. As explained only months ago in *Potts v. City of Devils Lake*, this Court has refused on "numerous occasions" to rewrite contracts based on policy reasons because it is the legislative branch that is suited to "set public policy in this state." 2021 ND 2, ¶ 15, 953 N.W.2d 648, 653. That is especially sound guidance here given (a) the fallacy of Defendants' self-serving policy; (b) the industry support for its own windfall; and (c) the procedural posture upon which this question is presented.

[¶14] Indeed, the question presented comes at the motion to dismiss stage in federal court, when no discovery has occurred and the only facts that may be considered are the ones alleged by Plaintiffs in their Complaint. *Barton v. Taber*, 820 F.3d 958, 963 n.2 (8th Cir. 2016) (explaining that "[o]ur review of a motion to dismiss is limited to the facts alleged in the complaint"). To be clear, none of Defendants' factual assertions (or expert opinions couched as amicus briefs) has been subjected to the crucible of federal civil litigation discovery or cross-examination.

[¶15] The question for the Court is whether "[i]t was within the power of [Defendants], as lessee and drafter of the lease, to expressly provide" for the valuation they now propose but "which it failed to do" expressly in the lease. *West*, 298 N.W.2d at 491. If so, Defendants "must be bound by the lease construed . . . to reflect a rational interpretation of its terms most favorable to the [lessors] . . . ." *Id.* In other words, because Defendants could have specifically said *then* what they try to rewrite the contract to say *now*, their interpretation is not even plausible.

[¶16] In contrast, Plaintiffs' reading of the clause at issue is more than rational. As the federal courts in North Dakota have recently recognized, Plaintiffs put forward a "plausible" interpretation of the oil royalty valuation language. Appellant App. 23, Certification Order 3 (citing *White River Royalties LLC v. Hess Bakken Invest. II, LLC*, Case No. 1:19-cv-00218, 2020 WL 6231893, at ¶30 (D.N.D. May 22, 2020)). Under North Dakota law, Defendants are bound to the rational interpretation put forward by Plaintiffs-Lessors.

[¶17] Defendants would like this Court to determine *as a matter of law* that their interpretation is favored due to self-serving policy rationales, oil and gas industry treatises, and distinguishable out-of-state cases. But no additional evidence, policy justification, or expert explanations from the oil and gas industry can undo the plain "in the pipeline" language the large oil company Defendants drafted and have literally used for decades but now want to re-write.

[¶18] Moreover, if this Court concludes that the oil industry views expressed in law review articles and treatises or the evidence of trade practices are necessary to interpret the oil provision of these leases, then Plaintiffs are entitled to discovery to test and interrogate those expert opinions, evaluate the authenticity and admissibility of third-party evidence, and develop Plaintiffs' own expert and industry-use evidence. This case is at the motion to dismiss stage, not even summary judgment, and it is a touchstone principle that "[s]ummary judgment is appropriate only after the non-moving party has had a reasonable opportunity for discovery to develop his position." *Choice Fin. Grp. v. Schellpfeffer*, 2006 ND 87, ¶ 9, 712 N.W.2d 855, 858 (reversing entry of summary judgment because plaintiff had requested additional discovery). None of this extrinsic evidence or discovery, however, is necessary or allowed for an unambiguous lease or one where the lessor puts forward a rational reading of the lease provision. If there is any ambiguity, the lease construction must be against the lessee as a matter of law.

B. Plaintiffs and lessor class agreed to a royalty "free of cost, in the pipeline to which the lessee may connect wells on said lands," not to a royalty "free of cost at the wellhead."

[¶19] As set out in its initial brief, only Plaintiffs provides a coherent explanation for all three critical phrases in the oil royalty provision at issue:

> to deliver to the credit of lessor, **free of cost**, ***in the pipeline*** **to which Lessee may connect wells on said land**, the equal [fractional] part of all oil produced and saved from the leased premises.

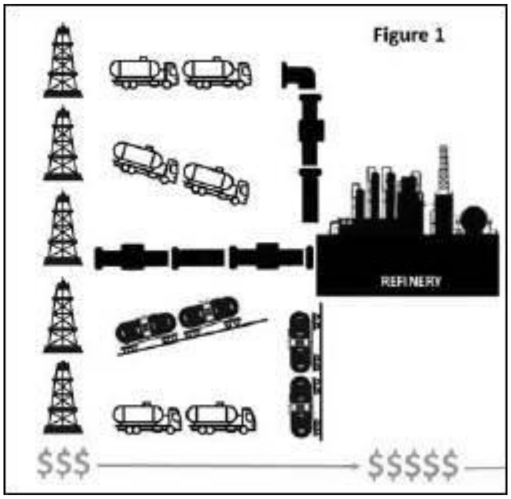
Appellant App. 17. The interpretations provided by Defendants all amount to reading the phrase as "free of cost . . . on said land." But such a reading eliminates two critical choices agreed to by Defendants when the lease was signed: (1) the parties agreed that no costs would be charged until the oil entered the pipeline, and (2) the lessor gave permission for the lessee to put a pipeline on the land ("may connect") if lessee decided to extend a pipeline to the wells.

[¶20] The choice by the contracting parties to put the valuation at the point where the oil enters "in the pipeline" and make it "free of cost" to the point has legal significance. No case put forward by Defendants suggests that "the pipeline" is anything but a system of tubes designed to move oil to a refinery.[1] And, again, if there is any ambiguity on what

[1] Both industry and plain language dictionaries are in line with Plaintiff's reading. Schlumberger, definition of *Pipeline*, Oilfield Glossary, https://www.glossary.oilfield.slb.com/en/terms/p/pipeline (last visited Jan. 7, 2021); dictionary.com, "pipeline," based on Random House Unabridged Dictionary, https://www.dictionary.com/browse/pipeline (2021) (A "pipeline" is "a long tubular

"pipeline" meant, lessor's rational and common-sense understanding that a pipeline is a line to gather oil to the refinery must be accepted as a matter of North Dakota law. *West*, 298 N.W.2d at 491. Such a rational interpretation is consistent with interpreting these form leases in a manner favorable to lessor and not burdening her with costs to get the oil to the first pipeline that a rational reading would exclude. *Id*.

[¶21] There is also no question that the location of that first pipeline can vary. For some wells, the lessee has chosen to extend the pipeline to the property. While in other cases, other means of gathering like trucks, trains, and barges are used to move the oil until it gets to the first pipeline (and occasionally, the first pipeline is the inlet pipe at the refinery). Graphically, Plaintiffs agree the diverse methods of movement—and different locations of the first pipeline—are well shown by Defendants Bruin and Kraken.



conduit or series of pipes, often underground, with pumps and valves for flow control, used to transport crude oil, natural gas, water, etc., especially over great distances") (last visited Mar. 20. 2021); Cambridge Dictionary, "pipeline," https://dictionary.cambridge.org/us/dictionary/english/pipeline ("pipeline" is "a line of connected pipes that are used for carrying liquids and gases over a long distance") (last visited Mar. 20, 2021).

Bruin and Kraken Br. ¶15. All Defendants also acknowledge that pipelines are not always located on lessors' lands. Lime Rock and EOG ¶24 ("Oil can be transported from the wellhead to downstream points of sale in numerous ways—*e.g.*, it can flow from the wellhead into a gathering pipeline connected to the wellhead; it can flow from the wellhead to a storage tank on the leased premised and then transported by truck or train downstream; or it can be transported by numerous other means."); Continental Br. ¶45 ("a pipeline may not actually exist on the lease premises"); Bruin and Kraken ¶14 ("No one disputes that crude oil is transported from wells by truck (or, before that, horse-drawn wagon), pipeline, rail, or some combination of the three ultimately to a refinery where it is converted into various consumer or industrial products."); Amicus API ¶14 (listing five forms of transportation and only one involves a pipeline).

[¶22] Defendants had two choices: (1) pay more money up front to invest in connecting the pipeline to individual wells, but then pay lessor a lower valuation rate, or (2) do not invest in local infrastructure and instead rely on more flexible gathering modes but be required to provide lessor with the higher valuation rate when it first reaches the gathering pipeline. *See also* Bruin and Kraken Br. ¶15. This is an economic decision. *See* Richard Rabinow, Association of Oil Pipe Lines, The Liquid Pipeline Industry in the United States: Where It's Been, Where It's Going 6, 11, 17 (2004). But Defendants seek to avoid this trade-off by paying every royalty owner as if they had brought the pipeline to the property—regardless of whether they did or not.

[¶23] Defendants continue to contend that contrary to the common meaning, "the pipeline" could mean any number of pipes or tubes used on the property. Bruin and Kraken Br. ¶17; Lime Rock and EOG Br. ¶49. However, such an interpretation ignores a crucial word in the verb phrase: "***may*** connect" as well as the definite object in "***the*** pipeline." The definite object indicates that there is a particular pipeline being referenced. In North Dakota, as Defendant Continental points out, that particular pipeline is a liquid pipeline "designed for or capable of transporting crude oil." N.D.C.C. § 38-08-02(18).[2] And the permissive language indicates that the pipeline need not actually connect onto the lessor's land. Indeed, the permissive language used indicates that the lessee oil company can, when it desires, connect the pipeline onto the property without returning to get another agreement. This permissive language would be unnecessary if it were merely for any pipe or tube leaving the well or if "in the pipeline" was synonymous with at the well—whether a pipeline may be connected or not.

[¶24] Through this language in the oil and gas lease, the royalty owner gave the lessee permission to bring the oil pipeline onto her property. Use of the word "may" has a settled meaning: it "implies discretion." *Jennings v. Rodriguez*, --- U.S. --- 138, S. Ct. 830, 844 (2018); *State v. Glaser*, 2015 ND 31, ¶ 18, 858 N.W.2d 920, 924 ("The word 'may' is usually used 'to imply permissive, optional or discretional, and not mandatory action or conduct.'"). Here, that discretion was solely up to the lessee on whether to enter the lessor's land and connect the pipeline to the well—a burdensome and unsightly event for the lessor, which is why it is provided for in the lease. And while the lease specifies that the pipeline

[2] Contrary to Defendant Continental's suggestion, Plaintiffs do not dispute that a gathering pipeline can be "the pipeline" referenced in the lease. Continental Br. ¶41. This gathering pipeline can also be brought onto the lands referenced in the lease. But the valuation point is only at the wellhead when the pipeline is at the wellhead, which is not the case here.

"may" be connected on the lessor's land, it does not have to be. It "may" be or it "may" not be. Either way, it is free of cost "in the pipeline."

[¶25] Defendant Continental concedes that this permissive language means that "Continental was not required to build a pipeline on the lease premises." Defendant Continental Br. ¶45. But Defendant Continental then suggests the conclusion that even when the pipeline does not "actually exist[]" on Plaintiffs' property, Defendants' "free of cost" obligation does not change—it can charge all costs from the wellhead. *Id.* But such an interpretation makes a mockery of the language expressly chosen by Defendants for the oil valuation point. The valuation point is always at the start of the pipeline, but it is up to Defendants to decide whether that pipeline will be brought onto the property or whether they will incur costs to gather the oil and take it to the pipeline in a different manner.

[¶26] The permissive "may" language is also consistent with North Dakota law recognizing easements are required to bring a pipeline onto a property. *Riverwood Commercial Park, LLC v. Standard Oil Co., Inc.*, 2005 ND 118, ¶ 10, 698 N.W.2d 478 (comparing a lease—which provides for exclusive use—with an easement which allows for nonexclusive use of the land for a specific, limited purpose like bringing a pipeline across someone's land) (citing 4 Powell on Real Property § 34.01[1] (2005) (an easement "may grant to A the right to do acts that, were it not for the easement, he would not be privileged to do, ***such as maintaining*** a driveway or ***a*** sewage ***pipe across B's land***")). This language demonstrating that lessor has given an easement for an oil pipeline to be brought on the land is also consistent with the rest of the lease, which provides "rights of way and easement for laying pipe lines" and that the lessor can request the pipeline be buried below plow depth. Appellant App. 120.

[¶27] While the modifying phrase gives permission for the lessee (the oil company) to bring the pipeline onto the lands, it does not place the valuation uniformly on "the lands"—unless, of course, lessee chooses to bring the pipeline to the "wells on said land." Such a reading would eliminate the phrase "in the pipeline to which the lessee may connect on" to simply state "free of cost, on said lands."

C. This interpretation is confirmed by looking at the four corners of the lease and giving effect to the parties' intent.

1. When Defendants wanted valuation at the wellhead, they used express, clear language to do so.

[¶28] The choice to provide the valuation "free of cost" to the first pipeline (with permission to bring the pipeline onto the property) should also be understood in contrast to the other valuation point used in the leases: notably, the decision to value gas "at the mouth of the well." One must use the gas royalty clause "to help interpret" the oil royalty provision that includes the "free of cost, in the pipeline" language. Courts presume that "differences in language"—like the differences in valuation language here—"convey differences in meaning." *Henson v. Santander Consumer USA Inc.*, --- U.S. ---, 137 S. Ct. 1718, 1723 (2017); *accord Barness v. Gen. Diesel & Equip. Co.*, 422 N.W. 2d 819, 826 (N.D. 1988) (concluding that "differences in language is significant" when interpreting provisions within a lease). Defendants knew how to set the valuation point at the well, and they chose not to for oil production even though they "could have easily included express language to that effect in the lease." *West*, 298 S.W.2d at 491. Whatever the wisdom of that choice, it is the one that Defendants made, even if in retrospect, Defendants wish they had a universal "at the well" valuation point for oil without bringing the pipeline to the well.

[¶29] Defendant Continental suggests that this Court should ignore the different valuation language chosen by the parties and simply re-write the oil provision to have a same valuation location as the gas provision—despite the different language—in order to "harmonize" the contract. Continental Br. at ¶ 71 ("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. . . . 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."). But no method of textual construction—let alone those outlined in North Dakota statute—have ever suggested that "harmonizing" a contract means ignoring the plain language in the contract. Instead, courts must "give effect to every part if reasonably practicable," N.D.C.C. § 09-07-06, and "presume" that "differences in language" used in the same statute "convey differences in meaning," *Henson*, 137 S. Ct. at 1723. Defendant Continental's suggestion would turn North Dakota law on its head and shatter the expectations of those parties who have proceeded under North Dakota law without fearing it would be erased.

[¶30] Similarly, Defendants Lime Rock and EOG urge this court not to create a "Frankenstein-like system" where a lease that provides that gas provision stating "at the well" is read to mean the value "at the well," while "free of cost, in the pipeline to which lessee may connect wells on said land" means something different. Lime Rock and EOG Br. ¶27. But there is nothing "incongruous" about different language conveying different meaning. *Henson*, 137 S. Ct. at 1723. Indeed, such a result is a fundamental principle of textual analysis. Besides, Defendants themselves concede that gas and oil are gathered and moved differently, so no great surprise that their valuation points would be different. *See* Continental Br. ¶14. Gas cannot be stored on the surface and can only be moved by pipeline; whereas, oil can be moved by truck, train, barge, and pipeline—the latter being the most efficient, safe, and reliable.

[¶31] Simply put, Defendants understood how to write and choose their form contracts to provide for a valuation point at the well. That is what was done for the gas royalty provision, and not done for in the oil royalty provision but "could have easily included express language to that effect." *West*, 298 S.W.2d at 491. It is too late to change it now. Courts do not rewrite contracts.

2. Historical context

[¶32] The royalty clause has been used in leases for a hundred years, and when the oil boom arrived in North Dakota, Defendants chose to continue using that same language in leases signed in the twenty-first century. *See, e.g.,* Appellant App. 120 (Continental 2006 lease). Defendant oil companies have also consistently had the unilateral authority to determine where the pipeline starts and whether to bring it on a lessor's property. In North Dakota, pipelines exist in all of the oil producing counties. But oil companies, like Defendants, have not always chosen to gather oil from the wells in this manner and still use trucks to transport oil in North Dakota to pipelines (either at the inlet to the refinery or a major gathering pipeline to move the oil). Bruin and Kraken Br. ¶¶14, 56.

[¶33] In contrast, lessors, like Plaintiffs, have no control over how lessee decided to gather the oil or which oil market was chosen. Royalty owners contracted to pay no expenses until the oil was in the cheapest gathering system possible—in the pipeline. Such a promise from Defendant oil companies also encouraged investment in local pipelines to move the oil from the region more efficiently, economically, and safely. *See* North Dakota Pipeline Authority, *About Pipelines*, http://dmr.nd.gov/pipeline/pipelines.asp (last visited Mar. 22, 2021) (noting that the country's 200,000-mile petroleum pipeline network "delivers the nation's crude oil and petroleum products (such as gasoline, jet fuel, home heating oil) reliably, safely, efficiently, and economically"); Megan E. Hansen, Ethan Dursteler, Strata, *Pipelines, Rail & Truck: Economic, environmental, and safety impacts of transporting oil and gas in the U.S.* (2017), available at https://www.strata.org/pdf/2017/pipelines.pdf ("Pipelines in particular have advantages in terms of safety, efficiency, and low environmental impacts.").

II. Wide variety of contracts show the importance of looking at the actual contract signed by parties.

[¶34] Defendants essentially ask this Court to set up a default rule that oil should be valued at the wellhead regardless of how the parties have contracted. Defendants contend that such an interpretation is mandated by their authorities. But this Court rejected that approach even for gas when the lease did not have clearly controlling "at the well" language. *Kittleson v. Grynberg Petroleum Co.*, 2016 ND 44, 876 N.W.2d 443, 447 (2016) (explaining in the natural gas context that "the parties altered the meaning of 'market value at the well'" by including specific language). Here, the oil clause does not even include the "at the well" phrase.

A. North Dakota law has consistently looked to the express language within the four corners of the contract at-issue and not theoretical policy rationales to guide contract construction.

[¶35] As all parties agree, there is no directly controlling precedent in North

Dakota. But, as described above, North Dakota law consistently requires courts to enforce the contract as written, to look at the particularities of each contract, and avoid re-writing the contract to achieve a desired end.

[¶36] The oil and gas cases cited by Defendants demonstrate this proposition. As predicted, Defendants rely heavily on this Court's decision in *Bice v. Petro-Hunt, LLC*, 2009 ND 124, 768 N.W.2d 496. In that case, this Court interpreted a ***natural gas*** royalty provision which, in contrast to the ***oil royalty*** provision at issue here, provided for natural gas royalties to be paid based upon the "market value of the gas at the well." *Id*. at 499. The North Dakota Supreme Court "conclude[d] the term market value at the well is not ambiguous," *id.* at 502, and that "market value at the well" means the royalty is calculated based on the value of the gas at the wellhead, *id*. at 500. As in *Bice*, the valuation point here is unambiguous. But it is not "at the wellhead" (or "at the mouth of the well," the term used in this same lease's gas provision); instead, the parties unambiguously chose "in the pipeline" for the oil royalty valuation point. So to be faithful to the logic of *Bice*, the Court should make "in the pipeline" the valuation location.

[¶37] Even if the *Bice* default "at the well" provision for gas royalty did exist for oil royalty (which it does not), other cases have confirmed that the default interpretation of that phrase can be altered by including additional provisions or phrases because the lease at issue must be construed "in its entirety so that all of its provisions are taken into consideration to determine the parties' true intent." *Newfield*, 931 N.W.2d at 480*; accord Bice* 768 N.W.2d at 500; *Kittleson*, 876 N.W.2d at 446. Indeed, *Kittleson* expressly ruled that the default rule does not apply if the parties include specific language to vary it. 876 N.W.2d at 447.[3]

[¶38] The only case that has squarely addressed this oil royalty provision under North Dakota law held that Plaintiffs' reading is plausible. *White River Royalties LLC v. Hess Bakken Invest. II, LLC*, Case No. 1:19-cv-00218, 2020 WL 6231893, at ¶30 (D.N.D. May 22, 2020). Under North Dakota law, such a "rational" interpretation should be binding on lessee. *West*, 298 N.W.2d at 491. But, at a bare minimum, Plaintiffs' interpretation is not "foreclosed" by a century of law.[4] It is Defendants' suggestion of rewriting the

[3] For gas, North Dakota has rejected the implied marketable condition rule in favor of just producing unmarketable gas "at the well." If the gas lease royalty clause just says "at the well," all midstream post-production costs can be netted out of royalty payments. *See Bice v. Petro-Hunt, LLC*, 2009 ND 124, 768 N.W.2d 496, *Hurinenko v. Chevron*, 69 F.3d 283 (8th Cir. 1995); *El Petron Enterp. v. Whiting Res.*, 2018 WL 1322391 (D.N.D. March 14, 2018); *see also Creson v. Amoco Prod*, 10 P.3d 853 (N.M. Ct. App. 2000). And if the gas royalty clause does not say "at the well," midstream post-production costs cannot be netted out. *See West v. Alpar Resources*, 298 N.W.2d 484 (N.D. 1980); *Newfield Exploration v. North Dakota University*, 2019 ND 193, 931 N.W.2d 478. If "at the well" and "no deductions" are provided for in the same lease, the more specific "no deductions" controls over the general "at the well." *Kittleson v. Grynberg Petro Co.*, 2016 ND 44, 876 N.W.2d 443; *see also BlueStone v. Randle*, 2021 WL 936175 (Tex. Mar. 12, 2021) ("at the well" can be overcome with "gross" language). In "free of cost, in the pipeline" leases, since a gas pipeline is always brought to the well, the effect (not the meaning) is the same as "at the well."*BlueStone Nat. Res v. Nettye Engler Energy*, 2020 WL 3865269 (Tex. Ct. App. July 9, 2020); *Kretni v. Consolidated Oil*, 74 F.2d 497 (10th Cir. 1934); *Scott v. Steinberger*, 213 Pac. 646 (Kan. 1923). The same would be true for oil—if, but only if—Defendants decided to bring the pipeline to the well. *Voshell v. Indian Territory Illuminating Oil Co.*, 19 P.2d 456 (Kan. 1933). But here, Defendants did not bring the pipeline to the well. Defendants cannot claim the "at the well" valuation that comes with connecting the oil pipeline to the well without doing so. No case law so holds, and Defendants cite none.

[4] As shown below, the century of law actually forecloses Defendants' argument. "in the pipeline" always means in the pipeline, and never means "at the well." It could be that the pipeline is connected to the well—as it always is for moving gas—which then has the same

contracts that is contrary to the very fiber of the common law of the American Republic. *See, e.g., Gavinzel v. Crump*, 89 U.S. 308, 320-21 (1874) (enforcing a contract as written and refusing to let a party out of the agreement it struck).

[¶39] All Defendants suggest that dicta in a non-binding, unpublished case from the U.S. District Court for the District of North Dakota, *El Petron Enterp. v. Whiting Res.*, 2018 WL 1322391 (D.N.D. Mar. 14, 2018), unmistakably support their interpretation. Bruin and Kraken Br. ¶39, Continental Br. ¶56; Lime Rock and EOG ¶¶40, 57, 58. But that same court has found *El Petron* gas royalty holding unpersuasive for the oil royalty question at hand because the plaintiff in *El Petron* stipulated that post-production gas costs could be deducted, but plaintiffs in *White River* did not. *White River Royalties LLC v. Hess Bakken Invest. II, LLC*, Case No. 1:19-cv-00218, 2020 WL 6231893, at ¶¶25-29 (D.N.D. May 22, 2020). Moreover, the overriding royalty interest in *El Petron* was carved out of the working interest, which would naturally bear all expenses, and said it would be "calculated in the same manner as is the royalty reserved under the terms of Said Lease" which was "proceeds, at the mouth of the well." 2018 WL 1322391 at *3-4. The oil royalty clause in this case does not contain "at the mouth of the well", so El Petron provides no support for this case.

[¶40] The lengthy policy arguments set forth by Defendants while urging this Court to avoid "windfalls" and provide "consistency" are nothing more than a request for this Court to re-write Defendants' leases to provide a valuation point that will increase their

effect as an "at the well" construction. But the two valuation points can and, in this case, are different for oil.

profits over the bargain originally struck. Bruin and Kraken Br. ¶54 ("Appellees' interpretation provides a consistent valuation point (at the well where it may connect to the pipeline) and consistent benefit of the parties' bargain."); Lime Rock and EOG ¶19 ("Appellants seek to shift the valuation point for oil to those downstream points, and to receive those higher downstream prices without sharing the costs required to obtain those higher prices—an inequitable result never contemplated by the parties."), ¶24 ("Valuing the oil at the well also makes good sense."). But this Court has roundly rejected rewriting oil and gas leases to reach "the most equitable or just" outcome. *West*, N.W.2d at 490-91; *see also Gavinzel*, 89 U.S. at 320 ("Each party took risks, and each received a consideration for the risk thus taken."). Plaintiffs' interpretation also provides a simple, and uniform valuation location—in the pipeline. Determining the first pipeline is not hard for Defendants since they contract for the oil from each well to go to a particular pipeline at some point before it reaches the market.

[¶41] Defendants also assert this policy argument on the bald assertion that the leases at issue are in-kind leases. *See, e.g.,* Lime Rock and EOG Br. ¶22. But they provide no support for this proposition under North Dakota law. And one of the Texas cases cited by Defendants concluded that the "into the pipeline" provision is not an in-kind provision and noted "while oil and gas agreements are not known for their clarity and simplicity, the parties surely could have used the words 'in kind' or similar words if they intended to create one set of rules for in-kind royalties and another for in-cash royalties." *Burlington Res. Oil & Gas Co. LP v. Texas Crude Energy, LLC*, 573 S.W.3d 198, 209 (Tex. 2019).

[¶42] The only uniform, centuries-old, agreed-upon, applicable legal maxim in this case is simple: courts do not rewrite contracts under the guise of policy. 11 WILLISTON

ON CONTRACTS § 31:5, *Courts May Not Rewrite the Contract* (4th ed.); *Kief Farmers Co-op. Elevator Co. v. Farmland Mut. Ins. Co*., 534 N.W.2d 28, 36 (N.D. 1995) ("We will not rewrite the contract[.]"). The leading treatise on contract (Williston) concludes in no uncertain terms that a court's role is not to determine the most efficient bargain but instead to enforce the bargain made:

> If freedom of contract means anything, it means that parties may make even foolish bargains and should be held to the terms of their agreements. A contract is not a non-binding statement of the parties' preferences; rather, it is an attempt by market participants to allocate risks and opportunities. The court's role is not to redistribute these risks and opportunities as it sees fit, but to enforce the allocation the parties have agreed upon.

11 WILLISTON ON CONTRACTS § 31:5 (4th ed. Nov. 2020 update) (internal quotation and alteration omitted).[5]

B. No precedent forecloses Plaintiffs' textual construction.

[¶43] As in the *West* case, Defendants cite a number of cases from other jurisdictions and summaries of these cases in treatises but "each is distinguishable from the instant case either in that involved a royalty clause different from the one in the instant case or that it involved different factual circumstances or legal issues than are involved in the instant case." 298 N.W.2d at 487. While one set of Defendants brashly claims Plaintiffs are seeking "to upend nearly a century of settled oil and gas law," Lime Rock and EOG ¶3, another defendant more candidly recognized: "Even though this oil royalty clause has been used for over 100 years, the number of opinions discussing it are relatively limited,

[5] Although not the exact section cited here, a Westlaw search shows that this Court has cited the Williston on Contracts treatise over 150 times.

presumably because oil lessors and lessees have understood its rather straightforward meaning," Continental Br. ¶49. Of course, presumably that interpretation recognizes the lay understanding and plain reading that "in the pipeline" means "in the pipeline," wherever lessee decides that will be.

[¶44] As was the case when this Court surveyed oil and gas law in *West*, the "major treatises on oil and gas law demonstrate the unsettled nature of the law in this area." 298 N.W.2d at 489. For example, in an article cited by Defendant Continental ¶58 and Amicus API ¶21, "a well-respected and well-written Texas oil and gas attorney"[6] wrote that this type of provision was very important to lessors because it obviated the lessor of expenditures to the pipeline:

> The royalty provisions relating to the time and place of payment ordinarily present little difficulty. When the royalty upon oil is payable in kind it is usually stipulated that the royalty oil shall be delivered, free of cost, in the pipe line to which the lessee may connect the wells. The lessor by his division order contract with the pipe line company provides for its receipt at that point and for the time and manner of payment by the purchaser. ***This clause obviates the necessity of any expenditures by the lessor in connection with the storage, treatment, and transportation of his royalty oil to his purchaser, and requires these expenses, sometimes of considerable proportions, to be borne by the lessee. It is, therefore, a vitally important provision from the standpoint of the lessor***.

A. W. Walker, Jr., *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 10 TEX. L. REV. 291, 312–13 (1932) (emphasis added). The article goes on to

[6] To be accurate, this should read a "defense" oil and gas attorney. After writing this article, Mr. Walker left academia and became one of the founding members of the third largest defense firm in Texas, Jackson Walker. https://www.jw.com/news/jackson-walker-ranks-as-third-largest-energy-law-firm-in-san-antonio/. Likewise, Mr. Kramer, who helped author an amicus in this case, and a book repeatedly referenced by Defendants, Williams & Meyers, became a dyed in the wool defense counsel at McGinnis Lochridge.

note that if no pipeline exists then lessee is not obligated to secure a pipeline connection to the wells on lessor's land, but lessee's obligations only "are at an end when he has made delivery at the place designated" which is "in the pipe line to which the wells may be connected," or, if the lease says so, "at the wells" or "into storage tanks." *Id.* at 313.

[¶45] Defendant Continental concedes scholars have concluded that under similar leases, the lessee must bear costs until the oil is delivered to a pipeline even if the wells are not connected to it: "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***." Defendant Continental Br. ¶58 (emphasis added) (citing 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).

[¶46] Similarly, other treatises cited by Defendants stand for the uncontroversial proposition that lessees are obligated to provide the oil free of cost to the valuation point specified in the lease. Defendant Continental ¶60 (citing O. Anderson, *Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, or Realistically?* (Part II), 37 NAT. RES. J. 611, 650 (1997) for the proposition that "[c]onsistent with nearly all case law," this provision "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"). All parties agree on that point. The only question in whether that agreed-upon valuation point is "at the wellhead" or "in the pipeline."

[¶47] When previously faced with similar uncertainties and conflicting views from scholars, this Court rejected "broad, general form" statements about royalty payments and instead concluded that the Court should look to the precise provisions in the given lease. *West*, 298 N.W.2d at 490. The same is true here. The North Dakota rules of construction coupled with the plain language of the leases is all that should be considered in a four-corners analysis. Defendants urge the Court to overlook its duty to examine the actual language chosen.

[¶48] On top of all this, treatises are not precedent and are only as persuasive as the law that they are summarizing. For example, all Defendants cite a section of William & Meyer's Oil and Gas Law Treatise that states the "weight of authority" has concluded "in the pipe line" language means "the expense of transportation or of treating oil . . . must be shared by the owner of the nonoperating interest."[7] Continental ¶¶50, 62; Bruin and Kraken ¶33; Lime Rock and EOG ¶32; Amicus API ¶¶10, 22 (citing 3 H. Williams & C. Meyers, OIL & GAS LAW § 646.2). But the citations for this assertion either support Plaintiffs' position or are distinguishable cases:[8]

- For example, the first cited case is *Kretni Development v. Consolidated Oil Corp.*, 74 F.2d 497 (10th Cir. 1934). But in *Kretni*, the Tenth Circuit only rejected the plaintiffs' suggestion that the valuation point under a similar lease should be at the ***end*** of a transmission pipeline. The Tenth Circuit adopted Plaintiffs' reading that

[7] To be clear, Plaintiffs only seek to recover gathering and other expenses incurred *before* the pipeline, not gathering, treating, or transportation expenses *on* the pipeline.

[8] Defendants also cite cases involving different lease language which results in different valuation points: *Burlington Res v. Texas Crude Energy*, 573 S.W.3d 198 (Tex. 2019) (lease language providing for gas valuation "into the pipelines, tanks, or other receptacles with which the wells may be connected" and where pipeline brought to the well); *Vedder Petro v. Lambert Lands*, 122 P.2d 600 (Cal. Ct. App. 1942) (lease language providing for valuation at "storage tanks").

the place of delivery was fixed in the contract: "[i]t is the point of connection with the pipe line," when it entered the transmission pipeline. *Id.* at 499.

- The second is *Molter v. Lewis*, 134 P.2d 404, 406-07 (Kan. 1943), a case where the Kansas Supreme Court expressly noted that it was ***not*** construing the lease language but was instead considering whether there was a general implied duty to market. *Id.* at 404 (stating that the Supreme Court could not consider the "operative interpretation" of the lease by the parties because no request for such a finding had been made). The case also concluded that a lessee must only share in the burden of truck gathering of oil if the lessee fulfills its implied "duty" "without cost to the lessor, to use all reasonable efforts to have pipe lines connected with producing wells which he drills on the lease." *Id.* If Defendants really suggest this Court should follow *Molter*, then discovery is warranted to determine if Defendants have made "all reasonable efforts" to connect the wells in question with pipelines.

[¶49] The William & Meyer treatise also concedes that this "weight of authority" does not apply everywhere given that lessees do bear these expenses under local law and custom in some jurisdictions. 3 H. Williams & C. Meyers, OIL & GAS LAW § 646.2 n.1.

[¶50] Indeed, the Court does not need oil and gas scholars to interpret the plain language of a contract; the role of the courts is to determine the legal effect of the contractual language chosen. *Moen v. Meidinger*, 547 N.W.2d 544, 546 (N.D. 1996) ("The construction of a written contract to determine its legal effect is a question of law for the court to decide."). And, if the Court decides that there is any ambiguity that requires expert opinions on the terminology, the proper course is to remand for discovery so the parties can disclose, examine the expert analyses of the terms, and allow for evidentiary challenges rather than adopting what amounts to an expert opinion of the lease language at the motion to dismiss stage. *See id.* at 547.

CONCLUSION

[¶51] Under North Dakota's bedrock principles of contract interpretation, Plaintiffs' reading should be confirmed, and this Court should answer the certified question in the negative. There is no language in the lease that suggests or implies that "free of cost, in the pipeline" should be interpreted to mean that lessor's share of oil should be valued "after deduction of costs incurred after the well" or "valued at the well." This Court should respond to the certified question by answering "no."

Dated this 23rd day of March 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, in compliance with N.D. R. App. P. 32(a)(8)(A), that this *Reply Brief of Plaintiffs/Appellants* was prepared with proportional typeface, 12 pt. font, and the total number of pages in the above Brief, excluding the certificate of compliance and the certificate of service is 32 pages.

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