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Contracts – Mines and Minerals: North Dakota Rejects Extensions of Oil Production Contracts on Unused Land

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CONTRACTS – MINES AND MINERALS: NORTH DAKOTA
REJECTS EXTENTIONS OF OIL PRODUCTION CONTRACTS
ON UNUSED LAND

Tank v. Citation Oil & Gas Corp., 2014 ND 123, 848 N.W.2d 691

ABSTRACT

In *Tank v. Citation Oil & Gas Corp.*, the North Dakota Supreme Court held that the drilling operations clause of an oil and gas lease failed to preserve the operator's right to extend the lease over unused portions of the land in the presence of an enforceable Pugh clause. The court, reviewing a district court summary judgment decision quieting title to Gregory Tank, reasoned that a failure to allow the Pugh clause to govern the drilling operations clause would make the Pugh clause wholly ineffective. Therefore, the court's holding in *Tank* focused on the Pugh clause language describing the severability of the parcel from the rest of the leasehold. *Tank* provides a clear avenue to landowners who wish to terminate oil and gas leases on parcels of land where no drilling operations have recently occurred, even if drilling operations have continued under the same lease on adjoining parcels.

I.	FACTS	428
II.	LEGAL BACKGROUND	429
	A. POOLING AND UNITIZATION OF OIL PRODUCTION UNITS	430
	B. THE INDIVISIBILITY OF OIL AND GAS LEASES AND THE PURPOSE OF THE PUGH CLAUSE	431
	C. EGELAND V. CONTINENTAL RESOURCES, INC.	432
III.	ANALYSIS	433
	A. THE COURT’S INTERPRETATION OF THE DRILLING OPERATIONS CLAUSE.....	434
	B. THE COURT’S INTERPRETATION OF THE PUGH CLAUSE	434
	C. WHEN IN CONFLICT, WILL THE PUGH CLAUSE OR DRILLING OPERATIONS CLAUSE GOVERN?	435
	D. DISSENT: UNDEVELOPED DOES NOT MEAN PREVIOUSLY DEVELOPED.	436
IV.	IMPACT ON NORTH DAKOTA PRACTITIONERS	437
	A. WRITING A PUGH CLAUSE AFTER <i>TANK</i>	437
	B. INTEGRATING A PUGH CLAUSE AND CONTINUOUS OPERATIONS CLAUSE AFTER <i>TANK</i>	438
V.	CONCLUSION.....	439

I. FACTS

In 1982, George and Phyllis Tank signed an oil and gas lease with a three-year primary term covering property in McKenzie County, North Dakota.¹ Although the parties ratified an extension of the primary term through 1989, production on the property continued for many years.² The Tank’s successor, Gregory Tank, filed a lawsuit in district court in 2011 against the operators under the lease seeking a determination that the oil and

1. Tank v. Citation Oil & Gas Corp., 2014 ND 123, ¶ 2, 848 N.W. 2d 691, 694.

2. *Id.*

gas lease had lapsed on the southwest quarter of the property.³ The Citation Oil & Gas Corporation and the other oil and gas operators under the lease filed a motion for summary judgment, arguing that production on other portions of the property under the lease was sufficient to hold the entire lease in effect during the period.⁴ Tank filed a cross-motion for summary judgment and argued that, under the Pugh clause of the lease, the operator's failure to maintain production on the southwest quarter of the property allowed it to be severed.⁵

The district court denied the operator's motion for summary judgment and sided with Tank, determining that the lapse in production on the southwest quarter was sufficient to cancel the lease.⁶ The court found that, between October 1, 2008 and October 30, 2009, production ceased on the southwest quarter, justifying the quieting of title in Tank.⁷ The defendants appealed the district court's decision.⁸

II. LEGAL BACKGROUND

Although oil and gas leases follow the rules of interpretation for contracts in general,⁹ courts must consider additional legal rules when interpreting them. Specifically, oil and gas contracts must address concerns for conservation of oil and gas and the protection of correlative rights.¹⁰ The rule of capture¹¹ created a regime which encouraged over drilling and the premature dissipation of natural reservoir energy.¹² Conservation regulation, including pooling or unitization of oil and gas leases, is one way policymakers have attempted to address these concerns.¹³ However, even as pooling or unitization has promoted the preservation of the entirety of an oil and gas lease to protect correlative rights, the lessor's ability to obtain revenue on a non-producing, non-pooled portion of the leased property has been jeopardized.¹⁴ Absent a Pugh clause, a lessor's only alternative would

3. *Id.* ¶ 6.

4. *Id.*

5. *Id.*

6. *Id.* ¶ 7, 848 N.W.2d at 694-95.

7. *Id.* at 695.

8. *Id.* ¶ 1, 848 N.W.2d at 694.

9. *Egeland v. Cont'l Res., Inc.*, 2000 ND 169, ¶ 10, 616 N.W.2d 861, 864.

10. BRUCE M. KRAMER & PATRICK H. MARTIN, *THE LAW OF POOLING AND UNITIZATION* § 2.01 (3d ed. 2014).

11. Under the rule of capture, "the owner of a tract of land acquires title to the oil or gas which he produces from wells on his land, though part of the oil or gas may have migrated from adjoining lands." *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 561-62 (Tex. 1948).

12. KRAMER & MARTIN, *supra* note 10, at § 2.01.

13. *Id.*

14. *Id.* at § 9.01

be under the implied covenant of reasonable development.¹⁵ The North Dakota Supreme Court's first impression of the effect of a Pugh clause on an oil and gas lease occurred in *Egeland v. Continental Resources, Inc.*¹⁶

A. POOLING AND UNITIZATION OF OIL PRODUCTION UNITS

Pooling and unitization of oil production units began as a method of protecting correlative rights.¹⁷ Pooling can have a significant impact on the duration of a lease.¹⁸ A “principal effect of the pooling or the unitization of a lease in most states is to preserve the entire lease even if only a portion, however small, of the lease is included in the unit.”¹⁹ Pooling, therefore, can create quite harsh consequences for the lessor, whose interest may be diluted by having only a small portion of his leased land included in a pooled unit with other interests.²⁰ Even if the well is on the property of another in the pooled unit, the lessor may be disadvantaged by having the lease continue on the remaining non-pooled portions of his or her lease, removing an incentive for the lessee to continue development on that portion of the property.²¹

In North Dakota, pooling can be either voluntary or forced by the North Dakota Industrial Commission (“Commission”) order under North Dakota Century Code section 38-08-08(1).²² If the pooling is voluntary, then the parties with interests in the pool have the opportunity to set up the contract to address concerns they may have. On the other hand, if the pooling is forced by an order from the Commission, the pooling is required to be set up in a way that ensures each owner will receive his or her “just and equitable share.”²³ The Legislature tasked the Commission with encouraging the production of oil and gas while protecting correlative rights through efforts such as pooling.²⁴

15. See *Hermon Hanson Oil Syndicate v. Bentz*, 40 N.W.2d 304, 307-08 (N.D. 1949).

16. 2000 ND 169, ¶ 15, 616 N.W.2d 861, 866.

17. KRAMER & MARTIN, *supra* note 10, at § 2.02.

18. EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 26.13 (2014).

19. *Egeland*, ¶ 16, 616 N.W.2d at 866 (quoting KRAMER & MARTIN, *supra* note 10, at § 9.01).

20. See *Will-Drill Res., Inc. v. Huggs, Inc.*, 738 So. 2d 1196, 1200 (La. Ct. App. 1999).

21. KRAMER & MARTIN, *supra* note 10, at § 9.01.

22. N.D. CENT. CODE § 38-08-08(1) (2014) (stating that “[w]hen two or more separately owned tracts are embraced within a spacing unit, or when there are separately owned interests in all or a part of the spacing unit, then the owners and royalty owners thereof may pool their interests for the development and operation of the spacing unit. In the absence of voluntary pooling, the commission upon the application of any interested person shall enter an order pooling all interests in the spacing unit for the development and operations thereof.”).

23. *Id.*

24. N.D. CENT. CODE § 38-08-07(1) (2014).

B. THE INDIVISIBILITY OF OIL AND GAS LEASES AND THE PURPOSE OF THE PUGH CLAUSE

To identify how a Pugh clause may affect the pooling of a lease, one must examine the rules of interpretation for oil and gas leases. The same rules that govern interpretation of general contractual agreements also govern the interpretation of oil and gas contracts.²⁵ Words in an oil and gas contract are construed in their “ordinary and popular sense” unless the parties defined the terms or used them in a technical sense.²⁶ Contracts are also read in light of existing statutes, with the statute read into the contract as if it were a term.²⁷ Contracts are interpreted, if possible, to give effect to every provision.²⁸ Lastly, a contract must also be considered in its entirety to determine the true intent of the parties.²⁹

Oil and gas contracts, however, have additional legal rules. Normally, an oil and gas lease is indivisible by its nature.³⁰ Operations on, or production from, any part of the land in an oil and gas lease will ordinarily extend the entire lease beyond the primary term.³¹ If part or all of the land under a lease is pooled, production anywhere in the pool is normally sufficient to extend the lease, even if the production is not on the leased land.³² Lastly, an oil and gas lease is often construed in favor of the lessor because the lessee normally drafts the lease.³³

In 1947, a Louisiana lawyer named Pugh drafted a clause intended to prevent the lessor’s unpooled land from being disadvantaged by production on pooled lands.³⁴ The purpose of what is now known as a “Pugh” clause is “to protect the lessor from the anomaly of having the entire property held

25. *Egeland*, ¶ 10, 616 N.W.2d at 864.

26. *Id.*

27. *Id.*

28. N.D. CENT. CODE § 9-07-06 (2014) (“The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others.”). See also *Kortum v. Johnson*, 2008 ND 154, ¶ 44, 755 N.W.2d 432, 447.

29. *Egeland*, ¶ 10, 616 N.W.2d at 864.

30. *Id.* ¶ 16, 616 N.W.2d at 866 (citing *Shown v. Getty Oil*, 645 S.W.2d 555, 560 (Tex. Ct. App. 1982)).

31. *Id.* (citing *SMK Energy Corp. v. Westchester Gas Co.*, 705 S.W.2d 174, 176 (Tex. Ct. App. 1982)).

32. See N.D. CENT. CODE § 38-08-08(1) (2014) (stating that “[o]perations incident to the drilling of a well upon any portion of a spacing unit covered by a pooling order must be deemed, for all purposes, the conduct of such operations upon each separately owned tract in the drilling unit by the several owners thereof. That portion of the production allocated to each tract included in a spacing unit covered by a pooling order must, when produced, be deemed for all purposes to have been produced from such tract by a well drilled thereon.”).

33. *West v. Alpar Res., Inc.*, 298 N.W.2d 484, 490-91 (N.D. 1980).

34. *Egeland*, ¶ 17, 616 N.W.2d at 866 (citing *Shown*, 645 S.W.2d at 560).

under a lease by production from a very small portion.”³⁵ However, the Pugh clause is also designed to “foster . . . reasonable development of leased property.”³⁶ While the goal of a Pugh clause is to sever the lease when the leasehold is comprised of several parts, Pugh clauses can vary widely in form.³⁷ Nonetheless, a Pugh clause must be explicit in the lease, directing the division of the lease into several parts and stating that production on the pooled portion does not constitute production on the non-pooled portion.³⁸

C. EGELAND V. CONTINENTAL RESOURCES, INC.

The North Dakota Supreme Court addressed the applicability of a Pugh clause³⁹ to lands not committed to a spacing unit most recently in *Egeland v. Continental Resources, Inc.*⁴⁰ In that case, Egeland entered into two oil and gas leases with Cenex in 1991.⁴¹ The leases contained both a continuous drilling operations clause and a Pugh clause.⁴² Near the completion of the five-year primary term, the operator spudded one well in each of the five units comprising the leases that had been pooled under a compulsory pooling order from the Commission.⁴³ Egeland, the property owner and plaintiff, argued that the leases expired on all lands except those in the Skull Creek unit, which had begun production prior to the termination of the primary term.⁴⁴ Egeland argued that the Pugh clause and the habendum clause were in conflict; he contended the Pugh clause was controlling since it was written instead of pre-printed.⁴⁵ To the contrary,

35. *Id.* (quoting *Sandefur Oil & Gas, Inc. v. Duhon*, 961 F.2d 1207, 1209 (5th Cir. 1992)).

36. *Id.*

37. *Id.*

38. *Id.* at 867 (citing *Mesa Petroleum Co. v. Scheib*, 726 F.2d 614, 615-16 (10th Cir. 1984)).

39. One commentator argues that the *Egeland* court actually addressed a “retained-acreage” or “continuous-development” clause as opposed to a Pugh clause. The *Egeland* clause directly limits the usual result of the habendum clause as opposed to a Pugh clause, which directly modifies the pooling clause of the lease. In this note, we will follow the North Dakota Supreme Court’s language to reduce confusion and focus on the text of the clauses as opposed to semantics. See KUNTZ, *supra* note 18, at § 26.12-13.

40. *Egeland*, ¶ 2, 616 N.W.2d at 861.

41. *Id.*

42. *Id.* ¶¶ 3-4, 616 N.W.2d at 862-63.

43. *Id.* ¶¶ 5-6, 616 N.W.2d at 863.

44. *Id.* ¶ 18, 616 N.W.2d at 867.

45. *Id.*; see also N.D. CENT. CODE § 9-07-16 (2014) (stating that “[w]hen a contract is partly written and partly printed, or when part of it is written or printed under the special directions of the parties and with a special view to their intention and the remainder is copied from a form originally prepared without special reference to the particular parties and particular contract in question, the written parts control the printed parts and the parts which are purely original control those which are copied from a form and if the two are absolutely repugnant the latter must be disregarded insofar as such repugnancy exists.”).

the defendant lessees argued that the Pugh clause was not in conflict with the continuous drilling operations clauses because the Pugh clause did not “address drilling at the end of the primary term.”⁴⁶

The court agreed with the lessees’ construction of the lease provisions as not being in conflict with one another.⁴⁷ The court held that the word “ONLY,” as used in the lease’s Pugh clause, limited the impact of production under the Pugh clause to only the lands sharing in production; however, the word “ONLY” did not mean that the leases could not be extended by some other means such as a continuous drilling operations clause.⁴⁸ In addition, the court held that, contrary to the lessor’s argument that the continuous drilling operations clause needed to be upheld in each unit due to the Pugh clause, the continuous drilling operations clause operated on a lease-wide basis.⁴⁹ The court was concerned that the lessor’s interpretation requiring drilling immediately at the expiration of the primary term within each unit individually would have a “chilling effect on the covenant of reasonable development implied in every lease . . . recognized by this Court at least as far back as 1949.”⁵⁰ The court explained that no previous holding in North Dakota on the covenant of reasonable development had ever required simultaneous development in every unit.⁵¹ Furthermore, the court was disinclined to accept a result that favored lessees who were recently drilling—since their entire lease was extended under the drilling operations clause—as opposed to lessees who had finished drilling and were now producing, since their entire lease would not be extended under the Pugh clause.⁵²

III. ANALYSIS

In *Tank v. Citation Oil & Gas Corp.*, the North Dakota Supreme Court held that the Pugh clause of the oil and gas lease severed the lease, quieting title in the lessor.⁵³ The court divided the analysis into three parts: an examination of the drilling operations clause individually, consideration of the Pugh clause individually, and a determination of whether the clauses were in conflict with each other.⁵⁴

46. *Egeland*, ¶ 19, 616 N.W.2d at 867.

47. *Id.* ¶ 27, 616 N.W.2d at 869.

48. *Id.* at 869-70.

49. *Id.* ¶ 29, 616 N.W.2d at 870.

50. *Id.* (citing *Hermon Hanson Oil Syndicate v. Bentz*, 40 N.W.2d 304, 308 (N.D. 1949)).

51. *Id.* ¶ 30.

52. *Id.* at 870-71.

53. *Tank v. Citation Oil & Gas Corp.*, 2014 ND 123, ¶¶ 32-33, 848 N.W.2d 691, 701.

54. *See generally id.* ¶¶ 11-33, 848 N.W.2d at 696-701.

A. THE COURT'S INTERPRETATION OF THE DRILLING OPERATIONS CLAUSE

First, the court examined the oil and gas lease's drilling operations clause, which allowed for the lease to remain in force "so long as operations are continuously prosecuted and, if production results therefrom, then as long as production continues."⁵⁵ The lease also required no more than thirty days pass between operations on a well and no more than ninety days pass between "completion or abandonment of one well and the beginning of operations for the drilling of a subsequent well."⁵⁶ Since production anywhere on the property will generally extend the lease for the entire property,⁵⁷ the court was required to define the term "production" because it was not defined in the lease.⁵⁸ The court supplied a technical term for production: "production in paying quantities, that is, production in quantities sufficient to yield a return in excess of operating costs, even though drilling and equipment costs may never be repaid and the undertaking considered as a whole may ultimately result in a loss."⁵⁹

Under the supplied definition, the court determined that the lease should be extended on the entire premises under the drilling operations clause because there had been a producing well located on the property during the entire post-primary term period.⁶⁰

B. THE COURT'S INTERPRETATION OF THE PUGH CLAUSE

Secondly, the court examined the Pugh clause under the lease:

[L]essee may continue to hold this lease in full force and effect as to all of said lands for subsequent and successive periods of one year by conducting [sic] additional drilling operations on undeveloped portions of said lands during each preceding one year period. Should Lessee fail to conduct drilling operations during any such one-year period, then this lease shall expire as to said lands not included in producing units at the end of the one-year period during which no drilling operations were conducted.⁶¹

55. *Id.* ¶ 12, 848 N.W.2d at 696.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* (citing 8 KRAMER & MARTIN, WILLIAMS & MEYERS OIL AND GAS LAW MANUAL OF TERMS 816 (2013)).

60. *Id.* ¶ 13. The Tank 3-10 well on the northwest quarter produced until June 1998 when it was replaced with the Tank 3-10R well on the northwest quarter, which produced through the time of trial. *Id.*

61. *Id.* ¶ 15, 848 N.W.2d at 697.

The lessee's argued that the Pugh clause was only operative at the end of the primary term.⁶² The court disagreed, finding that the Pugh clause, when read as a whole, contemplated future one-year periods.⁶³ The court further acknowledged that the Pugh clause required "additional drilling operations on undeveloped portions of the land during each one-year period."⁶⁴ Since the lease did not define "undeveloped," the court was forced to supply a definition for the term.⁶⁵ The court held that "developed" land meant land that had "a completed well capable of producing oil or gas in paying quantities."⁶⁶ The majority of the court then surmised that "undeveloped" land was "land that does not have a completed well capable of producing oil or gas in paying quantities."⁶⁷ The court found that the lease expressly divided the land into producing units, and production from a well in a producing unit was not sufficient to maintain the lease on non-producing units.⁶⁸

Under this interpretation of the Pugh clause, the court found that the lease had expired on the southwest quarter of the property due to a lapse in production and drilling operations on that quarter from October 1, 2008 to October 30, 2009.⁶⁹ As of July 15, 2009, the one-year term had expired, the southwest quarter was not in a producing unit, and no drilling operations had been commenced during the prior year.⁷⁰ Therefore, under the Pugh clause, the court held that the lease on the southwest quarter of the property had expired.⁷¹

C. WHEN IN CONFLICT, WILL THE PUGH CLAUSE OR DRILLING OPERATIONS CLAUSE GOVERN?

Since the court's interpretation of the drilling operations clause and Pugh clause led to opposite results, the North Dakota Supreme Court undertook an analysis of which clause should govern the conflict.⁷² The court stated that allowing the drilling operations clause to govern over the

62. *Id.* ¶ 16.

63. *Id.* ¶ 17, 848 N.W.2d at 698.

64. *Id.* ¶ 18.

65. *Id.*

66. *Id.* (citing 8 KRAMER & MARTIN, WILLIAMS & MEYERS OIL AND GAS LAW MANUAL OF TERMS 258 (2013)).

67. *Id.*

68. *Id.* ¶¶ 20-21, 848 N.W.2d at 689-99. The Pugh clause specifically divided the lease into producing units comprising approximately 160 acres or as determined by the appropriate governing body of North Dakota. *Id.* ¶ 23 848 N.W.2d at 699.

69. *Id.* ¶¶ 22-25.

70. *Id.* ¶ 27, 848 N.W.2d at 700.

71. *Id.* ¶ 28.

72. *Id.* ¶ 27.

Pugh clause would essentially make the Pugh clause meaningless because the lease would continue as long as production continued on any well on the property or if drilling operations were commenced.⁷³ The defendant lessees argued that the North Dakota Supreme Court should adopt reasoning similar to that in *Egeland*, where the Pugh clause and drilling operations clause did not conflict.⁷⁴

However, the court maintained that the continuous drilling operations clause and Pugh clause in this case were different from those in *Egeland*.⁷⁵ Primarily, the court noted that the Pugh clause in *Tank* addressed drilling operations, while the Pugh clause in *Egeland* did not.⁷⁶ Specifically, the Tank lease provided that if drilling operations were conducted on undeveloped land, the entire lease was to be maintained under both the drilling operations and Pugh clauses.⁷⁷ Therefore, the North Dakota Supreme Court affirmed the district court's decision, holding that the Pugh clause modified the drilling operations clause by "terminating the lease on land not included in a producing unit when additional drilling operations are not conducted on undeveloped land during the one-year terms after the primary term expires."⁷⁸

D. DISSENT: UNDEVELOPED DOES NOT MEAN PREVIOUSLY DEVELOPED.

Justice Sandstrom provided the court's lone dissenting opinion.⁷⁹ The dissent disagreed that "undeveloped" land, as noted in the lease, should be defined using the definition for "developed" land as "land that has a completed well capable of producing oil or gas in paying quantities."⁸⁰ Justice Sandstrom argued that the majority's opinion seemed to incorporate previously developed, but no-longer producing land, into a definition of undeveloped.⁸¹ Instead, the dissent advocated for a definition of undeveloped land or acreage as "acreage not included in producing units or in units on which drilling has commenced"⁸² The dissent believed that Pugh clauses were created not only to protect the lessor, but also to promote

73. *Id.* ¶ 28.

74. *Id.* ¶ 29.

75. *Id.* ¶ 32, 848 N.W.2d at 701.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* ¶ 36, 848 N.W.2d at 702 (Sandstrom, J., dissenting).

80. *Id.* ¶¶ 39-40.

81. *Id.* ¶ 42.

82. *Id.* ¶ 43, 848 N.W.2d at 703 (citing *Cmty. Bank of Raymore v. Chesapeake Exploration, L.L.C.*, 416 S.W.3d 750, 755 (Tex. Ct. App. 2013)).

reasonable development of leased property.⁸³ Justice Sandstrom argued that “once a unit of land has had a producing oil well, a Pugh clause relating to ‘undeveloped land’ cannot operate to end the oil and gas lease with regard to that unit.”⁸⁴ Under the dissent’s interpretation, the lease would have continued, as the Pugh clause could not have expired on the southwest quarter because it had been previously developed.⁸⁵

IV. IMPACT ON NORTH DAKOTA PRACTITIONERS

Although oil and gas related claims have come to the forefront of North Dakotan legal discussions due to the Bakken boom, North Dakota practitioners often need to look to sister states to determine legal outcomes. States such as Texas and Oklahoma have a wealth of legal history on oil and gas that North Dakota often lacks. This lack of information creates uncertainty in the legal environment. In *Tank*, the North Dakota Supreme Court clarified what language is required in Pugh clauses and continuous operations clauses.

A. WRITING A PUGH CLAUSE AFTER *TANK*

By upholding the Pugh clause in *Tank*, the North Dakota Supreme Court created a safe haven for landowners looking for appropriate language to insert into their land lease contracts. Because this is the first time North Dakota has found a Pugh clause to operate effectively, landowners can take guidance from the severability language contained in the *Tank* lease as they draft their own.

First, when drafting a Pugh clause, landowners will want to ensure that their lease specifically discusses producing units less than the size of the entire property. The court’s emphasis on the *Tank* lease’s definition of a “producing unit” as either a state defined area or approximately 160 acres⁸⁶ was critical to the court’s finding that the Pugh clause expressly severed the lease.⁸⁷ Furthermore, the careful drafter will verify that the Pugh clause, when read as a whole, explicitly discusses periods beyond the end of the primary term. In *Tank*, the court specifically denied the oil company’s assertion that the Pugh clause only operated at the end of the primary term

83. *Id.* ¶ 43.

84. *Id.* ¶ 44.

85. *Id.* ¶ 45.

86. *Id.* ¶ 23, 848 N.W.2d at 699 (majority opinion).

87. *Id.* ¶ 20, 848 N.W.2d at 698.

because of the language in the rest of the paragraph discussing subsequent one-year periods.⁸⁸

Lastly, a cautious landowner will consider placing a definition of “undeveloped” in the lease itself. Since the discussion between the majority and dissent in *Tank* centered upon this court-supplied definition,⁸⁹ drafters can avoid the issue altogether by placing the term in the lease. Landowners will prefer the majority’s definition of undeveloped: land “that does not have a completed well capable of producing oil or gas in paying quantities.”⁹⁰ On the other hand, it would be in the best interest of oil companies operating in North Dakota to provide a definition similar to that of the dissent—where undeveloped land “does not include ‘land in producing units or in units on which drilling has commenced.’”⁹¹

B. INTEGRATING A PUGH CLAUSE AND CONTINUOUS OPERATIONS CLAUSE AFTER *TANK*

Drafting an effective Pugh clause, however, is only half the battle because the Pugh clause must interact with the continuous operations clause in the correct manner. The critical difference in the court’s analysis between *Egeland* and *Tank* is that the court in *Egeland* construed the Pugh and continuous drilling operations clauses as working together,⁹² while the court in *Tank* found them to be in conflict with each other.⁹³ To draft a Pugh clause that is effective in light of a continuous drilling operations clause, the *Tank* decision indicates that a lessor should ensure that the Pugh clause allows the lease to be continued *only* if production or drilling occurs on the non-pooled land. The Pugh clause should explicitly indicate that the continuous drilling operations clause will not operate lease-wide, but will be segregated into a pool-by-pool basis. This stands in contrast to the *Egeland* Pugh clause, which only required the lessee to fulfill the continuous drilling operations clause on a lease-wide basis.⁹⁴ Since the Pugh clause in *Egeland* was not clear about whether the lease could be extended by other means, the court was unwilling to uphold it. Lessor drafters should pay particular attention to the limiting language of the Pugh clause and consider something similar to the provision in *Tank*, which

88. *Id.* ¶¶ 17-18.

89. *See id.* ¶ 18.

90. *Id.*

91. *Id.* ¶ 44, 848 N.W.2d at 703 (Sandstrom, J., dissenting) (quoting Cmty. Bank of Raymore v. Chesapeake Exploration, L.L.C., 416 S.W.3d 750, 755 (Tex. Ct. App. 2013)).

92. *Egeland v. Cont’l Res., Inc.*, 2000 ND 169, ¶ 19, 616 N.W.2d 861, 867.

93. *Tank*, ¶ 32, 848 N.W.2d at 701.

94. *Egeland*, ¶ 19, 616 N.W.2d at 869.

indicated that “[s]hould Lessee fail to conduct drilling operations during any such one-year period, then this lease shall expire as to said lands not included in producing units at the end of the one-year period during which no drilling operations were conducted.”⁹⁵

V. CONCLUSION

North Dakota’s meteoric rise on the national oil production scene is increasingly being complemented by an equal increase in judicial precedent on oil and gas issues.⁹⁶ *Tank’s* holding that a Pugh clause that expressly severs a lease for undeveloped lands and expressly operates beyond the primary term was the first time a Pugh clause had been held enforceable by the North Dakota Supreme Court. *Tank* fills a gap in North Dakota’s legal regime regarding Pugh clauses in oil and gas leases by providing a path for interested parties to ensure their leases are enforceable. Parties can easily contract around the court’s dispute over the definition of “undeveloped” described in the dissenting opinion by Justice Sandstrom. *Tank* provides practical guidance not only to lawyers looking to help clients draft a lease, but also to landowners with existing leases that find themselves with only a few operations extending the lease on an entire property. For those individuals, the North Dakota Supreme Court has provided relief in *Tank*.

Jesse Liebe^{*}

95. *Tank*, ¶ 15, 848 N.W.2d at 697.

96. See N.D. DEP’T OF MINERAL RESOURCES: OIL AND GAS DIVISION, *ND Monthly Oil Production Statistics*, <http://www.dmr.nd.gov/oilgas/stats/historicaloilprodstats.pdf> (showing that oil production has risen from 115,142 barrels of oil per day during December 2006 to 1,114,421 barrels of oil per day during July 2014).

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