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**The Dark Side of the Bakken Boom: Protecting the Importance of an Oil and Gas Lease's Bonus Payment Through Proposed Legislative Amelioration of *Irish Oil and Gas, Incorporated v. Reimer***

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THE DARK SIDE OF THE BAKKEN BOOM: PROTECTING  
THE IMPORTANCE OF AN OIL AND GAS LEASE'S BONUS  
PAYMENT THROUGH A PROPOSED LEGISLATIVE  
AMELIORATION OF *IRISH OIL AND GAS,  
INCORPORATED V. RIEMER*

ABSTRACT

As the Bakken oil boom matures, North Dakota courts are increasingly encountering questions concerning the validity of oil and gas leases, including whether a lessee's failure to timely tender a paid-up lease's bonus constitutes a complete or partial failure of consideration. In *Irish Oil and Gas, Incorporated v. Riemer*, the North Dakota Supreme Court held that it could not rule that a lessee's failure to timely tender a paid-up lease's bonus necessarily constitutes a complete failure of consideration because the lease's royalty interest may constitute sufficient consideration. Regardless of the decision's legal merits, this holding unfortunately usurps lessor-lessee relations by realigning the risks associated with a lease's execution and relegates lessors to pursuing inefficient forms of legal recourse that cannot account for the potential economic cost of the lessee's conduct. In order to rectify these and other policy concerns, this article will argue that North Dakota should adopt a statute that automatically terminates a lease, without the need for judicial intervention, if a lessee fails to tender a lease's bonus within thirty days of the lease's execution, the lessor subsequently notifies the lessee, in writing, of such a delinquency, and the lessee fails to redress the situation within fifteen additional days. To do otherwise subjects unsophisticated lessors to the mercurial and capricious whims of sophisticated lessees who speculate about a lease's value at the lessor's expense.

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I. INTRODUCTION

The Bakken shale formation is a 200,000 square mile geological region that encompasses parts of Montana, North Dakota, and Saskatchewan.<sup>1</sup> Scientists estimate that the Bakken contains in excess of 500 billion barrels

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1. See generally Toni Tease, *The Bakken Boom is Producing Not Only Oil but Also Creative Juices*, 38 MONTANA LAW. 22 (2012). For simplicity’s sake, this article refers to all geographical formations in western North Dakota as “the Bakken.”

of oil,<sup>2</sup> of which, approximately 4 billion barrels are recoverable with contemporary technology.<sup>3</sup> Amerada Oil first tapped the Bakken's potential in 1951,<sup>4</sup> and thereafter, North Dakota experienced intermittent spates of boom and bust development.<sup>5</sup> Recent advances in hydraulic fracking have ushered in a prosperous era of Bakken development as operators have enjoyed a drilling success rate of 99% in certain parts of the state.<sup>6</sup> This success has propelled North Dakota's oil production to 931,000 barrels of oil per day,<sup>7</sup> and some estimate that North Dakota could produce 1.3 million barrels of oil per day by 2023 and 2 million barrels of oil per day by 2029.<sup>8</sup>

Despite this prosperity, the oil industry remains laden with numerous risks,<sup>9</sup> and one must understand the context in which such risks occur in order to appreciate how these risks threaten lessor interests. In developing an understanding of these risks, this article begins by exploring how the various types of promises contained in oil and gas leases relate to the contractual precept of consideration. As a corollary, the article continues by examining how a party's potential breach of the lease in relation to the consideration supporting the lease may excuse a party from the lease. After this survey, the article addresses the North Dakota Supreme Court's decision in *Irish Oil & Gas, Incorporated v. Riemer* and how the majority and dissent's respective opinions appear to rest on tenuous legal underpinnings. Notwithstanding these legal issues, the article then examines how *Irish Oil* may adversely affect lessor interests and how North Dakota can go about remedying the problems potentially associated with *Irish Oil*. Finally, the article concludes by briefly touching upon various

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2. Leonardo Maugeri, *Oil: The Next Revolution: The Unprecedented Upsurge of Oil Production Capacity and What it Means for the World*, BELFER CTR. FOR SCI. & INT'L AFFS., HARV. KENNEDY SCH., June 2012, at 2.

3. UNIV. OF N.D. ENERGY & ENV'T RESEARCH CTR., *Bakken Formation Resource Estimates*, available at <http://www.undeerc.org/bakken/oilproduction.aspx>. Some have concluded that the Bakken may eventually produce up to 24 billion barrels of oil. See Stephen Moore, *The Weekend Interview with Harold Hamm: How North Dakota Became Saudi Arabia*, WALL ST. J., Oct. 1, 2011, at A13.

4. Owen Anderson, *Introduction: North Dakota Energy Landscape*, 85 N.D. L. REV. 715, 715 (2010).

5. *Id.* at 719.

6. See N.D. Indus. Comm'n, *Oil and Gas Frequently Asked Questions*, pg. 7, available at [www.nd.gov/ndic/ogrp/info/g-015-033-faq.pdf](http://www.nd.gov/ndic/ogrp/info/g-015-033-faq.pdf).

7. Nick Smith, *Oil Drilling Expected to Remain Strong*, BISMARCK TRIB., Dec. 12, 2013, available at [http://bismarcktribune.com/bakken/oil-drilling-expected-to-stay-strong/article\\_82ebe8d6-6375-11e3-9aa5-001a4bcf887a.html](http://bismarcktribune.com/bakken/oil-drilling-expected-to-stay-strong/article_82ebe8d6-6375-11e3-9aa5-001a4bcf887a.html).

8. James Mason, *Bakken's Maximum Potential Oil Production Rate Explored*, OIL & GAS J., available at <http://www.ogj.com/articles/print/vol-110/issue-4/exploration-development/bakken-s-maximum.html>.

9. See Anderson, *supra* note 4, at 719-20.

methods that lessors can employ to adequately protect their interests from *Irish Oil*.

#### A. OIL AND GAS LAW AND CONSIDERATION

From its inception, oil and gas law experienced a peculiar development because courts and legislatures could not refer to English law in developing governing doctrines.<sup>10</sup> Due to this precedential void, the legal community struggled to reconcile principles from other subsets of law into governing axioms,<sup>11</sup> and oil and gas law became the product of case-law at its worst.<sup>12</sup> Nevertheless, the legal community articulated various black letter rules that transcended jurisdictional inconsistencies, including the rule that oil and gas leases are contracts.<sup>13</sup> Accordingly, although leases are unique<sup>14</sup> and concern nearly every classification of property interest,<sup>15</sup> leases must still ascribe to basic contracting principles.

Among other requirements to form a legally binding agreement,<sup>16</sup> contracting parties must support a contract with sufficient consideration.<sup>17</sup> Generally, any benefit that the promisor agrees to confer upon the promisee may constitute sufficient consideration,<sup>18</sup> regardless of whether such consideration is inadequate given the circumstances.<sup>19</sup> Where sufficient consideration initially validated a contract, a party's breach of the contract causes either a complete or partial failure of consideration, each of which contains its own remedies.<sup>20</sup> Courts will excuse a party from a contract when it experienced a complete failure of consideration,<sup>21</sup> which occurs where a party "failed to perform a substantial part of its obligation so as to

10. Patick H. Martin, *Unbundling the Executive Right: A Guide to Interpretation of the Power to Lease and Develop Oil and Gas Interests*, 37 NAT. RES. J. 311, 312 (1997).

11. *Id.* at 313. For instance, North Dakota recognized that principles governing property law actually hindered the oil industry's growth. See *Cont'l Res., Inc. v. Farrar Oil Co.*, 1997 ND 31, ¶ 12, 559 N.W.2d 841.

12. See Martin, *supra* note 10, at 312.

13. N.D. CENT. CODE § 47-16-01 (1943) ("Leasing is a contract . . ."). Courts, however, also construe leases to be conveyances of real property. See *Petroleum Exchange v. Poynter*, 64 N.W.2d 718, 722 (N.D. 1954) (holding that "oil, gas and mineral leases are conveyances of interests in real property").

14. *Ramsey v. Grizzle*, 313 S.W.3d 498, 502 (Tex. App. 2010).

15. *Moorer v. Bethlehem Baptist Church*, 130 So.2d 367, 371 (Ala. 1961).

16. A valid contract also requires that consenting parties, who are capable of contracting, execute the agreement for a lawful purpose. N.D. CENT. CODE § 9-01-02 (1943).

17. *Id.*

18. N.D. CENT. CODE § 9-05-01 (1943).

19. *Harrington v. Harrington*, 365 N.W.2d 552, 555 (N.D. 1985) ("If consideration . . . exists, courts will generally not inquire into the adequacy of the consideration.").

20. *First Nat. Bank of Belfield v. Burich*, 367 N.W.2d 148, 152-53 (N.D. 1985).

21. *Check Control, Inc. v. Shepherd*, 462 N.W.2d 644, 647 (N.D. 1990).

defeat the very object of the agreement.”<sup>22</sup> Contrastingly, a court will only award monetary damages in an instance concerning a partial failure of consideration, which occurs where the party’s failure to perform under the contract leaves other sufficient consideration to sustain the contract.<sup>23</sup> Due to this differentiation, it is imperative to determine whether a party’s failure to perform under the contract constituted a complete or partial failure of consideration. Courts will generally consider such an inquiry based upon the facts of a given case;<sup>24</sup> however, “[i]ssues of fact may become issues of law for the court if reasonable persons could reach only one conclusion from the facts.”<sup>25</sup>

Pursuant to these principles, any benefit conferred upon the lessor or detriment suffered by the lessee may constitute sufficient consideration in the context of oil and gas leases.<sup>26</sup> In exchange for the lessor granting the lessee the right to develop the lessor’s property, a lessee generally offers consideration consisting of a bonus, royalty interests, and delay rental payments.<sup>27</sup> Courts consider the lease’s royalty interest the lease’s primary consideration<sup>28</sup> so that a covenant to develop the property along with a promise to pay royalties if production occurs from such development constitutes sufficient consideration.<sup>29</sup> However, lessees generally contract around this covenant of development by using drilling-delay rental clauses, which obviate any such covenant by “giving the lessee the right to maintain the lease . . . by paying delay rentals instead of starting drilling operations.”<sup>30</sup> Such a combination constitutes sufficient consideration because the lessee is either obligated to pay royalties if development occurs or pay delay rentals if development has yet to occur on the property.<sup>31</sup> Although the exchange of this consideration constitutes sufficient

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22. *Id.*

23. *Id.* Although the determination as to what constitutes a “substantial” failure to perform will be predicated upon the particularities of the given situation, one can discern the nature of a “substantial” breach by recognizing the distinction between a complete and partial failure of consideration. Since a partial failure of consideration occurs only where the breach of contract leaves sufficient consideration to sustain the contract, it stands to reason that a breach of contract is “substantial” where such breach leaves no other sufficient consideration to sustain the contract because such a situation would preclude a breach of contract from being classified as a partial failure of consideration.

24. *Id.* at 647.

25. *Groleau v. Bjornson Oil Co., Inc.*, 2004 ND 55, ¶ 6, 676 N.W.2d 763, 767.

26. *See* 38 AM. JUR. 2d *Gas & Oil* § 25 (1968).

27. 19A MICH. CIV. JUR. *Oil & Natural Gas* § 32 (2014).

28. 3A SUMMERS OIL & GAS § 31:1 (3d ed. 2012).

29. 58 C.J.S. *Mines & Minerals* § 280 (2009); 38 AM. JUR. 2d *Gas & Oil* § 25 (1968).

30. BLACK’S LAW DICTIONARY 569 (9th ed. 2009).

31. 12 B.E. WITKIN ET AL, *Summary of Cal. Law* § 799(2) (10th ed. 2000).

consideration, lessees also offer bonus payments, which are commonly referred to as “signing bonuses.”

## B. BONUS PAYMENTS AS CONSIDERATION

As competition for sought-after property increased, lessees began utilizing a one-time bonus payment to differentiate themselves from other lessees in attempting to induce the lessor to execute a lease in the lessee’s favor.<sup>32</sup> As such, a bonus is the consideration for the lessor’s execution of the lease<sup>33</sup> that provides the lessor with a speculative inducement to enter the lease insofar as the lessee will be able to collect additional royalties if production occurs on the property.<sup>34</sup> The amount a lessee is willing to pay as a bonus is contingent upon the perceived value of the lessor’s property, whether the lessor’s property is located in proven production areas, and tax consequences.<sup>35</sup> Because these circumstances are localized, lessees have paid bonuses from \$5 per acre in West Virginia to \$20,000 per acre in Texas.<sup>36</sup> Despite the fact that the bonus induces the lessor to execute a lease and the lessee is generally under no obligation to develop the property so as to provide royalties,<sup>37</sup> some lessees have unfortunately offered bonuses with little or no intention of tendering such payments, unless it is financially prudent to do so.

Due to the oil industry’s speculative nature, some lessees refuse to tender a lease’s bonus if market fluctuations or exploratory drilling render the lessor’s property worthless. For instance, lessors allege that Range Resources unjustly speculated about potential market fluctuations and refused to pay deferred lease bonuses after market prices suddenly slumped in 2010.<sup>38</sup> In North Dakota, lessees have refused to tender a bonus’s outstanding balance because the lessee failed to find a buyer for the lease

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32. 3A SUMMERS OIL & GAS § 31:1 (3d ed. 2012) (explaining that, “[a]s competition among lessees became keener, [lessees] instituted the practice of bidding against each other by offering the lessor a cash bonus for the lease . . .”).

33. *Antelope Prod. Co. v. Shrines Hosp. for Crippled Children*, 464 N.W.2d 159, 161 (Neb. 1991).

34. *Burlew v. Talisman Energy, Inc.*, 940 N.Y.S.2d 781, 787 (N.Y. 2011).

35. Ronald D. Nickum, *Negotiating and Drafting a Modern Lease on Behalf of Lessor*, 13 TEX. TECH L. REV. 1401, 1404 (1982).

36. See generally CONG. RESEARCH SERV., UNCONVENTIONAL GAS SHALES: DEVELOPMENT, TECHNOLOGY, & POLICY ISSUES, (2009) available at <http://www.fas.org/spp/crs/misc/R40894.pdf>.

37. See generally Kendor P. Jones & Jennifer L. McDowell, *Keeping Your Lease Alive in Good Times and in Bad*, 55 ROCKY MT. MIN. L. INST. 23-1, § 23.02 (2009).

38. See generally *Backwater Props., LLC v. Range Res.-Appalachia, LLC*, No. 1:10CV103, 2011 U.S. Dist. LEXIS 48496 (D. W.Va. May 5, 2011); *Valentino v. Range Res.-Appalachia, LLC*, No. 09-1615, 2010 U.S. Dist. LEXIS 50692 (D. Pa. May 21, 2010).

after market conditions deteriorated.<sup>39</sup> More recently, lessees have begun testing the Bakken's outermost peripheries, and Chesapeake Energy cancelled multiple leases and refused to tender deferred lease bonuses after drilling six exploratory wells in southwestern North Dakota in 2012.<sup>40</sup> Analogously, Chesapeake cancelled hundreds of leases and refused to tender deferred lease bonuses after encountering dry exploratory wells in northern Michigan.<sup>41</sup> Although these examples are atypical within the oil industry,<sup>42</sup> such examples illustrate that, despite statutory protections, lessors still fall victim to unscrupulous lessees who speculate about a lease's profitability by withholding lease bonuses.

## II. IRISH OIL AND GAS, INCORPORATED V. RIEMER

In spite of the questionable nature of the lessees' conduct in these situations, the lessors could take some solace in the fact that the lessees cancelled the leases so that the lessors could re-lease the properties.<sup>43</sup> But what happens when a lessee fails to tender a bonus in a timely fashion and refuses to discharge the lease? The North Dakota Supreme Court addressed this situation in *Irish Oil and Gas, Incorporated v. Riemer*.<sup>44</sup>

In *Irish Oil*, the Riemers executed paid-up leases with Irish Oil that contained royalty interests and bonuses that were payable within sixty days of the leases' executions.<sup>45</sup> Irish Oil failed to pay the bonuses within the prescribed time periods,<sup>46</sup> and the Riemers re-leased the property to another lessee.<sup>47</sup> Irish Oil, who later attempted to tender the bonuses,<sup>48</sup> sued the Riemers for breaching the leases, and the district court concluded that Irish Oil's failure to promptly pay the bonuses constituted a complete failure of consideration because reasonable minds could not differ that Irish Oil's failure to timely tender the bonuses constituted a substantial breach of the

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39. *Johnson v. Mineral Estate, Inc.*, 371 N.W.2d 136, 139-40 (N.D. 1985); *Nantt v. Puckett Energy, Co.*, 382 N.W.2d 655, 656-59 (N.D. 1986).

40. Lauren Donovan, *Chesapeake Energy Pulling Back, Won't Honor Lease Agreements*, BISMARCK TRIB., Feb. 7, 2012, available at [http://bismarcktribune.com/news/state-and-regional/chesapeake-energy-pulling-back-won-t-honor-lease-agreements/article\\_89324038-5214-11e1-ba31-0019bb2963f4.html](http://bismarcktribune.com/news/state-and-regional/chesapeake-energy-pulling-back-won-t-honor-lease-agreements/article_89324038-5214-11e1-ba31-0019bb2963f4.html).

41. Joshua Schneyer & Brian Grow, *Energy Giant Hid Behind Shells in "Land Grab,"* REUTERS, Dec. 28, 2011, <http://www.reuters.com/article/2011/12/28/us-energy-giant-newsprodUSTRE7BR0HS20111228>.

42. Donovan, *supra* note 40.

43. As will be discussed in forthcoming sections, this ability may be meaningless because market conditions may have rendered the lessor's property worthless.

44. 2011 ND 22, 794 N.W.2d at 715.

45. *Irish Oil*, ¶ 2, 794 N.W.2d at 716.

46. *Id.* ¶ 4, 794 N.W.2d at 717.

47. *Id.*

48. *Id.*



leases.<sup>49</sup> Accordingly, the district court excused the Riemers from the leases,<sup>50</sup> and Irish Oil appealed under the contention that its failure to timely tender the bonuses was only a partial failure of consideration.<sup>51</sup>

#### A. MAJORITY'S HOLDING

The North Dakota Supreme Court refused to find that Irish Oil's failure to timely pay the bonuses constituted a complete failure of consideration as a matter of law.<sup>52</sup> To do so would tacitly conclude that the leases' royalty interests were immaterial under the leases.<sup>53</sup> Such a conclusion would contrast a litany of cases finding that the royalty interest was the lease's primary consideration<sup>54</sup> and North Dakota Century Code section 47-16-39.1,<sup>55</sup> which provides that prospective royalties are the essence of the lease.<sup>56</sup> Moreover, the court found that prospective royalties could constitute executory consideration,<sup>57</sup> irrespective of the uncertainty that no royalties may eventuate.<sup>58</sup> Accordingly, the district court erred in holding that Irish Oil's failure to tender the bonuses converted an issue of fact into one of law because a royalty interest may constitute sufficient consideration.<sup>59</sup> Because the query of whether a royalty interest constituted sufficient consideration remained an issue of fact<sup>60</sup> and there was insufficient information to determine whether the Riemers ascribed enough importance to the royalty interests for such interests to constitute sufficient consideration,<sup>61</sup> the court remanded the case for further fact-finding.<sup>62</sup>

#### B. CHIEF JUSTICE VANDEWALLE'S DISSENT

In dissent, Chief Justice Vandewalle, joined by Justice Sandstrom, concluded that Irish Oil's failure to promptly pay the leases' bonuses

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49. *Id.* ¶ 9, 794 N.W.2d at 718.

50. *Id.*

51. *Id.* ¶ 10.

52. *Id.* ¶ 25, 794 N.W.2d at 721-22. With this conclusion, the court implied that reasonable minds could draw multiple inferences from the facts presented in *Irish Oil*.

53. *Id.* ¶ 24, 794 N.W.2d at 721.

54. *Id.* ¶ 22.

55. N.D. CENT. CODE § 47-16-39.1 (2013).

56. *Irish Oil*, ¶ 25, 794 N.W.2d at 721-22.

57. *Id.* ¶ 26, 794 N.W.2d at 722. “[C]onsideration may be executed or executory in whole or in part.” N.D. CENT. CODE § 9-05-05 (2013).

58. *Irish Oil*, ¶ 26, 794 N.W.2d at 722.

59. *Id.*

60. *See id.*

61. *Id.* ¶ 25, 794 N.W.2d at 721-22.

62. *Id.*

constituted a complete failure of consideration as a matter of law.<sup>63</sup> The Chief Justice opined that reasonable minds could not differ that paying the bonuses was a substantial part of Irish Oil's obligations because the bonuses were the inducement in the leases' executions<sup>64</sup> and the fact that Irish Oil was under no obligation to develop the Riemers' property indicated that any future royalty was purely speculative.<sup>65</sup> Additionally, in a foreshadowing of the aforesaid Chesapeake Energy situation,<sup>66</sup> the Chief Justice expressed his concern that the majority's holding could allow a lessee to drill on the lessor's property and tender the lease's bonus only if the drilling results made such an action advisable.<sup>67</sup> In this instance, the lessee could argue that the delinquent bonus was inconsequential because the royalty interest constituted sufficient consideration.<sup>68</sup> However, if the lessee found the lessor's property unsuitable for production, or if the lessee was unable to profitably peddle the lease, the lessee could terminate the lease without tendering the bonus, which would relegate lessors to seeking statutorily afforded damages while holding a property possessing no speculative value.<sup>69</sup> Because of these consternating potentialities and the fact that Irish Oil's failure to timely tender the leases' bonuses constituted a complete failure of consideration, the Chief Justice would have affirmed the appeal and excused the Riemers from the leases with Irish Oil.<sup>70</sup>

### III. IRISH OIL'S AFTERMATH

Irrespective of whether the court correctly concluded that a failure to tender a paid-up lease's bonus does not necessarily constitute a complete failure of consideration, *Irish Oil* offends public policy in numerous respects. The decision is a disservice to lessors who have fallen victim to perfidious lessees because the decision absolves the consequences of impermissible speculative conduct. Moreover, the decision leaves lessors to seek inefficient and insufficient forms of legal redress. The amalgamated effect of these issues requires legislative action to protect lessor interests from duplicitously speculating lessees.

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63. *Id.* ¶ 55, 794 N.W.2d at 729-30 (VandeWalle, C.J., dissenting).

64. *Id.* ¶ 58, 794 N.W.2d at 730 (citing *Elsinore Oil Co. v. Signal Oil & Gas Co.*, 40 P.2d 523, 523-24 (Cal. Ct. App. 1935)).

65. *Id.* ¶ 60, 794 N.W.2d at 731.

66. See discussion, *supra* Part I.B.

67. *Irish Oil*, ¶ 62, 794 N.W.2d at 731 (VandeWalle, C.J., dissenting).

68. See *id.* ¶ 61.

69. *Id.*

70. *Id.* ¶ 66, 794 N.W.2d at 732.

### A. LEGAL CORRECTNESS

Based upon the facts presented by *Irish Oil*, both the majority and the dissent erred in determining whether or how Irish Oil's failure to timely tender the paid-up leases' bonus payments constituted a complete or partial failure of consideration. Specifically, the majority conflated the concepts of primary and sufficient consideration in determining that a royalty interest may prevent a failure to tender a paid-up lease's bonus from constituting a complete failure of consideration. Similarly, the dissent improperly focused upon the importance of the bonus as the consideration inducing the lessor's execution of a lease rather than the peculiar role that a bonus plays in sustaining a paid-up lease. These positions should have recognized that, without a paid-up lease's bonus, no sufficient consideration supports a paid-up lease because a royalty interest cannot independently constitute sufficient consideration. Consequentially, Irish Oil's failure to timely tender the paid-up leases' bonuses constituted a complete failure of consideration because this breach left no sufficient consideration to support the leases.<sup>71</sup>

Before proceeding, it must be noted that this article assumes consideration is necessary in a lease. However, as one treatise notes, "[t]he question of whether consideration is required for an oil and gas lease has been the subject of some dispute" due to disagreement about whether leases are contracts or conveyances.<sup>72</sup> Where courts construe leases as conveyances, no consideration is required; where courts construe leases as contracts, consideration is required.<sup>73</sup> Precedent implies that North Dakota ascribes to the latter of these positions.<sup>74</sup> Whether this precedent is correct given that "oil, gas and mineral leases are conveyances of interests in real property"<sup>75</sup> is beyond the scope of this article. Accordingly, this analysis assumes that consideration is necessary for the execution and sustainment of a lease.

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71. The forthcoming analysis rests on the court's apparent assumption that no other type of consideration supported the implicated paid-up leases aside from the bonuses and prospective royalties.

72. PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS, OIL AND GAS LAW, § 220 (LexisNexis Matthew Bender 2013).

73. *Id.*

74. *See generally* AHO v. Maragos, 2000 ND 14, 605 N.W.2d 161 (oral contract to grant lease in exchange for dismissal of claims for damages enforced by court).

75. Petroleum Exchange v. Poynter, 64 N.W.2d 718, 722 (N.D. 1954).

### *1. Peculiarity of Paid-Up Leases*

In order to properly contextualize the issue, one must briefly examine the role consideration serves in contractual formations. Under North Dakota law, a contract “must impose an obligation upon each of the parties to do something or to permit something to be done as consideration for the act or promise of the other” because “mutuality of obligation is an essential element of a valid contract.”<sup>76</sup> “Without this mutuality of obligation, the agreement lacks consideration and no enforceable contract has been created. Or, if one of the promises leaves a party free to perform or to withdraw from the agreement at his own unrestricted pleasure, the promise is deemed illusory and it provides no consideration.”<sup>77</sup> Accordingly, in order for a valid contract to exist, the agreement must bind each contracting party in some respect.

Such principles laid the foundation for the previous discussion concerning the roles that various forms of consideration serve in oil and gas leases.<sup>78</sup> Lessees historically supported a lease with a royalty interest and a covenant to develop the lessor’s property within a specific time frame;<sup>79</sup> since the lessee was obligated to develop the property, this promise constituted sufficient consideration.<sup>80</sup> Lessees generally contract around this obligation by using drilling-delay rental clauses, which discharge any covenant of development by requiring the lessee to pay delay rentals if drilling has yet to occur on the property.<sup>81</sup> Although these delay rentals are typically nominal, the rentals constitute consideration because the lessee is bound to pay the rental payments where the lessee chooses not to develop the leased property.

Because the delay rentals effectively supplant the role typically served by covenants of development, such payments are critical in determining whether sufficient consideration, and thereby mutual obligation, exists in a lease. Where lessees employ a drilling-delay rental clause, the lease must obligate the lessee to pay the delay rentals because courts have invalidated leases that do not require the lessee to produce minerals or make payments in lieu of production.<sup>82</sup> The lack of mutuality in leases solely supported by

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76. *Stewart Equip. Co. v. Hilling Const. Co.*, 175 N.W.2d 692, 696 (N.D. 1970).

77. *Mattei v. Hooper*, 330 P.2d 625, 626 (Cal. 1958).

78. *See* discussion *supra* Part I.A.

79. 58 C.J.S. Mines and Minerals § 280 (2009).

80. *Id.*

81. BLACK’S LAW DICTIONARY 569 (9th ed. 2009).

82. *ICG Natural Res. LLC v. BPI Energy, Inc.*, 926 N.E.2d 446, 451 (Ill. Ct. App. 2010) (explaining that “[w]e recognize and adhere to the long-standing precedent in Illinois that royalty leases are void.”).

a promise to pay royalties if the lessee chooses to develop the lessor's property, which courts have dubbed "royalty leases,"<sup>83</sup> mandates that courts invalidate the lease because such leases "would allow the lessee to do absolutely nothing with the leases" while the lessor remained bound by the lease.<sup>84</sup> If courts were to do otherwise, the lessor's "hands would be tied up so that he could not engage in other enterprises of a permanent character, but must ever stand with his hands folded, awaiting the pleasure of [the lessee]. In such a contract as this[,] there is neither reciprocity, fairness[,] nor good conscience."<sup>85</sup> Thus, where the lease imposes no obligation to develop the lessor's property, the delay rentals are pivotal in maintaining the lease because such payments provide mutuality of obligation to the lease.

Based upon these principles, the royalty interest is largely inconsequential in determining whether sufficient consideration supports a lease. This immateriality emanates from the fact that any royalty payment will come to fruition only where the lessee *chooses* to develop the property. In this respect, it is immaterial that the royalties constitute the primary inducement for the lessor's execution of the lease<sup>86</sup> because the decision as to whether to develop the property is otherwise solely within the lessee's prerogative. As outlined above, this is precisely the type of illusory promise that cannot constitute sufficient consideration because such a promise "leaves a party free to perform [under] the agreement at his own unrestricted pleasure."<sup>87</sup> As one court succinctly stated, if the consideration "to be paid the lessor depends upon the profit to result from the development . . . and the lessee is not bound, either expressly or impliedly, to explore and discover, or, when discovered, to work such mine, *then no consideration for the lease exists.*"<sup>88</sup> Accordingly, where the lessee is under no obligation to develop the lessor's property, the royalty interest cannot

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83. *Id.* at 450.

84. *Id.*

85. *Lear v. Choteau*, 23 Ill. 39 (Ill. 1859).

86. *Cheyenne Mining and Uranium Co. v. Fed. Res. Corp.*, 694 P.2d 65, 74 (Wyo. 1985) (explaining that the primary consideration in [an oil and gas lease] is the royalty derived from the development of the resources).

87. *Mattei v. Hooper*, 330 P.2d 625, 626 (Cal. 1958).

88. *Petroleum Co. v. Cole, Coke & Mfg. Co.*, 18 S.W. 65, 66 (Tenn. 1890). In this respect, the majority may have also been misguided in its conclusion that a royalty interest without a covenant of development may constitute executory consideration pursuant to N.D. CENT. CODE § 9-05-05. A promise, act, or forbearance constitutes executory consideration only where the party is under an affirmative obligation to tender such consideration. See *Blarin Eng'g Co. v. Page Steel & Wire Co.*, 288 F. 662, 664 (3d Cir. 1923). Since the drilling-delay rental clause imposes no covenant of development, the royalty interest cannot constitute executory consideration because the lack of a covenant of development means that the lessee is not obligated to tender such consideration.

constitute sufficient consideration because the contract suffers from a want of mutual obligation. As outlined above, lessees typically provide this mutual obligation by using delay rentals to contract around any covenant to develop the lessor's property.

The principles associated with these delay rentals have a peculiar application within "paid-up leases." With paid-up leases, the lessee pays all of the delay rentals that the lessee would otherwise pay throughout the lease's primary term in one consolidated payment that "is included as a part of the bonus *tendered to the lessor upon execution of the lease*."<sup>89</sup> Consequentially, the "bonus payment, *not rentals*, maintains [a paid-up] lease during the primary term" where there lessee is under no covenant of development.<sup>90</sup> Where the lessee refuses to pay the paid-up lease's bonus, the lessee also refuses to tender the lease's delay rentals, which leaves a royalty interest supporting the lease through the lease's primary term. However, this royalty interest is unaccompanied by any obligation to develop the lessor's property because the inclusion of a drilling-delay rental clause expressly disclaims any such obligation, thereby preventing the judicial imposition of any type of implied covenant of development.<sup>91</sup>

Based upon these principles, a failure to pay paid-up lease's bonus payment would leave no other sufficient consideration supporting the lease because, as seen above, a royalty interest cannot solely support a lease without any other form of consideration. Since a partial failure of consideration *occurs only where a breach of contract leaves other sufficient consideration to support the lease*,<sup>92</sup> the failure to tender a paid-up lease's bonus payment constitutes a complete failure of consideration because no consideration exists where a lease is solely supported by a royalty interest and the lessee is not bound, whether implicitly or explicitly, to develop the lessor's property. Thus, the bonus is of the utmost importance in paid-up leases because the bonus is necessary to sustain a lease without a covenant of development.

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89. 6 MS PRAC. ENCYCLOPEDIA MS LAW § 53:8 (emphasis added).

90. EnerQuest Oil & Gas, LLC, v. Plains Exploration & Prod. Co., No. SA:12-CV-542-DAE, 2013 U.S. Dist. WL 5951952 at 21 (D. Tex. Nov. 7, 2013).

91. Bodcaw Oil Co. v. Atl. Ref. Co., 228 S.W.2d 626, 634 (Ark. 1950). In order to avoid terminating such leases due to a want of consideration, courts read implied covenants of development into leases that solely supported by a promise to pay a royalty interest if the lessee chooses to develop the property. See W.M. Moldoff, *Annotation, Implied Obligation of Purchaser or Lessee to Conduct Search for, or to Develop of Work Premises for, Minerals Other than Oil and Gas*, 76 A.L.R.2d 721 (1961). Where the court finds this implied covenant, the covenant "must be performed in order to keep such a lease in existence and to avoid its forfeiture." *Manfield Gas Co. v. Alexander*, 133 S.W. 837, 839 (Ark. 1911).

92. See *Check Control, Inc. v. Shepherd*, 462 N.W.2d 644, 647 (N.D. 1990).

## 2. Majority's Position

With this conclusion in mind, one can begin to see how the legal principles underlying the majority's position in *Irish Oil* begin to falter. From the outset, it is imperative to note that *Irish Oil* concerned paid-up leases that contained no covenant of development<sup>93</sup> or "unless" clauses.<sup>94</sup> As such, *Irish Oil* exchanged delay rentals to disclaim any covenant, whether expressed or implied, to develop the Riemers' property. However, because the implicated leases were paid-up leases, all of the delay rentals that *Irish Oil* used to contract around the obligation to develop the Riemers' property were subsumed within the leases' bonuses. Accordingly, in addition to failing to pay the leases' bonuses, *Irish Oil* failed to tender the leases' delay rentals when *Irish Oil* failed to tender the leases' bonuses, which left the royalty interest, without any obligation to develop the Riemers' property, independently supporting the leases.

Notwithstanding this realization and the importance of the bonus in sustaining a paid-up lease, the *Irish Oil* majority still found that *Irish Oil*'s failure to timely tender the lease bonuses merely amounted to a partial failure of consideration. Such a conclusion may be improper because, as noted above, the royalty interest cannot solely support a lease where the lessee is under no obligation to develop the property or pay delay rentals because the lessee is under no obligation to act under such an arrangement.<sup>95</sup> After discounting the obligation to pay the bonus after *Irish Oil* breached the lease from the consideration supporting the lease, *Irish Oil*'s lease with the Riemers effectively became a judicially proscribed "royalty lease" in the sense that the only way *Irish Oil* was bound to act under the lease was to pay royalties *if Irish Oil chose to develop the*

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93. See *Irish Oil and Gas, Inc. v. Riemer*, 2011 ND 22, ¶ 22, 794 N.W.2d 715, 721 (The implicated leases were "Paid-Up Lease(s)" which provide the lessee has no obligation to commence operations during the primary term . . .") (alteration in original).

94. "The leases in *Irish Oil* did not contain 'unless' clauses . . ." *Beaudoin v. JB Mineral Services, LLC*, 2011 ND 229, ¶ 12, 808 N.W.2d 672, 674. The lack of the unless clause is crucial because:

[w]here a lease contains a recital of an initial cash consideration, even though the amount is nominal, but provides that if the lessee does not drill within the time named, the lease will be void, unless the lessee pays a stipulated sum in advance for its further continuance (the unless drilling clause), then, although the lessee is under no duty to drill or pay, the courts have held that the lease is not void for want of consideration on the ground that the nominal initial cash consideration supports the entire lease.

2 NANCY SAINT-PAUL, *SUMMERS OIL & GAS* § 13:8 (3d ed. 2013). Accordingly, if the leases contained an unless clause, the forthcoming analysis would be moot because the mere recital of nominal consideration would have supported the entire lease.

95. See *ICG Natural Resources, LLC v. BPI Energy, Inc.*, 926 N.E.2d 446, 451 (Ill. Ct. App. 2010) (A lease that provided a royalty interest with no obligation to develop the property of tender delay rentals held invalid).

*Riemers' property*. This optionality, absent other obligations, is precisely why a royalty interest cannot solely support a lease because the Riemers remained bound under the lease while Irish Oil's performance under the lease was at its own discretion. Accordingly, Irish Oil's failure to tender the paid leases' bonuses amounted to a complete failure of consideration because a royalty interest cannot constitute sufficient consideration and a partial failure of consideration *only occurs where the Irish Oil's breach of the lease left other sufficient consideration to sustain the lease*.<sup>96</sup> Therefore, although the royalty interest is the primary consideration in leases, the majority erred by underappreciating how crucial a bonus is within paid-up leases because the bonus is necessary to sustain a paid-up lease. In this regard, *Irish Oil* was incorrectly decided.

### 3. Dissent's Position

Pursuant to the conclusion that Irish Oil's failure to tender the paid-up leases' bonus payments constituted a complete failure of consideration, one would expect that the dissent correctly resolved *Irish Oil*. The dissent correctly emphasized that the bonus was material to the disposition of *Irish Oil* because of the uncertainty that any royalties would ever eventuate from production. In this respect, the dissent rightly echoed the forgoing analysis to the extent that the uncertainties of potential development of the leased property preclude a royalty interest from constituting sufficient consideration. In spite of this realization, the dissent misinterpreted the relationship between such uncertainty and the role that the bonus serves within the context of paid-up leases.

Particularly, the dissent erred when it seemingly implied that a lessee's failure to tender a lease's bonus necessarily constitutes a complete failure of consideration. The dissent argued that the failure to tender the bonus constituted a complete failure of consideration because the bonus serves as the consideration for the lessor's execution of the lease.<sup>97</sup> Such a conclusion is not in and of itself incorrect, but the conclusion is erroneous given that the dissent came to the conclusion without once referencing the unique role that a bonus plays in a paid-up lease. As will be seen, merely failing to tender the bonus payment does not necessarily constitute a complete failure of consideration.

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96. See *Check Control*, 462 N.W.2d at 647.

97. *Irish Oil and Gas, Inc. v. Riemer*, 2011 ND 22, ¶¶ 56-58, 794 N.W.2d 715, 729-30 (VandeWalle, C.J., dissenting).



As previously alluded to, lessees typically utilize bonus payments where competition amongst lessees so dictates.<sup>98</sup> Where this competition is absent, it may not be necessary for the lessee to offer a bonus to induce the lessor to execute the lease. Alternatively, a lessor may choose to forgo a bonus payment in exchange for a larger royalty interest or other consideration. Moreover, a lease can simply stipulate that the lessee pay the lease's delay rentals on the lease's anniversary instead of with the bonus, which was popular with leases of yesteryear. In these instances, a lease may not even contain a bonus payment,<sup>99</sup> which indicates that other sufficient consideration otherwise supports the lease. For instance and as described above,<sup>100</sup> a royalty interest coupled with either a covenant of development or drilling-delay rental clause may constitute sufficient consideration because the lessee is bound to act in any eventuality. This mutuality of obligation, which is independent from the bonus payment, thusly removes a failure to pay a bonus from a complete failure of consideration because, even after discounting the obligation to pay the bonus from the lease's consideration, other sufficient consideration would still support the lease after the lessee breached the lease. The existence of this additional consideration would consequentially only entitle the lessor to commensurate monetary damages.<sup>101</sup>

Pursuant to these hypotheticals, the dissent's reasoning in regards to why *Irish Oil's* failure to tender the paid-up leases' bonuses was improper. As indicated above, where the bonus merely serves as consideration for the lease's execution, a failure to pay the bonus would only constitute a partial failure of consideration because other sufficient consideration would still exist notwithstanding a failure to pay the bonus. The reason that the failure to pay the bonus became of consequence in *Irish Oil* was because the paid-up nature of the leases indicated that bonuses contained the leases' delay rentals. For if the delay rentals had been parsed out from the bonus instead of subsumed within the bonus, *Irish Oil's* failure to tender the bonus would have been a partial failure of consideration because the delay rentals would still have furnished mutuality of obligation to the lease. Accordingly, the dissent came to the correct conclusion through the fortuitous occurrence of having the implicated leases be paid-up in nature.

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98. See discussion *supra* Part I.B.

99. See *Olson v. Schwartz*, 345 N.W.2d 33, 34 (N.D. 1984) (observing that “[t]he sole consideration for this lease was either delay rentals or a one-eighth royalty from production.”).

100. See discussion *supra* Part I.B.

101. See discussion *supra* Part I.A.

#### 4. Conclusion

Based upon this reasoning, both the majority and the dissent incorrectly addressed the dispositive facts presented in *Irish Oil*. The majority erred by implying that a royalty interest may constitute sufficient consideration so that a failure to pay a paid-up lease's bonus would merely constitute a partial failure of consideration. Similarly, the dissent's focus on the bonus as the consideration for the execution of the lease rather than the bonus's imperative role in paid-up leases was misguided because a failure to tender a lease's bonus does not necessarily constitute a complete failure of consideration, as the dissent seemingly implied. These positions should have found that, where a lessee fails to tender the paid-up lease's bonus, such failure constitutes a complete failure of consideration because the lessee's failure to tender such a payment is a substantial breach of the lease in the sense that such breach leaves no other sufficient consideration to support the lease. Accordingly, both positions underappreciated the role that a bonus payment serves in paid-up leases.

#### B. POLICY CONSIDERATIONS

Regardless of whether the foregoing analysis is correct, *Irish Oil* frustrates various policy concerns at the expense of prejudicing unsophisticated lessees. North Dakota must abrogate *Irish Oil* because the decision potentially unsettles lessor-lessee relations and leaves lessors to pursue inefficient forms of recourse that cannot account for the potential economic cost of the lessee's conduct. Placating such concerns is solely within the Legislature's prerogative because the proprieties of the laws creating these consternating results are questions for the Legislature.<sup>102</sup>

##### 1. *Skewing Lessor-Lessee Relations in Favor of the Lessee*

North Dakota must nullify *Irish Oil* because the decision usurps the lessor-lessee relational dichotomy by allowing a lessee to enter a lease without assuming the risks typically associated with a lease's execution. North Dakota would be woefully remiss if it allowed recent successes to cloud the state's perception about the oil industry's stability. As the state knows all too well from good times gone bust,<sup>103</sup> the oil industry is highly speculative<sup>104</sup> because the industry is subject to the ebbs and flows of

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102. See *Mont.-Dakota Utilities Co. v. Johanneson*, 153 N.W.2d 414, 420 (N.D. 1967).

103. See Anderson, *supra* note 4, at 719-20.

104. *Moerman v. Prairie Rose Res., Inc.* 308 P.3d 75, 79 (Mont. 2013).

numerous forces,<sup>105</sup> the amalgam of which leaves market conditions in a seemingly perpetual state of oscillation.<sup>106</sup> Due to this constant state of flux and the fact a lease commits both of the leasing parties to a long-term obligation containing a fixed valuation,<sup>107</sup> both of the leasing parties assume a great deal of potential risk and reward in leasing.

Following the lease's execution, the lessor and lessee maintain an inverse relationship regarding the lease's fair market value because the parties assume the risk that one party will benefit from market fluctuations at the other's expense. In such a relationship, the lessor assumes the risk that the property's value will appreciate so that the property is more valuable than what the parties originally anticipated.<sup>108</sup> Conversely, the lessee assumes the risk that the property's value will depreciate so that the property is less valuable than what the parties originally anticipated. Accordingly, in any eventuality, market fluctuations will benefit one party while prejudicing the other because either the lessor will have leased the property for less than the property's current worth or the lessee will have leased the property for more than the property's current worth.

In entering the lease and assuming such risks, the lessee may speculate about how market fluctuations may affect the lease's value so long as the lessee is in compliance with the lease's terms and covenants.<sup>109</sup> Regardless of its unsavory connotations, speculation is a necessity in the oil industry because the industry's volatility implicitly imputes some level of speculation into most oil contracts.<sup>110</sup> Moreover, speculation is generally an integral component of properly allocating resources because speculation regulates market conditions<sup>111</sup> and encourages timely and orderly

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105. As one commentator concluded, “[i]t is the long delay between an increase in demand for oil and gas, an increase in production and exploration activity, and an expansion of the whole supply chain, which explain the deep cyclicity of the petroleum industry and mining.” John Kemp, *Oil Industry Starts to Squeeze Costs, Wages*, FARGO FORUM, January 30, 2014, available at [https://secure.forumcomm.com/?publisher\\_ID=1&article\\_id=425101&CFID=425828693&CFTOKEN=47453689](https://secure.forumcomm.com/?publisher_ID=1&article_id=425101&CFID=425828693&CFTOKEN=47453689).

106. See Tim McMahon, *Historical Crude Oil Prices (Table)*, INFLATIONDATA.COM, [http://inflationdata.com/Inflation/Inflation\\_Rate/Historical\\_Oil\\_Prices\\_Table.asp](http://inflationdata.com/Inflation/Inflation_Rate/Historical_Oil_Prices_Table.asp).

107. Gary Conine, *Speculation, Prudent Operation, and the Economics of Oil and Gas Law*, 33 WASHBURN L.J. 670, 718 (1994).

108. *Id.*

109. This type of speculation before entering the lease permissible, as sharply contrasted from speculation after entering the lease.

110. See *Sinclair Prairie Oil Co. v. Worcester*, 205 P.2d 942, 943 (Kan. 1949) (rejecting the argument that an oil and gas contract of a speculative nature should be struck down as an unlawful gambling contract because to do so, the court “would have to strike down half the contracts in the oil business.”).

111. See Conine, *supra* note 107, at 718.

development.<sup>112</sup> In spite of speculation's efficacy and necessity in these regards, courts widely condemn the speculative holding of leases,<sup>113</sup> especially in instances concerning certain speculative acts.

With the recognition that protecting lessor interests is of the paramount importance,<sup>114</sup> a lessee may not "speculate with the assets of another without the payment of any consideration."<sup>115</sup> Courts predicate this concise aphorism upon the fact that it would be wholly inequitable to allow a lessee to speculatively lease a property through no expenditure because such an arrangement exposes the lessee to no risk and allows the lessee to reap the lease's rewards.<sup>116</sup> Pursuant to this principle, lessees may not hold a lease for speculative purposes except in strict compliance with the lease and for consideration *other* than prospective royalties.<sup>117</sup> Equity demands termination of the lease where no such consideration exists<sup>118</sup> or where such other consideration is delinquent because judicial termination will inflict no injustice<sup>119</sup> and lessors deserve more protections than simply the right to sue for delinquent consideration.<sup>120</sup>

*Irish Oil* contravenes these principles in numerous respects. The decision unjustly allows a lessee to refrain from tendering the bonus until it is economically judicious to do so under the pretense that such a delinquency was inconsequential because the royalty interest constituted sufficient consideration; if these market conditions never come to fruition, the lessee can dishonor the lease without the loss of the lease's required bonus. Such an unpalatable result that clemencies the untimely tendering of a lease's bonus in favor of lessees only exacerbates the lessee's decided

112. Daphna Lewinsohn-Zamir, *More is Not Always Better Than Less: An Exploration in Property Law*, 92 MINN. L. REV. 634, 694 (2008).

113. *Doss Oil Royalty Co. v. Texas Co.*, 137 P.2d 934, 936 (Okla. 1943).

114. *Moerman v. Prairie Rose Res., Inc.*, 308 P.2d 75, 79 (Mont. 2013) (quoting *Stanolind Oil & Gas, Co. v. Guertzgen*, 100 F.2d 299, 300 (9th Cir. 1938)).

115. *See Boyer v. Tucker & Baumgardner Corp.*, 372 N.W.2d 555, 556 (Mich. Ct. App. 1985) (rejecting a lease interpretation that would have allowed such a result).

116. *See generally id.*

117. *Rice v. Lee*, 113 P.2d 235, 236-37 (Cal. Ct. App. 1941).

118. *Hall v. Augur*, 256 P. 232, 234-235 (Cal. Ct. App. 1927) (explaining that a lessor cannot omit to drill and develop and hold the grant for speculative purposes purely when no other consideration supports the lease).

119. *Alford v. Dennis*, 170 P. 1005, 1007 (1918) (stating "[u]nless the defendants had a bona fide intention to prospect and develop this tract they had no proper purpose in leasing it, and to cancel the lease will do them no injury.>").

120. *Boyer v. Tucker & Baumgardner Corp.*, 372 N.W.2d 555, 556 (Mich. Ct. App. 1985) (explaining "[since the oil industry] is so highly speculative, *plaintiffs deserve more . . . protection than merely the right to sue on an obligation.*") (emphasis added).

advantages in sophistication and bargaining power<sup>121</sup> by allowing the lessee to lease with little to no risk while the lessor still assumes the risks otherwise associated with the lease's execution. One can hardly argue that such a result comports with the Legislature's previous efforts in other contexts of trying to "equalize the bargaining power of the landowners when dealing with major oil companies"<sup>122</sup> because *Irish Oil* may allow lessees to speculate with the lessor's assets without the paying of any consideration, which other courts resoundingly condemn.<sup>123</sup> These unnerving potentialities stand starkly in contrast to the adage that lessor interests must remain of the utmost importance,<sup>124</sup> and *Irish Oil* is unfortunately anything but a singular judicial aberration.

As *Irish Oil* and numerous other analogous cases indicate, legal technicalities have prevented courts from adequately protecting lessors from the unsavory conduct of much more sophisticated lessees.<sup>125</sup> Because the proprieties of the laws creating these technicalities are policy questions for the Legislature,<sup>126</sup> North Dakota must act to protect lessor interests by requiring the timely tendering of lease bonuses. And time is of the essence in doing as much because lessees have already attempted to use *Irish Oil* to excuse delinquent bonuses at a lessor's expense.<sup>127</sup>

## 2. Lessor's Lack of Efficient Legal Recourse

North Dakota must also amend its statutory scheme to require the timely tendering of lease bonuses because the state's existing statutory scheme relegates lessors to pursuing inefficient forms of recourse that cannot account for the true economic cost of the lessee's conduct. When considering this fleecing, one must note that the lessor loses both the bonus and the correlative rights associated with owning a sought after property when a lessee refuses to tender a lease's bonus, including the ability to

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121. See J. Zach Burt, *Playing the "Wild Card" in the High-Stakes Game of Urban Development: Unconscionability in the Early Barnett Shale Leases*, 15 TEX. WESLEYAN L. REV. 1, 13 (2008).

122. LEGISLATIVE RESEARCH COMM'N, REPORT TO THE LEGISLATURE, at 42 (N.D. 1961).

123. See Boyer, 372 N.W.2d at 556.

124. *Stanolind Oil & Gas, Co. v. Guertzen*, 100 F.2d 299, 300 (9th Cir. 1938).

125. For instance, other courts have excused a delinquent bonus under the reasoning that time is not necessarily of the essence in leases. See generally *Linder v. SWEPI LP*, No. 1:11-CV-1579, 2013 U.S. Dist. LEXIS 20827 (D. Pa. February 11, 2013); *Standefer v. T. S. Dudley Land Co.*, No. 3:09-CV-1115, 2010 U.S. Dist. LEXIS 132267, 22 (D. Pa. July 14, 2010).

126. *Mont.-Dakota Utils. Co. v. Johanneson*, 153 N.W.2d 414, 420 (N.D. 1967).

127. "JB first contends the July 2009 lease is valid because a royalty clause alone is sufficient consideration for an oil and gas lease under [*Irish Oil*]." *Beaudoin v. JB Mineral Servs., LLC*, 2011 ND 229, ¶ 8, 808 N.W.2d 671, 673.

make other arrangements for developing the leased property.<sup>128</sup> In order to rectify this situation through termination of the lease, a lessor must engage in laborious and time-consuming termination efforts.

North Dakota currently provides lessors with two options in attempting to terminate a lease. North Dakota Century Code section 47-16-36 provides lessors with a set of procedures to terminate a lease without judicial intervention if the lessee forfeits the lease pursuant to the lease's terms and the lessee fails to object to the lessor's termination efforts.<sup>129</sup> If unsuccessful under this section because of the lessee's refusal to terminate the lease, a lessor may seek judicial termination of the lease pursuant to North Dakota Century Code section 47-16-37,<sup>130</sup> which allows a prevailing lessor to terminate the lease, recover associated litigation expenses, one hundred dollars in damages, and "any additional damages that the evidence in the case will warrant."<sup>131</sup> Despite the affordance of such remedies, these provisions are inefficient and insufficient for lessors.

This existing statutory scheme is inefficient as applied to lease disputes because time is of the essence in leases.<sup>132</sup> Although North Dakota Century Code section 47-16-36 allows lessors to engage in a form of self-help termination, the statute still requires the lessor to spend several weeks trying to terminate the lease, and such an effort will be successful only in the highly improbable event that the lessee fails to contest the lease's termination. Only then may lessors begin the protracted and uncertain process of seeking judicial termination of the lease that could take years to complete.<sup>133</sup> Even if the lessor prevailed in either of these regards by terminating the lease, market conditions may have rendered the lessor's property worthless in the interim, and this statutory languidness forces the lessor to assume a great deal of economic loss.

In ascertaining these remedies' deficiencies, one must recognize "the measure of damages for breach of contract is the same for oil and gas leases

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128. See generally *Lear v. Choteau*, 23 Ill. 39 (1859).

129. N.D. CENT. CODE § 47-16-36 (2001).

130. N.D. CENT. CODE § 47-16-37 (1957).

131. *Id.* It should be noted that regular contractual damages may not be applicable in such instances because N.D. CENT. CODE § 47-16-37 provides a specific remedy for this specific instance and contractual damages are applicable "except when otherwise expressly provided by the laws of this state." See N.D. CENT. CODE § 32-03-09 (1943).

132. *Amber Oil and Gas Co. v. Bratton*, 711 S.W.2d 741, 743 (Tex. App. 1986).

133. Courts in western North Dakota are notoriously backlogged because of the oil boom. See Claire Zillman, *Bakken Boom Creating Constitutional Crisis for North Dakota Courts*, AM. LAW. DAILY, Aug. 21, 2012, available at <http://www.americanlawyer.com/id=1202568269279/Bakken-Boom-Creating-Constitutional-Crisis-for-North-Dakota-Courts>.

as it is for other contracts.”<sup>134</sup> North Dakota limits contractual damages to the amount that will compensate an aggrieved party for the damages proximately caused by the other party,<sup>135</sup> and courts cannot award damages that put the aggrieved party in a better position than if the breaching party fully performed under the contract.<sup>136</sup> Based upon these principles, the lessor would be able to recover the withheld bonus because the bonus is payable under all circumstances.<sup>137</sup> However, the lessor would be unable to recoup other, much more substantial damages.

Unfortunately, by executing a lease, the lessor foregoes the royalties that may have accrued if another lessee would have developed the lessor’s property where the original lessee refrained from doing so and the lessor also assumes the risk that market fluctuations may render the lessor’s property worthless before the lessor can re-lease the property. Normally, where the lessee is under an obligation to develop the lessor’s property and fails to do so, the appropriate damage award “is the amount of royalties that the lessor lost by reason of the lessee’s breach,”<sup>138</sup> and courts may also award damages that represent “the loss in leasing value of the plaintiff’s land resulting from the failure to drill.”<sup>139</sup> However, as previously discussed, the vast majority of modern leases impose no such obligation.<sup>140</sup> Lessors would accordingly be unable to collect damages for foregone royalties that may have accrued if another lessee developed the property because the lessee could fully perform under the contract without providing such royalties. Similarly, the lessor would be unable to recover for the property’s devaluation because market fluctuations caused the depreciation, not the lessee’s conduct.<sup>141</sup> Accordingly, lessors could only collect lease bonuses after market conditions rendered the lessor’s property worthless, surely to the chagrin of lessors who sustained significant damages in entering a lease with a lessee who was solely trying to further its own interests by withholding the lease’s bonus.

Lessors are sure to be similarly disappointed in trying to recoup damages pursuant to North Dakota Century Code section 47-16-37’s “any additional damages that the evidence in the case will warrant” clause, which

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134. 3 SUMMERS OIL & GAS (3d ed. 2012).

135. N.D. CENT. CODE § 32-03-09 (1943).

136. *Leingang v. Mandan Weed Bd.*, 468 N.W.2d 397, 398 (N.D. 1991).

137. *See Johnson v. Mineral Estate, Inc.*, 371 N.W.2d 136, 139-40 (N.D. 1985).

138. 38 AM. JUR. 2d *Gas & Oil* § 303 (1968).

139. 3 SUMMERS OIL AND GAS § 23:8 (3d ed. 2012).

140. *See Jones & McDowell*, *supra* note 36 at § 23.02.

141. In North Dakota, “damages must flow directly and naturally from the breach of contract.” *Vallejo v. Jamestown Coll.*, 244 N.W.2d 753, 758 (N.D. 1976).

North Dakota courts have yet to interpret or apply.<sup>142</sup> Other comparable statutes<sup>143</sup> only afford damages that proximately emanate from the lessee's failure to cancel the lease,<sup>144</sup> which are to be calculated based upon the difference of the lease's fair market value at the time the lessee should have terminated the lease because of a contractual breach and such value at the time of trial.<sup>145</sup> Despite this affordance, the statute still might not make the lessor whole because the lessor would be unable to collect damages for devaluations that occurred while the lessee speculatively withheld the lease's bonus during a protracted deferral period,<sup>146</sup> as the lessee would technically be in compliance with the lease.<sup>147</sup> Such a limitation is significant because market conditions may have rendered the lessor's property worthless during the deferral period so that the difference in the lease's fair market value<sup>148</sup> at the time the lessee should have terminated the lease and that at the time of trial may be nominal. Thus, even though North Dakota Century Code section 47-16-37 may provide additional damages, lessors might still sustain significant losses in dealing with impermissibly speculating lessees.<sup>149</sup>

Because the law cannot make lessors whole in their dealings with speculating lessees, North Dakota's statutory scheme is inadequate to

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142. See *Irish Oil & Gas, Inc. v. Reimer*, 2011 ND 22, ¶ 61, 794 N.W.2d 715, 731 (VandeWalle, C.J., dissenting) (explaining that “[i]t remains to be determined whether [N.D. Cent. Code § 47-16-37] will allow the recovery of the destruction of the value of the mineral estate proven worthless while the lessee holds a lease for which the lessee has not paid the agreed-upon bonus.”).

143. See MONT. CODE ANN. §§ 82-1-201 to 82-1-204. For other examples, see 3 SUMMERS OIL & GAS § 19:11 (3d ed. 2012).

144. *Solberg v. Sunburst Oil & Gas Co.*, 225 P. 612, 614 (Mont. 1924). Such damages cannot be used to allow the lessor “to recover more than they were actually damaged.” *Reaugh v. McCollum Exploration Co.*, 163 S.W.2d 620, 622 (Tex. 1942). Moreover, the lessee is not liable for a failure to discharge the lease if the lessee in good faith believed the lease to be valid. 3 SUMMERS OIL & GAS § 19:10 (3d ed. 2012).

145. *Solberg v. Sunburst Oil & Gas Co.*, 246 P. 168, 177 (Mont. 1926).

146. Leases will typically defer the lessee's obligation to tender the lease's bonus for a specific period of time. For instance, the leases implicated in *Irish Oil* contained a sixty-day deferral period. However, other leases have deferral periods of up to one hundred and eighty days. See *Linder v. SWEPI LP*, No. 1:11-CV-1579, 2013 U.S. Dist. LEXIS 20827 (D. Pa. February 11, 2013).

147. In this respect, this situation is analogous to that seen in the aforementioned Range Resources situation. See discussion, *supra* Part I.B.

148. In North Dakota, fair market value is “the price a buyer is willing to pay and the seller is willing to accept under circumstances that do not amount to coercion.” *Mike Golden, Inc. v. Tenneco Oil Co.*, 450 N.W.2d 716, 719 (N.D. 1990) (quoting *Connell v. Sun Exploration & Prod. Co.*, 655 P.2d 426, 428 (Colo. App. 1982)). In this determination, fair market value is to be determined based upon: “(1) analysis of comparable sales or market data; (2) analysis of the cost of replacement less depreciation; and (3) an income or economic analysis.” *Id.*

149. It should be noted that lessors might be able to collect exemplary damages in such instances so as to deter similar conduct in the future if the lessor can prove fraud or malice. See N.D. CENT. CODE § 32-03.2-11 (2009).



properly protect lessors. As one court observed about the oil industry, “[p]erhaps in no other business is prompt performance of contracts so essential to the rights of the parties, *or delay by one party likely to prove so injurious to the other.*”<sup>150</sup> In this regard, North Dakota’s laws only exacerbate the lessor’s plight by forcing the lessor to engage in protracted termination processes that prevent the lessors from making other arrangements for the property. This inability to re-lease the property because of the pending litigation only further inflicts damages that the law cannot rectify by exposing the lessor to the risk that market conditions may render the property worthless during the litigation. Accordingly, North Dakota must amend the state’s lethargic laws so as to allow the lessor to expeditiously re-lease the property. To do otherwise leaves lessors in the unenviable position of assuming irreparable harm and allowing lessees to walk away from a lease with minimal loss.

#### IV. PROPOSED LEGISLATIVE FIX: STATUTORILY REQUIRED TIMELY TENDERING OF BONUS PAYMENTS

The amalgam of these policy concerns indicates that North Dakota needs to take some action to protect the lessor’s interest in a lease’s bonus. The question then becomes how the state can properly effectuate this end. In resolving this determination, North Dakota can fashion an effective statute by considering the few existing statutes that concern the timely tendering of lease bonuses.

As of the beginning of 2014, only two states have promulgated statutes governing the paying of bonuses in oil and gas leases, and both statutes leave much to be desired. A New York statute voids any lease if a lessee fails to tender a lease’s bonus within one hundred and eighty days of the lease’s execution.<sup>151</sup> Although this statute properly invalidates a lease where the lessee fails to timely tender the bonus, the statute is undesirable because time is of the essence in leases and a one hundred and eight day deferral period is exceedingly long. Additionally, a North Carolina statute imposes a 10% interest rate penalty on all bonuses that remain unpaid after sixty day following the lease’s execution.<sup>152</sup> This statute is undesirable because a 10% interest rate is a relatively nominal penalty<sup>153</sup> and lessors cannot invalidate the leases. Despite these statutory shortcomings, North

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150. *Munroe v. Armstrong*, 96 Pa. 307, 311 (Pa. 1880) (emphasis added).

151. N.Y. GEN. OBLIG. LAW § 5-333(2) (McKinney 2006).

152. N.C. GEN. STAT. § 113-423(d) (2012).

153. For instance, North Dakota imposes an 18% interest rate penalty on all oil and gas royalties that are outstanding following one hundred and fifty days after production. See N.D. CENT. CODE § 47-16-39.1 (2011).

Dakota can adopt a statute that properly protects lessor interests and rectifies these issue laden statutes.

In recognizing the need to revise the state's laws to accommodate an influx of oil and gas development, North Carolina considered various legislative proposals concerning how to ensure the timely tendering of lease bonuses. One of these proposals stipulated that North Carolina should adopt a statute that automatically terminates a lease, without the need for judicial intervention, if the lessee fails to tender the lease's bonus within thirty days of the lease's execution, the lessor notifies the lessee, in writing, of such a delinquency, and the lessee fails to rectify the situation within fifteen days.<sup>154</sup> North Dakota should adopt this proposal so as to forestall *Irish Oil's* operation for the forthcoming reasons.

#### A. PROPERLY EFFECTUATING POLICY CONCERNS

Although North Carolina refrained from codifying this proposal, the proposal provides the best framework for North Dakota's statute. With its emphasis on expeditiousness and strident penalties, this proposal is much more preferable than the North Carolina and New York statutes. This proposal also ensures that the lessee assumes an appropriate amount of risk in a lease's execution, and the proposal's automatic termination of the lease increases the efficiency of the lessor's legal recourse so as to minimize the infliction of legally irreparable harm. Additionally, the proposal in no way unduly prejudices lessees because the proposal simply codifies long-standing legal principles and leasing practices that sophisticated lessors have used to protect their interests. In short, this proposal advances all of the implicated policy issues and rectifies the deficiencies seen in existing statutes while causing lessees only minimal inconvenience.

North Dakota should adopt the North Carolina proposal because such a proposal properly remedies the New York and North Carolina statutes' faults. The proposal is preferable to the North Carolina statute because the statute terminates the lease instead of imposing a potentially trivial penalty, which drastically increases the lessee's incentive to hastily tender a lease's bonus. Moreover, the proposal is superior to New York's statute because, by allowing the lessor to promptly re-lease the property instead of waiting one hundred and eighty days, the proposal's short deferral period helps protect lessors from drastic market fluctuations in the interim. The proposal's superiority in these respects is also keenly tailored to further the policy concerns frustrated by *Irish Oil*.

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154. N.C. Dep't of Justice Consumer Protect. Div., *North Carolina Oil and Gas Study under Session Law 2011-276: Impact on Landowners and Consumer Protection Issues* 42 (2012).

By automatically terminating the lease, the proposal allows the lessor to expeditiously re-lease the property before potential market changes may render the lessor's property worthless. This new lease would allow the lessor to enjoy an additional bonus that the lessor might not be able to collect if market conditions render the lessor's property worthless before the lessor can re-lease the property. The new lease would also allow the new lessee to develop the property under prevailing market conditions. In this regard, the proposal potentially allows the lessor to enjoy royalties that the lessor might have to otherwise injuriously forego because a change in market conditions might render such development uneconomical by the time the lessor can re-lease the property. Thus, the proposal imperatively expedites the lessor's recourse so as to minimize the infliction of legally incurable damages because the proposal allows lessors to circumvent protracted and uncertain termination processes.

Additionally, by requiring the timely tendering of a bonus under the threat of termination, the proposal ensures that the lessee assumes an appropriate amount of risk in the lease's execution. The required tendering of lease bonuses mandates that the lessee assume the risk that market conditions may render the leased property worthless so that the lessee loses the already paid bonus. The proposal accordingly furthers the Legislature's previously stated desire of trying to equalize lessor-lessee relations in other contexts<sup>155</sup> by ensuring that both the lessor and the lessee assume risk in the lease's execution. In doing so, the proposal prevents lessees from speculating with the lessor's assets without exchanging any consideration because the lessee must tender the bonus if the lessee wishes to hold the lease in anticipation of market changes.<sup>156</sup> Thus, the proposal properly forecloses the threat that *Irish Oil* could allow lessees to validate a lease while speculatively withholding the lease's bonus,<sup>157</sup> and the proposal achieves this end in a way that causes lessees minimal vexation.

In mandating the timely tendering of lease bonuses, this proposal is a tepid imposition on lessees. The proposal merely codifies the Legislature's possible assumption that a lease would not become operative without the lessee's tendering of the bonus.<sup>158</sup> Moreover, the proposal does nothing more than codify the well-accepted canon that time is of the essence in

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155. LEGISLATIVE RESEARCH COMM'N, REPORT TO THE LEGISLATURE, at 42 (N.D. 1961).

156. In this respect the proposal furthers North Dakota's policy of fostering and encouraging the development of the state's resources promulgated in N.D. CENT. CODE § 38-08-01 (1981) by ensuring that only those lessees who are serious enough about developing the lessor's property to invest a bonus are able to hold the property for extended times.

157. See *supra* Part II.A.

158. *Irish Oil & Gas, Inc. v. Riemer*, 2011 ND 22, ¶ 64, 794 N.W.2d 715, 732 (VandeWalle, C.J., dissenting).

leases<sup>159</sup> so that a lessee's failure to tender the bonus within the prescribed time period precludes the lessee from asserting any rights under the lease.<sup>160</sup> Such an imposition is consistent with how legislatures have protected lessors because states have already gone so far as to statutory impose Pugh clauses<sup>161</sup> and minimal royalty interests<sup>162</sup> into leases. Although such protection may cause lessees some mild trepidation,<sup>163</sup> the proposal adequately protects lessees who make a sincere mistake about failing to tender the lease's bonus because the proposal requires that the lessor notify the lessee of the delinquent bonus and affords the lessee fifteen additional days to tender the bonus before the lease terminates. In short, this proposal is merely a modest protectionist measure designed to protect lessors, specifically unsophisticated lessors.

Sophisticated lessors, usually with the attorney assistance, have already recognized the efficacy of including provisions similar to this proposal. For instance, seasoned lessors have included language to the effect that the implicated lease shall be null and void unless the bonus consideration is paid by a specified date.<sup>164</sup> However, lay lessors will most likely be unable to appreciate how the failure to include a similar provision can cause a situation like that found in *Irish Oil*. Rather, the prospect of newfound wealth often causes unsophisticated lessors to overlook that lessees are trying to further their own interests in negotiating leases.<sup>165</sup> Such a realization provides further fodder for codifying this proposal because the proposal properly protects the most vulnerable lessors, as indicated by the proposal's potential applications.

One can immediately recognize the proposal's virtue by applying it to the aforementioned instances of questionable lessee conduct.<sup>166</sup> The proposal would have prevented Range Resources from terminating leases without the loss of previously paid bonuses by requiring the full tendering

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159. *Amber Oil & Gas Co. v. Bratton*, 711 S.W.2d 741, 743 (Tex. Ct. App. 1986).

160. *E.E.E., Inc. v. Hanson*, 318 N.W.2d 101, 104 (N.D. 1982).

161. See N.D. CENT. CODE § 38-08-09.8 (1983); ARK. CODE ANN. § 15-73-201(a) (2011); OKLA. STAT. TIT. 52, § 87.1(b) (2012).

162. N.C. GEN. STAT. § 113-423(c) (2012) ("Any lease of oil or gas rights . . . shall provide that the lessor shall receive a royalty payment of not less than twelve and one-half percent (12.5%) . . .").

163. One can certainly argue that this proposal is unduly burdensome on lessees because the shortened deferral period may be insufficient time for the lessee to conduct a title search and cure any potential defects. Given that protecting lessors is of the utmost importance, such an argument is unavailing because the proposal may simply require that the lessees complete these and other tasks before entering the lease with the lessor.

164. *Johnson v. Mineral Estate, Inc.*, 343 N.W.2d 778, 779 (N.D. 1984).

165. See Joshua A. Swanson, *The Fine Print Matters: Negotiating Oil and Gas Leases in North Dakota*, 87 N.D. L. REV. 703, 706 (2012).

166. See discussion, *supra* Part I.B.

of the lease bonuses within a reasonable time frame; if Range Resources refused to do so, the leases would have terminated, and the lessors could have re-leased the property before market conditions deteriorated. The proposal also would have terminated the leases with Chesapeake Energy before drilling results presumably rendered the implicated area worthless, which would have allowed the lessors to gain the benefits of another lease before the new lessee found the implicated area unsuitable for production. Furthermore, by requiring the full tendering of a lease's bonus within the specific time frame, the proposal prevents lessees from refusing to tender a bonus's outstanding balance after the lessee fails to find a buyer for the lease. Finally, the proposal would have prevented Irish Oil from validating its lease with the Riemers after failing to tender the leases' bonuses because the proposal would have automatically terminated the leases if the Riemers complied with the proposal's various requirements. Thus, the proposal will duly protect lessor interests by preventing similar situations in the future.

#### B. PROPOSED LEGISLATIVE FIX

Based upon the foregoing reasons, North Dakota should adopt the following proposal: In order to protect lessor interests through mandating the prompt, full payment of all lease bonuses and to prevent impermissible speculation on the part of lessees, an oil and gas lease containing a bonus shall automatically terminate if the lessee fails to tender the lease's bonus within thirty days of the lease's execution, the lessor subsequently notifies the lessee, in writing, of such a delinquency, and the lessee fails to redress the situation within fifteen additional days.<sup>167</sup>

#### V. CONTRACTING AROUND IRISH OIL IN THE INTERIM

While *Irish Oil* persists and the Legislature's failure to act on *Irish Oil* during the 2013 legislative session constitutes a tacit endorsement of *Irish Oil's* constructions of law,<sup>168</sup> the question that arises is whether lessors can contract around *Irish Oil*. As previously alluded to,<sup>169</sup> lessors can use various methods to protect themselves from speculating lessees. Specifically, lessors can prevent *Irish Oil's* operation by making the timely

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167. This is not intended to be the full extent of the potential statute because the potential statute must address issues such as how the written notification is to occur, when and how the lessor is to file a satisfaction of the lease with county recorders, and other formalities.

168. *Johnson v. Johnson*, 527 N.W.2d 663, 666 (N.D.1995) (The court "presume[s] the legislature is aware of judicial construction of a statute, and from its failure to amend a particular statutory provision, we may presume it acquiesces in that construction.").

169. See discussion, *supra* Part IV.A.

tendering of a lease's bonus a condition precedent to the lease's formation or by pairing the lease's bonus with an "unless" clause.

Lessors can usurp *Irish Oil* by making the lessee's tendering of the bonus a condition precedent to the lease's formation. When the parties agree to a condition precedent, no binding contract exists before the parties satisfy the condition.<sup>170</sup> As applied within oil and gas leases, precedent conditions must be literally performed<sup>171</sup> so that a failure to honor a sight draft within a prescribed time period warrants cancellation of the lease where honoring the draft was a condition precedent to the lease's validation.<sup>172</sup> Accordingly, lessors can prevent *Irish Oil's* potentially draconian results by making the timely tendering of the lease's bonus a condition precedent. This result can be achieved by including the following language: The full and actual payment of the lease's bonus shall be the only form of consideration acceptable to create a valid lease. The promise or expectation to pay production royalties under the lease shall not be considered as any form of consideration, including executory consideration, to create a valid lease between the parties. If such bonus payment is not made to lessor by [a specified date], it shall be considered a total failure of consideration and there shall be no valid lease or contract.

Similarly, yet slightly different,<sup>173</sup> lessors can contract around *Irish Oil* by pairing a lease's bonus with an "unless" clause. In *Beaudoin v. JB Mineral Services, LLC*,<sup>174</sup> the North Dakota Supreme Court refused to extend *Irish Oil* to situations involving "unless" clauses.<sup>175</sup> With such a lease, the lease automatically terminates where the lease provides that the lease shall terminate unless the lessee tenders the lease's consideration by a specific date and the lessee fails to do so. Accordingly, lessors can prevent *Irish Oil's* operation by including a provision that stipulates that the lease will be null and void unless the lessee tenders the lease's bonus within a specific time period, which would have the same practical effect as this article's proposal. Thus, although *Irish Oil* continues to threaten lessor

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170. *Airport Inn Enter., Inc. v. Ramage*, 2004 ND 92, ¶ 11, 679 N.W.2d 269, 272.

171. *Paraffine Oil Co. v. Cruce*, 162 P. 716, 722 (Okla. 1916).

172. *Clawson v. Berklund*, 610 P.2d 1168, 1171 (Mont. 1980).

173. Although similar to precedent conditions, "unless" clauses are inherently distinguishable. With condition's precedent, no contract exists if the condition precedent is unsatisfied. *Airport Inn Enterprises*, 2004 ND ¶ 11, 679 N.W.2d at 272. Contrastingly, an unless clause invalidates an already existing contract based upon a parties' failure to perform a particular action. See *Norman Jessen & Assoc., Inc. v. Amoco Prod. Co.*, 305 N.W.2d 648, 651 (N.D. 1981).

174. 2011 ND 229, 808 N.W.2d 672.

175. *Id.* ¶ 11, 808 N.W.2d at 674

interests, lessors can still protect their interests by including simple provisions that emphasize the importance of lease bonuses.

## VI. CONCLUSION

The Bakken oil boom is an economic godsend for North Dakota that continues to present daunting and unprecedented challenges. Using hindsight from past booms and busts, public officials have mitigated some of the boom's consequences. However, these officials have yet to recognize that North Dakota's current statutory scheme allows lessees to take advantage of unassuming lessors through the use of legal technicalities that frustrate numerous policy aims, as indicated by *Irish Oil*. These unpalatable results are precisely why protection of lessor interests must remain of the utmost importance.<sup>176</sup> In order to effectuate this end, North Dakota must adopt a statute that automatically terminates a lease, without the need for judicial intervention, if a lessee fails to tender a lease's bonus with thirty days of the lease's execution, the lessor subsequently notifies the lessee, in writing, of such a delinquency, and the lessee fails to redress the situation within fifteen additional days. To do otherwise leads to decisions, such as *Irish Oil*, that are a "disservice to those lessors who may have their mineral estate found worthless and receive no bonus."<sup>177</sup>

*Zachary R. Eiken\**

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176. *Moerman v. Prairie Rose Res., Inc.* 308 P.3d 75, 79 (Mont. 2013).

177. *Irish Oil & Gas, Inc. v. Reimer*, 2011 ND 22, ¶ 63, 794 N.W.2d 715, 731 (VandeWalle, C.J., dissenting).

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