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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sarah Vogel, individually and for all those similarly situated, Plaintiff and Appellant, vs. Marathon Oil Company, an Ohio Corporation, Defendant and Appellee.	Supreme Court Case No.: 20150154 Mountrail County District Court Case No.: 31-2013-CV-00163

Appeal from Judgment Entered on March 23, 2015
Case No. 31-2013-CV-00163
County of Mountrail, North Central Judicial District
The Honorable Todd Cresap, Presiding

BRIEF OF PLAINTIFF/APPELLANT & Addendum

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶ 1] Whether the district court erred in granting Defendant's Motion to Dismiss pursuant to N.D.R.Civ.P. 12(b)(vi) for failure to exhaust administrative remedies.

[¶ 2] Whether the district court erred in determining that there is no implied cause of action for enforcement of N.D.C.C. § 38-08-06.4.

II. STATEMENT OF THE CASE

[¶ 3] Plaintiff, Sarah Vogel ("Vogel"), served and filed her Complaint (App. 005) against Defendant, Marathon Oil Company ("Marathon"), on October 16, 2013, in Mountrail County District Court. Marathon filed and served its Answer to the Complaint (App. 037) on December 2, 2013. Vogel filed her First Amended Complaint (App. 052) on May 2, 2014.

[¶ 4] Marathon filed a Motion to Dismiss (App. 088) with the court on May 27, 2014, and a hearing was held on that Motion on October 27, 2014. On March 13, 2015, Honorable Todd J. Cresap, Judge of the District Court granted Marathon's Motion to Dismiss without prejudice indicating that Vogel did not satisfy the requirements for subject matter jurisdiction to maintain a claim because she did not exhaust her administrative remedies and that Vogel did not state a claim for which relief could be granted. Vogel was instructed to pursue her claim before the North Dakota Industrial Commission ("NDIC"). Judgment (App. 137) was entered in Mountrail County District Court on March 23, 2015.

III. STATEMENT OF THE FACTS

[¶ 5] Marathon is a corporation incorporated under the laws of Ohio with its principal offices at 5555 San Felipe Street, Houston, Texas. Defendant has entered an appearance in this case through its counsel of record. (App. 052 ¶ 12).

[¶ 6] Marathon is the operator of an oil well classified as a "horizontal" well, the Elk USA 11-17H Well, located in the NWNW of Section 17, Township 150 North, Range 92 West, Mountrail County, having API number 33-061-01404-00-00 ("Elk USA 11-17H Well"). (App. 052 ¶ 3).

[¶ 7] At all times relevant to this action, Sarah Vogel owned mineral interests from which oil and gas are being produced from the Elk USA 11-17H Well and is entitled to royalties from production from the Elk USA 11-17H Well. (App. 052 ¶ 4).

[¶ 8] The Elk USA 11-17H Well was spudded on October 24, 2010. It began to produce hydrocarbons on or about May 22, 2011. (App. 053 ¶ 7).

[¶ 9] The Elk USA 11-17H Well produced oil and gas, and flared all or some of the gas produced from first production in May 2011 through January 2014. (App. 053 ¶ 10).

[¶ 10] Based on current reported production information, the Elk USA 11-17H Well has flared 39,918 Mcfs of gas after the one-year period from the date of first production from the well. (App. 055 ¶ 12).

[¶ 11] Marathon has not applied for nor been granted an exemption from the NDIC under subsection 6 of N.D.C.C. § 38-08-06.4 for gas flared from the Elk USA 11-17H Well for the production months Vogel alleges violated subsections 1 and 2 of N.D.C.C. § 38-08-06.4. (App. 057 ¶ 15).

[¶ 12] Marathon has not paid royalties to Vogel for the 39,918 Mcfs of gas flared from the Elk USA 11-17H Well after the first year of production. (App. 058 ¶ 20).

[¶ 13] Marathon continues to produce oil and gas from the Elk USA 11-17H Well and will continue to flare gas from such well in violation of the provisions of N.D.C.C. § 38-08-06.4. (App. 058 ¶ 21)

[¶ 14] The Elk USA 11-17H Well was not connected to a gas gathering and processing facility until August 2012. (App. 066 ¶ 40).

[¶ 15] Marathon reported to the NDIC that the Elk USA 11-17H Well produced over 124,073 Mcfs of gas during the first year of production (May 22, 2011 – May 21, 2012). Gas flared within the first year of production that Vogel alleges was flared in violation of rules as provided by the NDIC exceeded 54,745 Mcfs of gas. (App. 066 ¶ 41).

[¶ 16] Marathon has not paid royalties for the 54,745 Mcfs of gas produced and flared in violation of the NDIC's rules from the Elk USA 11-17H Well during the first year of production. (App. 067 ¶ 42).

IV. STANDARD OF REVIEW

[¶ 17] "When the jurisdictional facts are not in dispute, [this Court will] review the district court's dismissal for lack of subject-matter jurisdiction de novo." Winer v. Penny Enterprises, Inc., 2004 ND 21, ¶ 8, 674 N.W.2d 9.

[¶ 18] This Court has explained the standard of review for a N.D.R.Civ.P. 12(b)(vi) motion as follows:

> The purpose of a N.D.R.Civ.P. 12(b)(vi) motion is to test the legal sufficiency of the statement of the claim presented in the complaint. In reviewing an appeal from a Rule 12(b) dismissal, we construe the complaint in the light most favorable to the plaintiff, taking as true the

> well-pleaded allegations in the complaint. Because determinations on the merits are generally preferred to dismissal on the pleadings, Rule 12(b)(vi) motions are viewed with disfavor. Accordingly, a court's scrutiny of the pleadings should be deferential to the plaintiff, ... and the complaint should not be dismissed unless it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted. We will affirm a judgment dismissing a complaint for failure to state a claim if we cannot discern a potential for proof to support it.

Ziegelmann v. DaimlerChrysler Corp., 2002 ND 134, ¶ 5, 649 N.W.2d 556 (internal citations and quotes omitted).

V. SUMMARY OF THE ARGUMENT

[¶ 19] The District Court judgment is appealable because, although it was dismissed without prejudice, it had the "practical effect of terminating the litigation in plaintiff's chosen forum." Rodenburg v. Fargo-Moorhead Young Men's Christian Ass'n, 2001 ND 139, ¶ 12, 632 N.W.2d 407.

[¶ 20] This case does not involve principles of administrative exhaustion. Pursuant to Werlinger v. Champion Healthcare Corp., an "individual with a private right of action has the option to proceed either by way of the judicial system, or by way of the administrative scheme present within the applicable governmental agency." 1999 ND 173, ¶ 48, 598 N.W. 2d 820 ("Werlinger").

[¶ 21] Vogel has asserted a claim under the North Dakota Environmental Law Enforcement Act, claims for conversion and waste, and a claim based on an implied cause of action under the Anti-Flaring Statute at N.D.C.C. § 38-08-06.4. Vogel's claim under the Environmental Law Enforcement Act is supplemental and cumulative to any other claims, administrative or otherwise. Vogel's conversion and waste claims do not require exhaustion because N.D.C.C. § 38-08-06.4 does not cover the field of regulation for royalty owners attempting to recover royalties for flared gas, and even if N.D.C.C. § 38-

08-06.4 did cover the field, the conversion and waste claims pose no conflict with that statute. Vogel has also asserted a cause of action pursuant to N.D.C.C. § 38-08-06.4, and argues that an implied cause of action exists pursuant to that statute.

[¶ 22] Because Vogel has private causes of action, she has a choice of forums in which to proceed, and she has chosen the judicial forum.

VI. ARGUMENT

A. The District Court Order and Judgment are Appealable.

[¶ 23] Although a "dismissal without prejudice is ordinarily not appealable," it "may be final and appealable … if the dismissal has the practical effect of terminating the litigation in plaintiff's chosen forum." Rodenburg v. Fargo-Moorhead Young Men's Christian Ass'n, 2001 ND 139, ¶ 12, 632 N.W.2d 407. For example, in Jaskoviak v. Gruver, this Court found that where dismissal without prejudice would trigger a statutory two year prohibition on re-filing of the case, this would "effectively foreclose[] litigation in the courts of this state" for the plaintiff and was "therefore, appealable." 2002 ND 1, ¶ 8, 638 N.W.2d 1, 4. This Court reached a similar result in cases dismissed without prejudice for lack of personal jurisdiction and for lack of subject matter jurisdiction. Winer v. Penny Enterprises, Inc., 2004 ND 21, ¶ 6, 674 N.W.2d 9, 11 (dismissal of case without prejudice for lack of subject matter jurisdiction over Indian defendant found appealable); Rodenburg v. Fargo-Moorhead Young Men's Christian Ass'n, 2001 ND 139, ¶ 14, 632 N.W.2d 407, 414 (decision dismissing defendant for lack of personal jurisdiction found appealable).

[¶ 24] The instant appeal is no different from these cases. Here, Vogel's case was dismissed without prejudice for lack of subject matter jurisdiction. The district court

determined that subject matter jurisdiction was vested with the North Dakota Industrial Commission, and not the district courts. This dismissal "has the practical effect of terminating the litigation in plaintiff's chosen forum," and therefore is appealable.

[¶ 25] This Court has accepted jurisdiction of numerous appeals of cases dismissed for lack of jurisdiction due to failure to exhaust administrative remedies. See, e.g., Tracy v. Central Cass Pub. Sch. Dist., 1998 ND 12, ¶ 8, 574 N.W.2d 781; Brown v. State ex rel. State Bd. of Higher Educ., 2006 ND 60, ¶ 3, 711 N.W.2d 194; Thompson v. Peterson, 546 N.W.2d 856, 860 (N.D. 1996).

B. In Werlinger v. Champion Healthcare Corp., this Court Decided that a Litigant with a Private Cause of Action May Choose the Forum for Relief.

[¶ 26] If this Court determines a private cause of action exists under Vogel's common law claims, or as implied by N.D.C.C. § 38-08-06.4 (hereafter the "Anti-Flaring Statute"), or under the Environmental Law Enforcement Act (hereafter "ELEA"), then there is no requirement to exhaust administrative remedies. In the case of Werlinger v. Champion Healthcare Corp., the Court considered a case after class certification. 1999 ND 173, 598 N.W. 2d 820. One of the defense arguments in Werlinger against not only class certification but also the case merits was the availability of an administrative remedy before the North Dakota Department of Labor. Like this case, the Werlinger defendants argued that because that administrative remedy was available, the case should not proceed by judicial action but rather by administrative action alone.

[¶ 27] After a careful and thorough analysis, this Court squarely addressed the issue and held that principles of administrative exhaustion do not apply if a private right of action exists. Rather, under North Dakota law, the individual making the claims has the right to proceed either by the court or the agency, and gets to choose her avenue of relief:

> The district court did not err in finding an implied private right of action. This case therefore does not involve principles of administrative exhaustion. An individual with a private right of action has the option to proceed either by way of the judicial system, or by way of the administrative scheme present within the applicable governmental agency. Riley v. Boxa, 542 N.W.2d 519, 522 (Iowa 1996) (citing Charles Gabus Ford. Inc. v. Iowa St. Highway Commission, 224 N.W.2d 639, 647 (Iowa 1974)).

Id. at ¶ 48. (emphasis added). The first step in the analysis was whether a private right of action existed. Once it was determined a judicial remedy was available to the plaintiff, the exhaustion doctrine became moot.

[¶ 28] Under the "Werlinger rule," if a private cause of action exists under any of Vogel's claims, then Marathon's administrative exhaustion and exclusive jurisdiction arguments necessarily fail and the District Court's ruling must be reversed. The first question to be decided here is whether Vogel and other royalty owners have the right to sue under conversion, waste, the ELEA, or the Anti-Flaring Statute. If the answer is yes, then the inquiry ends, and Vogel is entitled to her day in court.

C. Vogel Has Appropriately Chosen the Judicial Forum for Litigation of her Private Causes of Action.

1. The NDIC's Jurisdiction to Enforce the Anti-Flaring Statute is Discretionary.

[¶ 29] In 1993, the Legislative Assembly amended the Anti-Flaring Statute at the request of the NDIC and the North Dakota Petroleum Council ("NDPC"). According to Lowell Ridgeway of the NDPC, "[t]he bill provides the Industrial Commission to have discretionary authority to determine in their minds, that an operator should be required to come in and demonstrate why a line is not being built." Hearing on S.B. 2342 Before the Senate Natural Resources Comm., 53rd N.D. Legis. Sess. (Jan. 29, 1993) ("Hearing on S.B. 2342") (testimony of Lowell Ridgeway), Doc. ID No. 45.

[¶ 30] Attorney Lawrence Bender also spoke in favor stating "[t]here is a need for this bill and will save the industrial commission a lot of time. This saves people from coming out of state." Hearing on S.B. 2342. Wes Norton of the NDIC testified that it would cut down on their workload: "We support this bill. The impact of this bill means it would cut down on our workload….When this leg[islation] was enacted every well that wasn't hooked to a gas line had to get a waiver. We have had hearings where we have had in access [sic] of 100 cases. At present the largest workload in the hearing area are wells that in the areas where there are no gas lines and they have to get the exemption." Hearing on S.B. 2342, Doc. ID No. 45.

[¶ 31] The 1993 amendments passed resoundingly. No longer was the NDIC required to enforce the Anti-Flaring Statute or required to value the gas flared in violation of the statute. This occurred when the word "shall" was deleted from the statute and replaced with the word "may." This language has been the law for the past 21 years:

> The industrial commission may enforce this section and, for each well operator to be found in violation of this section, may determine the value of flared gas for purposes of payment of royalties under this section and its determination is final.

N.D.C.C. § 38-08-06.4(5) (emphasis added).

[¶ 32] Marathon argued below that "the legislature granted the Industrial Commission sole authority to determine whether there has been a violation of § 38-08-06.4." Marathon District Court Brief, Doc. ID No. 25, p.6. (App. 095). Marathon cites to N.D.C.C. § 38-08-11, which states merely that

> [t]he commission may act upon its own motion or upon the petition of any interested person. On the filing of a petition concerning any matter within the jurisdiction of the commission, the commission must fix a date for a hearing and give notice.... [and] the commission must enter its order within thirty days after a hearing.

This general provision does not, however, override the specific legislative amendment that clearly makes the NDIC's enforcement jurisdiction *discretionary*.

[¶ 33] Similarly, N.D.C.C. § 38-08-17 anticipates an action against an operator in violation of Chapter 38-08 for injunctive relief, and states that "the commission must be made a party defendant" in the action and that "injunctive relief may be granted to the commission without bond in the same manner as if suit had been brought by the commission." It does not make sense that Vogel would be required to bring an injunctive action naming the NDIC as a defendant to acquire a court order granting a mandatory injunction to force the NDIC to exercise *discretionary* jurisdiction. In short, because NDIC's authority to enforce the Anti-Flaring Statute is discretionary and a private party cannot compel NDIC to exercise discretionary authority, the presence of any remedy before NDIC is illusory.

2. The NDIC's Administrative Remedy is Inadequate.

[¶ 34] Since this action was filed, Continental Resources, one of the largest operators in the Bakken, filed forty-one petitions with the NDIC seeking a valuation of gas for payment of royalties pursuant to the Anti-Flaring Statute. (NDIC Case Nos. 22180-22220, inclusive). Undersigned counsel entered appearances and attended hearings on behalf of three clients in two different NDIC cases where Continental sought a valuation of gas (NDIC Case Nos. 22190 and 22201). The proceedings in Case No. 22190 offer a striking illustration of the inadequacy of proceedings undertaken before the NDIC.

[¶ 35] In Case No. 22190, undersigned counsel represented GBPM Properties, LLC ("GBPM"). GBPM owns a royalty interest in the Palmer 1-25H, a Continental Well. See NDIC Case No. 22190, (the case file for this case was attached for reference to

Plaintiff's brief below at Doc. ID Nos. 56, 57, 59). Continental applied in Case No. 22190 to have its flared gas valued. In doing so, Continental admitted that it had flared gas in violation of the Anti-Flaring Statute. Continental asked that the hearing be set for the April 2014 hearing docket. Because the NDIC uses a general docket call, it is only certain which day of the two-day docket a case will be heard, but not the time. On the day that Case 22190 was to be heard, Continental moved for a continuance of Case 22190.

[¶ 36] Case 22190 was reset for the May docket. In order to participate meaningfully in the hearing, GBPM retained an economics expert from Bozeman, Montana. See Doc. ID No. 58. Three members of GBPM and the expert traveled to Bismarck to attend the hearing in their capacity as members. Id. Because of the general docket call, the members of GBPM, its attorneys, and its economics expert spent most of the day of May 29, 2014 waiting for Case No. 22190 to be called. Id. Once the hearing started, Continental expressed its original intent to submit Case 22190 on affidavit without a hearing, but ultimately presented its case since representatives of GBPM were present. Id.

[¶ 37] Despite requesting the hearing, continuing the April hearing in order to better prepare, and preparing exhibits, Continental's expert witness was unprepared to answer the questions of GBPM's attorneys. Id. After a long period of cross-examination of Continental's sole expert witness, the hearing examiner – upon her own motion – moved to continue the hearing in order to allow Continental to better prepare. Id. The NDIC's own order states: "On cross-examination, it was clear Continental's witness was unprepared to answer questions posed by GBPM and the Commission staff." NDIC Order No. 24524. GBPM's attorneys objected and requested to be allowed to present their case,

including the testimony of the economics expert. Doc. ID No. 58. The case was continued over GBPM's objection. Id.

[¶ 38] The total expense to prepare and secure the presence of the expert witness alone was $2,369.04. Id. GBPM calculates its total damages for flared gas from the Palmer 1-24H to be less than $2,000.00. On October 27, 2014, the NDIC issued Order No. 24524, granting Continental's motion to voluntarily dismiss its own case, and refusing to award attorneys' fees and expenses to GBPM, stating: "While the Commission is sympathetic that GBPM has spent a significant amount of money litigating this matter, the Commission has no authority to direct the payment of attorney fees or costs by either party." NDIC Order No. 24524. GBPM has other royalty interests where oil and gas operators have flared gas in violation of N.D.C.C. § 38-08-06.4, but it does not make economic sense to seek recovery from the NDIC because the cost of prosecuting a claim will almost certainly exceed potential damages. Doc. ID No. 58.

[¶ 39] As for the remainder of the forty-one cases filed by Continental, thirty-four of the cases sit stale on the NDIC's docket. These cases were all filed in March of 2014, the last filings in each of these cases were in 2014, and NDIC has taken no action whatsoever on these cases. A total of five of these cases were dismissed without prejudice at Continental's request (NDIC Case Nos. 22185, 22188, 22190, 22193, and 22197). Out of the forty-one cases filed, only once did NDIC actually assess the value of flared gas (NDIC Case No. 22197).

[¶ 40] Thousands of royalty owners are similarly situated to GBPM. The effect of requiring individual actions at the NDIC will result in a windfall to producers, as many claims will go unprosecuted due to the uneconomic nature of prosecuting individual

actions before the NDIC. Indeed, this is the true reason for Marathon's argument that administrative exhaustion is necessary. However, the broad and liberal public policy in favor of class actions in North Dakota supports allowing putative class members to adjudicate their rights as a class.

[¶ 41] A class action is the only practicable way to give North Dakota royalty owners the relief they deserve. As this Court has stated:

> We believe that Rule 23 is a remedial rule which "continues to have as its objectives the efficient resolution of the claims or liabilities of many individuals in a single action, the elimination of repetitious litigation and possibly inconsistent adjudications involving common questions, related events, or requests for similar relief, and the establishment of an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits."

Rose v. United Equitable Ins. Co., 2002 ND at ¶ 6, 651 N.W.2d 683, 686-87 (emphasis added) (internal citations omitted). As this Court has recognized, a class action is the most effective way to address Vogel's claims and those of the many other royalty owners impacted by wanton flaring.

D. The ELEA Provides a Private Cause of Action to Enforce the Anti-Flaring Statute.

[¶ 42] The ELEA was enacted "in recognition of the vital role played by environmental laws in maintaining the health, safety, and general welfare of the state's citizens; the need to maintain a sound system of law, order, and justice; and the need to provide relief to those aggrieved by a failure of others to abide by or enforce the state's environmental laws." N.D.C.C. § 32-40. It is a remedial statute that is to be construed liberally in favor of the purposes obviously intended. See, e.g., Willits v. Job Service N.D., 799 N.W.2d 374, 377 (N.D. 2011). The remedial nature of the statute is clear in that the ELEA was enacted as an enabling statute to "provide relief to those aggrieved by a

failure of others to abide by . . . the state's environmental laws." N.D.C.C. § 32-40-02. The remedies provided by the ELEA are "cumulative and shall not replace statutory or common-law remedies." N.D.C.C. § 32-40-04. As an enabling statute, a person "aggrieved by the violation of any environmental statute, rule, or regulation of this state may bring an action in the appropriate district court . . . to recover any damages that have occurred as a result of the violation . . . ." N.D.C.C. § 32-40-06 (emphasis added). See also N.D.C.C. § 32-40-11(3).

[¶ 43] The legislative history of the ELEA indicates that the statute applies not only to environmental laws that existed when the ELEA was passed, but also those that were to be enacted thereafter: "This bill would contribute to the enforcement of the existing environmental law and any additional law the assembly should choose to enact." See Doc. ID No. 49, Hearing on HB 1059 Before the Judiciary Comm., 1975 Leg., 44th Sess. (ND 1975) ("ELEA Legislative History") (statement of Robert Beck, University of ND Law School).

1. The Anti-Flaring Statute Fits Squarely within the ELEA's Definition of an "Environmental Statute, Rule, or Regulation."

[¶ 44] The ELEA defines an "environmental statute, rule, or regulation" as "any statute, rule, or regulation of the state for the protection of the air, water, and other natural resources**,** including land, minerals, and wildlife, from pollution, impairment, or destruction." N.D.C.C. § 32-40-03(2) (emphasis added). "Oil and natural gas are generally classified as minerals." State ex rel. Rausch v. Amerada Petroleum Corp., 49 N.W.2d 14, 17 (1951). Among the other purposes of the Anti-Flaring Statute, such as protecting air quality, it is a "statute...for the protection of...minerals...from...destruction," and is therefore plainly an environmental statute as defined in N.D.C.C. § 32-40-03(2).

[¶ 45] The legislative history of the Anti-Flaring Statute indicates that the statute purposely sought to curtail pollution and the destruction of natural gas due to flaring. The bill, originally called "A bill for an act to limit flaring of gas," was unanimously approved by the House Natural Resources Committee by a 12-0 vote after deliberations and the following statements by members of the Committee (contained in the Minutes):

> Rep. R. Anderson, Terrible waste of Natural Resources, bit unfair that Federal Government receives royalties and no one else.
>
> David Nelson, Supports the bill, feels so much of this gas is wasted. Determent [sic] to our farms and buildings, our health and livestock.

Doc. ID No. 44, Hearing on H.B. 1521 Before the Natural Resources Comm., 49th N.D. Legis. Sess. (Feb. 8, 1985) ("Hearing on H.B. 1521") (testimony of Rep. R. Anderson and testimony of David Nelson).

[¶ 46] Testimony before the Senate Natural Resources Committee included statements by the North Dakota State Department of Health, the Dakota Resource Council and the American Lung Association, all three of which voiced their support for the bill because it addressed environmental concerns:

> The North Dakota State Department of Health testified in favor explaining that the Anti-Flaring Statute could have a "positive impact on the air quality environment of western North Dakota" by reducing "the amount of sulfur, in the form of hydrogen sulfide and sulfur dioxide, being emitted to the ambient air from oil and gas wells."
>
> The Dakota Resource Council spoke in favor of the bill explaining that flaring not only increased "pollution levels within the state," but further testified the benefit of potentially mitigating tons of emissions of sulfur dioxide and nitrous oxides whereby land owners living in the area have "experienced rapid deterioration" of steel buildings, grain bins, farm machinery, fences, electrical lines and telephone lines.
>
> The American Lung Association spoke in favor of the Anti-Flaring Statute explaining that flaring's "resultant production of hydrogen sulfide has been

> noted to the extent of being dangerous to both human health and to agriculture."

Id. (testimony of Dana Mount, Director of Environmental Engineering, North Dakota State Department of Health), (testimony of Rose Sickler, Chair, Dakota Resource Council), (testimony of Duane K. Flick, Executive Director, American Lung Association). Environmental concerns were again voiced when the Anti-Flaring Statute was amended in 1993:

> Senator Urlacher asked about air quality monitoring of flaring whereby the answer was the "Health Department is doing monitoring" and attended "Industrial Commission meetings to determine how much of the gas will be flared."
>
> Similarly, Representative Henegar asked how the statute played "in the Clean Air Act" whereby he was also told the Health Department "has representatives at all hearings and they monitor site – must be certain size, watch sulfur etc."

Doc. ID No. 45, Hearing on S.B. 2342 Before the Senate Natural Resources Comm., 53rd N.D. Legis. Sess. (Jan. 29, 1993) (questions of Senator Urlacher), (questions of Representative Henegar). Environmental concerns were raised, yet again, when the Anti-Flaring Statute was amended 16 years later in 2009:

> Representative Wald spoke and said, in part, the following: "If you have driven through the oil patches you will see flaring gas burning up in the atmosphere. We feel this [amendment] would be good for the environment, ..."
>
> NDIC Director Lynn Helms testified that "[t]he products off of the flaring are carbon dioxide, water vapor and sulfur dioxide. The Health Department monitors the flare length to see how much sulfur dioxide is being put in the atmosphere and make sure it is not dangerous for human health."
>
> Documentation supporting the 2009 amendment says it will help reduce "unnecessary flaring of natural gas and lower greenhouse gas emissions" plus "[o]ur Environment wins because natural gas and waste heat can be cleanly transformed into useful and needed electricity, instead of being utterly wasted by flaring!"

Doc. ID No. 46 Hearing on S.B. 2413 Before the House Finance & Taxation Comm., 61st N.D. Legis. Sess. (Feb. 3, 2009) (testimony of Representative Wald,) (testimony of Lynn Helms, Director, North Dakota Industrial Commission), (Attachment 2 to testimony). In addition to the numerous environmental announcements in the legislative history, the NDIC has also construed its power to regulate flaring, due in large part to the Anti-Flaring Statute, as encompassing environmental concerns. These environmental concerns are illustrated in the NDIC field rules, where the following language is typically included:

> If the flaring of gas produced with crude oil . . . causes, or threatens to cause, degradation of ambient air quality, production from the pool shall be further restricted."

See, e.g., Case No. 9571, Order No. 11352, at ¶ 15 (emphasis added) (a copy was provided in the court below for reference at Doc. ID No. 50). Indeed, the vast majority of NDIC orders adopting field rules have this same basic language. See, e.g., NDIC Case No. 16585, Order No. 18854; Case No. 15875, Order No. 18135; Case No. 18111, Order No. 20380; and Case No. 12168, Order No. 14420.

[¶ 47] The Anti-Flaring Statute requires the payment of royalties and taxes to disincentivize the flaring of gas to the detriment of the environment. While the disincentive's efficacy may be questioned if producers refuse to pay the royalties or taxes owed, the Legislative Assembly envisioned that the threat of producers having to pay royalties and taxes would result in decreased flaring and less waste of the state's nonrenewable resources. That, in turn, would reduce risks of environmental degradation and associated health problems caused by flaring gas.

2. The Plain Language of the ELEA Requires that It Be Read in Harmony with and Cumulative of Plaintiff's Additional Claims.

[¶ 48] The ELEA is expressly authorized to coexist with remedies like the Anti-Flaring Statute and other remedial provisions in Chapter 38-08: "The remedies provided by this chapter shall be cumulative and shall not replace statutory or common-law remedies." N.D.C.C. § 32-40-04 (emphasis added). While elementary, it is helpful to revisit the definition of "cumulative remedy": "A remedy available to a party in addition to another remedy that still remains in force." Black's Law Dictionary 1407 (9th ed. 2011). The ELEA exists as a separate private right of action, in addition to any other private administrative or judicial actions. The ELEA also creates a mechanism for "the enforcement of the existing environmental law and any additional law the assembly should choose to enact [in the future]." See Doc. ID No. 49, ELEA Legislative History.

[¶ 49] The District Court relied on N.D.C.C. § 1-02-07, concluding that "N.D.C.C. § 38-08-06.4 is a more specific statute as compared to the ELEA while also being enacted after the ELEA." Order Granting Motion to Dismiss, Doc. ID No. 72. (App. 132). First, the remedial provisions contained in Chapter 38-08 are as general as anything in Chapter 32-40; and the fact that N.D.C.C. § 38-08-06.4 is more specific is therefore irrelevant. More importantly, the District Court acknowledged that "it would appear that the ELEA provides a cumulative remedy." Order Granting Motion to Dismiss, Doc. ID No. 72. The District Court decided, however, that because it considered N.D.C.C. § 38-08-06.4 to be more specific than Chapter 32-40, administrative exhaustion was still required.

[¶ 50] This does not comport with this Court's previous cases or N.D.C.C. § 1-02-07.

> When a general statutory provision conflicts with a specific provision in the same or another statute, the two must be construed, if possible, so that effect may be given to both provisions. When statutes relate to the same subject matter, we make every effort to harmonize and give meaningful effect to each statute. Only when the conflict between the two provisions is irreconcilable should resort be made to the "particular controls general" rule of statutory construction.

State ex rel. Dep't of Human Servs., Child Support Enforcement Div. v. North Dakota Ins. Reserve Fund, 2012 ND 216, ¶ 12, 822 N.W.2d 38 (internal quotes and citations omitted). Indeed, if the District Court's logic is followed, the ELEA will never be used, because there will always be a more specific environmental law, and the ELEA will be a nullity.

[¶ 51] Moreover, the ELEA and the Anti-Flaring Statute are not in conflict with one another. Marathon argued below that the ELEA is analogous to 42 U.S.C. § 1983, and cited the cases of Middlesex County Sewerage Auth. v. Nat'l Sea Clammers, 453 U.S. 1 (1981), Smith v. Robinson, 468 U.S. 992 (1984), and City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005). See Doc. ID No. 25, pp.12-13. These cases consider, in part, whether the enabling statute of 42 U.S.C. § 1983 could apply to create a private cause of action under other federal statutes. A closer look at the cases also reveals that they are not persuasive authority as applied to the ELEA.

[¶ 52] As stated in City of Rancho Palos Verdes, the "critical question" is "whether Congress meant the judicial remedy expressly authorized by § 332(c)(7) to coexist with an alternative remedy available in a § 1983 action." 544 U.S. at 120-21. In Nat'l Sea Clammers, the Court held that comprehensive citizen enforcement provisions allowing aggrieved parties to take polluters violating the Clean Water Act to federal court precluded an alternate action to enforce the Clean Water Act under 42 U.S.C. § 1983. 453

U.S. at 20. In Smith, the Court concluded that the Educational Health Act provided the sole avenue to bring an equal protection claim to a publicly financed education due to the Act's comprehensive remedial scheme. 468 U.S. at 1010-12. There, the Educational Health Act "established an enforceable, substantive right" subject to an express and "elaborate" administrative process, and further subject to full judicial review. Id.

[¶ 53] Marathon's reliance on these cases is misplaced. Apart from the fact that the Anti-Flaring Statute does not provide a meaningful remedial scheme for aggrieved parties (let alone a comprehensive one), the ELEA's remedies are expressly "cumulative" in nature, whereas 42 U.S.C. § 1983's remedies are not.

[¶ 54] In the cases cited by Marathon, those federal statutes did not coexist. Following that guidance, the question becomes whether the ELEA can coexist with the Anti-Flaring Statute. The plain language of the ELEA answers this question.

[¶ 55] Because the federal cases cited by Marathon contemplate legislation that lacks provision for cumulative remedies, those cases do not provide a sound analogy. Instead, this Court must consider North Dakota law and the ELEA. The ELEA's remedies are cumulative and thus coexist with those contained in the Anti-Flaring Statute. To adopt Marathon's arguments in favor of mutual exclusivity asks this Court to render meaningless the "cumulative remedies" provision of the ELEA. Any argument that asks that the express language of a statute be ignored should be rejected.

E. Vogel Has Claims for Conversion and Waste.

[¶ 56] Marathon has also argued that Vogel cannot maintain her claims for conversion and waste because N.D.C.C. § 38-08-06.4 purportedly "covers the field" with respect to the flaring of natural gas. Doc. ID No. 25, p.22. (App. 111). This is not true.

[¶ 57] Marathon argued in the court below that "[u]nder North Dakota law, it is well established that state statutes trump the common law." Doc. ID No. 25, p.21. (App. 110). Marathon cites to In re White, stating that "when legislation covers the entire field, the common law is no longer operative." Id. at p.22 (citing 69 N.D. 61, 284 N.W. 357, 358 (1939). The Court in In re White actually stated: "It is a general principle that, when legislation covers the entire field, previous provisions of either the common or statutory law in conflict therewith become no longer operative." In re White, 69 N.D. 61, 284 N.W. 357, 358 (1939) (emphasis added).

[¶ 58] It is not true that N.D.C.C. § 38-08-06.4 "covers the field" with respect to the practice of flaring natural gas, and other cases illustrate well the limited jurisdiction of the NDIC. For example, in Ritter, Laber & Associates, Inc. v. Koch Oil, Inc., 2004 ND 117, ¶ 1, 680 N.W.2d 634 ("Ritter"), the Court considered the validity of a conversion claim for oil. Although the issue of administrative exhaustion was not before the Court, it is very telling that the parties did not even raise the issue.

[¶ 59] In that case, Defendant "Koch paid the plaintiffs for oil based on hand-gauging measurements at the well, but when Koch delivered the oil for shipping or selling, Koch measured the oil by volumetric meter, which allegedly resulted in Koch selling more oil than it had obtained from the plaintiffs." 2004 ND 117, ¶ 4. "The plaintiffs claim Koch had an established practice of systematically adjusting the observed hand-gauging measurements for oil taken at the well, which allowed Koch to obtain more than 750,000 barrels of oil during the relevant time period without paying the plaintiffs for that oil." Id.

[¶ 60] The Court was considering a separate issue regarding whether the plaintiffs could maintain a conversion action based on the same facts as a breach of

contract action, but notably absent from the Court's discussion is any concern with the numerous administrative remedies available and codified in statute. The regulatory provisions related to oil metering that are administered by the NDIC are more numerous and detailed than the Anti-Flaring Statute, and yet, the Court never discussed administrative exhaustion in determining that the plaintiffs had a claim for conversion that could be adjudicated in the judicial forum.

[¶ 61] The NDIC "has the authority to require ... [m]etering or other measuring of oil, gas, or product related to production in pipelines, gathering systems, storage tanks, barge terminals, loading racks, refineries, or other places, by meters or other measuring devices approved by the commission." N.D.C.C. § 38-08-04(1)(h). Chapter 38-08 contains very specific provisions related to metering of oil:

> ...If wells producing into a centralized storage facility have diverse ownership, the production from each well must be measured by meters approved and tested by or under the direction of the commission or production must be measured by some other method the commission has approved after notice and opportunity for hearing. If wells producing into a centralized storage facility have common ownership, including the common ownership of the working interest, the common ownership of the royalty ownership, and the common ownership of any overriding royalty owners, the production from each well need not be measured on meters approved by the commission if the owner of the wells demonstrates to the commission that the production from each well can be accurately determined at reasonable intervals by other means.

N.D.C.C. § 38-08-20.

[¶ 62] Significantly, N.D.C.C. § 38-08-20.1 provides a specific remedy for a royalty owner with complaints about the accuracy of a meter used by an operator:

> Upon request by a royalty owner to test an oil and gas meter or measuring device, the commission shall test the meter or measuring device or contract for the testing by a qualified meter tester who is independent of any operator or purchaser of production from the metered well.

[¶ 63] N.D.A.C. § 43-02-03-14.2, titled "Oil and gas metering systems," contains *pages* of specific provisions related to meters used for measuring oil production.

[¶ 64] Despite all these provisions that directly relate to meters and measuring oil production, there was no mention of whether the plaintiffs needed to exhaust remedies before the NDIC; nor should there have been, because the plaintiffs had a private property right (royalties) and a private cause of action (conversion), as the Court recognized. Here, the conversion claim asserted by Vogel does not conflict with the Anti-Flaring Statute, just as the conversion claim in Ritter did not conflict with any of the laws related to oil metering administered by the NDIC. Nothing in the Century Code "trumps" a common law claim for conversion in either instance. The argument that it does is even weaker with respect to the Anti-Flaring Statute, which is merely one section in Chapter 38-08. Additionally, it should be noted that Marathon apparently argues that the Anti-Flaring Statute trumps all common law causes of action related to flared gas, but also emphatically argues that the Anti-Flaring Statute provides no cause of action. Regardless, the Ritter case illustrates the weakness of Marathon's argument. The Anti-Flaring Statute does not "cover the field" with respect to recovery of royalties for illegally flared gas.

[¶ 65] Even if the Court determined that N.D.C.C. § 38-08-06.4 covered the field with respect to recovery of royalties on flared gas, conversion is not a "previous provision[] of ... the common ... law in conflict [with N.D.C.C. § 38-08-06.4]." See, In re White, 69 N.D. 61, 284 N.W. 357, 358 (1939). Rather, the Anti-Flaring Statute and a conversion claim are *complementary*. First, in the context of flared natural gas, both create an economic disincentive for a company to flare gas. The purpose of a conversion claim presents no obstacle to furtherance of the Anti-Flaring Statute's objects or purposes.

Second, the Anti-Flaring Statute is only enforceable at the administrative level at the discretion of NDIC. See supra, Section VI-C-1. A claim for conversion, on the other hand, is enforceable in court by a royalty owner.

[¶ 66] Similarly, Vogel's waste claim is a separate, private cause of action, and is not trumped by the Anti-Flaring Statute. "Waste may be defined as an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession, which results in a substantial injury." Meyer v. Hansen, 373 N.W.2d 392, 395 (N.D. 1985).

[¶ 67] Waste, as it is understood for purposes of Vogel's cause of action, is different than waste as it is referred to in Chapter 38-08. While the term certainly has the same general meaning regardless of context, it holds a very specific *legal* meaning within the context of oil and gas development, and this meaning is irrelevant to the private cause of action for waste. Compare N.D.C.C. § 38-08-02(19) with Meyer v. Hansen, 373 N.W.2d 392, 395 (N.D. 1985). Certainly the NDIC has a duty to prevent waste *as that term is understood within the oil and gas industry and Chapter 38-08*, but it cannot seriously be argued that any claim for waste in North Dakota must be brought before the NDIC. Any attempt to characterize Vogel's waste claim as merely a claim that waste has occurred as the term is defined by N.D.C.C. § 38-08-02(19) fails to recognize the true nature of a cause of action for waste.

[¶ 68] Neither Vogel's claim for waste nor her claim for conversion conflicts with the Anti-Flaring Statute, a law aimed at curbing the wanton flaring of natural gas by creating economic disincentives to doing so. They are complementary. Therefore, because Vogel's conversion and waste claims do not conflict with N.D.C.C. § 38-08-06.4, even if

that section "covers the field," Vogel is not required to exhaust administrative remedies. See, In re White, 69 N.D. 61, 284 N.W. 357, 358 (1939).

F. Vogel Has an Implied Cause of Action under N.D.C.C. § 38-08-06.4.

[¶ 69] The North Dakota Legislative Assembly enacted the Anti-Flaring Statute to make producers liable to mineral owners for royalties on the value of gas flared in violation of the statute and provided mineral owners with a right to recover damages when those royalties are not paid. The Anti-Flaring Statute speaks directly to the right to damages asserted by Plaintiff.

[¶ 70] Like many states, North Dakota adopted the test articulated by the United States Supreme Court for determining if rights of action are to be implied from statutes as set forth in Cort v. Ashe, 422 U.S. 66 (1975). Trade 'N Post v. World Duty Free Americas, 2001 ND 116, 628 N.W. 2d 707. The test as it existed at the time of North Dakota's adoption in 2004 was three-pronged:

> (1) Is the plaintiff one of the class for whose especial benefit the statute was enacted?
>
> (2) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?
>
> (3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

Id. As discussed below, all three factors are satisfied.

1. Factor 1: Plaintiff is part of the class for whose especial benefit the statute was enacted.

[¶ 71] Marathon concedes that Vogel is a member of a class of persons intended to benefit from the Anti-Flaring Statute. Defendant Marathon Oil Company's

Memorandum in Support of Motion to Dismiss, Doc. ID No. 25 ("Marathon District Court Brief"), p.7. The first prong of the Cort test is satisfied.

2. Factor 2: Both explicit and implicit legislative intent exists that a remedy was created in favor of Plaintiff and other royalty owners.

[¶ 72] The second factor asks whether there is any indication of legislative intent, explicit or implicit to create a remedy in favor of the class for whose benefit the statute was created. Trade 'N Post, 2001 ND 116, ¶13. The United States Supreme Court, referring to its analysis as set forth in Cort, stated:

> Our focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action. The implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action. Rather, as an *implied* cause of action doctrine suggests, the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. We therefore have recognized that Congress' intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment.

Thompson v. Thompson, 484 U.S. 174, 179 (1988) (internal citations and quotations omitted).

[¶ 73] Congressional intent has been traditionally determined by an examination of the language and focus of the statute, its legislative history, and a consideration of its statutory purpose. R. B. J. Apartments, Inc. v. Gate City Sav. & Loan Ass'n, 315 N.W.2d 284, 287 (N.D. 1982) (citing Cort v. Ash, 422 U.S. 66, 78 (1975)).

[¶ 74] The legislative history of the statute reveals that the bill was introduced and passed in 1985 in large part because "the federal government already requires royalties to be paid on flared gas," and [the proposed legislation] would likewise "require royalties to be paid to the landowner." Doc. ID No. 44, Hearing on H.B. 1521 Before the

Natural Resources Comm., 49th N.D. Legis. Sess. (Feb. 8, 1985) ("Hearing on H.B. 1521") (testimony of Rep. R. Anderson).

[¶ 75] The circumstances surrounding the enactment of the Anti-Flaring Statute and its purpose also support an implied cause of action. The legislative history of the Anti-Flaring Statute indicates that the statute purposely sought to curtail pollution and the destruction of natural gas due to flaring. The bill was originally titled "A bill for an act to limit flaring of gas," and one of the representatives stated clearly that flaring was a "terrible waste of natural resources" and he considered it unfair that the federal government receives royalties and royalty owners do not. See, Doc. ID No. 44, Hearing on H.B. 1521.

[¶ 76] The North Dakota Legislative Assembly intended to vest royalty owners with a right to be paid royalties on gas unlawfully flared. See N.D.C.C. § 38-08-06.4(4) ("For a well operated in violation of this section, the producer shall pay royalties to royalty owners . . .") (emphasis added). The language of N.D.C.C. § 38-08-06.4(4) demonstrates that the Legislative Assembly intended to create for royalty owners a right to money damages for royalties attributable to illegally flared gas. When the statute has been violated, royalties accrue at the time of the violation and not upon some pronouncement or order by the NDIC. The NDIC acknowledged this in a case regarding the Anti-Flaring Statute:

> The petitioner contends that the Commission erred in determining taxes and royalties had accrued under Section 38-08-06.4. The petitioner misconstrues the Commission's use of the word "accrued." The Commission merely meant that because the gas has been flared without exemption, the amount due, if any, has been set. In other words, although the Commission has not established the actual value of the gas flared, any liability for taxes and royalties has accrued.

NDIC Case No. 4735, Order No. 5645 (corrected November 17, 1989) at ¶ 10. NDIC's interpretation of its own implementing statute is entitled to deference. See HIT, Inc. v. N. Dakota Dep't of Human Servs., 2013 ND 51, ¶ 7, 828 N.W.2d 792, 794.

[¶ 77] Indeed, although Vogel obviously does not quote the following as a legal citation, it is instructive to note that in mid-December, 2013, after the filing of this suit and others, NDIC Oil and Gas Division director Lynn Helms referenced the NDIC's lack of enforcement, consistent with NDIC's limited jurisdiction and position that royalties accrue without NDIC action:

> So they [producers] either have to pay these taxes and royalties or file for an exemption," he said. "The responsibility is on them**.** It is assumed in the statue [sic] that they will pay the taxes and royalties."

Doc. ID No. 48 (Petroleum News Bakken, Vol. 18, No. 50, Week of Dec. 15, 2013 (emphasis added)).

[¶ 78] The purpose of the Anti-Flaring Statute is to create a disincentive for operators to continue flaring in violation of the statute. In keeping with that purpose, the mineral owner's right to the royalties accrues automatically when an operator violates the statute.

[¶ 79] The statute demonstrates a legislative intent that gas flared in violation of the statute, though not sold, nonetheless will be seen as having value for which royalties must be paid. The Legislative Assembly's use of the word "royalties" carries with it the rights associated with the term, including those for judicial redress. The "legislature is presumed, in enacting a statute, to have in mind court decisions pertaining to the subject legislated on and to have acted with reference thereto." Lapland v. Stearns, 54 N.W.2d 748, 753 (N.D. 1952) (citing Merchants' Transfer and Warehouse Co. et al. v. Gates, 21

S.W.2d 406 (Ark. 1929); Texarkana Special School Dist. v. Consolidated Special School District No. 2, 46 S.W.2d 631 (Ark. 1932)).

[¶ 80] The right to seek judicial redress for non-payment of royalties embodied as a cause of action for payment of royalties was recognized at the time of the Anti-Flaring Statute's enactment in 1985. See, e.g., West v. Alpar Res., Inc., 298 N.W.2d 484, 491 (N.D. 1980). "A royalty interest is a . . . share of the product or proceeds reserved to the owner for permitting another to develop or use the property." Acoma Oil Corp. v. Wilson, 471 N.W.2d 476, 481 (N.D. 1991) (citing 1 Williams & Meyers at § 301; 8 Williams & Meyers) (emphasis added).

[¶ 81] Contrary to what Marathon may imply, the Legislative Assembly did not seek to establish a new category of royalty damages that required the NDIC's administration. Instead, as the Anti-Flaring Statute expressly provides that royalties shall be paid on gas flared in violation of the statute. N.D.C.C. § 38-08-06.4.

[¶ 82] Providing for a judicial remedy to protect one's property interest is a core function of the courts. A royalty owner's right to judicial enforcement does not change simply because the royalties accrue differently as a result of a statutory enactment. In the 1983 North Dakota Supreme Court decision of Slawson v. North Dakota Industrial Commission, the producer sought to impose a statutory lien for costs and expenses against unleased mineral owners as part of a pooling order. Slawson v. North Dakota Industrial Commission, 339 N.W.2d 772, 775 (N.D. 1983) ("Slawson"). The defendant's position was rejected. Instead, it was determined that unleased mineral owners would be entitled to a cost-free royalty. Slawson sought to overturn that decision by arguing it created a lessor/lessee relationship where none existed. Id.

[¶ 83] This Court disagreed finding that the "right to the royalty interest . . . does not rise from the lease, but from ownership of the minerals." Id. at 776 (footnote omitted). The right to royalties "is not created by order of the Commission, nor is it created by the statute. The right to a royalty interest rises from ownership of the minerals." Id. at 778.

[¶ 84] Like the Slawson royalty owners, Vogel and the proposed class have a right to be properly paid royalties based upon the "value of the gas flared" and can judicially enforce that right. N.D.C.C. § 38-08-06.4. Similarly, the right to be paid the proper amount of "royalties" arises from the private property interests they own.

[¶ 85] Two years after Slawson, in 1985, the North Dakota Legislative Assembly enacted the Anti-Flaring Statute. The Anti-Flaring Statute had a clear purpose of preventing waste and potential health problems arising from environmental degradation. Through the payment of royalties for illegally flared gas, the statute created an economic disincentive to prevent perpetual unchecked flaring. Besides acting as an economic disincentive to flaring, requiring payment of royalties on flared gas also protects underlying property rights of the royalty owners who suffer the waste. In this litigation, that property interest is the right to receive royalties.

[¶ 86] By enacting the Anti-Flaring Statute and creating liability for "royalties," the Legislative Assembly's use of the term "royalties" cannot be said to be coincidence, especially since the statute was enacted two years after the Slawson case was decided:

> Accordingly, where words used in a statute have acquired a settled meaning through judicial interpretation, and the same terms are used in a subsequent statute upon the same or an analogous subject, they are generally interpreted in the latter as in the former, where the object to which the words are applied, or the connection in which it stands, does not require it to be differently understood in the two statutes, or where a contrary intention of the legislature is not made clear by other qualifying or explanatory terms

Lapland, 54 N.W.2d at 757. With the guidance of cases like Slawson, North Dakota law is clear. The right to royalties is a private property interest based on ownership of the minerals. An oil and gas lease can modify the amount and timing of what is paid, and the same is true of a statute like the Anti-Flaring Statute. North Dakota's Anti-Flaring Statute provides that unsold, flared and wasted gas, when flared in violation of the statute, creates a liability that must be monetized as damages and royalties therefor must be paid to the royalty owner. As recognized by Slawson, these rights can be *modified* by statute. But the enforcement of the property right to royalties inherent in the ownership of the minerals has always been appropriate for the judicial forum, and it must be assumed that the Legislative Assembly had this in mind when enacting the Anti-Flaring Statute. Consequently, the Legislative Assembly must have intended that a private cause of action would exist for royalty owners to recover their royalties if operators flared in violation of the statute. The Legislative Assembly did not choose to create a penalty for flaring gas improperly that was *sui generis*. Instead, it termed the royalty owner's share of the value of the flared gas as "royalties" because that term has a defined meaning in North Dakota and incorporates all causes of action for recovery of royalties.

[¶ 87] It is also instructive that the Anti-Flaring Statute, and indeed the entirety of N.D.C.C. ch. 38-08 enforcement mechanism or procedural process specific to enforcement of the mineral owner's right to royalties under the statute. See, generally, N.D.C.C. § 38-08. Although in the court below Marathon attempted to argue that the generic provision in N.D.C.C. § 38-08-17 is a "comprehensive legislative scheme" for enforcement of the Anti-Flaring Statute, the truth is that there is no enforcement mechanism specific to N.D.C.C. § 38-08-06.4. See Doc. ID No. 25 (App. 097), Defendant

Marathon Oil Company's Memorandum in Support of Motion to Dismiss, p.8; N.D.C.C. ch. 38-08. Marathon also attempted to draw an analogy between Chapter 38-08, and the Unfair Discrimination Law and the Unfair Trade Practices Law considered in Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc., 2001 ND 116, 628 N.W.2d 707.

[¶ 88] The Unfair Discrimination Law and the Unfair Trade Practices Law both contain only six and eight sections, respectively, approximately half of which are enforcement and remedial mechanisms. Compare this to Chapter 38-08's twenty-seven sections containing numerous varied regulations for oil and gas operations, with fewer and less specific enforcement provisions than either of the chapters considered in Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc. In short, the attempt to draw an analogy between the statutes considered in Trade 'N Post and Chapter 38-08 is specious at best; misleading and disingenuous at worst. Chapter 38-08 does not contain a "comprehensive legislative scheme" for enforcement of the Anti-Flaring Statute. It contains a few generic provisions that relate to numerous provisions that regulate different aspects of oil and gas production. The Unfair Discrimination Law and the Unfair Trade Practices Law show a legislative intent to create a comprehensive legislative scheme for enforcement; Chapter 38-08 does not, and Trade 'N Post is inapposite.

[¶ 89] The intent of the Legislative Assembly to imply a cause of action is also evinced by the NDIC's view of its own jurisdiction. The NDIC has often described itself as an "entity with limited jurisdiction." See, e.g., NDIC Case No. 9571, Order No. 11352 at ¶ 7) (Numerous other decisions of the NDIC say essentially the same thing; that matters of private dispute are not within the NDIC's jurisdiction.). Consistent with that position,

the NDIC has declined jurisdiction over private disputes even if those disputes result from NDIC decisions or are enmeshed in the facts giving rise to NDIC decisions.

[¶ 90] In NDIC Order No. 11352, the NDIC stated:

> The Commission is an entity with limited jurisdiction.... Thus, the Commission is generally without authority to consider and adjudicate disputes limited to private interests. Such disputes must be resolved by the courts.

NDIC Order No. 11352 (emphasis added) (internal citations omitted).

[¶ 91] In NDIC Order No. 11352 view of its jurisdiction was informed by the guidance given in Tenneco Oil Co. v. El Paso Natural Gas Co., 687 P.2d 1049 (Okla. 1984) ("Tenneco"), as this case was specifically cited by the NDIC in its Order. NDIC Order No. 11352. The Tenneco case involved a question analogous to the one raised here: When may a court of general jurisdiction exercise jurisdiction in light of agency decisions? Initially, the Oklahoma Supreme Court recognized that there was overlapping jurisdiction. Tenneco at 1053. Factually, the Oklahoma Corporation Commission had established a pooling order. Id. at 1050-52. Thereafter, the parties involved had entered into a private contract regarding "the terms set forth in the pooling order." Id. When it appeared that the private operating agreement had been breached, the matter was decided by a district court. Id. An appeal was taken by one of the parties who argued that the matter was required to be resolved by the Corporation Commission. Id. The Tenneco court ultimately found that the district court had jurisdiction. Id. at 1052. In doing so, the court examined whether the claim put forward in the district court was one that sought to change or challenge the pooling order. It found:

> . . . no attempt is made by any party in the instant case to change or challenge the public issue of conservation of oil and gas; all items in the

> operating agreement are private and thus properly presented to the district court.

Id. at 1054-55.

[¶ 92] The same is true in this case. As was true in the Tenneco context, Vogel does not seek to change or challenge any NDIC rules or orders.

[¶ 93] As adopted by the NDIC with reliance upon the Tenneco decision, a court of general jurisdiction may go forward provided the following condition is met:

> The limitation being *always omnipresent* is that no private contract or operating agreement may cause or grant a license to commit waste, or diminish correlative rights, control of which is exclusively within power of Corporation Commission. The Corporation Commission is a tribunal of limited jurisdiction. Respective rights and obligations of parties are to be determined by the district court.

Id. at 1053 (internal citations omitted) (emphasis in original).

[¶ 94] The essential question is: Would a court's determination of a violation of the Anti-Flaring Statute or the value of the illegally flared gas "cause or grant a license to commit waste or diminish correlative rights?" It would not.

[¶ 95] In the forty-one Anti-Flaring Statute cases filed by Continental, the NDIC could have used its discretion to enforce the Anti-Flaring Statute as to every well that would be part of the proposed class. But the NDIC did not, and since 1993, the Anti-Flaring Statute has not required the NDIC to so act. See N.D.C.C. § 38-08-06.4 ("The industrial commission may enforce this section..."). Neither NDIC's actions nor its administrative procedures indicate its willingness to act if producers refuse to pay royalties.

[¶ 96] A court's exercise of jurisdiction would not dislodge the NDIC's orders, and far from creating waste would lead to less waste as producers are incentivized to capture and sell the gas rather than paying royalties on flared gas.

3. Factor 3: The underlying purpose of the Anti-Flaring Statute and Chapter 38-08 implies a remedy to royalty owners such that they can pursue their private action for royalties when the statute is violated.

[¶ 97] The final factor asks whether implying a right of action is consistent with the underlying purposes of the legislative scheme. When considering the underlying purpose of a statute, consideration should be given to "the entire enactment of which it is a part and, to the extent possible, interpret the provision to be consistent with the intent and purpose of the entire Act." Werlinger v. Champion Healthcare Corp., 1999 ND 173, ¶ 43, 598 N.W.2d 820 (citing Payne v. Board of Trustees, 35 N.W.2d 553, 558 (N.D. 1948); Coverston v. Grand Forks County, 23 N.W.2d 746, 749 (N.D. 1946)). Chapter 38-08 declares its purpose and clearly is intended to protect, in part, royalty owners. Under the statute, royalty owners are included in that group who are to be provided the "greatest possible economic recovery of oil and gas . . . within the state to the end that ... the royalty owners . . . realize and enjoy the greatest possible good from these vital natural resources." N.D.C.C. § 38-08-01.

[¶ 98] While producers and the general public are to be considered, when gas is flared illegally, a mineral owner's interest weighs heavily as the express language of the Anti-Flaring Statute requires a violating producer to "pay royalties" for gas flared. The implication of a private right of action for the "royalties for gas flared" advances the principal purpose of the Anti-Flaring Statute to create an economic disincentive to flare gas. Changing the economics of gas flaring for producers substantially curbs waste of

valuable natural gas, and maximizes "ultimate recovery" while protecting correlative rights. This Court has stated with regard to correlative rights:

> [t]here appear to be two aspects of the doctrine of correlative rights: (1) as a corollary of the rule of capture, each person has a right to produce oil from his land and capture such oil or gas as may be produced from his well, and (2) a right of the land owner to be protected against damage to a common source of supply and a right to a fair and equitable share of the source of supply.

Hystad v. Industrial Comm'n, 389 N.W.2d 590, 595-96 (N.D. 1986) (citing Amoco Prod. Co. v. North Dakota Indus. Comm'n, 307 N.W.2d 839, 842 n. 4 (N.D. 1981)). The ability to pursue unpaid royalties, whether through express or implicit causes of action, fits squarely into this concept of "correlative rights." Prohibiting a royalty owner from pursuing such rights under a private cause of action serves only to frustrate that purpose. A finding of no private right of action would contradict the goal of ensuring the greatest possible good from oil and gas.

[¶ 99] Finally, this Court should reject the argument that to allow royalty owners a private action would frustrate the NDIC's regulatory scheme by risking inconsistent results. Vogel does not attack any NDIC decisions, let alone ask this Court to do so in a manner that encourages waste. A private right of action under N.D.C.C. § 38-08-06.4 prevents selective enforcement of the law and ensures the legislative intent to provide a meaningful and efficacious remedy to the class of persons the law was designed to protect.

[¶ 100] Vogel has met her burden by demonstrating that the Anti-Flaring Statute was intended to provide, and does in fact provide, a private right of action for mineral owners to recover royalties on gas flared in violation of the statute.

VII. Conclusion

[¶ 101] Because the NDIC is an entity with self-proclaimed limited jurisdiction, and because Vogel has private causes of action under the ELEA and the Anti-Flaring Statute, and for conversion and waste, she is entitled to choose the forum for litigating this dispute. Vogel has chosen judicial remedies, particularly because she represents a class of individuals for whom individual relief through the NDIC's administrative process is uneconomical. Indeed, this is the real reason Marathon and other operators argue that Vogel and others must exhaust their administrative remedies. The operators know that it is uneconomical for an individual to pursue an administrative claim. Marathon also knows that the NDIC will not enforce North Dakota law on its own, in particular because the NDIC views these issues as private matters outside of its limited jurisdiction. Restricting the ability to pursue these claims in the courts effectively means that producers like Marathon will continue to burn off natural gas without regard to North Dakota law and without consequence. The ability to obtain relief from NDIC is illusory due to the NDIC's discretion to enforce the Anti-Flaring Statute, and justice can only be served for North Dakota royalty owners through the class action device. The doctrine of administrative exhaustion was never meant to be used as cover for oil and gas operators who violate the law and continue doing so unchecked. Such gamesmanship is an abuse of our system of justice, and should not be tolerated. Vogel asks this Court to reverse the District Court's dismissal of her claims.

DATED this 18th day of September, 2015.

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APPENDIX OF LAWS

N.D.C.C. § 32-40-01. Short title

This chapter may be cited and shall be known as the North Dakota Environmental Law Enforcement Act of 1975.

N.D.C.C. § 32-40-02. Legislative intent and purpose

The legislative assembly of North Dakota enacts this Environmental Law Enforcement Act in recognition of the vital role played by environmental laws in maintaining the health, safety, and general welfare of the state's citizens; the need to maintain a sound system of law, order, and justice; and the need to provide relief to those aggrieved by a failure of others to abide by or enforce the state's environmental laws.

N.D.C.C. § 32-40-03. Definitions

As used in this chapter, unless a different meaning clearly appears from the context:

1. "Aggrieved" means the suffering of an injury in fact as a result of the alleged violation of a statute, rule, or regulation, and the injury is of the type the statute, rule, or regulation in question was intended to regulate or protect against. It is not necessary for the injury to be economic in nature. The injury is sufficient if it has harmed the party's use and enjoyment of the protected natural resources in a manner different from the harm to the general public.

2. "Environmental statute, rule, or regulation" means any statute, rule, or regulation of the state for the protection of the air, water, and other natural resources, including land, minerals, and wildlife, from pollution, impairment, or destruction.

3. "Person" means any natural person, corporation, limited liability company, association, partnership, receiver, trustee, executor, administrator, guardian, or fiduciary.

4. "State agency" means any state agency, board, commission, council, officer, office, department, or division.

N.D.C.C. § 32-40-04. Cumulative remedies

The remedies provided by this chapter shall be cumulative and shall not replace statutory or common-law remedies.

N.D.C.C. § 32-40-05. Enforcement powers of attorney general

The attorney general shall have the authority to enforce, in the same manner as state's attorneys, any state environmental statute, rule, or regulation.

N.D.C.C. § 32-40-06. Who may sue--Defendants--Exception to recovery of damages

Any state agency, with the approval of the attorney general; any person; or any county, city, township, or other political subdivision, aggrieved by the violation of any environmental statute, rule, or regulation of this state may bring an action in the appropriate district court, either to enforce such statute, rule, or regulation, or to recover any damages that have occurred as a result of the violation, or for both such enforcement and damages. Such action may be brought against any person, state agency, or county, city, township, or other political subdivision allegedly engaged in such violation. However, no damages may be recovered against any state agency, county, city, township, or other political subdivision, except as otherwise provided by law.

N.D.C.C. § 32-40-07. Notice to be provided

Any person, any state agency, or any county, city, township, or other political subdivision, before commencing any action pursuant to section 32-40-06, shall give thirty days' notice by certified mail of intent to file suit and of the alleged violation to the person alleged to have violated the statute, rule, or regulation; to the state agency or to the political subdivision responsible for the supervision or enforcement of the statute, rule, or regulation alleged to have been violated; to the state's attorney of the county in which the alleged violation occurred; and to the attorney general. This section shall not apply to emergency proceedings, brought under any environmental statute, rule, or regulation, necessary to protect the health, safety, or welfare of any person.

N.D.C.C. § 32-40-08. Bond

The court may order the complainant to post a cash bond in an amount not to exceed five hundred dollars to pay any cost or judgment that might be rendered adverse to a complainant in any action brought under this chapter.

N.D.C.C. § 32-40-09. Intervention in action

Any state agency that receives a notice pursuant to section 32-40-07 shall be entitled to intervene as a matter or right in the action unless such action is commenced solely to recover damages for alleged violations.

N.D.C.C. § 32-40-10. Costs

If the court finds an action brought under this chapter to have been frivolous, it shall award costs to the defendants. Otherwise, the court may apportion costs among the parties as the interests of justice require.

§ 32-40-11. Relief granted

In any action brought under this chapter, the court may:

1. Grant the relief specified in the environmental statute alleged to have been violated or pursuant to which the rule or regulation alleged to have been violated was promulgated.

2. Grant temporary or permanent equitable relief.

3. Award damages.

4. Enter any order it deems necessary to enforce compliance with any environmental statute, rule, or regulation of this state.

N.D.C.C. § 38-08-06.4. Flaring of gas restricted--Imposition of tax--Payment of royalties--Industrial commission authority

1. As permitted under rules of the industrial commission, gas produced with crude oil from an oil well may be flared during a one-year period from the date of first production from the well.

2. After the time period in subsection 1, flaring of gas from the well must cease and the well must be:

a. Capped;

b. Connected to a gas gathering line;

c. Equipped with an electrical generator that consumes at least seventy-five percent of the gas from the well;

d. Equipped with a system that intakes at least seventy-five percent of the gas and natural gas liquids volume from the well for beneficial consumption by means of compression to liquid for use as fuel, transport to a processing facility, production of petrochemicals or fertilizer, conversion to liquid fuels, separating and collecting over fifty percent of the propane and heavier hydrocarbons; or

e. Equipped with other value-added processes as approved by the industrial commission which reduce the volume or intensity of the flare by more than sixty percent.

3. An electrical generator and its attachment units to produce electricity from gas and a collection system described in subdivision d of subsection 2 must be considered to be personal property for all purposes.

4. For a well operated in violation of this section, the producer shall pay royalties to royalty owners upon the value of the flared gas and shall also pay gross production tax on the flared gas at the rate imposed under section 57-51-02.2.

5. The industrial commission may enforce this section and, for each well operator found to be in violation of this section, may determine the value of flared gas for purposes of payment of royalties under this section and its determination is final.

6. A producer may obtain an exemption from this section from the industrial commission upon application that shows to the satisfaction of the industrial commission that connection of the well to a natural gas gathering line is economically infeasible at the time of the application or in the foreseeable future or that a market for the gas is not available and that equipping the well with an electrical generator to produce electricity from gas or employing a collection system described in subdivision d of subsection 2 is economically infeasible.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sarah Vogel, individually and for all those similarly situated, Plaintiff and Appellant, vs. Marathon Oil Company, an Ohio Corporation, Defendant and Appellee.	Supreme Court Case No.: 20150154 Mountrail County District Court Case No.: 31-2013-CV-00163

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

I hereby certify that on September 18, 2015, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

1. Brief of Plaintiff/Appellant; and,

2. Appendix of Plaintiff/Appellant, and served the same electronically as follows:

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