

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF MCKENZIE

NORTHWEST JUDICIAL DISTRICT

Newfield Exploration Company, Newfield
Production Company, and Newfield RMI
LLC,

Plaintiffs,

v.

State of North Dakota, ex rel. the North
Dakota Board of University and School
Lands, and the Office of the Commissioner
of University and School Lands, a/k/a the
North Dakota Department of Trust Lands,

Defendants.

**BRIEF IN RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Civil No. 27-2018-CV-00143

[¶1] Defendants State of North Dakota, ex rel. the North Dakota Board of University and School Lands (the “Board”), and the Office of the Commissioner of University and School Lands, a/k/a the North Dakota Department of Trust Lands (the “Department”) (collectively “Defendants”), submit this Brief in Response to Plaintiffs’ Motion for Partial Summary Judgment filed by Plaintiffs Newfield Exploration Company, Newfield Production Company, and Newfield RMI LLC (collectively “Newfield”).

I. Background and procedural history.

[¶2] The background and procedural history are accurately stated in the Brief in Support of Defendants’ Motion for Summary Judgment and are incorporated herein by reference. Index # 93 at pp. 1-4.

[¶3] At the outset, the Defendants challenge the constitutionality of House Bill 1080 of the Sixty-Seventh Legislative Session, codified at N.D.C.C. §§ 15-05-10 and 47-16-39.1 (HB 1080). HB 1080, section 1, creates N.D.C.C. § 15-05-10(5), effective August 1, 2021, and provides in part:

5. If a lessee or the lessee's representative or assignee fails or refuses to comply with demands by the board to pay royalties, interest, or penalties under this chapter, the board may file an action to cancel the lease, recover unpaid royalties, and recover interest and penalties on the unpaid royalties. Notwithstanding

chapter 28-01, an action under this subsection must be commenced within seven years of the date oil or gas was produced under a lease. An action to cancel a lease, recover unpaid royalties, or recover interest or penalties on unpaid royalties may not be filed for production that occurred under a lease before August 1, 2013.

[¶4] Newfield argues in its Brief in Support of Plaintiffs' Motion for Partial Summary Judgment that:

This case is about the Board's claims for breach of lease against Ovintiv for allegedly underpaying gas royalties. In that context, the Motion presents two discrete, legal issues: (1) the Board's underpayment claim is subject to certain limitations imposed by N.D.C.C. §§ 15-05-10 as amended in the last legislative session, and the Board cannot recover any underpaid royalties prior to August 1, 2013; and (2) the Board's equitable accounting claim is improper, unsupported, and duplicative of existing legal claims in this litigation....

In sum, HB 1080 amends and reenacts N.D.C.C. § 15-05-10 to include an obligation to pay royalties that is limited specifically to oil and gas leases with the Board and adds a limitations (or repose) period in which any actions to recover unpaid royalties and related penalties and interest must be brought. *See id.* Although the amendments and reenactments of HB 1080 do not go into effect until August 1, 2021, . . . such amendments and reenactments will apply retroactively, as N.D.C.C. § 15-05-10 will cover claims made for production on leases back to August 1, 2013. *See Bender Decl.*, ¶¶ 2-3, Exs. A-C.

Index # 99 ¶¶ 2, 16 (footnote omitted).

[¶5] Additionally, Newfield notes:

The Board filed its Counterclaims on April 11, 2018, thereby cutting off the ability to seek unpaid royalties, penalties, or interest for any production occurring more than seven years prior, i.e., before April 11, 2011. *See id.* However, because the amended and reenacted N.D.C.C. § 15-05-10 also provides that all claims are limited to recover unpaid royalties, penalties, and interest only on production occurring from a lease on or after August 1, 2013, the Board is estopped from recovering such unpaid royalties, penalties, and interest from production occurring prior to that date.

Id. ¶ 17.

II. Constitutionality.

[¶6] The Defendants note that Newfield argues N.D.C.C. § 15-05-10, as amended and reenacted by HB 1080, is controlling law over this case. The Defendants

challenge this argument on the grounds that it contends N.D.C.C. § 15-05-10(5), as amended and reenacted by HB 1080, is unconstitutional. Specifically, the Defendants contend it violates the Contracts Clause of both United States Constitution art. I, § 10, cl. 1 and North Dakota Constitution art. I, § 18, and the Gift Clause of North Dakota Constitution art. X, § 18, particularly as it relates to the trust funds created and protected under article IX of the North Dakota Constitution. The Defendants request this Court to rule on the constitutionality as part of the parties' motions for summary judgment or as a separate matter and to allow additional briefing, if necessary.

A. Contracts Clause.

[¶7] The Constitutions prohibit retroactive alteration of contracts, including the impairment of obligations thereunder.¹ The applicability of the Contract Clause, as it applies to laws passed by the North Dakota Legislature, was recently addressed in *Association of Equipment Manufacturers v. Burgum*, 932 F.3d 727 (8th Cir. 2019).

The Court stated:

The [Contracts] Clause's terms are absolute: "No State shall ... pass any ... Law impairing the Obligation of Contracts ..." U.S. Const. art. I, § 10, cl. 1. The Clause's principal target was debtor-relief legislation that many States had passed in the wake of the Revolutionary War, *see Sveen*, 138 S. Ct. at 1821, but the text is not so limited, and historical context suggests that the Clause was "aimed at all retrospective, redistributive schemes in violation of vested contractual rights." Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 533-34 (1987). The Supreme Court, through Chief Justice Marshall,

¹ The United States Constitution art. I, § 10, cl. 1 provides:

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

North Dakota Constitution art. I, § 18 provides:

"No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed."

understood the Framers “to have intended to establish a great principle, that contracts should be inviolable,” and concluded in an early case construing the Clause that the Court “should give these words their full and obvious meaning.” *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 205-06, 4 L.Ed. 529 (1819).

Even where a state statute was designed to further a legitimate state purpose of assisting poor people who were oppressed by debts, the Contract Clause forbade legislation that discharged contractual liability without performance. *See id.* at 206; Kmiec & McGinnis, *supra*, at 536-37. The Clause did not prevent a State from regulating health, safety, and morals, *see Stone v. Mississippi*, 101 U.S. 814, 817-19, 25 L.Ed. 1079 (1880), but drew the line at efforts “to redistribute resources in violation of vested contractual rights.” Kmiec & McGinnis, *supra*, at 541; *see also* Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 715-16, 730-40 (1984) (arguing that while the Contract Clause encompasses a modest police power limitation, “the transfer of wealth by special-interest politics” is the “evil to which the clause is directed”).

Id. at 731-32.

The Court added that:

“The [drafter] bears the burden of proof in showing a significant and legitimate public purpose underlying the Act.” *Id.* at [*Equip. Mfrs. Inst. v. Janklow*, 300 F.3d 842,] 859 [(8th Cir. 2002)]. The state legislature declined to follow the examples of the legislatures in [cases supporting the retroactive alteration of contracts], which included well-supported findings or purposes within their duly enacted laws, so any significant and legitimate public purpose must be discerned from the design and operation of the legislation itself. Statements in the legislative history of individual legislators, lobbyists, or advocates that the law would benefit farmers and rural communities are insufficient. Special-interest groups cannot establish that legislation serves a broad societal interest simply by ensuring that the record contains testimony or floor statements about a law's conceivable public benefits.

Id. at 733.

In determining whether a state law passes muster under the Contract Clause, “[t]he threshold issue is whether the state law has ‘operated as a substantial impairment of a contractual relationship.’” *Sveen v. Melin*, — U.S. —, 138 S. Ct. 1815, 1821-22, 201 L.Ed.2d 180 (2018) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978)). If the answer is yes, then the court asks “whether the state law is drawn in an ‘appropriate’ and ‘reasonable’ way to advance ‘a significant and legitimate public purpose.’” *Id.* at 1822 (quoting *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411-12, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983)). “The [drafter] bears the burden of proof in showing a significant and legitimate public purpose underlying the Act.” *Equip. Mfrs. Inst. v. Janklow*, 300 F.3d

842, 859 (8th Cir. 2002); *see also Energy Reserves Grp.*, 459 U.S. at 411-12, 103 S.Ct. 697. . . .

Id. at 730.

[¶8] Thus, any statute that impairs a party’s right to obtain payment is unconstitutional absent a showing of a significant and legitimate public purpose by the drafter. Proponents of any bill which retroactively alters terms of an existing contract must demonstrate the state law is drawn in an “appropriate” and “reasonable” way to advance “a significant and legitimate public purpose.”

[¶9] “In *Equipment Manufacturers Institute*, South Dakota conceded that the purpose of a . . . law [retroactively impacting existing contracts] was ‘to level the playing field between manufacturers and dealers,’ 300 F.3d at 860, and this court concluded that the conceded purpose did not qualify as a ‘significant and legitimate public interest.’ *Id.* at 861.” *Id.* at 731.

[¶10] Under the current bill, proponents make no such concession and assert very little as to how this law furthers a significant public interest. At the hearings on this bill, the North Dakota Petroleum Council (“NDPC”), the primary voice of the oil and gas industry in North Dakota since 1952, was the main supporter of the legislation insofar as providing testimony on its behalf.

[¶11] The NDPC explained that the legislation was brought forward as a direct result of the decision in *Newfield v. State*, 2019 ND 193, 931 N.W.2d 478.² The NDPC requested the Legislature step in and essentially change the royalty payment obligations of lessees under the Board’s Lease.³ In other words, they were attempting

² Hearing on HB 1080 Before the Senate Energy & Natural Resources Committee, 2021 N.D. Leg. (Mar. 12, 2021) (Testimony of Ron Ness) at 10:59:56. (<https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210730/-1/19521?startposition=20210312103000>).

³ Hearing on HB 1080 Before the Senate Energy & Natural Resources Committee, 2021 N.D. Leg. (Mar. 12, 2021) (Testimony of Ron Ness) at 11:01:10.

to do exactly what the Constitution prohibits, the redistribution of “resources in violation of vested contractual rights.” *Ass’n of Equip. Mfrs.*, 932 F.3d at 732. In this case, the redistribution would go from schools and students of the state to private oil companies.

[¶12] If N.D.C.C. § 15-05-10(5), as amended and reenacted by HB 1080, is found constitutional, the Legislature will have altered the terms of the Board’s Lease retroactively by reducing what companies owe the Defendants by millions of dollars without any real justification. “[T]he mere assertion of a conceivable public purpose is insufficient to justify a substantial impairment of contractual rights. Virtually all legislation enacted by multi-member bodies will be motivated by multiple purposes in the minds of individual legislators, but those subjective intentions are not controlling. Whether the law passes constitutional muster requires a more discerning inquiry into the Act’s structure and design.” *Id.*

[¶13] In defense of the legislation, the NDPC highlights the fact that a company could be assessed as much as 18% in interest and 12% in penalties for failure to pay royalties properly. This became an even more ominous situation for the NDPC and the oil and gas industry after the North Supreme Court issued the *Newfield* decision, holding that the Defendants’ interpretation of the Board’s Lease was correct and that Newfield had not been paying correctly. 2019 ND 193, ¶ 11, 931 N.W.2d 478. This left Newfield liable for potentially millions of dollars per the terms of the Board’s Lease, which it should be noted it voluntarily entered into with the Defendants. Thus, the Legislature responded by passing N.D.C.C. § 15-05-10(5), a retroactive law that discharged contractual liability owed under the terms of the Board’s Leases by

(<https://video.legis.nd.gov/en/PowerBrowser/PowerBrowserV2/20210730/1/19521?startposition=20210312103000>).

not allowing the Board to collect royalties owed from production occurring before August 1, 2013, which solely benefits a favored group.

[¶14] As noted above, there is precedent for a court to uphold a law that retroactively alters the terms of a contract, which demonstrates the high standard the court will apply in its analysis. In *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934), the Court upheld a Contract Clause attack against a mortgage moratorium law that Minnesota had enacted to provide relief for homeowners threatened with foreclosure. Although the legislation conflicted directly with lenders' contractual foreclosure rights, the Court there acknowledged that, despite the Contract Clause, the States retain residual authority to enact laws “to safeguard the vital interests of [their] people.” *Id.* at 434. In upholding the state mortgage moratorium law, the Court found five factors significant. First, the state legislature had declared in the Act itself that an emergency need for the protection of homeowners existed. *Id.* at 444. Second, the state law was enacted to protect a basic societal interest, not a favored group. *Id.* at 445. Third, the relief was appropriately tailored to the emergency that it was designed to meet. *Id.* Fourth, the imposed conditions were reasonable. *Id.* at 445–447. And, finally, the legislation was limited to the duration of the emergency. *Id.* at 447.

[¶15] N.D.C.C. § 15-05-10(5) fails to satisfy or violates each the five factors discussed above. As noted above, “the mere assertion of a conceivable public purpose is insufficient to justify a substantial impairment of contractual rights.” *Ass’n of Equip. Mfrs.*, 932 F.3d at 731. Thus, the Court should rule that N.D.C.C. § 15-05-10(5) is unconstitutional.

B. Gift Clause/Permanent Trust Funds.

[¶16] The North Dakota Constitution protects money belonging to the permanent

funds.⁴ North Dakota Constitution art. IX, § 1 provides “Revenues earned by a perpetual trust fund must be deposited into the fund.” Additionally, any diversion of such funds is unconstitutional. North Dakota Constitution art. IX, § 2 specifically states:

Distributions from the common schools trust fund, together with the net proceeds of all fines for violation of state laws and all other sums which may be added by law, must be faithfully used and applied each year for the benefit of the common schools of the state and ***no part of the fund must ever be diverted, even temporarily, from this purpose or used for any purpose other than the maintenance of common schools as provided by law.*** Distributions from an educational or charitable institution's trust fund must be faithfully used and applied each year for the benefit of the institution and no part of the fund may ever be diverted, even temporarily, from this purpose or used for any purpose other than the maintenance of the institution, as provided by law.

(Emphasis added.)

[¶17] Under N.D.C.C. § 15-05-10(5), as amended and reenacted by HB 1080, millions of dollars belonging to the permanent trust funds will be diverted from educational purposes and, instead, retained by the oil and gas industry in violation of both Sections 1 and 2 of the North Dakota Constitution art. IX and the Gift Clause, North Dakota Constitution art. X, § 18.

‘A statute which has the effect of thus transferring the property of all the people, without compensation or public advantage, to a few, denies that equal protection and benefit to the people for which government is instituted, as declared in the Bill of Rights. Equal protection is defeated by a gift of that which belongs to all as effectually as by compelling a contribution from all, which, as we have seen, the authorities do not permit. While this protection is usually sought by the few against the many, no reason is perceived why it may not be invoked in behalf of the people at large against legislation which would bestow their property upon the few. This provision of the Constitution, as we have seen, while declaring a political truth, does not permit legislation which trenches upon the truth thus affirmed. To this extent, at least, it must, like other constitutional provisions, be interpreted with sufficient liberality to carry into effect the principles of government which it embodies. *State v. Sessions*, 84 Kan. 856, 115 P. 641, 22 Ann.Cas. [1912A,] 796.

⁴ We note that the Defendants manage both permanent and non-permanent trust funds. Around 80% of the royalties at issue in this case belong to the permanent trust funds.

Solberg v. State Treasurer, 53 N.W.2d 49, 55 (N.D. 1952).

[¶18] North Dakota Constitution Article IX created the Board and granted it the authority to manage the permanent funds. Section 1 of Article IX provides that “[r]evenues earned by a perpetual trust fund must be deposited into the fund.” Since the Constitution provides that these funds must be deposited, it is beyond Legislative power to pass a law that authorizes diversion of income from these funds. *State ex rel. Sathre v. Bd. of Univ. & Sch. Lands of N.D.*, 262 N.W. 60, 65–66 (1935). Even if the Legislature did have the authority to divert income from said funds, such a law would conflict with Article X, § 18 of the North Dakota Constitution which provides “neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation . . .”

[¶19] The permanent funds managed by the Board are protected by the North Dakota Constitution. In recognition of the unique nature of the trusts in which the funds are deposited, the North Dakota Supreme Court has referred to the trusts as “sacred trust[s]”. *Erickson v. Cass Cnty.*, 92 N.W. 841, 848 (N.D. 1902). This unique nature established by the Constitution was designed to protect the trusts from certain legislative actions. Thus, the Court should find that N.D.C.C. § 15-05-10(5) violates the Gift Clause, Article X, § 18, and Article IX, §§ 1 and 2 of the North Dakota Constitution.

III. **The Court should reject Newfield’s claim that the Defendants are not entitled to an accounting of Newfield’s records.**

A. **Newfield must produce sufficient records to the Defendants to allow them to determine damages for breaching the Board’s Lease.**

[¶20] Newfield describes the accounting request as a separate, equitable cause of action which can only be awarded in limited circumstances. Newfield is incorrect as to the nature of the Defendants’ request. Assuming Newfield is held to have breached

the Board's Lease, the Defendants are merely seeking to access records of Newfield that will provide sufficient information to calculate damages. The Defendants are not seeking a separate equitable cause of action but rather requesting the Court order Newfield to provide the necessary documentation in whatever form the Court decides is appropriate in connection with the breach. As other courts have described, "[t]he 'accounting' is not a separate cause of action, but a word used to describe the process for determining the amount of damages in the breach of contract action." *Moore v. Medtronic, Inc.*, No. CIV. 99-2066ADMAJB, 2001 WL 1636248, at *3 (D. Minn. July 30, 2001). This reasoning has been applied specifically to oil and gas royalty payments. "Nevertheless, should the Plaintiff succeed on its remaining breach of contract claim, it seems obvious that some kind of 'accounting' will necessarily be involved in calculating the damages resulting from Defendant's alleged failure to pay Plaintiff the full amount of royalties to which [it] was contractually entitled." *Wilcox v. Career Step, LLC*, 929 F. Supp. 2d 1155, 1168–69 (D. Utah 2013). In other words, the Defendants' request for an accounting in this case is merely ancillary to their claim that Newfield has breached the Board's Lease and has an objective of obtaining an accurate calculation of damages due to said breach.

[¶21] The North Dakota Supreme Court has reasoned the District Court has discretion to award an accounting or production of records in its sole discretion.

[T]his Court has noted that, where it is reasonably certain substantial damage has resulted, mere uncertainty as to the exact amount will not preclude recovery. *See Langer v. Bartholomay*, 2008 ND 40, ¶ 27, 745 N.W.2d 649; *Farmers Ins. Exch. v. Schirado*, 2006 ND 141, ¶ 17, 717 N.W.2d 576; *Livinggood v. Balsdon*, 2006 ND 11, ¶ 8, 709 N.W.2d 723; *Keller v. Bolding*, 2004 ND 80, ¶ 21, 678 N.W.2d 578. In cases where no definite evidence of an exact amount of damage exists, we allow proof by the best evidence available:

“[W]here damage obviously has been suffered, but there is no definite evidence available for an exact determination of the amount of damage resulting from a breach of contract,

the best evidence which the circumstances will permit is all the law requires.”

Langer, at ¶ 27 (quoting *Livinggood*, at ¶ 8); see also *Schirado*, at ¶ 17; *Keller*, at ¶ 21; *North Am. Pump Corp. v. Clay Equip. Corp.*, 199 N.W.2d 888, 891 Syll. ¶ 6 (N.D.1972). This Court has therefore concluded that, in cases “where the amount of damages may be hard to prove, the amount of damages is to be left to the sound discretion of the finder of facts.” *Keller*, at ¶ 21 (quoting *B.W.S. Invs. v. Mid-Am Rests., Inc.*, 459 N.W.2d 759, 764 (N.D.1990)); see also *Langer*, at ¶ 27; *Schirado*, at ¶ 17.

Martin v. Trinity Hosp., 2008 ND 176, ¶ 30, 755 N.W.2d 900.

B. **A fiduciary relationship between a lessor and lessee is not required for the Court to order the production of documentation sufficient to calculate damages for breach of an oil and gas lease.**

[¶22] Newfield claims a fiduciary duty between Newfield and the Defendants is required to award an accounting. Again, Newfield mischaracterizes the nature of the Defendants’ accounting claim. Newfield’s claim is dependent on the Defendants having brought a second cause of action. As noted above, the Defendants’ request for an accounting is tied to its breach of lease and underpayment of royalties claims. Thus, the Court should reject Newfield’s argument as it is inapplicable to the breach of lease claim and underpayment of royalties under the present facts. Even assuming the Court was to consider the issue of fiduciary duty, the Court should reject Newfield’s argument. Indeed, “in at least one oil-producing State, it has been recognized that the operator of an oil and gas lease owes a fiduciary duty to royalty owners (see, *Coosewoon v Meridian Oil Co.*, 25 F3d 920, 931).” *La Barte v. Seneca Res. Corp.*, 285 A.D.2d 974, 977 (2001).

C. **The availability of discovery does not prevent the court from ordering an Accounting to allow the Defendants to calculate damages properly.**

[¶23] In the present case, the opportunity to conduct discovery does not eliminate the Defendants’ right to an accounting when calculating damages. It is only when a party forgoes an obvious opportunity to obtain available records through the discovery process that a court should consider denying an accounting. If documents

relating to damages are requested through discovery but are not produced, the Court should not penalize the requesting party. *Martin*, 2008 ND 176, ¶ 33, 755 N.W.2d 900 (“Martin's inability to present definite evidence of an exact amount of damages flowing from the breach did not result because such evidence did not exist, but rather was the direct result of Martin's questionable pretrial tactics.”)

[¶24] In the present case, discovery was not available prior to the state receiving a judgment in its favor from the North Dakota Supreme Court. Upon remand, the parties agreed to allow discovery. The Defendants made the following requests in the Defendants State of North Dakota, ex re. the North Dakota Board of University and School Lands, and the Office of the Commissioner of University and School Lands, a/k/a the North Dakota Department of Trust Lands’ Interrogatories, Requests for Production of Documents, and Requests for Admissions to Plaintiff (Apr. 1, 2021):

REQUEST FOR PRODUCTION NO. 4: Provide all of Plaintiff's internal documents and communications regarding calculation of royalties owed to Defendants.

REQUEST FOR PRODUCTION NO. 5: Provide all of Plaintiff's documents and communications regarding how to complete royalty statements provided to Defendants, including where to include deductions and calculation of Gross Proceeds of Sale.

REQUEST FOR PRODUCTION NO. 6: Provide all documentation evidencing how Plaintiff identified deductions on royalty statements provided to Defendants.

REQUEST FOR PRODUCTION NO. 7: Please provide all royalty statements provided to Defendants in which Plaintiff has identified deductions as required under N.D.C.C. § 38-08-06.3.

[¶25] In Plaintiffs’ Responses to Defendants’ First Set of Interrogatories, Requests for Production, and Requests for Admission, the Plaintiff rejected these requests within the context of the discovery process, stating:

Request for Production No. 4: Provide all of Plaintiff's internal documents and communications regarding calculation of royalties owed to Defendants.

Response:

The Owner Defendants⁵ object to this Request in that it seeks to require the Owner Defendants to produce documents related to royalty payments without any period or time limitation, and which may not be relevant to Defendants' claims in this lawsuit. Ovintiv further objects that it would be unduly burdensome to locate all internal documents or communications that may be even tangentially relate to Defendants' royalty interests. Ovintiv also objects that this Request seeks documents that are duplicative of Request for Production No. 2.

Subject thereto and without waiving its objections, responsive documents will be produced at a mutually agreeable time and place or have been produced contemporaneously with these responses.

Request for Production No. 5: Provide all of Plaintiff's documents and communications regarding how to complete royalty statements provided to Defendants, including where to include deductions and calculation of Gross Proceeds of Sale.

Response:

Ovintiv objects to this Request in that it seeks to Ovintiv to produce documents related to royalty payments without any period or time limitation and which may not be relevant to Defendants' claims in this lawsuit. Ovintiv further objects that it would be unduly burdensome to locate all internal documents or communications that may even tangentially related to Defendants' royalty interests. Ovintiv also objects to this request in that it improperly assumes that Ovintiv has made "deductions" in calculating Defendants' gas royalties. Ovintiv further objects to this request in that it improperly calls for a legal determination of what qualifies as Gross Proceeds of Sale and is impermissibly vague in that it fails to define that term. Ovintiv will respond to this request as seeking all of its documents and communications regarding how to complete gas royalty statements provided to Defendants.

Subject thereto and without waiving its objections, responsive documents will be produced at a mutually agreeable time and place or have been produced contemporaneously with these responses.

Request for Production No. 6: Provide all documentation evidencing how Plaintiff identified deductions on royalty statements provided to Defendants.

Response:

Ovintiv objects to this Request in that it seeks to require Ovintiv to produce documents related to royalty payments without any period or time limitation, and it would be unduly burdensome to locate all internal

⁵ The term "Owner Defendants" is not defined in the discovery. We assume this is a typo and should refer to Ovintiv (Newfield).

documents or communications that may be even tangentially related to Defendants' royalty interests. Ovintiv objects to this request in that it improperly assumes that Ovintiv has made "deductions" in calculating Defendants' gas royalties.

Subject thereto and without waiving its objections, responsive documents will be produced at a mutually agreeable time and place or have been produced contemporaneously with these responses.

Request for Production No. 7: Please provide all royalty statements provided to Defendants in which Plaintiff has identified deductions as required under N.D.C.C. § 38-08-06.3.

Response:

Ovintiv objects to this request in that it improperly assumes that Ovintiv has made "deductions" in calculating Defendants gas royalties. Ovintiv further objects to this request in that it seeks a legal determination of that a North Dakota statute requires and presumes that Defendants' legal interpretation thereof is correct.

Subject thereto and without waiving its objections, responsive documents will be produced at a mutually agreeable time and place or have been produced contemporaneously with these responses.

[¶26] As such, the Defendants have sought to obtain necessary records through the discovery process and Newfield has refused to produce them. Accordingly, this Court should reject Newfield's argument that the availability of discovery precludes the court from awarding an accounting.

CONCLUSION

[¶27] Based on the foregoing, Defendants respectfully request the District Court grant Summary Judgment in favor of Defendants and enter a judgment declaring:

1. That Newfield has breached the Board's Lease by failing to pay royalties properly;
2. That Newfield owes the Department additional gas royalty payments based on its failure to pay all amounts due to the Department under the Newfield Leases;
3. That Newfield owes applicable interest and penalties due to Newfield's failure to pay all amounts due to the Department under the Newfield Leases;
4. That Defendants are entitled to an accounting for the production and revenues derived from the Newfield Wells in order to determine the gas royalties, interest and penalties owed to the Department;

5. That Defendants are entitled to such other and further relief as the Court deems just and equitable; and
6. N.D.C.C. § 15-05-10(5), as amended and reenacted by HB 1080, is an unconstitutional violation of the Contracts Clause of both United States Constitution art. I, § 10, cl. 1 and North Dakota Constitution art. I, § 18, the Gift Clause of North Dakota Constitution art. X, § 18, and North Dakota Constitution art. IX, §§ 1 and 2.

Dated this 2nd day of August, 2021.

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