

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

GEM Razorback, LLC, Plaintiff/Appellant, vs. Zenergy, Inc., Defendant/Appellee.	SUPREME COURT NO. 2016170 Civil No. 27-2015-cv-00129
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ON APPEAL FROM JUDGMENT
STATE OF NORTH DAKOTA
MCKENZIE COUNTY

ON APPEAL FROM JUDGMENT GRANTING
DEFENDANT'S MOTION TO DISMISS
MAY 4, 2016
STATE OF NORTH DAKOTA
COUNTY OF MCKENZIE

BRIEF OF PLAINTIFF/APPELLANT

Joshua A. Swanson (#06788)
jswanson@vogellaw.com
VOGEL LAW FIRM
Attorneys for Plaintiff/Appellant
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
Telephone: 701.237.6983

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[1] Whether the district court erred in holding that it did not have jurisdiction to determine whether GEM Razorback, LLC, a nonparticipating owner that paid its share of costs plus a statutory risk penalty in two oil and gas wells, has a statutory right to certain information, including but not limited to financial information, from the former operator of the wells, Zenergy, Inc.

[2] Whether the district court erred in dismissing, as a matter of law, GEM Razorback, LLC's, claim that it was a third-party beneficiary of the Assignment between Zenergy, Inc., and Oasis Petroleum, LLC.

STATEMENT OF THE CASE

[3] This is an appeal from the district court's Findings of Fact, Conclusions of Law and Order for Judgment, and Judgment, dated May 4, 2016, granting Zenergy, Inc.'s ("Zenergy") Motion to Dismiss. The dispute centers on the question of whether the district court had jurisdiction to determine if GEM Razorback, LLC ("GEM Razorback") has a right under Chpt. 38-08, N.D.C.C., or as a third-party beneficiary to an Assignment between Zenergy and Oasis Petroleum North America, LLC ("Oasis"), to information for two oil and gas wells in which GEM Razorback is a nonconsenting owner.

[4] GEM Razorback is a nonconsenting owner in the Berquist 33-28H well, NDIC file no. 18980 ("Berquist well") and the Ceynar 29-32H well, NDIC file no. 19350 ("Ceynar well"). Zenergy operated the Berquist and Ceynar wells from when they were drilled in February 2011 and October 2010 until Zenergy assigned their interests in the wells to Oasis in December 2013. Zenergy assessed GEM Razorback its share of costs in proportion to GEM Razorback's ownership interest in the wells along with the 150 percent risk penalty provided for in N.D.C.C. § 38-08-08.

[5] GEM Razorback asked Zenergy numerous times to provide certain financial and production information so GEM Razorback could properly review and account for the costs and risk penalties Zenergy was assessing for the wells. The documents requested included those related to the cumulative balance to payout, and information detailing the costs, revenues and production data for the Berquist and Ceynar wells. Despite the fact GEM Razorback is an owner in these wells and paid their share of costs and a risk penalties, Zenergy refused to provide this information. The result is that GEM Razorback has paid for their share of costs and risk penalties in the Berquist and Ceynar wells without knowing what Zenergy actually assessed in costs and risk penalties.

[6] On May 1, 2015, the Summons and Complaint were filed in McKenzie County District Court (ROA #2 – 4) seeking a declaration that, as an owner in the Berquist and Ceynar wells, GEM Razorback was entitled to the information they requested for the wells. Additionally, GEM Razorback sought specific performance of the Assignment between Zenergy and Oasis as a third-party beneficiary based on Oasis providing GEM Razorback with the information defined in the Assignment for the time period beginning in December 2013 when Oasis acquired the wells.

[7] Zenergy responded by filing the Motion to Dismiss. (ROA #12 – 14). Zenergy contended the district court did not have jurisdiction to consider GEM Razorback's request for declaratory relief – that GEM Razorback, as an owner in the Berquist and Ceynar wells, had a right to the information from Zenergy for the two wells. Zenergy also contended that GEM Razorback's request for declaratory relief and claim as a third-party beneficiary of the Assignment did not state a claim for relief under N.D.R.Civ.P. 12(b)(6). On May 15, 2015, GEM Razorback filed their response to the motion to

dismiss. (ROA #24). GEM Razorback asserted that the district court had jurisdiction to determine whether, as an owner in the wells, it was entitled to the information requested from Zenergy; and that it was a third-party beneficiary of the Assignment.

[8] The initial hearing on Zenergy's motion to dismiss was held before the Honorable Robin Schmidt on September 11, 2015. Before the hearing, counsel for the parties reached an agreement whereby Zenergy agreed to provide certain information requested by GEM Razorback. The district court entered an order referencing the parties' agreement and reserved ruling on Zenergy's motion. (ROA #41). Despite Zenergy's assurance that it would provide the information, Zenergy reversed course, first providing an incomplete set consisting of 579 pages of documents, then refused to provide the remainder of the information to GEM Razorback.

[9] In response, GEM Razorback requested a second hearing with the district court to take up the matter, (ROA #42), which was held on January 26, 2016. The district court took the motion under advisement. On March 2, 2016, the district court e-mailed the parties, indicating it was granting Zenergy's motion and asked Zenergy to prepare the findings of fact, conclusions of law, and order for judgment. In May 2016, the district court issued its Findings of Fact, Conclusions of Law and Order for Judgment, and Judgment, granting Zenergy's motion to dismiss. (ROA #48 – 49). The district court held it did not have jurisdiction to consider GEM Razorback's request for declaratory relief and that GEM Razorback was not a third-party beneficiary of the Assignment between Zenergy and Oasis.

[10] On May 10, 2016, Appellant GEM Razorback timely provided notice of appeal from the district court's Judgment (ROA #50), arguing the district court erred in holding

that it did not have jurisdiction to determine whether GEM Razorback had a right under North Dakota law to the information it requested from Zenergy, and that whether GEM Razorback was a third-party beneficiary presented a question of fact that was inappropriate for dismissal. Accordingly, GEM Razorback respectfully requests that the Court reverse the district court's Order and Judgment granting Zenergy's motion to dismiss and hold that, as a matter of law, GEM Razorback is entitled to the information requested from Zenergy. Alternatively, if the Court affirms that the district court did not have jurisdiction to consider GEM Razorback's request for declaratory relief, the Court should still remand to the district court on the issue of whether GEM Razorback was a third-party beneficiary of the Assignment. Whether GEM Razorback was a third-party beneficiary presented a sufficient claim for relief – and questions of fact – that should not have been dismissed by the district court.

STATEMENT OF THE FACTS

A. GEM Razorback has an ownership interest in the Berquist and Ceynar wells

[11] GEM Razorback is a nonconsenting owner in the Berquist and Ceynar wells. (ROA #48 at ¶ 5). The wells are located in McKenzie County. The Berquist well is spaced in a 1,280 acre unit consisting of Township 152 North, Range 98 West, Sections 28 and 33. The Ceynar well is spaced in a 1,280 acre unit consisting of Township 152 North, Range 98 West, Sections 29 and 32. Zenergy operated the wells from when they were drilled – in February 2011 (Berquist well) and October 2010 (Ceynar well) – until they assigned their interests to Oasis in December 2013. (See *id.* at ¶ 4). The Assignment is recorded in McKenzie County at document no. 458423. (See *id.*)

[12] As a nonconsenting owner, GEM Razorback is subject to the provisions of N.D.C.C. § 38-08-08, which provides for how an operator recovers its costs from nonconsenting owners and allows a 150 percent risk penalty in addition to the costs assessed by the operator. Zenergy admits when it operated the wells, it assessed GEM Razorback for their proportionate share of costs plus the 150 percent risk penalty.

B. GEM Razorback requested information and documents from Zenergy for the Berquist and Ceynar wells

[13] GEM Razorback requested certain information and documents related to their interests in the wells from Zenergy. (ROA #3 and 48 at ¶ 6). GEM Razorback began requesting this information when Zenergy was operating the wells. (ROA #48 at ¶ 6). The information included the cumulative balance to payout for the wells, the costs – and details for revenue and expenses – that GEM Razorback was being assessed for its ownership interest, and production data for the wells. (Id.) GEM Razorback requested the same information from Oasis for when they operated the well. Oasis acquired Zenergy’s interest in the wells in December 2013. In February 2015, Oasis provided the requested information to GEM Razorback without dispute, recognizing that GEM Razorback was entitled to the information as an owner in the wells. (ROA #27).

[14] While Oasis provided the information to GEM Razorback for the time period they operated the wells, Oasis could not provide the information for the time period prior to December 2013 when Zenergy operated the wells. Oasis indicated that, “[Z]energy will have a better knowledge of and easier access to the documents that you are seeking prior to Oasis becoming operator.” (Id.) Zenergy does not dispute that the information requested by GEM Razorback is in their possession and readily available.

C. Zenergy refused to provide GEM Razorback with the information it requested for the Berquist and Ceynar wells

[15] While Zenergy has refused to provide the information GEM Razorback requested, they do not dispute that GEM Razorback ultimately has a right to the information. Instead, Zenergy contends GEM Razorback must petition the North Dakota Industrial Commission and request that Zenergy provide the information to the Industrial Commission, who will then review the information on behalf of GEM Razorback.

Q. (The Court): I think I've said this before. But this all seems like a ridiculous shell game to me.

A. (Zenergy): And, Your [sic] Honor, I completely understand where you're coming from that this appears to be a request for documents, but that's not the basis for a lawsuit. I mean, there's appropriate procedures to request documentation, and a review of appropriate costs and risk penalties through the Industrial Commission.

(Transcript at 13). Zenergy further argued, "It's not that Zenergy will not produce the documents," (Id. at 14), but that GEM Razorback's "[r]ights [are] through the Industrial Commission, who would then review whether appropriate costs and risk penalties have been assessed." (See id. at 15). What Zenergy overlooks is, at this point, GEM Razorback cannot challenge the costs or risk penalties they were assessed by Zenergy because GEM Razorback does not even know what those costs and risk penalties are as Zenergy refuses to provide the information.

[16] Zenergy admits that while they are withholding the information from GEM Razorback, the participating owners in the Berquist and Ceynar wells subject to the Joint Operating Agreement are entitled to the same information upon request. "Like I said, under a Joint Operating Agreement, yes, they [GEM Razorback] could do that, but that right is reserved for individuals who participate in a Joint Operating Agreement and

Plaintiff has not done that, in this case.” (Id.) In effect, Zenergy is making a distinction between the rights afforded to participating owners versus nonconsenting owners. The Joint Operating Agreement (“JOA”) provides that participating owners are entitled to the books and records for the Berquist and Ceynar wells necessary to conduct an audit of the wells. (ROA #26). The JOA provides in relevant part: “Each party ... shall have access at reasonable times to information pertaining to the development or operation thereof, including Operator’s books and records relating thereto.” (Id. at Section VI.D).

[17] Zenergy makes a distinction between participating and nonparticipating owners. Zenergy contends participating owners are entitled to all the information for the Berquist and Ceynar wells necessary to audit the wells, but because GEM Razorback is a nonconsenting owner, they are not entitled to the information and instead must go to the Industrial Commission. At that point, Zenergy will purportedly produce the information GEM Razorback has requested, not to GEM Razorback, but to the Industrial Commission, and the Industrial Commission will then audit the wells.

D. The Assignment included a right for Oasis to receive all files, records, and data maintained by Zenergy for the Berquist and Ceynar wells

[18] Zenergy assigned its interest in the Berquist and Ceynar wells to Oasis in December 2013. (ROA # 21). The Assignment provides at Article I, Section 1.01(h) that Oasis has a right to the following records from Zenergy:

- (h) all files, records, and data maintained by Assignor and Operator and relating to the interests described in this Section 1.01, including all cores (whole and sidewalls), thin sections prepared from any Wells, lease files, land files, well files, drilling reports, files relating to the Transferred Agreements, division order files, abstracts and title opinions and copies of applicable accounting records, and copies of all joint interest billings (“JIBs”), authorities for expenditures and revenue remittance advices, related to the foregoing Assets, and all land and geological data associated with the Properties (collectively, the “Records”); ...

(Id.) This is the very information GEM Razorback seeks from Zenergy. (ROA # 3). In February 2015, when Oasis provided the information to GEM Razorback, Oasis explained that Zenergy had the pre-Assignment records requested by GEM Razorback. Oasis instructed GEM Razorback to contact Zenergy and request the desired information in order for GEM Razorback to be able to exercise their right to audit the wells.

We have been more than happy to provide documents from our operatorship, as required, but we respectfully decline to go beyond this as Zenergy will have a better knowledge of and easier access to the documents that you are seeking prior to Oasis becoming operator. Oasis cannot host or facilitate the hosting of an audit of a property that we did not operate, nor are we legally obligated to do so. However, Zenergy is obligated to keep records for circumstances such as these and we suggest that you exercise your legal right to audit them.

(ROA #27 and 48 at ¶ 9).

LAW AND ARGUMENT

A. The district court erred as a matter of law when it held that it was without jurisdiction to determine whether, under North Dakota law, GEM Razorback was entitled to the information it requested from Zenergy

[19] The district court erred, as a matter of law, in finding that GEM Razorback failed to exhaust its administrative remedies because the appropriate avenue for requesting the information from Zenergy was through the Industrial Commission. (ROA #48 at ¶ 14). The district court erred as the Industrial Commission is not empowered to interpret statutes. Only our courts have the power to interpret statutes.

[20] Whether GEM Razorback is entitled to the information it requested under Chpt. 38-08, N.D.C.C., is a question of law fully reviewable on appeal. “Statutory interpretation is a question of law fully reviewable on appeal.” Hassan v. Brooks, 1997 ND 150, ¶ 5, 566 N.W.2d 822, 823 (citing Heck v. Reed, 529 N.W.2d 155, 160 (N.D. 1995)). The goal in interpreting a statute is to determine the legislature’s intent. See id. (citing Medcenter One, Inc. v. North Dakota State Board of Pharmacy, 1997 ND 54, ¶ 13,

561 N.W.2d 634, 638). To determine that intent, the Court looks first to the language of the statute, and if that is ambiguous, to extrinsic aids. See id. (citing Nesdahl Surveying & Engineering, P.C. v. Ackerland Corp., 507 N.W.2d 686, 689 (N.D.1993)).

1. The district court had jurisdiction to determine whether Chpt. 38-08, N.D.C.C., provided GEM Razorback the right to the information for the Berquist and Ceynar wells requested from Zenergy

[21] This district court has jurisdiction to consider GEM Razorback's claim for declaratory relief that it was entitled to the information requested from Zenergy for the wells. There is a real controversy as to whether GEM Razorback, an owner that was assessed its costs plus risk penalties by Zenergy, has a statutory right to the information. GEM Razorback argues that under Chpt. 38-08, N.D.C.C., it is entitled to the information. Zenergy argues GEM Razorback is not entitled to the information. Whether Chpt. 38-08, N.D.C.C., gives GEM Razorback the right to the information is a question of statutory interpretation for the courts, not for the Industrial Commission. The doctrine of exhaustion of administrative remedies does not prevent GEM Razorback from seeking declaratory relief because the decisive question, whether North Dakota law gives GEM Razorback a right as a nonconsenting owner to the information for the wells, does not require any factual determinations by the Industrial Commission.

[22] Zenergy argues, on one hand, that GEM Razorback has not exhausted their administrative remedies by petitioning the Industrial Commission for the information. "No such right to production of documents and information as requested by GEM Razorback is provided in Chapter 38-08 against Zenergy as a former well operator. *See generally* N.D.C.C. ch. 38-08." (ROA #14 at ¶ 13). Zenergy then argues the exact opposite, that while GEM Razorback has no right to the information, they should be

required to petition the Industrial Commission for it. “Further, the request for documents related to the wells under Chapter 38-08 of the North Dakota Century Code is an issue more appropriately raised and enforced by the North Dakota Industrial Commission. *See* N.D.C.C. § 38-08-12.” (Id. at ¶ 14). Either GEM Razorback has a right to the information they requested for the wells under North Dakota law or they do not. The Industrial Commission cannot decide that question of law.

[23] When a legal question involves statutory interpretation invoked under the declaratory relief statute, and does not require the exercise of an agency’s expertise in making factual decisions, the exhaustion doctrine does not apply. “[T]he exhaustion doctrine has several well-recognized exceptions, including when a legal question simply involves statutory interpretation and does not need the exercise of an agency’s expertise in making factual decisions.” Medcenter One, Inc., 1997 ND 54, ¶ 12. GEM Razorback is not asking the Industrial Commission to exercise its expertise to make any factual determinations. Like Medcenter One, Inc., GEM Razorback asked the district court to decide a question involving statutory interpretation.

[24] GEM Razorback asked the district court to determine whether Chapter 38-08, N.D.C.C., required Zenergy to provide them with the information for the wells. Exhaustion of administrative remedies is not the rigid prerequisite for GEM Razorback’s claim as Zenergy suggests. “*Shark Brothers* acknowledges that exhaustion of administrative remedies is not a rigid prerequisite for a statutory interpretation that does not infringe on an agency’s factual decisionmaking process.” Medcenter One, Inc. at ¶ 12. Questions involving statutory interpretation are for the courts, not an administrative agency. *See id.* (citing Kessler v. Board of Educ. Of City of Fessenden, 87 N.W.2d 743

(N.D. 1958)). The courts, not the Industrial Commission, should decide whether GEM Razorback had a right to the information it requested from Zenergy.

[25] In Medcenter One, Inc., the Court held the doctrine of administrative remedies did not require deferring a decision on interpreting the requirements for a permit to operate a pharmacy under N.D.C.C. § 43-15-35 until after the administrative process was completed. Id. at ¶ 21. “This case involves only the interpretation of an unambiguous statute, and does not involve any issues generally reserved to an administrative decisionmaker.” Id. The Court affirmed the district court’s decision that Medcenter One was not required to exhaust administrative remedies before requesting declaratory relief from the court. Like Medcenter One, Inc., a real controversy exists as to whether GEM Razorback has a right to the information it has requested from Zenergy.

[26] The declaratory relief statute gives our courts the power to answer this question. “A court of record within its jurisdiction shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” N.D.C.C. § 32-23-01. Among those powers vested in the courts is the power to construe statutes. “Any person ... whose rights, status, or other legal relations are affected by statute, ..., may have determined any question of construction or validity arising under the ... statute ... and may obtain a declaration of rights, status, or other legal relations thereunder.” N.D.C.C. § 32-23-02. The Industrial Commission lacks the authority to interpret statutes and determine what is required of them. That power is specifically granted to our courts by Chapter 32-23, N.D.C.C.

[27] The Industrial Commission is not empowered to determine the legal relationship between a lessor and lessee. “[T]he Industrial Commission is an administrative agency

and, as such, is not empowered by the statutes to determine the legal relationships between a lessor and a lessee. This is a matter for the courts in an appropriate action.” Schank v. North American Royalties, Inc., 201 N.W.2d 419, 432 (N.D. 1972). In Schank, the Court held one of the matters for the courts were the rights nonconsenting owners have vis-à-vis the operators developing the unitized property for oil and gas, including the right to an accounting. “Upon discovery of oil and gas upon the premises, the producing cotenant **must account** to the nonconsenting or nonproducing cotenant for his pro rata share of the net profits apportioned according to the fractional interest of said cotenant.” Id. at 429 (emphasis added). That is the right GEM Razorback asked the district court to enforce in their request for declaratory relief – the right to an accounting from Zenergy. The information GEM Razorback requested from Zenergy is necessary to enable GEM Razorback to conduct an audit accounting for its interest in the wells.

[28] That a nonconsenting cotenant can request an accounting from the producing cotenant in control of the property is widely recognized by other oil and gas states. See e.g., Mitchell Energy Corp. v. Samson Res. Co., 80 F.3d 976, 983 (5th Cir. 1996) (stating, “The law, of course, provides the nonconsenting cotenant a remedy—the right to an accounting.”); Cox v. Davison, 397 S.W.2d 200, 201 (Tex. 1965) (stating, “The Texas rule is that a cotenant who produces minerals from common property without having secured the consent of his cotenants is accountable to them on the basis of the value of the minerals taken less the necessary and reasonable cost of producing and marketing the same.”); Moore Oil, Inc. v. Snakard, 150 F. Supp. 250, 259 (W.D. Okla. 1957) (holding that an operator has “[a] duty to account to plaintiff, his co-tenant, for its proportionate share of the market value of oil and gas produced, less the reasonable costs of

development, production and marketing.”); Hafeman v. Gem Oil Co., 163 Neb. 438, 471, 80 N.W.2d 139, 159 (1956) (stating, “A cotenant having control of the common property has been said to be a trustee for his cotenant to the extent of the interest of the cotenant and he may have and compel an accounting); Scott v. Hunt Oil Co., 152 So. 2d 599, 603-04 (La. Ct. App. 1962) (stating, “[w]here a co-owner ... has explored and developed an oil or gas field without the concurrence or assistance of the other, the former is bound to account to the other for his proportionate share of the proceeds, less a proportionate share of the expenses); and P & N Inv. Corp. v. Florida Ranchettes, Inc., 220 So. 2d 451, 453-54 (Fla. Dist. Ct. App. 1968) (explaining the right of a controlling cotenant to extract oil and gas is “[s]ubject to the right of the nonconsenting mineral owner to an accounting. One of the leading cases recognizing this rule is Prairie Oil & Gas Co. v. Allen, 2 F.2d 566, 40 A.L.R. 1389 (U.S.C.C.A., 8th Cir., 1924).”)

[29] North Dakota, too, should recognize this widely held right of a nonconsenting owner to an accounting from the controlling cotenant – the operator – extracting oil and gas from the nonconsenting owner’s property. Considering the foregoing, as a matter of law, the district court erred in holding it was without jurisdiction to interpret Chpt. 38-08, N.D.C.C., and determining whether GEM Razorback was entitled to the information it requested from Zenergy.

2. GEM Razorback has a right to the information from the Berquist and Ceynar wells under Chapter 38-08, N.D.C.C.

[30] Statutes are construed to avoid absurd or illogical results. See State v. Hirschhorn, 2016 ND 117, ¶ 11 (quoting Blomdahl v. Blomdahl, 2011 ND 78, ¶ 10, 796 N.W.2d 649). It would be absurd and illogical that Chpt. 38-08, N.D.C.C., allowed Zenergy to assess whatever costs and risk penalties it desired on a nonconsenting owner

like GEM Razorback without requiring Zenergy to account for and disclose to GEM Razorback what those costs and risk penalties were. The century code and administrative code provisions relied on by Zenergy pertain only to the Industrial Commission's power to require operators to provide the Industrial Commission with information. See N.D.A.C. § 43-02-03-14 and N.D.C.C. § 38-08-12. Neither of these provisions say anything about an owners right to information from wells where they have been assessed costs and risk penalties. Zenergy uses Chapter 38-08, N.D.C.C., as sword and shield, assessing unknown costs and risk penalties against GEM Razorback for the Berquist and Ceynar wells while being shielded from GEM Razorback having any recourse to request Zenergy answer and account for the amounts they assessed in costs and risk penalties.

[31] GEM Razorback has a right under Chapter 38-08, N.D.C.C., to the information from Zenergy relating to the costs and risk penalties for the wells. The declaration of policy for Chapter 38-08, N.D.C.C., provides that it is in the public interest to authorize and provide for the operation and development of oil and gas properties so that:

“[t]he correlative rights of all owners are fully protected; ... in order that the greatest possible economic recovery of oil and gas be obtained within the state to the end that the landowners, the royalty owners, the producers, and the general public realize and enjoy the greatest possible good from these vital natural resources.”

N.D.C.C. § 38-08-01 (emphasis added). GEM Razorback's correlative rights include economic information. “[T]he physical characteristics and reservoir dynamics of the common source of supply necessitate the use of highly technical geological and economic information to determine the extent of correlative rights.” Hanson v. Industrial Com'n of North Dakota, 466 N.W.2d 587, 591 (N.D. 1991) (quoting Hystad v. Industrial Comm'n, 389 N.W.2d 590, 596 (N.D. 1986)). GEM Razorback has requested economic

information from Zenergy, which would enable GEM Razorback to conduct the necessary audit to protect its correlative rights. GEM Razorback cannot protect its correlative rights if it does not have access to the most basic of economic information, such as the costs it was assessed for the wells by Zenergy.

[32] As noted in Schank, the relationship between Zenergy and GEM Razorback was not a one-way street running solely in Zenergy's direction. In Hystad, the Court further recognized the "interdependent rights and duties" of each landowner in the common source of supply, including the right to economic information.

Thus, correlative rights includes interdependent rights and duties of each landowner in the common source of supply. Each landowner is entitled to a just and equitable share of oil or gas in the pool; however, that right is limited by the landowner's duty to all the other owners of interests in the common source of supply not to damage or take an undue proportion of the oil or gas from that common source of supply. *Dodds v. Ward*, 418 P.2d 629 (Okla.1966); 1 Summers, *Oil and Gas*, Section 63 (1954). The physical characteristics and reservoir dynamics of the common source of supply necessitate the use of highly technical geological and economic information to determine the extent of correlative rights. 1 Summers, *Oil and Gas*, Section 63 (1954). This information necessarily includes, if reasonably practicable, the physical size, shape, and location of the common source of supply relative to each owner's tract of land.

Hystad, 389 N.W.2d at 596 (emphasis added). In exchange for the right to extract the oil and gas from GEM Razorback's property, Zenergy was "subject to the right of the nonconsenting mineral owner to an accounting." P & N Inv. Corp., *supra*, citing Prairie Oil & Gas Co., 2 F.2d 566 (8th Cir. 1924). See also Schank, *supra*, at 429.

[33] Under the doctrine of correlative rights, the interdependent rights and duties between Zenergy and GEM Razorback are a two-way street. The correlative rights of owners are mentioned in the "legislative findings" for Chapter 38-08. The broad scope of the rights afforded mineral owners like GEM Razorback are preserved as a matter of

policy and as a specific legislative finding so “[t]he correlative rights of the owners in a fuller and more beneficial enjoyment of the oil and gas rights be protected.” N.D.C.C. § 38-08-09.1. As an owner in the Berquist and Ceynar wells, GEM Razorback cannot protect its correlative rights if it has no right, as a matter of law and public policy under the controlling statutes, to information related to the costs and risk penalties Zenergy assessed against its share of production. The information GEM Razorback requested allows them to protect their correlative rights guaranteed by Chpt. 38-08, N.D.C.C., and ensures that the beneficial enjoyment of GEM Razorback’s oil and gas rights is protected.

[34] Asking Zenergy to protect the correlative rights provided to GEM Razorback in Chapter 38-08, N.D.C.C., when Zenergy assessed unknown costs and risk penalties against GEM Razorback and refuses to tell GEM Razorback what those costs and risk penalties were, is like asking the proverbial fox to guard the chicken coup.

[35] North Dakota law recognizes this fundamental principle in N.D.C.C. § 38-08-06.3 by requiring operators to provide royalty owners with an information statement accounting for revenue (the royalty) and deductions (costs) from the revenue.

“Any person who makes a payment to an owner of a royalty interest in land in this state for the purchase of oil and gas produced from that royalty interest shall provide with the payment to the royalty owner an information statement that will allow the royalty owner to clearly identify the amount of oil or gas sold and the amount and purpose of each deduction made from the gross amount due. ... ”

N.D.C.C. § 38-08-06.3. Statutes are construed to avoid absurd results. It makes no sense considering the correlative rights provided for in Chapter 38-08, N.D.C.C., that the legislature would give royalty owners recourse to knowing the revenue and deductions taken from their royalty but deprive an owner, like GEM Razorback that is being assessed costs for all well expenses and a significant risk penalty, of that same right.

[36] The economic rights afforded mineral owners continues in N.D.C.C. § 38-08-08, which provides, in relevant part, that all pooling orders “[m]ust be upon terms and conditions that are just and reasonable, and that afford to the owner of each tract or interest in the spacing unit the opportunity to recover or receive, without unnecessary expense, that owner’s just and equitable share.” N.D.C.C. § 38-08-08(1). How can GEM Razorback know if they are receiving, without unnecessary expense, their just and equitable share when Zenergy refuses to provide the information that would enable GEM Razorback to answer that question. It is inherent that if GEM Razorback is to “receive, without unnecessary expense, that owner’s just and equitable share,” GEM Razorback be able to protect that right by requesting and receiving the relevant information for the Berquist and Ceynar wells from Zenergy.

[37] These economic rights surface again in N.D.C.C. § 38-08-09.8, which provides that GEM Razorback is entitled to its share of production or proceeds in the same manner had the unit (for the Berquist and Ceynar wells) not been organized.

“The amount of unit production allocated to each separately owned tract within the unit ... must be distributed among or the proceeds thereof paid to the several persons entitled to share in the production from such separately owned tract in the same manner, in the same proportions, and upon the same conditions that they would have participated and shared in the production or proceeds thereof from such separately owned tract had not said unit been organized, and with the same legal force and effect. If adequate provisions are made for the receipt thereof, the share of the unit production allocated to each separately owned tract must be delivered in kind to the persons entitled thereto by virtue of ownership of oil and gas rights therein or by purchase from such owners subject to the rights of the unit to withhold and sell the same in payment of unit expense pursuant to the plan of unitization,”

N.D.C.C. § 38-08-09.8. The provisions of Chapter 38-08, N.D.C.C., demonstrate an intent by the legislature, recognized by the Court in Schank, that GEM Razorback receive full consideration for their interest in the Berquist and Ceynar wells and be allowed to

protect that interest by receiving the relevant information on the costs and risk penalties assessed by Zenergy against GEM Razorback's interests.

[38] This right to information is also recognized in the JOAs for the Berquist and Ceynar wells. Each JOA allows participating owners access to information pertaining to the development and operation – including Zenergy's books and records – for both wells.

“Each party shall have access to the Contract Area at all reasonable time, at its sole cost and risk to inspect or observe operations, and shall have access at reasonable times to information pertaining to the development or operation thereof, including Operator's books and records relating thereto. Operator, upon request, shall furnish each of the other parties with copies of all forms or reports filed with government agencies, daily drilling reports, well logs, tank tables, daily gauge and run tickets and reports of stock on hand at the first of each month, and shall make available samples of any cores or cuttings taken from any well drilled on the Contract Area. The cost of gathering and furnishing information to Non-Operator, other than that specified above, shall be charged to the Non-Operator that requests the information.”

(ROA #26 at Section VI.D) (emphasis added). The information GEM Razorback requested is the same information Zenergy has agreed to provide other owners in the wells. Zenergy agreed at the September 2015 hearing to provide this information, or parts of it necessary for GEM Razorback to audit the wells. (ROA #41). After providing an incomplete set of 579 pages of documents, Zenergy refused to provide the remainder of the information to GEM Razorback, reversing course, arguing only participating owners were entitled to the information GEM Razorback requested. (Transcript from January 26, 2016 hearing at 15).

[39] For GEM Razorback to be able to protect their economic interests and correlative rights in the Berquist and Ceynar wells as envisioned by Chpt. 38-08, N.D.C.C., it needs the information it has requested from Zenergy – the same information Zenergy already provide to participating owners, the same information Oasis provided GEM Razorback

from when they took over operations of the wells in December 2013.

[40] Statutes are construed to avoid absurd or illogical results. See Hirschhorn at ¶ 11. It makes no sense that Chpt. 38-08, N.D.C.C., would guarantee the protection of GEM Razorback's correlative rights, see N.D.C.C. §§ 38-08-01 and 38-08-09.1, that GEM Razorback receive without unnecessary expense their just and equitable share of production from the wells, see § N.D.C.C. § 38-08-08(1), that royalty owners be entitled to information statements enabling them to identify the amount of oil and gas sold and the amount and purpose of each deduction, see N.D.C.C. § 38-08-06.3, to allow Zenergy to unitize the property and sell GEM Razorback's share of oil and gas pursuant to the plan of unitization, see N.D.C.C. § 38-08-09.8, and to allow Zenergy to assess GEM Razorback its full share of costs plus a risk penalty for both wells, see N.D.C.C. § 38-08-08, but not allow GEM Razorback the right to the information they have requested that is necessary to protect their interests. All these protections afforded mineral owners under Chpt. 38-08, N.D.C.C., are rendered meaningless if GEM Razorback does not have a right to the information they requested from Zenergy.

[41] The district court erred when it determined it did not have jurisdiction to determine whether GEM Razorback had a statutory right under Chpt. 38-08, N.D.C.C., to the information it requested. This issue is a matter of statutory interpretation that should be decided by the courts, not the Industrial Commission.

B. The district court erred in dismissing, as a matter of law, GEM Razorback's claim that it was a third-party beneficiary of the Assignment between Zenergy and Oasis

[42] GEM Razorback's claim that it was a third-party beneficiary of the Assignment between Zenergy and Oasis presented a question of fact that was inappropriate for

dismissal under N.D.R.Civ.P. 12(b)(6).

[43] The Complaint must be construed in the light most favorable to GEM Razorback and the allegations therein taken as true by the district court. “The complaint is to be construed in the light most favorable to the plaintiff, and the allegations of the complaint are taken as true.” Bala v. State, 2010 ND 164, ¶ 7, 787 N.W.2d 761. See also McColl Farms, LLC v. Pflaum, 2013 ND 169, ¶ 12, 837 N.W.2d 359 (explaining the high standard for granting a motion to dismiss under Rule 12(b)(6)). GEM Razorback’s claim that it was a third-party beneficiary should not have been dismissed unless it appeared beyond a doubt that they could prove no set of facts entitling them to relief. “[A] claim should not be dismissed under N.D.R.Civ.P. 12(b)(6), unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” McColl Farms at ¶ 19. The Court has stated many times decisions on the merits are preferred to dismissal on the pleadings under Rule 12(b)(6). See e.g., Gosbee v. Martinson, 2005 ND APP 10, ¶ 12, 701 N.W.2d 411. Accordingly, the district court’s scrutiny of the Complaint should have been highly deferential to GEM Razorback.

[44] The district court should have viewed Zenergy’s motion to dismiss as a request for summary judgment. When a motion to dismiss for failure to state a claim includes matters outside the pleadings, the motion should be treated as one for summary judgment. See Podrygula v. Bray, 2014 ND 226, ¶ 7, 856 N.W.2d 791. “If, on a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b), matters outside the pleadings are presented to and not excluded by the court, the motion should be treated as one for summary judgment and disposed of as provided in Rule 56.” Livingood v. Meece, 477 N.W.2d 183, 187 (N.D. 1991). Zenergy presented materials

outside of the pleadings for the district court's consideration. (ROA #15 – 19 and 21). GEM Razorback presented materials outside the pleadings for consideration as well. (ROA #26 and 27). As a result, GEM Razorback should have been allowed a reasonable opportunity to present material pertinent to the motion under Rule 56. "Of course, when this occurs, each party must be allowed a reasonable opportunity to present material pertinent to the motion under Rule 56." See Livingood, 477 N.W.2d at 187.

[45] When reviewing the Assignment in light of all the surrounding circumstances, there is a question of fact as to whether Zenergy and Oasis intended for GEM Razorback to benefit from the provisions for obtaining records and information. "The interpretation of assignments, like the interpretation of contract terms generally, is a question of the intent of the parties and it typically is a question of fact for the trier of fact." Golden v. SM Energy Co., 2013 ND 17, ¶ 11, 826 N.W.2d 610. The Assignment, when viewed in the light most favorable to GEM Razorback, shows that the parties intended GEM Razorback benefit from § 1.01(h). This is supported by the e-mail from Oasis instructing GEM Razorback to request the information for the wells, pre-December 2013, from Zenergy to allow GEM Razorback to conduct its audit. (ROA #27 and 48 at ¶ 9).

[46] Zenergy assigned Oasis all of its right, title, and interests, including the rights to operate and profit from the Berquist and Ceynar wells. (ROA #21). This included the JOAs for the Berquist and Ceynar wells, (Id. at § 1.01(f)), and the information for the wells requested by GEM Razorback, (Id. at § 1.01(h)). It also included Zenergy's ownership interest in the wells. (Id. at Exhibit A-2). ¹

[47] Oasis provided GEM Razorback the information for the Berquist and Ceynar

¹ "Exhibit A-2" is part of the Assignment. It is located on p. 142 -145 of (ROA #21).

wells from when Oasis succeeded to ownership of the wells. (ROA #27). Zenergy admits Oasis agreed to provide GEM Razorback with any information in Oasis' possession for the wells. (ROA #14 at ¶ 21). Oasis instructed GEM Razorback to request the records for the wells for pre-December 2013 when Zenergy operated the wells, which Oasis was entitled to, from Zenergy.

“We have been more than happy to provide documents from our operatorship, as required, but we respectfully decline to go beyond this as Zenergy will have a better knowledge of and easier access to the documents that you are seeking prior to Oasis becoming operator. Oasis cannot host or facilitate the hosting of an audit of a property that we did not operate, nor are we legally obligated to do so. However, Zenergy is obligated to keep records for circumstances such as these and we suggest that you exercise your legal right to audit them.”

(ROA #27). This e-mail creates a question of fact as to whether GEM Razorback is an intended beneficiary of the Assignment allowing it to request the records from Zenergy under § 1.01(h) of the Assignment.

[48] The Court must accept, as true, the allegations in the Complaint. Viewing the e-mail from Oasis to GEM Razorback (ROA #27) and Oasis's actions in providing the information to GEM Razorback in the light most favorable to GEM Razorback, Zenergy's motion to dismiss must be denied as GEM Razorback has stated a claim upon which relief can be granted as a third-party beneficiary of the Assignment.

CONCLUSION

[49] GEM Razorback respectfully requests the Court reverse the district court's Order and Judgment granting Zenergy's motion to dismiss as the district court had jurisdiction to consider whether GEM Razorback was entitled to the information it requested from Zenergy. GEM Razorback further requests that, when reviewing the question under the de novo standard of review, the Court hold that GEM Razorback is entitled to the

information it requested from Zenergy in order to protect the rights granted to mineral owners in Chpt. 38-08, N.D.C.C.

[50] Should the Court affirm the district court on GEM Razorback's request for declaratory relief, the Court should still remand GEM Razorback's claim that they were a third-party beneficiary of the Assignment to the district court as such claim sufficiently stated a claim for relief upon which dismissal was inappropriate under Rule 12(b).

Respectfully submitted 13th day of July, 2016.

VOGEL LAW FIRM

By: /s/ Joshua A. Swanson

Joshua A. Swanson (#06788)

jswanson@vogellaw.com

218 NP Avenue

PO Box 1389

Fargo, ND 58107-1389

Telephone: 701.237.6983

ATTORNEYS FOR Plaintiff/Appellant

2601665.1

CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Plaintiff/Appellant in the above matter, and as the author of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 7,037.

VOGEL LAW FIRM

By: /s/ Joshua A. Swanson
Joshua A. Swanson (#06788)
jswanson@vogellaw.com
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
Telephone: 701.237.6983
ATTORNEYS FOR PLAINTIFF/APPELLANT

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

GEM Razorback, LLC, Plaintiff/Appellant, vs. Zenergy, Inc., Defendant/Appellee.	SUPREME COURT NO. 2016170 Civil No. 27-2015-cv-00129
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I hereby certify that on July 13, 2015, I served the following documents:

1. **Brief of Plaintiff/Appellant; and**
2. **Appendix of Plaintiff/Appellant**

on the following by electronic mail transmission, pursuant to N.D.R.App.P. 25.

lbender@fredlaw.com

dkrause@fredlaw.com

/s/ Joshua A. Swanson