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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Nos. 2016-0261; 2016-0262

STATOIL OIL & GAS LP
Appellant/Plaintiff,

v.

ABACO ENERGY LLC, *et al.*,
Appellees/Defendants,

v.

NORTH DAKOTA STATE ENGINEER,
Appellee/Interested Party.

STATOIL OIL & GAS LP
Appellant/Plaintiff,

v.

1280 ROYALTIES LLC, *et al.*,
Appellees/Defendants.

v.

NORTH DAKOTA STATE ENGINEER,
Appellee/Intervenor.

On Appeal from the Orders Granting Motions to Dismiss
Entered by the District Court of Williams County
No. 53-2015-CV-00744 (Hon. David W. Nelson)
No. 53-2015-CV-01437 (Hon. Paul W. Jacobson)

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STATEMENT OF ISSUES PRESENTED

[¶1] 1. Whether the district court erred by misinterpreting and improperly weighing the factors to be considered under N.D. R. Civ. P. 19(b), which resulted in the dismissal of these actions for failure to join the United States as a party under N.D. R. Civ. P. 12(b)(7).

STATEMENT OF THE CASE

[¶2] Plaintiff/Appellant Statoil Oil & Gas LP ("Statoil") filed the actions leading to this consolidated appeal in the District Court for Williams County as actions in the nature of interpleader pursuant to N.D. R. Civ. P. 22. Each action sought the court's determination regarding the proper distribution of certain revenues that Statoil obtained from operating oil and gas wells in Williams and McKenzie Counties. The actions were brought due to a dispute over the scope of the State of North Dakota's ownership of mineral interests in lands adjacent to the Missouri River and under Lake Sakakawea. Because of this dispute, competing claims exist to the ownership of certain minerals and to the corresponding right to receive royalties from the production of Statoil's wells. Those claims expose Statoil to multiple liability. The complaints named as defendants those whom Statoil believed might claim an interest in the disputed property. An additional party, the United States of America, is believed to claim an interest in the disputed lands, but was not joined as a defendant because it is not amenable to the district court's jurisdiction.

A. *Statoil Oil & Gas LP v. Abaco Energy LLC, et al.*

[¶3] The *Abaco Energy* action was filed on June 23, 2015. On July 15, 2015, the Benefit Fund Defendants moved to dismiss the complaint under N.D. R. Civ. P. 12(b)(1), (3), (5), (6), and (7), and 19. On February 16, 2016, the Cody Oil Defendants moved to dismiss the complaint under N.D. R. Civ. P. 12(b)(7) & 19, as well as under N.D. R. Civ. P. 12(b)(3) and (5) and the doctrine of

forum non conveniens. Both the Benefit Fund Defendants and the Cody Oil Defendants moved for a more definite statement under N.D. R. Civ. P. 12(e).

[¶4] On February 26, 2016, with leave of the district court, Statoil filed an amended complaint. On March 11, 2016, Continental Resources, Inc. ("Continental") filed a motion to dismiss, arguing that the United States was an "indispensable" party under N.D. R. Civ. P. 19 and that the action should be dismissed under N.D. R. Civ. P. 12(b)(7).

[¶5] The district court heard argument on May 6, 2016. Statoil, the Benefit Fund Defendants, and Continental filed proposed orders. On May 17, 2016, the district court entered its Order Granting Motion to Dismiss. The district court did not specify which motion it granted and held, *in toto*:

> The Court, having reviewed the briefs and heard oral argument on the motions to dismiss this action under N.D. R. Civ. P. 12(b), hereby ORDERS that the above-captioned action is hereby dismissed as to all Defendants, without prejudice as to refiling and without costs or disbursements being awarded to any party.
>
> This dismissal makes any other pending motions moot.

(App. 113).[1] Judgment was entered on June 10, 2016. On July 15, 2016, Statoil timely filed its notice of appeal to this Court. (App. 118-20).

[¶6] On September 13, 2016, the Court temporarily remanded the *Abaco Energy* action to the district court and ordered Statoil to file a motion in the district court seeking clarification of the district court's ruling. Statoil filed

[1] The Appendix ("App.") has been filed contemporaneously herewith.

the motion as ordered. On September 27, 2016, the district court entered its Order Clarifying Reasons for Decision, explaining that the district court had dismissed the action under N.D. R. Civ. P. 12(b)(7). Other than making necessary edits to reflect the procedural posture of the action, and adding a single paragraph, the district court adopted Continental's proposed order *verbatim*. (App. 127-33). The action was returned to this Court on September 27, 2016.

B. *Statoil Oil & Gas LP v. 1280 Royalties LLC, et al.*

[¶7] The *1280 Royalties* action was filed on November 24, 2015. On January 7, 2016, Continental filed a motion to dismiss, arguing that the United States was an "indispensable" party under N.D. R. Civ. P. 19 and that the action should be dismissed under N.D. R. Civ. P. 12(b)(7). The district court heard argument on May 5, 2016. Both Continental and Statoil filed proposed orders.

[¶8] On May 16, 2016, the district court entered its Order Granting Motion to Dismiss. Other than fixing a single typographical error, the district court adopted Continental's proposed order *verbatim*. (App. 320-26). Judgment was entered on June 10, 2016. On July 15, 2016, Statoil timely filed its notice of appeal to this Court. (App. 331-32).

C. *The Consolidated Appeals*

[¶9] On August 30, 2016, the Court ordered Statoil to brief the appealability of the district court's order in both actions in light of the fact that the actions were dismissed without prejudice. Statoil filed its

Statements on Appealability on September 9, 2016. By Order dated September 12, 2016, the Chief Justice instructed the parties to "include briefing on appealability in their briefs on the merits."

[¶10] On October 10, 2016, Statoil moved to consolidate the *Abaco Energy* and *1280 Royalties* appeals in light of the virtual identicalness of the district court's opinions. On October 24, 2016, the Court consolidated the appeals.

STATEMENT OF FACTS

[¶11] Statoil operates a number of oil and gas wells in the State of North Dakota. As operator of, and working interest owner in, these wells, Statoil has a right to part of the proceeds, and distributes the remainder of the proceeds, from production of said wells attributable to the owners of oil, gas, and mineral rights ("minerals") in and under the various "spacing units" established by the North Dakota Industrial Commission.[2]

[¶12] At the time these spacing units were established—and the wells were drilled—the State of North Dakota, by and through the North Dakota Board of University and School Lands, was believed to claim an interest in some, but not all, of the spacing units at issue in this appeal. (App. 56, 159). In 2011, the State undertook a new determination of the location of the ordinary high watermark of the Missouri River, including under Lake Sakakawea, utilizing aerial photographs of the Missouri River as it existed immediately

[2] The North Dakota Industrial Commission has the authority to establish spacing units "[w]hen necessary to prevent waste, to avoid the drilling of unnecessary wells, or to protect correlative rights." N.D.C.C. § 38-08-07.

prior to the creation of Lake Sakakawea. As a result of this new determination, the State now claims an expansive interest in the lands under Lake Sakakawea—claiming a larger interest in some units and claiming, for the first time, an interest in others. (App. 56-57, 159).[3] The State's claim is adverse to some of the other mineral owners in these units and, if correct, will change the interest in oil and gas production, and revenues attributable thereto, otherwise due the other mineral owners, including Statoil. *Id.*

[¶13] At issue in this consolidated appeal are three specific "spacing units": the Knight Unit, the Maston Unit, and the Brakken Unit. The units include the following described premises in Williams and McKenzie Counties, North Dakota:

> Township 153 North, Range 98 West, 5th P.M.
> Section 27: All
> Section 34: All
> McKenzie and Williams Counties, North Dakota, containing 1280 acres more or less
> ("Maston Unit")
>
> Township 153 North, Range 98 West, 5th P.M.
> Section 26: All
> Section 35: All
> McKenzie and Williams Counties, North Dakota, containing 1280 acres more or less
> ("Knight Unit")
>
> Township 154 North, Range 100 West, 5th P.M.
> Section 30: All

[3] A depiction of the State's determination was attached as Exhibit A to each complaint. *See* (App. 68-72; 174-76). A full copy of the State's determination can be found on the Department of Trust Lands' website, at https://land.nd.gov/minerals/mineralapps/OHWM2/Home.aspx.

Section 31: All
Williams County, North Dakota, containing 1280 acres more or less
("Brakken Unit")

(App. 55-56, 158).

[¶14] In each complaint, Statoil named as defendants those parties who Statoil's title opinions had identified as claiming a mineral interest in what the State claims is the "shore zone" of the Missouri River in the respective units.[4] (App. 57-63, 159-68). Also named as defendants were certain additional persons who Statoil believed might claim an interest in the unit. (App. 63-64, 168-70). A final party, the United States of America, was believed to claim a mineral interest in the shore zone, but was not joined as a defendant because it is not amenable to the district court's jurisdiction.[5]

SUMMARY OF THE ARGUMENT

[¶15] Millions of dollars are owed someone. Hundreds of landowners face uncertainty over the scope of their ownership. The State is making expansive claims of ownership and threatening sanctions for those who do not acquiesce to its claims. Companies, such as Statoil, that drill and operate wells are unsure of who is owed royalties; faced with competing claims for payment; and under the spectre of litigation or administrative penalty from

[4] The "shore zone" is defined as the "land between the ordinary high watermark and the ordinary low watermark" of the river. *State ex rel. Sprynczynatyk v. Mills*, 523 N.W.2d 537, 538 (N.D. 1994).

[5] As required by N.D. R. Civ. P. 19(c), each complaint set forth both the "the name . . . of any person who is required to be joined if feasible but is not joined" (*i.e.*, the United States) and the "reasons for not joining that person." *See* (App. 65, 170).

landowners, the State, or some lessee. Statoil brought these actions to seek resolution of some of these issues and to allow it to pay the proper recipients. If the district court's orders are allowed to stand, these issues will go unresolved and money—held by Statoil, but owed to someone—will remain unpaid indefinitely.

[¶16] The district court's conclusion that the United States was an "indispensable" party under N.D. R. Civ. P. 19(b) stemmed from a series of fundamental misinterpretations regarding the factors to be considered. First, the district court improperly concluded that there was an alternative forum for this action to proceed. This factor is generally considered the most important, even dispositive. Here, there was no dispute that the Eleventh Amendment to the United States Constitution prevented Statoil from haling the State of North Dakota into federal court. Rather, the district court concluded that the *possibility* that the State might waive its immunity created an alternative forum. This definition of an alternative forum is too expansive. And, the district court's speculation regarding the State's intentions is both inconsistent with North Dakota statute and contrary to the State's actual behavior.

[¶17] Second, the district court failed to fully analyze the prejudice—if any—to the United States of proceeding in its absence. After concluding that the United States was a party that should be joined, the district court simply concluded that the prejudice factor weighed in favor of dismissal. But, courts

recognize that an alignment of interests between the absent and existing parties can mitigate any prejudice. Here the interest of the United States and many of the private landowners are aligned.

[¶18] Third, the district court failed to properly consider its ability to shape the relief to protect the United States' interest while providing adequate relief to the existing parties. The district court can require Statoil to pay any royalties that may be claimed by the United States into escrow—with the State of North Dakota and the United States later resolving their dispute between themselves—and omit the United States' claim from the action. This action would proceed to resolve all other claims. The district court concluded that it could not omit the United States, because any judgment in the United States' absence would "reveal the Court's opinion" about legal issues that might also implicate the federal interest. This position would severely limit state courts' ability to decide questions of state property law because those conclusions of law might implicate federal land—or, indeed, any question of law that might impact an absent person's interest in a separate matter. This is not a sustainable conclusion.

[¶19] Taken together, it is apparent that the district court abused its discretion in dismissing this action. Either this case should be remanded so that the district court can rebalance the Rule 19(b) factors properly; or this Court should undertake that rebalancing.

ARGUMENT

I. The District Court's Orders are Final and Appealable

[¶20] The district court's orders in these actions would foreclose litigation of these issues in the courts of this state and are therefore appealable. "[A] dismissal without prejudice may be final and appealable if the plaintiff cannot cure the defect that led to dismissal or if the dismissal has the practical effect of terminating the litigation in the plaintiff's chosen forum." *Rodenburg v. Fargo-Moorhead Young Men's Christian Ass'n,* 2001 ND 139, ¶ 12, 632 N.W.2d 407, 413 (N.D. 2001) (internal citation omitted).

[¶21] Here, the district court correctly held that the United States may not be joined because of its sovereign immunity but then, incorrectly, concluded that the actions may not proceed in its absence. If affirmed, these holdings mean that these actions could never proceed in the courts of North Dakota. Statoil cannot "cure the defect that led to dismissal" because it cannot join the United States to an amended complaint nor can it seek its relief in state court through any other amendment. "In this case, the order and judgment effectively foreclose litigation of [Statoil's] action in the courts of this state." *Winer v. Penny Enters., Inc.*, 2004 ND 21, ¶ 6, 674 N.W.2d 9, 11 (N.D. 2004). The orders are both final and appealable.

II. Standard of Review

[¶22] The district court's ruling on a motion to dismiss for failure to join an indispensable party is reviewed for abuse of discretion. *Revoir v. Kansas Super Motels of N.D., Inc.*, 224 N.W.2d 549, 552 (N.D. 1974). "A district court

abuses its discretion if it misinterprets or misapplies the law." *Bertsch v. Bertsch*, 2006 ND 31, ¶ 8, 710 N.W.2d 113, 117 (N.D. 2006). "Underlying legal conclusions supporting Rule 19 determinations, however, are reviewed *de novo*." *Davis v. United States*, 192 F.3d 951, 957 (10th Cir. 1999); *accord Washington v. Daley*, 173 F.3d 1158, 1165 (9th Cir. 1999); *cf. Picciotto v. Continental Cas. Co.*, 512 F.3d 9, 15 n. 9 (1st Cir. 2008) ("Because a district court by definition abuses its discretion when it makes an error of law, even under an abuse of discretion standard, we review the district court's answers to abstract questions of law de novo.") (internal quotation marks and citation omitted).[6]

[¶23] Where the district court adopts a party's proposed findings verbatim, the appellate court "must view the challenged findings and the record as a whole with a more critical eye to insure that the trial court has adequately performed its judicial function." *Ramey Const. Co., Inc. v. Apache Tribe of Mescalero Reservation*, 616 F.2d 464, 467 (10th Cir. 1980). "[T]he greater the extent to which the [district] court's eventual decision reflects no independent work on its part, the more careful [the appellate court is] obliged to be in [its] review." *In re Las Colinas, Inc.*, 426 F.2d 1005, 1010 (1st Cir. 1970).

[6] North Dakota Rule 19 "is derived from Fed. R. Civ. P. 19." N.D. R. Civ. P. 19, explanatory notes. Accordingly, "interpretations given to the federal rule by federal courts will be given appreciable weight in interpreting and construing" the North Dakota rule. *Dvorak v. Dvorak*, 329 N.W.2d 868, 871-72 (N.D. 1983).

III. The District Court Erred in its Interpretation and Application of the Rule 19(b) Factors

[¶24] "Dismissal of an action for non-joinder of a party is an extreme remedy which should only be granted where a party is truly 'indispensable.'" *Kouba v. Great Plains Pelleting, Inc.*, 372 N.W.2d 884, 887 (N.D. 1985). Rule 19 calls for a two-step analysis: "First, the court must determine whether an absent party belongs in the suit. . . ." *Viacom Int'l, Inc. v. Kearney*, 212 F.3d 721, 724 (2d Cir. 2000). "[W]here the court makes a threshold determination that a party is necessary under Rule 19(a), and joinder of the absent party is not feasible for jurisdictional or other reasons, the court must finally determine whether the party is 'indispensable.'" *Id.* at 725 (internal citations omitted).[7] A party is "indispensable" where the action cannot proceed "in equity and good conscience" in its absence. N.D. R. Civ. P. 19(b).

[¶25] Here, the parties below agreed—and the district court found—that the United States should be joined under Rule 19(a), but that, due to its immunity from suit, it could not be joined to a state court action. (App. 129, 321). Thus, the question before the district court was whether the actions

[7] "The present version of Rule 19 does not use the word 'necessary.' It refers to parties who should be joined if *feasible*. The term *necessary* in referring to a Rule 19(a) analysis harks back to an earlier version of Rule 19. It survives in case law at the price of some confusion." *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 404 n.4 (3d Cir. 1993) (emphasis in original). A "necessary party" is a party that must be joined, if feasible. Only where a "necessary" party is *also* "indispensable" should the action be dismissed.

could proceed in the absence of this party—a possibility specifically contemplated by Rule 19.

[¶26] Rule 19(b) sets forth four non-exclusive and non-exhaustive factors for the court to consider:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping of the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

N.D. R. Civ. P. 19(b). The United States Court of Appeals for the Ninth Circuit has described how these factors should be weighed:

> First, *prejudice* to any party resulting from a judgment militates toward dismissal of the suit. . . .
>
> Second, *shaping of relief* to lessen prejudice may weigh against dismissal. The Supreme Court has encouraged shaping relief to avoid dismissal. . . .
>
> Third, if an *adequate remedy,* even if not complete, can be awarded without the absent party, the suit may go forward. . . .
>
> Finally, if no *alternative forum* is available to the plaintiff, the court should be "extra cautious" before dismissing the suit.

Makah Indian Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990) (internal citations omitted). The fourth factor—the availability of an alternative forum—is "perhaps the most important." *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1293 (10th Cir. 2003) (internal alterations and citation omitted). Indeed, "[t]he absence of an alternative forum would weigh heavily, if not conclusively against dismissal. . . ." *Rishell v. Jane Phillips Episcopal Memorial Medical Ctr.*, 94 F.3d 1407, 1413 (10th Cir. 1996) (quoting *Pasco Int'l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 501 n.9 (7th Cir. 1980)).

[¶27] The district court purported to consider the four factors and concluded that each weighed against allowing the action to proceed. However, the district court's conclusion stemmed from three fundamental errors of analysis: (1) it incorrectly concluded that an alternative forum existed for Statoil to pursue its claims (Factor Four); (2) it incorrectly concluded that there would be "substantial prejudice" to the United States if the action proceeded in its absence (Factor One); and (3) it incorrectly concluded that it could not shape the relief to protect the interests of the United States while providing adequate relief to the existing parties (Factors Two and Three).[8]

[8] Continental argued below that the United States' immunity from suit was dispositive under the United States Supreme Court's decision in *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008), *see* Continental's Reply in Support of Motion at 4, *Abaco Energy,* Dkt. No. 157 ("The Sovereignty of the United States Is Dispositive Under Rule 19(b) as a Matter of Law"). Significantly, this argument did *not* appear in Continental's proposed order and was *not* adopted by the district court. And rightly so. "If

Because the district court misinterpreted the relevant factors under Rule 19, it abused its discretion. *See Davis*, 192 F.3d at 957 ("To the extent the district court's ruling was based on conclusions of law, we review those legal conclusions *de novo*. 'A district court by definition abuses its discretion when it makes an error of law.'") (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).

A. *Statoil has no Alternative Forum and the District Court Erred in Concluding Otherwise*

[¶28] "If no alternative forum exists, the district court should be extra cautious before dismissing an action." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (internal quotation marks and citation omitted). The significance of this factor—the "most important," *Davis*, 343 F.3d at 1293 and potentially "conclusive[]," *Rishell*, 94 F.3d at 1413—merits its discussion first. Here, the district court concluded: "it is at least possible that there is another forum available," namely the United States District Court for the District of North Dakota. (App. 133, 325). Therefore, the district court reasoned, the

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the inability to join a sovereign as a party had the automatic effect of nullifying the suit against other private defendants, Rule 19 would be rendered superfluous in these cases. That is not the law." *SourceOne Global Partners, LLC v. KGK Synergize, Inc.*, No. 08 C 7403, 2009 WL 1346250, at *4 (N.D. Ill. May 13, 2009); *see also Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1071 (9th Cir. 2010); *Hayes v. Chaparral Energy, LLC*, Case No. 14-CV-495-GKF-PJC, 2016 WL 1175238, at *4 n.5 (N.D Okla. March 23, 2016); *Dine Citizens Against Ruining Our Envt. v. U.S. Office of Surface Mining Reclamation and Enf't*, Civ. A. No. 12-cv-1275-AP, 2013 WL 68701, at *4 (D. Colo. Jan. 4, 2013); *Klamath Tribe Claims Comm. v. United States*, 106 Fed. Cl. 87, 96 (Fed. Cl. 2012). Even where the absent party is immune from suit, the court must undertake a complete analysis of the 19(b) factors.

"alternative forum" factor weighed against Statoil. The district court was mistaken.

[¶29] As the district court recognized, the prospect of bringing this action in federal court faces a key challenge: the Eleventh Amendment to the federal constitution prohibits Statoil from bringing the State of North Dakota into federal court. *See* U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State. . . ."). [9] The Eleventh Amendment recognizes that "each State is a sovereign entity in our federal system" and that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (internal alterations omitted) (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)). Quite simply, "[t]he 11th Amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens of another State or citizens or subjects of any foreign state." *Ex parte Young*, 209 U.S. 123, 149 (1908).

[9] The Board of University and School Lands and the State Engineer administer the "sovereign lands" of the State of North Dakota. *See* N.D.C.C. § 61-33-02. While the Board and the State Engineer are the named defendants in this action, the State of North Dakota is the real party in interest. Thus, the Eleventh Amendment likely operates to bar suit even though a state agency, and not the state itself, is the named party. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984).

[¶30] The State cannot be joined to a suit in federal court without its consent. Neither Continental nor the district court disputed this. Rather, the district court concluded—without reference to authority—that the speculative possibility that the State *might waive* its immunity was sufficient to require Statoil to attempt to bring suit against the State in federal court to see what happened. Thus, according to the district court, "it is at least possible that Statoil could bring this suit in federal court." (App. 133, 325).

[¶31] Significantly, the district court cited no authority—and Statoil is aware of none—for the proposition that a plaintiff must commence suit in all conceptually possible forums on the chance that a defendant might waive its rights and allow the action to proceed there. This principal, if affirmed, would extend far beyond a State's Eleventh Amendment immunity to presumably include *all* rights that can be waived by parties in litigation but that would otherwise make joinder infeasible, such as personal jurisdiction. It stretches the logic of Rule 19(b) too far to conclude, as the district court apparently did, that the speculative possibility that a person might waive its rights—rights that would otherwise prevent the action from proceeding there—creates an "alternative forum."

[¶32] Statoil is not aware of any authority defining an "alternative forum" in the Rule 19 context. However, a helpful analogy may be found in the federal venue transfer provision at 28 U.S.C. § 1404(a), which allows a district court to transfer a civil action "to any other district or division where it might have

been brought." In *Hoffman v. Blaski*, 363 U.S. 335 (1960), the United States Supreme Court addressed the argument that an action "might have been brought" in a district court where a defendant—not otherwise subject to jurisdiction there—had waived its jurisdictional defenses. The Court explained:

> We agree with the Seventh Circuit that: "If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district 'where the action might have been brought.' If he does not have that right, independently of the wishes of defendant, it is not a district 'where it might have been brought,' and it is immaterial that the defendant subsequently makes himself subject, by consent, waiver of venue and personal jurisdiction defenses or otherwise, to the jurisdiction of some other forum."

Hoffman, 363 U.S. at 344 (internal alterations omitted) (*quoting Blaski v. Hoffman*, 260 F.2d 317, 321 (7th Cir. 1958)). The Court explained, "we do not think the § 1404(a) phrase 'where it might have been brought' can be interpreted to mean, as petitioners' theory would require[], 'where it may now be rebrought, with defendants' consent.'" *Id.* at 342-43. Such an argument "would not only do violence to the plain words of § 1404(a), but would also inject gross discrimination." *Id.* at 344. Although dissenting from the interpretation of the statute, Justice Frankfurter defined the Court's holding well: "alternative forums" are "places of *unobjectionable* venue where the defendant is amenable to service of process and where there are no other impediments such as a statute of limitations which the defendant can rely on

to defeat the action." *Id.* at 359 (Frankfurter, J., dissenting) (emphasis added).

[¶33] The same reasoning should apply to Rule 19(b)'s "alternative forum" question. It does violence to the concept to conclude, as the district court did here, that an "alternative forum" exists in any forum where a defendant *might* waive its rights and consent to jurisdiction. A plaintiff does not have an alternative forum where access to the forum is contingent on a defendant's waiver of it rights. Rather, an alternative forum only exists where a plaintiff "has a right to sue . . . , independently of the wishes of [a] defendant." *Hoffman*, 363 U.S. at 344.[10] There is no support in law or logic to require a plaintiff, such as Statoil, to undertake the Sisyphean effort of bringing suit in a variety of forums in the hopes that a party will waive—intentionally or unintentionally—its rights.

[10] The concept of an "alternative forum" is also found in the doctrine of *forum non conveniens*. *See, e.g.*, *Vicknair v. Phelps Dodge Indus., Inc.*, 2009 ND 113, ¶ 13, 767 N.W.2d 171, 179 (N.D. 2009) ("We conclude that the availability of an adequate alternative forum is a prerequisite to granting a motion to dismiss based on *forum non conveniens* . . . ."). While an agreement by all of the defendants to submit to jurisdiction in an alternative forum can satisfy this, such dismissals are often expressly *conditioned* on a pre-dismissal waiver of jurisdictional arguments. *See, e.g., In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 203-04 (2d Cir. 1987) ("The first condition[s], that UCC consent to the Indian court's personal jurisdiction over it and waive the statute of limitations as a defense, are not unusual and have been imposed in numerous cases where the foreign court would not provide an adequate alternative in the absence of such a condition.").

[¶34] But, whatever the merits of the district court's conclusion in the abstract, it does not work here. There is no doubt that the State of North Dakota will invoke its immunity under the Eleventh Amendment.

[¶35] First, it has done so by statute. "[W]hile a state can waive Eleventh Amendment immunity by voluntarily consenting to be sued in federal court, North Dakota has specifically preserved its immunity by statute." *Wanke v. Job Serv. N.D.*, No. 2:08-cv-94, 2009 WL 1259212, at *4 (D.N.D. May 1, 2009). In a provision entitled "Eleventh Amendment immunity preserved," the Code provides that "[t]his chapter does not waive the state's immunity under the Eleventh Amendment to the United States Constitution in any manner, and this chapter may not be construed to abrogate that immunity." N.D.C.C. § 32-12.2-10. It is doubtful that the North Dakota Attorney General has the legal authority to waive the State's immunity—at least, in an action where the State is named as a defendant in federal court and the State merely appears and defends itself. *See Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 468 (1945) ("Since the state legislature may waive state immunity only by general law, it is not to be presumed in the absence of clear language to the contrary, that they conferred on administrative or executive officers discretionary power to grant or withhold consent in individual cases."), *overruled in part by Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002).

[¶36] Second, any doubt over the State's intent with respect to these actions has since been resolved. On May 13, 2016, an action involving similar issues of fact and law—which had been pending for years in the District Court for McKenzie County—was removed to the federal district court by some newly-added defendants under the federal Class Action Fairness Act, 28 U.S.C. § 1332(d). *EEE Minerals, LLC v. State of North Dakota*, No. 1:16-cv-115 (D.N.D.); No. 27-2014-cv-282 (McKenzie County). *EEE Minerals* was brought as a purported class action seeking to quiet title to minerals in twenty-seven survey townships, including the lands at issue in this consolidated appeal. After removal, the State of North Dakota invoked its Eleventh Amendment immunity and moved to dismiss itself from the action on those grounds. *See* Mot. to Dismiss, *EEE Minerals*, No. 1:16-cv-115, Dkt. No. 96.

[¶37] The federal court in *EEE Minerals* ultimately chose to dismiss the action on similar Rule 19 grounds as the district court in these actions—and made similar, and additional, errors in reasoning.[11] *See* Order Granting Motions to Dismiss, *EEE Minerals, LLC,* No. 1:16-cv-115, Dkt. No. 287. As a result, the court did not reach the State's Eleventh Amendment argument.

[11] While the *EEE Minerals* court suggested that the plaintiffs could replead their action to make joinder of the United States feasible—something possible because of the different factual posture of that action in contrast with Statoil's interpleaders here—the court overlooked the State's Eleventh Amendment challenge which it did not address. Further, as discussed below, the *EEE Minerals* court similarly misapplied the second and third Rule 19(b) factors.

But, after *EEE Minerals*, there is no longer any speculation over what the State might do if joined to a federal court action seeking to adjudicate these issues: it will assert its immunity.

[¶38] In assessing whether or not Statoil had an alternative forum to bring these actions, the district court misinterpreted the relevant legal standard—by concluding that an alternative forum existed anywhere a defendant *might* waive its rights. "An error of law is, of course, an abuse of discretion." *Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 221 (1st Cir. 2003). But, even if the district court had not made an error of law—and it did——the district court also misapprehended the State's intentions by incorrectly predicting that it might waive its immunity. The district court itself recognized that its analysis might be different if the State invoked its sovereign immunity. *See* (App. 133, 325) ("The analysis of the fourth factor may be different if Statoil had attempted to bring this action in federal court and the State had objected on sovereign immunity grounds . . . ."). Either this case should be remanded so that the district court can rebalance the Rule 19(b) factors in light of the State's invocation of its immunity; or this Court should undertake that rebalancing.

B. *Prejudice to the United States is Minimized by the Fact that its Interests are Aligned with Existing Defendants and the Fact that its Lessees are Parties to this Action*

[¶39] The first enumerated factor under Rule 19(b)—prejudice to the absent party—"overlaps considerably with the Rule 19(a) analysis." *Gardiner v. V.I. Water & Power Auth.*, 145 F.3d 635, 641 n.4 (3d Cir. 1998). Any prejudice to

the United States from proceeding in its absence, however, is mitigated by the presence of parties whose interests are aligned with the United States and, indeed, by the United States' lessee themselves. Because the United States' interests are represented, any prejudice is mitigated and the first factor weighs against dismissal.

[¶40] First, the United States' "interest in protecting these rights is aligned with the interest of the defendant landowners, who also seek to prevent the [State] from obtaining a declaratory judgment quieting title in the [State]." *Wyandotte Nation v. City of Kansas City*, 200 F. Supp. 2d 1279, 1292 (D. Kan. 2002). In *Wyandotte Nation*, an Indian tribe brought a declaratory judgment action to quiet title to certain lands located in Kansas City; the action named as defendants the city as well as certain private landowners. *Id.* at 1282. The State of Kansas intervened for the limited purpose of moving to dismiss under Rule 19 for failure to join it. *Id.* at 1287. Kansas argued that, "[i]f title is quieted in the plaintiff tribe, Kansas would lose the taxation, regulatory, and jurisdictional powers it currently exercises." *Id.* at 1291. Therefore, Kansas claimed, it was a "necessary party" under Rule 19(a) and—because the Eleventh Amendment prevented its joinder—the action must be dismissed because it was also indispensable. The district court agreed that Kansas was "necessary" under Rule 19(a) and that it was immune from suit. *Id.* at 1291-92.

[¶41] However, the *Wyandotte Nation* court *rejected* Kansas' claim that it was an indispensable party. With respect to the first factor under Rule 19(b), the court noted that,

> Kansas's interest in protecting these rights is aligned with the interest of the defendant landowners, who also seek to prevent the tribe from obtaining a declaratory judgment quieting title in the tribe. Although there is not a precise alignment of interests between the defendant landowners and Kansas, the court finds that the potential prejudice to the state is lessened by the fact that the defendant landowners seek the same outcome, if for different reasons.

Id. at 1292. Because the state's interests were aligned with the private defendants, and because there was no alternative forum available to the tribe, the court found that the state was not indispensable and the action could proceed. *Id.* at 1294. Here, the federal interest is aligned with the private landowners, and for the exact same reason—both the United States and most of the private defendants are adverse to the State of North Dakota's expanded claim to mineral interests in and around the Missouri River and Lake Sakakawea. If the private landowners prevail, then so do the interests of the United States. "Prejudice to the [United States'] interests is minimized by the fact that the purported landowners' interests in the litigation are aligned with the [United States'] interests." *Id*.

[¶42] Second, the United States' lessees are parties to this action. The interests of these lessees are perfectly aligned with the United States. Even where a party's joinder is prevented by sovereign immunity, prejudice is

lessened by the presence of an aligned party. *See, e.g.*, *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1259-60 (10th Cir. 2001) (holding that an Indian tribe was not indispensable where the action included a party whose interests "are substantially similar, if not virtually identical, to those of the" Indian tribe); *see also id.* at 1259 (citing 3A James Moore, *Moore's Federal Practice* ¶ 19.07 (2d ed. 1995)) ("[T]he fact that the absent person may be bound by the judgment does not of itself require his joinder if his interests are fully represented by parties present."); *Davis*, 343 F.3d at 1291-92 ("We note that in some cases the interests of the absent person are so aligned with those of one or more parties that the absent person's interests are, as a practical matter, protected.").

[¶43] Because the claimed federal interests are aligned with the interests of the existing defendants, any prejudice to the United States is substantially lessened and the first factor under Rule 19(b) augurs in favor of allowing this action to proceed. The district court merely asserted that there was "a risk of substantial prejudice" to the United States, without analysis or explanation. (App. 130, 316). By failing to conduct a proper analysis of this factor, the district court abused its discretion. *See Wright v. First Nat'l Bank of Altus*, 483 F.2d 73, 75 (10th Cir. 1973) ("The generalizations of the trial court are no substitute for the analysis required by the rule."); *see also Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir. 1982) ("[A] trial court's resolution of

a Rule 19 issue requires a comprehensive statement of the facts and reasons upon which the decision is based.").

C. *The District Court can Shape the Relief to Mitigate any Prejudice to the United States*

[¶44] "Rule 19(b) also directs a district court to consider the possibility of shaping relief" to balance the various interests. *Provident Tradesmens Banks & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968). "[A] court should consider modification of a judgment as an alternative to dismissal." *Id.* at 112. The second and third Rule 19(b) factors ask, in essence, whether the district court can shape the relief in such a way to mitigate any prejudice to the interests of the absent party while still providing "adequate relief" to the existing parties.

[¶45] In determining that it could not do so, the district court erred. In fact, if the court were to order Statoil to deposit the portion of the royalties that was claimed by both the United States and the State of North Dakota into either the court or into an escrow account, and otherwise omit the United States' interest from the action, the district court could mitigate any prejudice to the claimed federal interest as well as provide full relief for the other existing parties—hundreds of parties for whom relief *can* be granted.[12]

[¶46] As an initial matter, in *Wyandotte Nation* discussed above, the court concluded that it "could not shape relief to preserve Kansas's interests if title

[12] Specifically, the district court could determine the precise amount of the funds held in suspense that are claimed by the United States and the State of North Dakota and order those funds deposited into escrow. Those parties could then resolve their dispute over those funds at a later date.

is quieted in the tribe." 200 F. Supp. at 1292. *Yet*, the court concluded that "it does not find this factor dispositive in light of the other considerations listed in Rule 19(b)." *Id.* at 1293-94. The lack of an alternative forum and "the fact that the purported landowners' interests in the litigation are aligned with the state's interests" was sufficient to tip the balance of the Rule 19(b) analysis in favor of the plaintiff. *Id.* Even if this Court were to conclude that the district court could not shape the relief sought by Statoil to minimize prejudice to the United States, the same result is appropriate here.

[¶47] However, the district court *can* shape the relief to protect the claimed federal interest. The district court identified three objections to omitting the claimed federal interest: (1) it lacked jurisdiction over the United States, (App. 131, 323); (2) given the nature of the dispute, a judgment in the United States' absence would "reveal the Court's opinion with respect to the United States' property, even though it will not be binding on the United States," *id.*; and (3) the remedy cannot be "adequate" if it is not complete. *Id.* at 131-32, 324.

[¶48] The district court's first conclusion appears to simply misunderstand Statoil's argument. In order to require Statoil to deposit the royalties currently held in suspense into an escrow account, the district court does not need to exercise jurisdiction over any party other than Statoil. The purpose of this order is simply to preserve the contested funds pending the resolution of the competing claims.

[¶49] The district court's conclusion with respect to its ability to shape the relief is similarly in error. It is likely true that a ruling with respect to the factual and legal issues presented in these cases would guide a subsequent action between the United States and the State of North Dakota. But, if the mere fact that the court's ruling on state property law might be applied in a subsequent proceeding were sufficient to render any party that might be affected in that later action "indispensable" to the earlier action, the doctrine would swallow the district court's jurisdiction to the point of absurdity. Indeed, to allow these actions to proceed without the United States would result in no greater prejudice than an action presenting the same legal and factual issues, but confined to a spacing unit without a federal interest.

[¶50] For example, the *EEE Minerals* court suggested—as a way to avoid the Rule 19 problem—that "[c]lass members who own in an area where the United States does not claim an interest could file an action to quiet title in state court . . . ." *EEE Minerals* Order at 17. Under this approach, the court reasoned, the plaintiffs could seek adjudication of their claims by excluding the United States from the action and, later, bringing suit against the United States to resolve the remaining dispute. But this approach elevates form over substance. It is functionally identical to the procedure proposed by Statoil here: an adjudication of the mineral rights of the parties that can be joined in state court and the potential of a subsequent proceeding to address the claimed federal interest. That the district court may establish some legal

precedent that may bear on a subsequent action does not make an absent party "indispensable" nor does it mean that the precedent would be controlling in the subsequent action.

[¶51] Similarly, presently pending before this Court is an action, not involving the United States, which raises some of the same issues that are present here. *Wilkinson v. Bd. of Univ. and Sch. Lands*, Sup. Ct. No. 2016-199. The *Wilkinson* action involves a single survey township along the Missouri River, west of the Highway 85 Bridge. The United States does not claim a mineral interest in those lands. *However*, the district court was called upon to determine the location of the ordinary high watermark in those lands, and, by extension, "reveal" its view of the location of the ordinary high watermark for all lands west of the Highway 85 Bridge. Indeed, in that action, the district court, even though it found that the property was part of the Missouri River and not part of Lake Sakakawea, went further and purported to determine the ordinary high watermark for *all* lands adjacent to the Missouri River and under Lake Sakakawea, including the lands at issue in these interpleader actions. It is Statoil's position that the *Wilkinson* court erred by issuing a ruling that encompassed the lands under Lake Sakakawea, and which was outside of the scope of the litigation. Nevertheless, even for the issues that the *Wilkinson* court properly decided, the court's decision—and this Court's decision on appeal—will guide a

subsequent action involving the claim of the United States to similarly situated lands.

[¶52] Any prejudice to the United States from allowing these interpleader actions to proceed is exactly the same as the prejudice to the United States from the *Wilkinson* action or if the *EEE Minerals* plaintiffs follow the advice of the federal court: pursuit of a judgment, not binding on the United States, which elucidates principles of state property law that may guide a subsequent action involving the claimed federal interest. Allowing these actions to proceed will definitively resolve the ownership interests of the existing parties—literally hundreds of persons who will no longer have their interests disputed. It will allow the payment of millions of dollars of royalties presently held in suspense by Statoil to the proper recipients. And it will reduce Statoil's exposure to multiple claims or liability from competing claimants to the royalties from the proceeds of its wells. Given the issues at stake, and the district court's ability to mitigate any prejudice to the United States by omitting their claim from the action, the second and third Rule 19(b) factors weigh in favor of allowing the action to proceed.

[¶53] "Rule 19 calls for a pragmatic approach; simply because some forms of relief might not be available due to the absence of certain parties, the entire suit should not be dismissed if meaningful relief can still be accorded." *Smith v. United Bhd. of Carpenters and Joiners of Am.*, 685 F.2d 164, 166 (6th Cir. 1982). By incorrectly concluding that it could not provide "adequate" relief

simply because it could not provide "complete" relief, and by failing to properly consider the ways in which it could shape the judgment in order to protect the United States' interest, the district court abused its discretion by misinterpreting the third and fourth factors under Rule 19(b).

CONCLUSION

[¶54] For the foregoing reasons, Appellant Statoil Oil & Gas LP respectfully requests that the Orders Granting Motion to Dismiss entered by the district court be reversed; that the judgments entered by the district court be vacated; and that this action be remanded for further proceedings.

Dated: December 8, 2016

Respectfully Submitted,

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[¶55] The undersigned hereby certifies that the foregoing brief complies with the requirements of N.D. R. App. P. 32. This brief was prepared in a proportionally spaced typeface in 12 point font and contains 7,871 words, excluding those portions of the brief exempted by the rules. The undersigned relied on his word processor, Microsoft Word 2010, to obtain the word count.

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STATE OF NORTH DAKOTA

STATOIL OIL & GAS LP, Appellant/Plaintiff, v. ABACO ENERGY LLC, *et al.*, Appellees/Defendants, v. North Dakota State Engineer, Appellee/Interested Party.	)	Sup. Ct. No. 2016-0261 Dist. Ct. No. 2015-cv-00744

STATOIL OIL & GAS LP, Appellant/Plaintiff, v. 1280 ROYALTIES LLC, *et al.*, Appellees/Defendants, v. North Dakota State Engineer, Appellee/Intervenor.	)	Sup. Ct. No. 2016-0262 Dist. Ct. No. 2015-cv-01437

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