20220088
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 19, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Allen Dominek and Arlen Dominek, Plaintiffs/Appellants, vs. Equinor Energy L.P. f/k/a and a/k/a Brigham Oil & Gas L.P. and Statoil Oil and Gas L.P., and Grayson Mill Williston, LLC, Defendants/Appellees.	)	Supreme Court No. 20220088 U.S. District Court No. 1:19-cv-00288

Certification Order Entered March 16, 2022
U.S. District Court Case No. 1:19-cv-288
United States District Court for the District of North Dakota
The Honorable Daniel L. Hovland

BRIEF AND ADDENDUM OF *AMICUS CURIAE* NORTH DAKOTA PETROLEUM COUNCIL, INC. IN SUPPORT OF DEFENDANTS/APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Paragraph**

Statutes

Other Authorities

STATEMENT OF IDENTITY AND INTEREST

[¶ 1] The North Dakota Petroleum Council ("NDPC") is a trade association representing more than 500 companies involved in all aspects of the oil and gas industry, including operators who produce approximately 98% of the oil in North Dakota. Because many NDPC members operate and produce from overlapping spacing units and allocate production in the same manner as Defendant Equinor, the questions certified to this Court are of vital interest to the NDPC. This brief was authored by counsel for the NDPC, and not counsel for any other party. No other party, party's counsel, or person other than the NDPC contributed money to prepare or submit this brief.[1]

BACKGROUND

[¶ 2] This Court has recognized that traditional property concepts generally, and the rule of capture specifically, contributed to inefficiency and waste in oil and gas development. *Gadeco, LLC v. Indus. Comm'n of State*, 2012 ND 33, ¶¶ 3-4, 812 N.W.2d 405. To promote efficient devolvement, North Dakota enacted the "Act for the Control of Gas and Oil Resources in 1953," which is codified at N.D.C.C. ch. 38-08. *Id.* That chapter provides the Industrial Commission (the "Commission") with extremely broad and comprehensive powers to regulate North Dakota's oil and gas development. *Black Hills Trucking, Inc. v. N.D. Indus. Comm'n,* 2017 ND 284, ¶ 12, 904 N.W.2d 326.

[1] Grayson Mill is a current member of the NDPC. Equinor is a former member of the NDPC. Neither Grayson Mill, Equinor, nor their counsel authored or contributed money to prepare or submit this brief.

A. The Commission creates pooled spacing units and drilling setbacks.

[¶ 3] The Commission commonly promotes efficient development of North Dakota's oil and gas reserves by creating and pooling spacing units. The Commission is empowered to establish spacing units "[w]hen necessary to prevent waste, to avoid the drilling of unnecessary wells, or to protect correlative rights[.]" N.D.C.C. § 38-08-07(1). Absent voluntary pooling, the Commission will "enter an order pooling all interests in the spacing unit for the development and operations thereof." N.D.C.C. § 38-08-08(1). Any pooling order "must be upon terms and conditions that are just and reasonable, and that afford to the owner of each tract or interest in the spacing unit the opportunity to recover or receive, without unnecessary expense, that owner's just and equitable share." *Id.*

[¶ 4] To protect the correlative rights of owners outside the spacing unit from having their oil and gas drain across the spacing unit boundary, the Commission imposes setback requirements that prohibit wellbores within certain distances of the spacing unit boundary. For example, the Commission generally imposes a 500-foot setback from the east and west boundaries of a standup 1,280-acre spacing unit (i.e., a spacing unit one mile wide and two miles long with wells drilling in a north-south configuration). *See, e.g.,* (R26-7:6:¶18). Those setbacks alone[2] prevent drilling into approximately 19% of the typical standup 1,280-acre spacing unit.[3] The 500-foot setbacks often create 2-mile-

[2] The Commission also imposes smaller setbacks from the "heel" and "toe" of horizontal wells (i.e., from the north and south boundaries of a standup spacing unit).

[3] There are 55,756,800 square feet in two standard sections (each of which contains one square mile), calculated as 10,560 ft*5,280 ft. The 500-foot setbacks collectively create 10,560,000 square feet of area through which producers cannot drill, calculated as (500 ft*10,560 ft) + (500 ft*10,560 ft).

long 1,000-foot-wide undrilled strips along the east and west boundaries of adjacent standup spacing units. Wells outside these setback areas may drain some of the reserves in the setback areas, but not as efficiently or completely as a well drilled into the setback area.

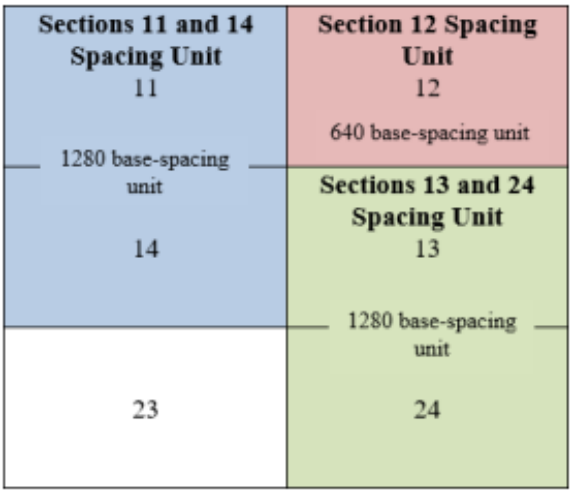
B. Overlapping spacing units allow the drilling of setback areas.

[¶ 5] To prevent the waste that would result from leaving such setback areas less than fully developed, the Commission commonly spaces and pools spacing units that overlap two or more previously pooled spacing units, commonly referred to as "overlapping" and "base" spacing units, respectively. These overlapping spacing units are typically larger than base spacing units, often comprising 2,560-acre blocks that embrace four sections. The Commission typically authorizes one or two wells to be drilled near the center section line of the overlapping spacing unit, to produce from the setback areas of the base spacing units.[4] *See* (R34-2). North Dakota has thousands of overlapping spacing units at present.

[¶ 6] Many overlapping spacing units consist of two adjacent 1,280-acre base spacing units that are wholly within the overlapping spacing unit. In those cases, the question of allocating production to lands outside the overlapping spacing unit does not arise. However, issues arising from existing spacing or topography often dictate that the overlapping spacing unit only include portions of a given base spacing unit. As a result, North Dakota presently has hundreds of overlapping spacing units that include base units partially inside and partially outside the overlapping spacing unit. The case at bar is

[4] For an illustrative video, *see* Permitting Program, Frequently Asked Questions "What are Overlapping Spacing Units?", https://www.dmr.nd.gov/oilgas/permitting.asp#mr5.

illustrative, with the 1,280-acre spacing unit consisting of Sections 13 and 24 being half in and half out of the 2,560-acre spacing unit consisting of Sections 11, 12, 13, and 14. *See* (R70:4):



C. Producers, the Commission, and federal government allocate production from overlapping spacing units across the entirety of affected base spacing units.

[¶ 7] In situations where the boundaries of the overlapping spacing unit and base spacing units do not neatly align, operators of overlapping spacing units are tasked with allocating production in accordance with all the Commission's pooling orders. In general, this means that they first ratably allocate production across all lands within the overlapping spacing unit as if it were a single tract. Next, they allocate production across base spacing units either wholly or partly within the overlapping spacing unit. In this case, that means allocating 25% of production from the 2,560-acre overlapping spacing unit (the "Overlapping Unit") to Section 13, and further allocating that share of production with the 1,280-acre base spacing unit (the "Base Unit") that consists of Sections 13 and 24, resulting in Section 13 and Section 24 each receiving 12.5% of the

production from the Overlapping Unit well. Allocating production from overlapping spacing units has occurred in this way for over a decade. *See, e.g.,* (R44-7:2:¶2).

[¶ 8] The Commission has previously interpreted its pooling orders and pooling statute to require allocation across the base spacing unit under analogous circumstances:

> The Commission believes the allocation of production as described is appropriate since the lease-line horizontal well in the overlapping lease-line 2560-acre spacing unit will recover oil from lands within the setback area of the underlying base 1280-acre spacing units, oil that without the lease-line horizontal well would be recovered less efficiently or not at all by the horizontal wells in the base 1280-acre spacing units; therefore, all pooled interest owners within the base 1280-acre spacing units should receive their equitable share of that oil, not just the interest owners in the sections included in the lease-line spacing unit but all interest owners in horizontal wells in the base 1280-acre spacing unit.

NDIC File No. 36559, at p.6, ADD-007; *see also* (R44-12).

[¶ 9] The federal government has applied this same interpretation to federal mineral tracts in North Dakota. Because federal interests cannot be pooled by the Commission, development of federal minerals and Indian trust lands in North Dakota requires execution of a communization agreement (or "CA") with the federal government. *See Horob v. Zavanna, LLC*, 2016 ND 168, ¶¶ 18-26, 883 N.W.2d 855 (discussing communitization). These communitization agreements generally correspond to Commission-created spacing units. *See, e.g.,* (R26-12:¶1). To develop interests in a setback area, the federal government commonly executes a communitization agreement that corresponds to a Commission-approved overlapping spacing unit. *See id.* Such agreements, in turn, overlap areas covered by "base" communitization agreements that correspond to the Commission's base spacing units. *See, e.g., id.*

[¶ 10] Under Permanent Instruction Memorandum No. 2018-004 dated July 27, 2018, the federal government directed that production from an overlapping communitized area should be allocated to lands and then further allocated across the base communitized areas. (R26-11). In fact, the document contains an illustration that includes a "Base CA" analogous to the Base Unit at issue in this case, with Section 13 inside and Section 24 outside a four-section "Overlapping CA." *Id.* at 5, Fig. 2. The federal instructions dictate that Section 13 and Section 24 each receive 12.5% of production, just as Equinor has argued in this case. Numerous active communitization agreements in North Dakota obligate operators to distribute production in the same manner. *See, e.g.,* (R26-12:9) ("All production allocated to this tract is to be further allocated in accordance with the terms of CA NDM 107559. CA NDM 107559 consists of ALL of Sections 17 & 18 T.149N., R.97W." despite Section 18 being outside the overlapping communitized area). Operators of overlapping spacing units that include federal interests, of which there are many, have distributed well revenues consistent with this federal directive.

[¶ 11] In short, industry practice, Commission guidance, and federal directives all align with Equinor's allocation of production in this case.

ARGUMENT

[¶ 12] North Dakota's pooling statute and the pooling orders at issue require Equinor to allocate production from the Overlapping Unit across all the Base Unit. If the Court has any doubts, it should defer to the Commission's prior interpretations. Before the Court are five certified questions concerning the requirement of base unit allocation under N.D.C.C. § 38-08-08(1) and the applicable pooling orders. The Court should answer Question 1 "Yes." The answer to Question 2 is "Yes" in that Order No. 18082

(the "Base Unit Order") requires allocating Overlapping Unit production to Section 24. The answer to Questions 3 through 5 is "No."

A. The pooling statute and the Base Unit Order require allocation across the Base Unit to protect correlative rights of all owners.

[¶ 13] North Dakota has declared it "in the public interest . . . to authorize and provide for the operation and development of oil and gas properties in such a manner . . . that the correlative rights of all owners be fully protected." N.D.C.C. § 38-08-01. Correlative rights have numerous dimensions, including that each "landowner is entitled to a just and equitable share of oil or gas in the pool." *Hystad v. Indus. Comm'n*, 389 N.W.2d 590, 596 (N.D. 1986). Both N.D.C.C. § 38-08-08(1) and the Base Unit Order require allocation across the Base Unit as the only means of fully protecting the correlative rights of all owners impacted by production from the Overlapping Unit.

1. The pooling statute and pooling orders require production from the Overlapping Unit be deemed as production from Section 13 "for all purposes," including for allocating production within the Base Unit.

[¶ 14] Under N.D.C.C. § 38-08-08(1), "[t]hat portion of the production allocated to each tract included in a spacing unit covered by a pooling order must, when produced, be deemed <u>for all purposes</u> to have been produced from such tract by a well drilled thereon." *Id.* (emphasis added). The pooling statute thus treats all production from any pooled lands as if production occurred on each integrated tract. *See, e.g., Horob*, 2016 ND 168, at ¶ 24. Nothing limits the pooling to one spacing unit or one pooling order, because that production must be deemed to have occurred on each pooled tract "for all purposes." N.D.C.C. § 38-08-08(1). Pooling orders must be read together, not in isolation. *See Murphy v. Amoco Production Co.*, 590 F. Supp. 455, 462 (D.N.D. 1984).

[¶ 15] Here, the Overlapping Unit Order undisputedly allocates production to each tract within the Overlapping Unit, including Section 13. Under N.D.C.C. § 38-08-08(1), "[t]hat portion of the production allocated to [Section 13] . . . must, when produced, be deemed for all purposes to have been produced from [Section 13] by a well drilled thereon." "For all purposes" is without limitation and includes the purpose of allocating any portion of Overlapping Unit production attributable to Base Unit lands, as if a well was drilled on Section 13. As a result, the Base Unit Order further allocates production attributable to Section 13 to each tract in the Base Unit, including Section 24. In other words, the Overlapping Unit Order requires allocating 25% of the Overlapping Unit production to Section 13, and the Base Unit Order further requires allocating half of Section 13's production to Section 24. Read together, Section 38-08-08(1) and the pooling orders require that Section 24 share in production from the Overlapping Unit.

[¶ 16] The Court should answer Question 1 "Yes."

2. Allocating production from the Overlapping Unit across the full Base Unit protects correlative rights and ensures all owners receive their just and equitable share of production from the Base Unit.

[¶ 17] Allocating production across the Base Unit is necessary to protect correlative rights and to permit each owner to receive their just and equitable share, as required by the Base Unit Order. As noted above, correlative rights have numerous dimensions. Those rights include that each "landowner is entitled to a just and equitable share of oil or gas in the pool." *Hystad*, 389 N.W.2d at 596. They also include "the opportunity to produce[.]" *Hanson v. Indus. Comm'n*, 466 N.W.2d 587, 594 (N.D. 1991). Conservation laws, however, limit an owner's ability to self-develop the reserve to secure their just and equitable share. *See Texaco Inc. v. Indus. Comm'n of State of*

N.D., 448 N.W.2d 621, 624 (N.D. 1989). To avoid a confiscation of property without due process, conservation laws must permit an owner to receive their just and equitable share of the supply when produced. *See id.*

[¶ 18] In North Dakota, that occurs through the pooling statute and corresponding pooling orders. *See id.* Consistent with N.D.C.C. § 38-08-08(1), the Base Unit Order requires each owner in the Base Unit receive "their just and equitable share of production from the spacing unit in the proportion as their interest may appear in the spacing unit." (R26-4:2:¶4). The entitlement to a just and equitable share extends to the entirety of the pooled spacing unit, including those oil and gas reserves located in setback areas. The inability to drill a wellbore into the setback does not diminish each owner's correlative rights to obtain their equitable share of the reserves within in the setback. "All owners," not just those whose interests are subsequently committed to an overlapping spacing unit, are entitled to a share in any production from lands pooled in the Base Unit. *Id.* (emphasis added).

[¶ 19] The reason is simple—the oil and gas reserves located within the setback remain pooled with the other reserves in the Base Unit, and each owner therein has correlative rights that entitle them "to a just and equitable share of oil or gas in the pool." *Hystad*, 389 N.W.2d at 596. As illustrated by this case, the Overlapping Unit and Base Unit share a common supply of oil and gas reserves in the western setback of Section 13. As a result, production from the Overlapping Unit drains from the same supply that could have been produced by Base Unit wells but for the Commission's setbacks. Indeed, a Base Unit well adjacent to the setback area could undoubtedly produce some of the reserves from the setback area, even if a section line well may do so more completely or

more efficiently. The Base Unit Order requires allocation across the Base Unit as the only means through which each owner in the Base Unit may receive "their just and equitable share of production from the [base] spacing unit," including the setbacks. (R26-4:2:¶4). A contrary result could be of constitutional concern—setbacks would prevent owners in Section 24 from fully developing the Base Unit to secure their just and equitable share, and yet those owners would not share production from the Overlapping Unit. *See Texaco*, 448 N.W.2d at 624.

[¶ 20] The Overlapping Unit also implicates correlative rights insofar as it may impact Base Unit wells. While safeguards (such as well spacing) exist, the Overlapping Unit could adversely impact production from the Base Unit and harm owners in Section 24 if they do not share in production from the Overlapping Unit well. *See Hanson*, 466 N.W.2d at 594 (discussing possible extraterritorial effects). In addition to draining the common supply, the Overlapping Unit well could decrease formational pressures necessary for production from the Base Unit. *See Syverson v. N.D. Indus. Comm'n*, 111 N.W.2d 128, 132 (N.D. 1961) (recognizing recovery "depends on the pressure in the field"). In fact, the Commission has asserted that production from an overlapping spacing unit may cause "negative impacts to a well or wells in a base 1280-acre spacing unit[.]" NDIC File No. 36559, at p.7, ADD-008. This Court has expressed similar concerns in other contexts. *See Texaco*, 448 N.W.2d at 625 n.4. When a base spacing unit is partially in and partially out of the overlapping spacing unit, the Commission has asserted allocation across the base spacing unit is necessary to protect correlative rights of all owners in the pool. NDIC File No. 36559, at p., ADD-008. This is the correct result.

[¶ 21] A contrary result would harm interest owners across North Dakota, not only because it would undermine correlative rights but also because it would upset settled expectations. For over a decade, producers have allocated production from myriad overlapping spacing units consistent with the Commission's long-standing interpretation. *See, e.g.,* (R26-12). If this Court construes the pooling statute or standard pooling orders to prohibit allocation from section line wells across base spacing units, the implications will be far reaching. Years of payments from numerous wells may be challenged, and litigation will likely proliferate. Operators of overlapping spacing units that include federal tracts would be subject to conflicting allocation requirements in Commission pooling orders versus federal communitization agreements. On that reality, development of some overlapping spacing units involving federal minerals and Indian trust lands—of which there are countless in western North Dakota—may be delayed or abandoned altogether. In short, reversing the Commission's interpretation and established industry practice concerning base spacing unit allocation will represent a fundamental shift concerning pooling orders and correlative rights in North Dakota.

[¶ 22] By contrast, the result urged by Equinor does not diminish or offend the correlative rights of any owner. Here, owners in Section 13 receive the same share of production they otherwise would have received had the reserves underlying the setback been produced from the Base Unit. The possibility also remains that the western setback in Section 24 could be produced in the future from a different overlapping spacing unit. In that event, owners in Section 13 would benefit from allocation across the Base Unit under N.D.C.C. § 38-08-08(1) and the Base Unit Order because, again, such production would drain the same reserves that could have been developed in the Base Unit but for

the setback. North Dakota law requires protecting the correlative rights of all owners, not just those owners who have their interests included in an overlapping spacing unit. *See* N.D.C.C. § 38-08-01.

[¶ 23] The answer to Question 2 is "Yes" in that as the Base Unit Order requires allocating Overlapping Unit production to Section 24. The Overlapping Unit Order requires allocating 25% of Overlapping Unit production to Section 13, and the Base Unit Order requires further allocating that share of production evenly across the Base Unit, such that Section 13 and Section 24 each receive 12.5% of the production from the Overlapping Unit. The answer to Question 3 is "No."

3. The limiting language in the Overlapping Unit Order is not relevant to allocating production from the Overlapping Unit to Section 24. Rather, it prevents production from the Base Unit from being reallocated across the Overlapping Unit.

[¶ 24] Many areas contain a series of overlapping spacing units that overlap base spacing units and/or other overlapping spacing units. Because N.D.C.C. § 38-08-08(1) requires production from each pooled tract be deemed to have occurred on that tract "for all purposes," an overlapping pooling order could be read to require reallocation of production from the base spacing units across the overlapping spacing unit. (R44-7:2:¶2). The pooling of the overlapping spacing unit, accordingly, could cause a "daisy chain" effect to occur, in which owners many miles apart would share production because of a series of overlapping spacing units. *See, e.g., id.* at ¶ 3; *see also* (R44-9:2).

[¶ 25] The Commission first considered this problem over a decade ago when a company expressed concern about how the pooling order for five overlapping spacing units would interact with the pooling orders for eight base spacing units. (R44-7). The

Commission clarified that the pooling of overlapping spacing units was limited to allocating production from overlapping spacing units and would not impact production allocations from any base spacing unit well, ordering that the overlapping pooling order was amended:

> to clarify that it is limited to pooling the five spacing units covered thereby for development and operation of such spacing units . . . and does not have the effect of further allocating production allocated to separately owned tracts within those five spacing units by other pooling orders or any pooling agreements that may exist.

(R.44-10:3:¶1). The Commission has since commonly included similar language in its pooling orders for overlapping spacing units, and has instructed that this language only clarifies that the overlapping pooling order "does not result in the sharing of horizontal wells drilled and completed in one of the base . . .units[.]" (R44-12:19).

[¶ 26] Questions 4 and 5 implicate this language. This limiting language does not "require the reallocation of production allocated to separately owned tracts within any spacing unit by any existing pooling orders[.]" *See also* (R62-8:3:¶8) (emphasis added). This prevents production from the Base Unit being further allocated across the Overlapping Unit; it does not prevent production from the Overlapping Unit being further allocated across the Base Unit. *See* (R44-12:19). The language at issue in Questions 4 and 5 is therefore irrelevant to the dispute in this case—it neither requires nor prohibits allocation of Overlapping Unit production across the Base Unit.

[¶ 27] The Court should answer Questions 4 and 5 "No."

B. The Court should defer to the Commission's interpretations.

[¶ 28] The meaning of N.D.C.C. § 38-08-08(1), the Overlapping Unit Order, and the Base Unit Order are unambiguous as applied to the certified questions. But if the

Court has any doubts, it should defer to the Commission's interpretation of the issue. Administrative agencies "routinely construe statutes under which they operate in the performance of administering those laws." *GEM Razorback, LLC v. Zenergy, Inc.*, 2017 ND 33, ¶ 12, 890 N.W.2d 544. Because of their expertise, courts will "generally defer to an administrative agency's reasonable interpretation of its governing statutes and rules." *Black Hills Trucking*, 2017 ND 284, at ¶ 19. When faced with a statute of doubtful meaning, this Court will give weight to an agency's long-continued, practical interpretation. *See City of Fargo v. Ness*, 551 N.W.2d 790, 793 (N.D. 1996).

[¶ 29] The certified questions all turn on technical Commission-specific statutes and pooling orders. The Commission has offered the following interpretation:

> The Commission believes the allocation of production as described [across the base spacing unit] is appropriate since the lease-line horizontal well in the overlapping lease-line 2560-acre spacing unit will recover oil from lands within the setback area of the underlying base 1280-acre spacing units, oil that without the lease-line horizontal well would be recovered less efficiently or not at all by the horizontal wells in the base 1280-acre spacing units; therefore, all pooled interest owners within the base 1280-acre spacing units should receive their equitable share of that oil, not just the interest owners in the sections included in the lease-line spacing unit but all interest owners in horizontal wells in the base 1280-acre spacing unit.

NDIC File No. 36559, at p.6, ADD-007. The Commission further expressed that this "is the <u>understanding and interpretation of the North Dakota Industrial Commission</u>, Department of Mineral Resources, Oil and Gas Division[.]" *Id.* at p.8, ADD-009 (emphasis added). The Court should defer to that interpretation. *Black Hills Trucking*, 2017 ND 284, at ¶ 19. In addition to being correct, the Commission's interpretation has long been applied in North Dakota and ensures the Commission's setbacks do not deprive

any owner in a base spacing unit from receiving their just and equitable share of production, as discussed above. *See Ness*, 551 N.W.2d at 793.

[¶ 30] As a final alternative, if any doubt remains, the Court could require administrative exhaustion before the Commission. Doing so would respect the Commission's initial decision-making responsibility and would allow the Commission to use its experience and expertise in developing a record from which this Court may benefit. *See Vogel v. Marathon Oil Co.*, 2016 ND 104, ¶ 36, 879 N.W.2d 471. The Commission has previously accepted petitions to clarify the meaning of its orders. *See, e.g.*, Commission Order No. 26006, ADD-010 (clarifying retroactivity of spacing order). To be clear, however, the NDPC does not believe that administrative proceedings should be required here, given the plain language of the Commission's orders and the Commission's prior interpretations of the issue presented by this case.

[¶ 31] If the Court believes that the statute or pooling orders are somehow ambiguous, the Court should defer to the Commission's interpretation and answer the five certified questions in the same manner discussed above.

CONCLUSION

[¶ 32] The NDPC respectfully requests the Court answer Question 1 "Yes", Question 2 "Yes" in that as the Base Unit Order requires allocating Overlapping Unit production to Section 24, and Questions 3 through 5 "No."

Dated this 19th day of July, 2022.

/s/ Paul J. Forster

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CERTIFICATE OF COMPLIANCE

[¶ 33] The undersigned hereby certifies, in compliance with N.D.R.App.P. 29(a)(5) and N.D.R.App.P. 32(a)(8)(A), that this Brief of *Amicus Curiae* North Dakota Petroleum Council in Support of Defendants/Appellees was prepared with proportional typeface, 12 pt. font, and that the total number of pages in the above brief is 19 pages.

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IN THE SUPREME COURT
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CERTIFICATE OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

I hereby certify that on July 19, 2022, true and correct copies of the following documents were electronically filed with the Clerk of the North Dakota Supreme Court:

1. Motion for Leave to File *Amicus Curiae* Brief by North Dakota Petroleum Council in Support of Defendants/Appellees;

2. *Amicus Curiae* Brief of the North Dakota Petroleum Council in Support of Defendants/Appellees (with Addendum)

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