20200327 - 20200331

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 11, 2021
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,	)
	) 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

BRIEF OF PLAINTIFFS/APPELLANTS
DAVID A. BLASI and PAULA J. BLASI

MONTGOMERY & PENDER, P.C.
Michael S. Montgomery (ND# 05089)
Kyle G. Pender (ND# 06300)
5630 34th Avenue South, Suite 120
P.O. Box 9199
Fargo, ND 58104
Phone: (701) 281-8001
Email: mike@mplawnd.com
kyle@mplawnd.com

and

SHARP LAW, LLP
Rex A. Sharp ID# (P02399)
5301 West 75th Street
Prairie Village, KS 66208
Phone: (913) 901-0505
Email: rsharp@midwest-law.com

Attorneys for Plaintiffs/Appellants
David A. Blasi and Paula J. Blasi

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STATEMENT OF THE ISSUES PRESENTED

[¶1] On November 30, 2020, the Honorable Peter D. Welte, Chief Judge of the United States District Court for the District of North Dakota, certified to this Court a single question in five (5) pending cases.[1] The question certified is:

> Whether the instant oil royalty provision is interpreted to mean the royalty is based on the value of the oil "at the well:"
>
> > Lessee agrees … "[t]o deliver to the credit of the 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."

App. p. 21.

STATEMENT OF THE CASE

[¶2] The five cases pending before Chief Judge Welte are all putative class actions filed by oil royalty owner/lessors against defendant oil producer/lessees. In every case, Plaintiffs allege a single claim for breach of contract based on Defendants' practice of deducting costs incurred before the oil reaches the first pipeline from royalties to lessors in contravention of the royalty provision in the parties' contractual oil and gas lease. The leases of Plaintiffs and

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[1] *Blasi, et al. v. Bruin E&P Partners, LLC, et al.* 3:20-cv-85;
Blasi, et al. v. Lime Rock Resources Operating Company, Inc., et al. 3:20-cv-91;
Blasi, et al. v. Kraken Development III LLC 3:20-cv-92;
Blasi, et al. v. Continental Resources, Inc. 3:20-cv-93; and
Blasi, et al. v. EOG Resources, Inc. 3:20-cv-94.

the thousands in the putative class explicitly provide that the royalty credit will be "free of cost" incurred by the lessee until the oil reaches the pipeline.

[¶3] Each of the separate Defendants moved to dismiss. Plaintiffs responded to all of the motions to dismiss, which are now fully briefed. Defendants all essentially argued the same thing: the oil royalty provision at issue—providing for royalty payments to be "free of cost in the pipeline"—actually means free of cost "at the well," thus allowing them to pass along their various costs from the well to the pipeline to royalty owners.

[¶4] They advanced this reading even though the leases explicitly state that the royalty payment to lessors are "free of cost" incurred prior to being placed "in the pipeline":

> Lessee agrees … "[t]o deliver to the credit of the 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."

App. p. 17. Any assertion that the language regarding "free of cost" *in the pipeline* is ambiguous is answered by looking at how costs are apportioned in other parts of the same contracts for natural gas. In those provisions, the royalty is based on *proceeds at the mouth of the well*. Thus, Defendants were well aware of how to ensure that royalties would be calculated from value at the wellhead and allowing for the deduction of subsequent costs. But the form contracts provided to lessors provided a different point for valuation and assessment of costs for oil. This

distinction is dispositive here and must be respected when interpreting the leases. Had the parties intended their bargain to allow lessees to deduct costs from the well, the defendant oil companies could have (and would have) used this language in the oil royalty provisions. That they did not do so precludes any attempt to rewrite the contract as though they did.

[¶5] Following the briefing on the motions to dismiss, on October 14, 2020, Judge Welte requested a telephonic status conference to "discuss certifying a question to the North Dakota Supreme Court as to the interpretation of the oil royalty provision at issue[.]" That status conference was held on October 30, 2020. The day before, the Court issued a draft of a certified question similar to the one ultimately certified:

> Whether the instant oil royalty provision allows a lessee to deduct post-production costs before calculating the lessor's royalty interest:
>
> > Lessee agrees … "[t]o deliver to the credit of the 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."

The district court indicated it would hear from the parties on their initial impressions as well any other objections or comments at the hearing. At the October 30 hearing, most of the parties suggested a certified question was premature, but Judge Welte requested the parties submit written summaries of their position before he ruled. The parties all did so, and Judge Welte ultimately certified a slightly revised version of the original question to this Court; he also

stayed all five cases. In his Order for Certification, Judge Welte expressly rejected defendants' argument that *Bice* controls the interpretation of the plaintiffs' oil royalty provision because, as he pointed out, the royalty provisions here are "substantially different" than the language in *Bice*. The district court also noted that one of its recent decisions had already concluded "a lessor in a similar [royalty underpayment] case presented a plausible claim for relief and denied dismissal." Certification Order 3 (citing *White River Royalties LLC v. Hess Bakken Invest. II, LLC*, Case No. 1:19-cv-00218, Doc. No. 32 (D.N.D. May 22, 2020)) App. p. 23.[2]

[¶6] All of the certified question cases are in the beginning stages: no Rule 26 Conference has been conducted, discovery has not occurred, no scheduling conference has been held, and no scheduling orders entered. It is not known how many identical or similar oil royalty leases each defendant has. Likewise, it is not in the record how many oil royalty leases have "at the well" valuation language in them or to which pipeline(s) each defendant connects these wells.

STATEMENT OF FACTS

[¶7] The district court's Order for Certification included a statement of facts relevant to the question certified in the cases at issue, and Plaintiffs hereby

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[2] That case is now in discovery. It is likely that any decision by this Court would impact that case as well.

adopt and incorporate this statement of facts as though fully set forth herein. *See* App., pp. 21-22. Also, Plaintiffs provide the following additional facts that are relevant to the issues submitted for review:

[¶8] The oil royalty provision in the Plaintiffs' leases at issue *do not* state or suggest anywhere that the lessees may pay for oil produced "based on its value 'at the well'"; "free of cost, at the well"; "proceeds at the mouth of the well"; "value after trucking costs"; or "at the well value." The lack of such language in the oil royalty provisions stands in stark contrast to the separate royalty provision in the same lease for gas produced. Those gas royalty provisions state:

> To pay Lessor 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 [fractional share] of the proceeds, ***at the mouth of the well***, payable monthly at the prevailing market price.

(App. p. 17 – emphasis added). This contrasting language in the same lease verifies that the lessees knew how to include language providing for costs after the well to be passed on to royalty owners in any royalty provision it drafted.

LEGAL STANDARD

[¶9] This Court has been asked to consider and answer a single certified question of law. "This Court is the final arbitrator of unsettled questions of state law[.]" *Mosser v. Denbury Res., Inc.*, 2017 ND 169, ¶ 12, 898 N.W.2d 406, 410. Accepting a certified question is purely discretionary. *Id.*

LAW AND ARGUMENT

I. Introduction.

[¶10] If the Court decides that now is the proper time to answer this certified question, the Court should answer the question in the negative. All of the five class actions at issue are filed on behalf of North Dakota property owners who are paid royalties under leases with the defendants. Defendants, or their predecessors, drafted the lease language at issue in all the leases. Despite their own language stating that oil royalty payments must be "free of cost" to the pipeline, Defendants do the opposite and make improper deductions from the royalties they pay every month to thousands of lessors for such costs. All Defendants contend the "free of cost in the pipeline" language somehow means just the opposite: "burden with all costs" from the well to the pipeline. To reach the opposite of the lease's plain meaning, Defendants all must ask this Court to rewrite the oil royalty clause and transform it judicially to an "at the well" royalty provision. This rewrite is foreclosed by this Court's decisions on plain language construction, and the sanctity of contracts being enforced as written; these decisions are especially poignant here in the face of the markedly contrasting language—in the same leases—on gas royalties.

[¶11] At bottom, the question certified should be answered "no" because the phrase "free of cost" means what it says—without cost to the royalty owner.

Defendants' interpretation subverts the plain language of the leases, which they alone drafted using sophisticated counsel. To rule in favor of defendants would rewrite the leases and impose gathering, treating, and other costs upon thousands of North Dakota royalty owners. That result is unjust; instead, the plain language of the lease begins and ends the inquiry.

II. Is this the Proper Time to Certify the Question?

[¶12] On January 8, 2021, Appellants submitted to this Court its Motion to Decline to Answer Certified Question and brief in support. Appellant's Motion to Decline is still pending.

III. The Plain and Natural Language of the Oil Royalty Provision Precludes Defendants from Assessing Costs prior to the First Pipeline to Royalty Owners.

[¶13] In accordance with North Dakota law, the answer to the question posed centers on interpreting the contractual agreement between the Defendants and royalty owners, like the Plaintiffs, over how oil royalties would be calculated. Noteworthy for the analysis are two provisions in the lease as well as what is not included.

[¶14] All of the leases involved contain the same oil royalty provision, under which the lessees have all agreed:

> 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.

App. pp. 10, 17 ("the oil royalty provision").

[¶15] The oil royalty provision does not state or provide anywhere that the lessees may deliver the agreed upon fractional share of all oil produced "free of cost, at the well"; "in the tank battery"; "in the truck picking up the oil"; "in the central delivery point." App. pp. 10-11 at ¶11.

[¶16] All of the leases, however, do contain a separate royalty provision for gas produced which explicitly provided for valuation "at the mouth of the well":

> To pay Lessor 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 [fractional share] of the proceeds, *at the mouth of the well*, payable monthly at the prevailing market price.

App. p. 17. (the gas royalty clause).

A. Because A Lease is a Contract, The Rules of Contract Interpretation Apply.

[¶17] "The same general rules that govern interpretation of a contract apply to oil and gas leases." *Newfield Exploration Co. v. State Exhibit Rel. North Dakota Board of University and School Lands,* 2019 ND 193, ¶5, 931 N.W.2d 478 (quoting *Johnson v. Statoil Oil & Gas LP*, 2018 ND 227, ¶¶ 7-8, 918 N.W.2d 58). North Dakota law provides the framework for interpreting contracts:

> (1) The language of the contract governs its interpretation as long as the language "is clear and explicit and does not involve an absurdity." N.D.C.C. § 09-07-02. If possible, the intent of the parties is to be ascertained from the writing. N.D.C.C. § 09-07-04.

(2) "Words in a contract are construed in their ordinary and popular sense, unless used by the parties in a technical sense or given a special meaning." *Newfield*, 2019 ND 193, ¶ 5, 931 N.W.2d at 480; *accord* N.D.C.C. § 09-07-09.

(3) "A contract must be read and considered in its entirety so that all of its provisions are taken into consideration to determine the parties' true intent." *Id.*; *accord* N.D.C.C. § 09-07-06 ("The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable.") "Each clause [in a contract] is to help interpret the others." N.D.C.C. § 09-07-06; *accord Henson v. Santander Consumer USA Inc.*, --- U.S. ---, 137 S. Ct. 1718, 1723 (2017) (When interpreting a statute, courts "presume" that "differences in language" used in the same statute "convey differences in meaning.").

(4) An oil and gas lease should be construed most favorably to the lessor because the lessee usually drafts the lease form or dictates the terms thereof, and if the lessee is desirous of more complete coverage the lessee has the opportunity to protect itself by the manner in which it drafts the lease. *West v. Alpar Resources*, 298 N.W.2d 484, 490-91 (N.D. 1980).

[¶18] These basic principles of contract interpretation, coupled with the plain language of the oil royalty provision confirm that the Plaintiffs' royalties must be paid based upon the price of the oil in the pipeline, free of all costs before

that. Contrary to Defendants' contentions below, the lease—read as a whole—forecloses the argument that costs from the well or wellhead can be assessed.

B. After Applying These Rules of Construction, The Leases Are Not Ambiguous and Require Royalty Payments from Defendants to be "Free of Cost" Prior to the First Pipeline.

[¶19] Turning back to the provision at issue in this dispute, three phrases are critical to interpret the oil royalty provision:

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

App. p. 17. There is no dispute that "free of cost" means that the fractional part owed cannot include costs to some point. The only question is what that point is. The two remaining phrases provide that answer. The costs cannot be assessed until the oil produced and saved from the premises is "in the pipeline." Which pipeline? It is "***the*** pipeline" to which the wells on the lands specified in the lease may connect. Contrary to any grammatical gymnastics or inapplicable cases provided by Defendants, the contract does not state that the oil royalty is only free of costs until it reaches any "pipe" connected to the wells. This was not merely inadvertent or poor drafting. Every wellhead has one or more pipes connected to it, but very few wells, and none in this case, have an oil pipeline connected. An oil pipeline is usually connected to a Central Delivery Point (CDP) so that a larger, more efficient pipeline can be used to move the aggregate oil from multiple wells.

***1.** “In the Pipeline”: Means The Pipeline and Not Just A**ny** Pipe or Tube.*

[¶20] The parties to the lease agreed that for oil the royalty would be “free of cost” until the oil was “in the pipeline.” The “pipeline” is not merely any “pipe” or “tube” that oil is placed into after being pumped from a well. While a “pipeline” is a specific type of pipe or series of pipes, not all “pipes” are “pipelines.” Rather, “pipeline” is defined in the oil industry as a specialty type used for moving oil to the refinery: “pipeline” is “[a] tube or system of tubes used for transporting crude oil and natural gas ***from the field or gathering system to the refinery***.” Schlumberger, definition of *Pipeline*, OILFIELD GLOSSARY, https://www.glossary.oilfield.slb.com/en/terms/p/pipeline (last visited January 7, 2021) (emphasis added).[3] Pipelines are generally regulated by state or federal authorities[4] for moving oil hundreds or thousands of miles, not a pipe between the wellhead and the tank battery to move oil a few feet. Defendants' interpretation of “pipeline” to mean any tube or pipe cannot be supported by the ordinary and natural use of the term.

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[3] This Court frequently uses dictionary definitions to determine the ordinary meaning of terms. *Comstock Const., Inc. v. Sheyenne Disposal, Inc.*, 2002 ND 141, ¶ 24, 651 N.W.2d 656, 663 (“In construing the ordinary meaning of language in statutes, we have often resorted to dictionary definitions.”). But if the Court finds that this term is ambiguous and extrinsic evidence is necessary, it should decline to review the certified question and allow the parties to conduct discovery for a complete evidentiary record on this ***fact question***.

[4] https://northdakotapipelines.com/about-us/ (listing at least 8 state and federal regulatory bodies for pipelines). And the Merriam-Webster first definition of “pipeline” is “a line of connected pipes that are used for carrying liquids and gases over a long distance”. https://www.learnersdictionary.com/definition/pipeline

[¶21] Indeed, the definitions proffered by Defendants thus far in the underlying cases highlight six different types of pipes that never move anything off the lease. *See e.g.* App. p. 51, Doc. No. 17, Continental Brief at ¶19. The interpretation that any "pipe" regardless of function or length, qualifies as "the pipeline" referred to in the lease is nonsensical as it requires one to accept that the first tube or pipe either below or from the wellhead will always be "the pipeline." Springing from this false premise, Defendant Continental below has already made the erroneous conclusion that "free of cost, in the pipeline" can have no other meaning than the oil is free of costs "at the well" because the wells attach to some type of pipe or tubing—and thus all costs incurred after the well can be deducted. No court has ever so held, no industry definition of pipeline would convert every pipe into a pipeline (as shown above), and no commonsense understanding would either.

[¶ 22] Defendants also made another word choice in their form contracts that further indicates that the "pipeline" in question is not just any pipe or tube at the well; they chose the definite article ("the") and not an indefinite article ("a" or "an"). The choice of "the" "particularizes the subject" that the parties were agreeing to. *Yellowbird v. N. Dakota Dep't of Transp.*, 2013 ND 131, ¶ 12, 833 N.W.2d 536, 539 ("In contrast, 'the' is an article which particularizes the subject spoken of. In construing a statute, definite article 'the' particularizes the subject which it precedes and is a word of limitation as opposed to indefinite or

generalizing force of 'a' or 'an.'") (internal quotation and alteration omitted). This choice confirms that the parties' intent was to indicate the specific pipeline to which wells on this property were sent to—not simply any pipe or tube on the property.

2. *The Phrase "On Said Land" Modifies "Wells" and Does Not Change the Meaning of "Pipeline" or When Costs Can or Cannot be Assessed.*

[¶23] Contrary to Defendants' proposed interpretations, the plain reading of the phrase "on said land" in the oil royalty provision does not indicate that the pipeline in question is on the lessor's land. Instead, the phrase comes immediately after and modifies the word "wells."

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

The underlined phrase does not indicate that the pipeline is "on said lands." Such a construction could have been easily made by placing the phrase immediately after "pipeline." Rather, it simply indicates that the oil produced and saved on the premises should be free of cost until the oil is in the pipeline if the Lessee decides to connect the "wells on said land" to it.

3. *Reading the Whole Contract in Context Confirms the Common Usage of "Pipeline" Because If The Drafters Meant "at the Wellhead," They Did That in a More Simple and Direct Manner In the Gas Provision In the Same Contract.*

[¶24] Plaintiffs' plain language reading of the oil royalty provision is confirmed by following the contractual construction principles and reading the

whole contract as one and allowing each provision to inform the interpretation of others. *Newfield*, 2019 ND 193, ¶ 5 (concluding that an oil lease agreement should be "read and considered in its entirety so that all of its provisions are taken into consideration to determine the parties' true intent"); N.D.C.C. § 09-07-06 (providing that other clauses in a contract are to be used "to help interpret" the provision at issue); *Henson v. Santander Consumer USA Inc*., --- U.S. ---, 137 S. Ct. 1718, 1723 (2017) (when interpreting a statute, courts "presume" that "differences in language" used in the same statute "convey differences in meaning"). If the parties had intended to allow costs after the wellhead when the oil necessarily entered some type of pipe or tube, there was a much simpler way to express that intent—and it was the method chosen in the gas royalty provision. The drafter's choice not to include that language forecloses any suggestion that the "in the pipeline" language means "at the well".

[¶25] Here, in each of the Plaintiffs' leases, there is an intentional contrast between the language of the oil royalty provision and the language of the gas royalty provision. Each lease includes the identical gas royalty provision that requires the lessee to pay royalty on gas based on "the proceeds, *at the mouth of the well*." App. pp. 10, 17 Complaint at ¶9; Exhibits 1 and 2 (emphasis added). This distinction confirms that if the original lessors and lessee had intended for the payment of royalty on oil sales under the Plaintiffs' leases to be based upon a wellhead valuation, they could have easily included the same "at the well" royalty

language in the oil royalty provision as they set forth in the casinghead gas royalty provision. They did not do so, choosing instead to vary the language of the oil royalty as "free of cost." *See, e.g., West v. Alpar Resources*, 298 S.W.2d 484, 491 (N.D. 1980) (holding that if the lessee "had desired to limit the royalty payments under the lease to a fraction of the net proceeds derived from the sale of gas after allowance for a deduction of certain costs . . . , it could have easily included express language to that effect in the lease.").

4. *If any Uncertainty, the Language is Construed against Drafter, Defendant Oil Companies.*

[¶26] At best, the term "the pipeline" is ambiguous. And if there is any ambiguity,[5] it "must be construed against the drafter." *Grove v. Charbonneau Buick-Pontiac Inc.* 240 N.W.2d 853 (N.D. 1976); *see also* N.D.C.C. § 09-07-19 (providing that in case of uncertainty, "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist"). In this case, lessees drafted all the leases. They are sophisticated, multimillion or billion-dollar oil companies. In contrast, the landowners are not. To this end:

> 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

[5] Plaintiff believes the oil royalty provision at issue unambiguously requires royalties be paid without deduction or costs in the pipeline. However, as noted previously, if this Court believes that there is ambiguity, the parties should proceed through discovery in federal district court rather than undertake a premature legal analysis.

> reason, the courts have adopted a rule to the effect to construe an oil and gas lease most favorable to the lessor, where its terms can be so construed without doing violence to the language used.

Ladd v. Upham, 58 S.W.2d 1037 (Tex. App. 1933); *accord West*, 298 N.W.2d at 490-91. While the lessees here may now in hindsight wish they had negotiated oil royalty terms similar to what they had negotiated in the gas provisions, this desire cannot be the basis for re-writing the form contracts they previously agreed to.

IV. North Dakota Federal Courts Have Recognized the Importance of "in the Pipeline" Language.

[¶27] The federal court has considered similar language to that at issue here. It did not adopt the construction proposed by Defendants. In *White River*, the lessee argued that the identical "free of cost in the pipeline" delivery royalty provision sets the point of valuation for oil at the wellhead by ignoring the operative part of the prepositional phrase, "in the pipeline," and rewriting to say "free of cost [] on said land." *White River Royalties, LLC v. Hess Bakken Inv. II, L.L.C.*, No. 1:19-cv-00218, 2020 WL 6231893, at ¶22 (D.N.D. May 22, 2020). The arguments and curious lease interpretation given by the lessee in *White River* mirror those made by the Defendants in the present cases. The court refused to adopt these arguments as a matter of law:

> White River claims Plaintiffs' oil royalties are "free and clear, in the pipeline" so Hess is responsible for all costs to transport the oil to the pipeline. *See* Doc. No. 17. White River asserts Plaintiffs' oil royalties may not be reduced by transportation costs. In the absence of any North Dakota caselaw construing the instant provision, White River presents a plausible interpretation of "***free of cost, in the pipeline to which lessee may connect wells on said land.***"

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 22, 2020) Doc. No. 32 (emphasis in original).

[¶28] It also concluded that the lessor had demonstrated a "plausible interpretation" of the royalty provision by arguing that "the valuation point is 'free of cost, in the pipeline' and [Defendant] bears the cost of transportation to that pipeline." *White River Royalties*, 2020 WL 6231893, at ¶31. That same interpretation exists here: The royalty must be paid on the price of the oil in the pipeline—free of all costs before that point—and the Defendants improperly deducted the gathering or moving costs incurred before the oil went into the pipeline.

V. Defendants Flee North Dakota Law and Cite Stray Cases and Treatises that Only Confirm that Plaintiffs' Core Argument: the Lease Language Controls and "at the Wellhead" Should Not Be Imported into the Oil Provision.

A. *Bice* and North Dakota Gas Law

[¶29] Defendants will no doubt request this Court rewrite the lease to provide for an "at the well" royalty valuation—even though the oil royalty clause does not contain the phrase "at the well." App. p. 17. To reach this conclusion, the Defendants below have all advanced the default rule under North Dakota *gas* law. But a default rule applies only in gas royalty litigation when the parties fail to express their intention for a valuation point. When parties choose to be specific,

the default rule does not apply—even in the gas context—the language of the contract does. *Kittleson v. Grynberg Petroleum Co*., 2016 ND 44, 876 N.W.2d 443, 447 (N.D. 2016) ("[B]y including the 'no deductions' language in the royalty clause, the parties altered the meaning of 'market value at the well.'").

[¶30] The Defendants have all previously relied heavily on *Bice v. Petro-Hunt, LLC*, 2009 ND 124, 768 N.W.2d 496 (N.D. 2009), where the Supreme Court of North Dakota 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. But as both Judge Welte and Judge Traynor have already found, the gas decision in *Bice* provides no support for Defendants' oil royalty contention in the present cases, because the "market value at the well" gas royalty provision the *Bice* court interpreted is substantially different to the oil royalty provision in the Plaintiffs' leases. App. p. 22-23. Certification Order, at 2-3 (concluding that this royalty provision is "substantially different from the royalty provisions at issue in *Bice,* 2009 ND 124, *Kittleson*, 2016 ND 44, and *Newfield Exploration Co.*, 2019 ND 193); *White River Royalties*, 2020 WL 6231893, at ¶21 (noting that the North Dakota Supreme Court's previous analyses cited by Defendants did not include

the interpretation of an oil royalty provision like the one at issue here). Indeed, the oil royalty provisions do not contain any of the "at the well" language. In this case, the original parties to the leases knew how to specify that a royalty should be paid based upon a value "at the well," but they did not agree to do that for oil. Instead, they agreed that the oil royalty should be paid "free of cost, in the pipeline."

[¶31] Moreover, the Supreme Court of North Dakota later held that the "at the well" rule adopted in *Bice* was not controlling if the gas royalty clause contained additional language stating "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." *Kittleson*, 2016 ND 44, 876 N.W.2d at 447 (N.D. 2016). The Supreme Court held the parties can modify the "at the well" rule and emphasized the language used by the parties in the lease controls the methodology for the royalty calculation. *Id.* The Supreme Court emphasized that "by including the 'no deductions' language in the royalty clause, the parties altered the meaning of 'market value at the well.'" *Id.* Here, the parties did just that: they included no deduction language when they described the royalty as "free of cost" to the "pipeline." The *Kittleson* Court held the "no deductions" language qualified and "prevails over the at the well" language in the royalty clause and therefore, forbids the deduction of post-production cost. *Id.* Similarly, here, the more specific provision setting out what portion of production is "free of costs" trumps any default rule.

[¶32] In another decision handed down in July 2019, the Supreme Court of North Dakota interpreted a royalty provision that required the lessee "to pay lessor the royalty on any gas, produced and marketed, based on gross production or the market value thereof, at the option of the lessor, such value to be based on gross proceeds of sale where such sale constitutes an arm's length transaction," and stated that "[a]ll royalties on . . . gas . . . shall be payable on an amount equal to the full value of all consideration for such products in whatever form or forms, which directly or indirectly compensates, credits, or benefits lessee." *Newfield Exploration Co. v. State Exhibit Rel. North Dakota Board of University and School Lands,* 2019 ND 193, 931 N.W.2d 478, 480 (N.D. 2019) ("*Newfield*"). The Supreme Court held, in accordance with the plain language of the royalty provision, that "[g]ross proceeds from which the royalty payments under the leases are calculated may not be reduced by an amount that either directly or indirectly accounts for post-production costs incurred to make the gas marketable." *Id.* at 481. In short, North Dakota case law since *Bice* provides that even in the gas context, if the parties expressly state which costs cannot be passed on to royalty owners, as it is in the oil royalty provision here, those deductions are not allowed.

[¶33] Taken together, this Court utilized the same analytical approach in *Bice*, *Kittleson*, and *Newfield*. In every case, the Court interpreted the lessee's royalty payment obligations by construing the lease at issue "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.

B. Cases from other jurisdictions

[¶34] Defendants cannot dispute that this Court should look primarily to North Dakota law to construe North Dakota leases. *White River Royalties*, 2020 WL 6231893 at ¶16 (holding North Dakota law alone governs the dispute.). However, not finding any support in North Dakota for their flawed interpretation and staring down the on-point ruling in *White River*, they have cited below to inapplicable cases from other jurisdictions to support their "wellhead valuation" argument. In addition to being from outside of North Dakota, those cases have no persuasive value because they address factually distinguishable provisions or issues not present in this case. Indeed, when read in whole, these cases squarely support Plaintiffs' argument to look at the actual contractual terms and to read the entire contract (here, a lease) in context.

[¶35] In the one case dealing with a similar provision, the Tenth Circuit verifies Plaintiffs' plain language argument that the point of valuation for oil is when it is delivered into the pipeline—not before the oil makes it into the pipeline. *Kretni Development v. Consolidated Oil Corp.*, 74 F.2d 497 (10th Cir. 1934) (S*ee e.g.* App. p. 51, Doc. No. 17 Continental Brief at ¶17 n.4). The pertinent royalty provision in *Kretni* stated that the:

> Lessee agrees to deliver to the credit of the lessors, their heirs or assigns, or to such person or trustee as they may designate, 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 said one-eighth part of said oil or gas.

Id. at 497. In *Kretni*, the Tenth Circuit found that the place of delivery was fixed in the contract: "[i]t is the point of connection with the pipe line." *Id*. at 499. That analysis applies full force here.

[¶36] Moreover, and shattering the premise of Defendants' arguments, the *Kretni* case established that "the pipeline" in that royalty provision's "free of cost at the pipeline" language referred specifically to the transmission pipeline that carried the gas from the lessor's field to the refineries in Casper, Wyoming—not any of the conduit pipes, gathering lines, or any other "system of pipes" used to carry the gas from the wells to "the pipeline." *Kretni*, 74 F.2.d at 499. Thus, *Kretni* confirms Plaintiffs' reading of "the pipeline" is correct, not some unmoored definition of "the pipeline," which includes any tube or pipe that connects an oil well to a storage tank.

[¶37] Defendants also have cited *Burlington Resource Oil & Gas Company, LP v. Texas Crude Energy, LLC*, 573 S.W.3d 198 (Tex. 2019), a case that did not address the same oil royalty provision at issue in Plaintiffs' case or the *White River* case. Rather, *Burlington* was based upon the Texas Supreme Court's interpretation of overlapping royalty provisions, included in a granting clause, a valuation clause, and a joint operating agreement ("JOA"). In *Burlington*, the JOA specified that if a party did not take its share of the oil "in kind" then it would be

paid for its share of the oil based upon "the actual net proceeds received for such production." *Id*. at 208. Given this net proceeds language, deduction of post-production costs in calculating gas royalties, was allowed because "[w]e have previously interpreted a 'net proceeds' royalty provision to authorize deduction of post-production costs . . . [and] the JOA appears to contemplate, albeit obliquely, that later-assigned royalty interests would be calculated net of post-production costs." *Id*. at 209. Here, however, there is no such "net proceeds" operating agreement or any other overlapping royalty provision. Thus, *Burlington* does not support Defendants' misguided interpretation of the royalty provision in this case.

C. Treatises

[¶38] Defendants below have also taken treatise language out of context. They cite Eugene Kuntz, TREATISE ON THE LAW OF OIL AND GAS §40.5 and 3 H. Williams & C. Meyers, OIL AND GAS LAW §645, for the proposition that the use of "wellhead value" of the oil is consistent with hornbook law. *See e.g.* App. p. 51, Doc. No. 17 Continental Brief at ¶¶ 26, 35. In addition to not being controlling law, it does not assist Defendants' interpretation. The portion of the Kuntz treatise cited by Defendants deals entirely with natural gas royalty law (not oil royalties), does not even pertain to wellhead valuation, and is taken out of context.[6]

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[6] The relevant portion of Kuntz's treatise cited by Continental provides: "If 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, and the lessee is not required to construct the lessee's own

Moreover, the only case which is cited for support within this portion of the treatise is the Tenth Circuit decision in *Kretni Development v. Consolidated Oil Corp. Id.* § 40.5(a), n.2. As discussed above, the Tenth Circuit in *Kretni* did not hold that under the oil royalty provision at issue, the parties would have contemplated the lessee's delivery of oil to the lessor at the well. Instead, the Tenth Circuit held that "[t]he place at which delivery should be made in kind is definitely fixed in the contract. It is the point of connection with the pipe line." *Kretni*, 74 F.2d at 499.

[¶39] Nor does the citation to Williams & Meyers, OIL AND GAS LAW §§ 642.3 or 645, support for Defendants. At best, the Williams & Meyers treatise provides a discussion of how unrelated *gas* royalty provisions in leases are interpreted by other jurisdictions. As the federal district court recognized in denying defendants' motion to dismiss in *White River,* however, these secondary

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expense a feeder line in order to deliver lessor's gas to a distant pipeline. Further, the lessee is only required to deliver royalty gas or to pay for royalty gas which the lessee reduces to possession. **Accordingly, it has been held that the lessee is not liable to the lessor for a failure to deliver royalty gas *when gas must be produced in order to produce oil but there is no market for the gas and it must be flared in accordance with state regulations*.**" Eugene Kuntz, Treatise on the Law of Oil and Gas §40.5 (citations from outside jurisdictions omitted; emphasis added). The remainder of the cited section of Kuntz treatise concerns the implied duty to market royalty gas. Of note is Kuntz's comment that "the question of the duty of the lessee to market royalty gas is a great deal more complex that it first appears to be." *Id.* That falls in line with the Court's ruling in *White River* that a factual record is needed for the Court to interpret the language in the lease. 2020 WL 6231893, at ¶30.

sources are not controlling law and "an examination of North Dakota law is most appropriate." *White River Royalties*, 2020 WL 6231893, at ¶16.

Conclusion

[¶40] The United States District Court for the District of North Dakota certified one question: Whether the instant oil royalty provision is interpreted to mean the royalty is based on the value of the oil "at the well." The Court should answer "No" to this question. 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." Rather, the plain language of the contract read in its entirety demonstrates that the parties agreed that royalties to lessors would not include assessment for costs prior to the pipeline. This reading is irrefutable given the intentional contrast between the gas royalty clause and the oil royalty clause in the same lease. Under North Dakota law, Plaintiffs' reading should be confirmed under bedrock principles of contract interpretation.

Dated this 11th day of January 2021.

MONTGOMERY & PENDER, P.C.

/s/ Michael S. Montgomery
Michael S. Montgomery (ND# 05089)
Kyle G. Pender (ND# 06300)
5630 34th Avenue South, Suite 120
P.O. Box 9199
Fargo, ND 58104
Phone: (701) 281-8001
Direct: (701) 809-7001
Fax: (701) 281-8007
Email: mike@mplawnd.com
kyle@mplawnd.com

and

Rex A. Sharp (ID# P02399)
SHARP LAW, LLP
5301 West 75th Street
Prairie Village, KS 66208
Phone: (913) 901-0505
Email: rsharp@midwest-law.com

ATTORNEYS FOR PLAINTIFFS/ APPELLANTS AND THE PROPOSED CLASS

CERTIFICATE OF COMPLIANCE

[¶41] The undersigned hereby certifies, in compliance with N.D. R. App. P. 32(a)(8)(A), that this *Brief of Plaintiffs/Appellants* was prepared with proportional typeface, 13 pt. font, and the total number of pages in the above Brief, excluding the cover page, table of contents, the table of authorities, the certificate of compliance, the certificate of service, and the addendum of statues and other sources, is 26 pages.

Dated January 11, 2021

MONTGOMERY & PENDER, P.C.

/s/ Michael S. Montgomery
Michael S. Montgomery (ND# 05089)
Kyle G. Pender (ND# 06300)
5630 34th Avenue South, Suite 120
P.O. Box 9199
Fargo, ND 58104
Phone: (701) 281-8001
Direct: (701) 809-7001
Fax: (701) 281-8007
Email: mike@mplawnd.com
kyle@mplawnd.com

CERTIFICATE OF SERVICE

[¶42] On January 11, 2021, the Brief of Plaintiffs/Appellants and Appendix to Brief of Appellants David A. Blasi and Paula J. Blasi 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:

pforster@crowleyfleck.com
Paul J. Forster
Crowley Fleck, PLLP
Attorneys for Bruin, et al., Lime Rock, et al., Kraken, et al., EOG Resources, Inc.

daniel.donovan@kirkland.com
Daniel T. Donovan
Kirkland & Ellis, LLLP
Attorneys for Lime Rock, et al.,

rob.forward@stinson.com
Robin Wade Forward
Stinson, LLP
Attorneys for Bruin, et al., Kraken, et al.

matt.salzman@stinson.com
Matthew Salzman
Stinson, LLP
Attorneys for Bruin, et al., Kraken, et al.

jeffrey.c.king@klgates.com
Jeffrey C. King
K&L Gates, LLP
Attorneys for Continental Resources, Inc.

rmclean@serklandlaw.com
Ronald McLean
Serkland Law Firm
Attorneys for Continental Resources, Inc.

dan.mcclure@nortonrosefulbright.com
Daniel M. McClure
Norton Rose Fulbright US, LLP
Attorneys for EOG Resources, Inc.

/s/ Michael S. Montgomery