FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 12, 2015
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

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"Of all the rights guaranteed by state constitutions but absent from the federal Bill of Rights, the right to a remedy through open access to the courts may be the most important."

-Thomas Phillips, Chief Justice, Texas Supreme Court

I. ARGUMENT

[¶ 1] Marathon's and amicus's arguments (collectively "Marathon") seek to wrest control of any case related to Chapter 38-08 from the judiciary. Respondents argue NDIC has exclusive jurisdiction to enforce § 38-08-06.4 ("Anti-Flaring Statute"), that the Anti-Flaring Statute preempts and displaces common law and statutory causes of action available to recover unpaid royalties, and, therefore, Vogel has no remedy in this instance other than to seek administrative relief before NDIC (characterized as a requirement to exhaust her administrative remedies). Marathon advances these arguments for one reason—to deny class relief to Vogel and thousands of similarly situated North Dakota mineral owners, relegating them to inefficient, uneconomical case-by-case review before NDIC—an administrative body with no obligation to enforce this law. In other words, Marathon's arguments would leave Vogel with a right, but no guaranteed remedy.

[¶ 2] Apart from the disturbing practical implications of Marathon's arguments, they fail as a matter of law for three reasons. First, the Anti-Flaring Statute unambiguously preserves judicial actions for violations of this Statute. Second, the Environmental Law Enforcement Act ("ELEA," N.D.C.C. Chapter 32-40) provides an express, cumulative action for relief. Third, since a right of judicial action exists, principles of administrative exhaustion are inapplicable under this Court's unambiguous pronouncement in *Werlinger v. Champion Healthcare*, 1999 ND 173, 598 N.W.2d 820.

A. The Anti-Flaring Statute contains an unambiguous three-step process that creates a right, but no guaranteed administrative remedy.

[¶ 3] While amicus NDIC tries to paint the Anti-Flaring Statute as a complicated maze of statute, regulation, administrative orders, and agency policy, the fact is the Anti-Flaring Statute boils down to three basic steps that are simple functions courts undertake every day.

1. Step 1: Determination of whether a company is violating the Anti-Flaring Statute

[¶ 4] Both steps 1 and 2 derive from the Anti-Flaring Statute's directive that "[f]or a well operated in violation of this section, the producer shall pay royalties to royalty owners upon the value of the flared gas." N.D.C.C. § 38-08-06.4(4). That section is violated when (a) flaring occurs (b) in violation of NDIC's rules and N.D.C.C. § 38-08-06.4, and (c) NDIC has not issued an order exempting the producer from the Anti-Flaring Statute. N.D.C.C. § 38-08-06.4(1),(2),(6). If these three requirements are met, then a company is flaring in violation of the Anti-Flaring Statute and shall pay royalties.

2. Step 2: The violator "shall" pay royalties

[¶ 5] The second step is not complicated. It simply requires a quantification of the royalties owed. NDIC again attempts to paint this process as exceedingly complicated. It is not. It merely involves multiplying the market rate of the flared gas by the quantity of gas flared. The quantity of gas flared is available through NDIC's publicly available well records. The company violating the Anti-Flaring statute is then required to "pay royalties…upon the value of flared gas." N.D.C.C. § 38-08-06.4(4).

[¶ 6] The Statute's "shall pay" language requires the violator to immediately pay for the royalty owners' destroyed property. *Slawson v. North Dakota Industrial Commission*, 339 N.W.2d 772, 775 (N.D. 1983) (the "right to the royalty interest…does

not rise from the lease, but from ownership of the minerals"). And there lies the key to the Anti-Flaring Statute. In essence, it balances environmental protection with flexibility that allows operators to flare in situations where it is likely uneconomical to do otherwise or there is no market, and allows NDIC to grant exemptions for these reasons. In those situations, the royalty owner would not get paid on their mineral interests anyway, precisely because gas production would occur at a loss or have no market. Violations of the Anti-Flaring Statute presume economic production, and therefore the Statute mandates payment of the royalty owners' destroyed property.

3. Step 3: NDIC "may" enforce payment of royalties

[¶ 7] Finally, if an operator is in violation of the Anti-Flaring Statute but refuses to pay royalties, NDIC "may" enforce the Statute. This language gives NDIC discretion to enforce the law if it chooses. Vogel concurs with Marathon that she is entitled to a hearing before NDIC, but that is irrelevant. The relevant question is whether she is guaranteed a remedy before NDIC, and the Statute plainly answers this question: while Vogel can petition NDIC for relief, NDIC is not required to grant it.

B. This statutory structure can be construed only one way: the legislature intended to either preserve common law remedies or create an implied remedy.

1. Every right has a remedy

[¶ 8] Based on the structure of the Anti-Flaring Statute and the fact that Vogel holds a property interest in the flared minerals in question, Vogel has a right to recover unpaid royalties. It has always been the law of this state that "[f]or every wrong there is a remedy." N.D.C.C. § 31-11-05(14). This statement is enshrined in North Dakota's Constitution: "All courts shall be open, and every man for any injury done him in his

lands, goods, person or reputation shall have remedy by due process of law . . . ."). N.D. Const. art. I, § 9.

[¶ 9] If this Court accepts Marathon's arguments, Vogel will be left without a guaranteed remedy, and it would be impossible to obtain class relief. Such a reading does not pass constitutional muster. The Anti-Flaring Statute unambiguously gives Vogel dual remedies; one in court and another administratively. No remedy is guaranteed before NDIC. There is only one way to read the Anti-Flaring Statute: Vogel has a guaranteed judicial remedy to recover unpaid royalties either through common law or through an implied statutory remedy.

2. Common law remedies compliment, rather than conflict, with the Anti-Flaring Statute's overall structure

[¶ 10] Marathon relies in part on the rule stated in N.D.C.C. § 1-01-06 that "[i]n this state there is no common law in any case in which the law is declared by the code" to argue that the Anti-Flaring Statute preempts common law. But this view makes little sense in light of this Court's holding that N.D.C.C. § 1-01-06 means "that statutory enactments take precedence over and govern conflicting common law doctrines." *Bornsen v. Pragotrade, LLC*, 2011 ND 183, ¶ 15, 804 N.W.2d 55 (emphasis added). Here, common law remedies compliment, rather than conflict, with the Anti-Flaring Statute. The Anti-Flaring Statute provides a right, but no guaranteed remedy, and this indicates the legislative intent to preserve common law remedies such as conversion and waste so that aggrieved royalty owners can recover unpaid royalties.

3. In the alternative, an implied remedy exists

[¶ 11] The paramount requirement is that Vogel have a judicial remedy to seek unpaid royalties. If this Court determines that a common law remedy does not exist, then it

must find an implied cause of action. Marathon has argued that no such implied cause of action exists based upon the plain language of the Anti-Flaring Statute and legislative history. But Marathon offers no support such as plain language analysis or legislative history. The language of the statute is plain: it creates an express right for royalty owners, and vests NDIC with discretionary enforcement authority to provide relief. The only logical conclusion is that the legislature intended that aggrieved royalty owners be able to exercise their right to collect unpaid royalties in court through remedies at common law, or through an implied cause of action.

C. Vogel has a distinct, cumulative cause of action under the ELEA.

[¶ 12] With respect to Vogel's claim under the ELEA, Marathon pronounces that "it is a common maxim that what cannot be done directly cannot be done indirectly," citing to *Langenes v. Bullinger*, 328 N.W.2d 241 (N.D. 1982). Marathon Brief, ¶ 40. This maxim does not apply; Vogel is doing nothing indirectly. She is asserting a private cause of action expressly provided by the ELEA.

[¶ 13] The *Langenes* case and others cited therein refer to circumstances in which a litigant or agency attempted to accomplish an action indirectly that was otherwise outright prohibited. But "[t]he common judicial statement that one must exhaust administrative remedies before going to court is false almost as often as it is true." *Shark Bros., Inc. v. Cass Cnty.*, 256 N.W.2d 701, 705 (N.D. 1977).

[¶ 14] Asserting her private action in the judicial system rather than pursuing administrative remedies is not prohibited; it is Vogel's prerogative. See *Werlinger* at ¶ 48. The ELEA specifically allows an aggrieved party to "bring an action in the appropriate district court." N.D.C.C. § 32-40-06. The doctrine of administrative exhaustion is not analogous to the prohibitions to which the maxim cited by Marathon applies; directly

utilizing the ELEA rather than an administrative proceeding is not an attempt to do indirectly what cannot be done directly.

[¶ 15] Marathon also attempts to analogize the ELEA to 42 U.S.C. § 1983, but §1983 is extremely expansive compared to the ELEA, stating:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen ... or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…(emphasis added)

[¶ 16] The ELEA provides a private judicial action to an aggrieved person to enforce North Dakota's environmental laws when they have been violated or go unenforced.

[¶ 17] At the same time, the nature of the ELEA is such that it will always be more general than the environmental laws it was created to enforce, so Marathon's argument that Chapter 38-08 is more specific and therefore controls the ELEA is also unavailing. All of North Dakota's environmental laws, by their very nature, are more specific than the ELEA.

[¶ 18] The § 1983 cases cited by Marathon are also inapposite because § 1983 specifically states that liability to the party injured may be "in an action at law...or other proper proceeding for redress…," and thus § 1983 expressly allows for administrative proceedings. (emphasis added). The ELEA, however, provides only for "an action in the appropriate district court." N.D.C.C. § 32-40-06.

[¶ 19] It makes sense that NDIC chose not to comment on the private action available under the ELEA. The ELEA was promulgated "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. § 32-40-02 (emphasis added). The NDIC may enforce the Anti-Flaring Statute, but is not required to do so. N.D.C.C. § 38-08-06.4. If Vogel chooses to utilize her private ELEA action in court, she may, with the only caveat being that she must give the agency notice, and the agency may intervene. N.D.C.C. §§ 32-40-07, 32-40-09. In this action, the NDIC chose not to intervene after receiving notice from Vogel regarding her intent to utilize her private ELEA action. (App. 75).

D. Vogel has the express right to proceed in the judicial forum.

[¶ 20] Notably, Marathon does not respond to the clear pronouncement in *Werlinger* that 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.

[¶ 21] Marathon is attempting to use the doctrine of administrative exhaustion to turn the NDIC into a shield to protect itself from the justice administered by our judicial system. Vogel has chosen the most appropriate forum and mechanism to obtain relief. Her constitutional right to a remedy through open access to the courts should not be denied.

DATED this 11th day of November, 2015.

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I hereby certify that on November 12, 2015, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

1. Reply Brief of Plaintiff/Appellant

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