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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Statoil Oil & Gas LP, Plaintiff/Appellant, vs. Abaco Energy LLC, et al., Defendants/Appellees, and North Dakota State Engineer, Intervenor/Appellee.	Supreme Court No. 20160261

Statoil Oil & Gas LP, Plaintiff/Appellant, vs. 1280 Royalties LLC, et al., Defendants/Appellees, and North Dakota State Engineer, Intervenor/Appellee.	Supreme Court No. 20160262

Appeal from Summary Judgments Dated June 10, 2016
Case No. 53-2015-CV-00744 – Hon. David W. Nelson
Case No. 53-2015-CV-01437 – Hon. Paul Jacobsen
County of Williams, Northwest Judicial District

BRIEF OF DEFENDANTS/APPELLEES CONTINENTAL RESOURCES, INC., NOBLE ROYALTIES ACCESS FUND XI, NOBLE ROYALTIES ACCESS FUND 12 LP, MIRADA ENERGY, LLC, ORRION ENERGY, LLC, SLAWSON EXPLORATION COMPANY, INC., SPLIT CREEK ENTERPRISES LLC, WILD BASIN OIL & GAS, LLC, AND ZAVANNA, LLC

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] Whether the district court erred by dismissing the cases consolidated for this appeal because the United States, which claims an interest in the property at issue, was not joined as a party. *See* N.D.R.Civ.P. 12(b)(7).

STATEMENT OF THE CASE

[¶2] The consolidated appeals require the Court to determine whether the two cases filed below can continue "in equity and good conscience" in the absence of the United States. N.D.R.Civ.P. 19(b). Plaintiff and Appellant Statoil Oil & Gas LP ("Statoil") initiated the cases to obtain a judicial determination of the ownership of the minerals in and under six sections of land in Williams and McKenzie Counties. It is undisputed that the United States claims an interest in the disputed lands, but it was not joined as a party because of its immunity to suit in state courts. Absent the express consent of the United States, North Dakota state courts, like all state courts, lack jurisdiction over it.

[¶3] Defendant and Appellee Continental Resources, Inc. ("Continental") moved to dismiss both actions under Rule 12(b)(7), arguing the United States was a required party, it was not feasible to join the United States, and the suit could not proceed "in equity and good conscience" without the United States. *See* N.D.R.Civ.P. 19. Defendants and Appellees Noble Royalties Access Fund XI, Noble Royalties Access Fund 12 LP, Mirada

Energy, LLC, Orrion Energy, LLC, Slawson Exploration Company, Inc., Split Creek Enterprises LLC, Wild Basin Oil & Gas, LLC, and Zavanna, LLC joined in Continental's motion. After briefing and oral argument, the district court granted both motions to dismiss. Statoil now appeals, claiming the district court misinterpreted the Rule 19(b) factors in reaching the conclusion that the cases should not proceed without the United States.

STATEMENT OF FACTS

[¶4] Statoil's statement of facts is generally accurate. However, the statement that the United States "was believed to claim a mineral interest in the shore zone" does not go far enough. Indeed, it is undisputed that the United States claims an interest in the property in dispute. *See* Supplemental Appendix at 1–5. If the United States did not claim an interest in the property, it would not be a required party under Rule 19(a), and the question of whether the cases can proceed without the United States under Rule 19(b) would be moot.

ARGUMENT

I. The District Court's Judgments Are Final and Appealable.

[¶5] A judgment dismissing a case without prejudice generally is not appealable. *Sanderson v. Walsh Cnty.*, 2006 ND 83, ¶ 5, 712 N.W.2d 842 (citing *Kouba v. Febco, Inc.*, 1998 ND 171, ¶ 4, 583 N.W.2d 810; *Community Homes of Bismarck, Inc. v. Clooten*, 508 N.W.2d 364, 365 (N.D. 1993); *Runck v. Brakke*, 421 N.W.2d 487, 488 (N.D. 1988)). "[H]owever, a dismissal without

prejudice may be final and appealable where the dismissal has the 'practical effect of terminating the litigation in the plaintiff's chosen forum.'" *See id.* ¶ 6 (citing *Haugenoe v. Bambrick*, 2003 ND 92, ¶ 2, 663 N.W.2d 175).

[¶6] Here, although the district court's dismissals were without prejudice, all of the parties to these proceedings and the district court agreed that the United States is immune from suit in state court and therefore cannot be made a party in Statoil's chosen forum. *See generally A.P.I., Inc. v. United States*, 430 N.W.2d 333 (N.D. 1988) (discussing the sovereign immunity of the United States and affirming dismissal of claims against it). Moreover, while it is possible for the United States to waive its sovereign immunity, such a decision must be made by Congress. *See FDIC v. Meyer*, 510 U.S. 471, 475–76 (1994) (discussing congressional waivers of sovereign immunity). The attorney general has no authority to waive sovereign immunity in individual cases. *See Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 469 n.14 (1945) (citing *Stanley v. Schwalby*, 162 U.S. 255, 269–70 (1896) ("It is a fundamental principle of public law, affirmed by a long series of decisions of this court, and clearly recognized in its former opinion in this case, that no suit can be maintained against the United States, or against their property, in any court, without express authority of Congress.")). Thus, absent an act of Congress, the judgments entered in the court below had "the 'practical effect of terminating the litigation in the plaintiff's chosen forum.'"

Sanderson, 2006 ND 83, ¶ 5, 712 N.W.2d 842. They are final and appealable judgments.

II. The District Court's Judgments Should Be Affirmed Because these Actions Cannot Proceed, "in Equity and Good Conscience," Without the United States.

A. Summary of Argument.

[¶7] Rule 19 of the North Dakota Rules of Civil Procedure provides a two-step process for evaluating whether a case should be dismissed based on the plaintiff's failure to join a party. First, under Rule 19(a), the court must evaluate whether a party is required, and if so, whether joinder of the party is feasible. In this case, all parties agree that the United States is a required party that cannot be feasibly joined because of its sovereign immunity. Because the parties agree with respect to step one, the focus of this appeal is on step two of the analysis: whether the case should nevertheless continue in the absence of the United States.

[¶8] Rule 19(b) identifies four nonexclusive factors for Courts to consider when determining whether to proceed without a required party:

> (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 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). In evaluating the Rule 19(b) factors, this Court has explained that particular attention should be paid to the interests of four stakeholders. *Cudworth v. Cudworth*, 312 N.W.2d 331, 333 (N.D. 1981). First, the plaintiff has an interest in choosing the forum and preserving the judgment. *Id.* Second, the defendant has an interest in avoiding multiple litigation or inconsistent obligations. *Id.* Third, the court and the public have an interest in the efficient resolution of the complete controversy. *Id.* Fourth, the absent party has an interest in "the extent to which the judgment may impair or impede his ability to protect his stake in the subject matter of the suit." *Id.* A court must consider and weigh the interests of each stakeholder in determining whether the action should be maintained without the absent party. *Erdmann v. Thomas*, 446 N.W.2d 245, 249 (N.D. 1989).

[¶9] In its appellate brief, Statoil contends the district court erred in its analysis of each of the four factors. Statoil Br. ¶ 27. Specifically, Statoil argues that the court erred in concluding there may be an alternative forum, gave too much weight to the potential prejudice to the United States, and failed to account for the ways such prejudice may be mitigated. Contrary to Statoil's argument, the prejudice to the United States' interest as a sovereign is dispositive, or nearly so, even if there is no alternative forum. When the absent party is a sovereign, respect for the absent party's sovereignty almost

always requires dismissal of the suit, regardless of whether another forum is available. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) ("A case may not proceed when a required-entity sovereign is not amenable to suit.").

[¶10] Moreover, Statoil misidentifies the prejudice that will result to the United States, and existing parties, when it claims that an adequate judgment can be entered in the absence of the United States. The district court cannot simply carve out the interests claimed by the United States from its judgment or put the United States' claimed interest in escrow. Any decision on the merits would necessarily reveal the district court's opinion of the United States claims and therefore violate the United States' right to sovereign immunity. As the U.S. Supreme Court has held, it is error "to undertake[] to rule on the merits" of a sovereign's claims when the sovereign is not a party to the action. *See id.*

[¶11] Finally, Statoil may be able to proceed with its interpleader action in another forum—U.S. District Court for the District of North Dakota. The Quiet Title Act waives the United States' sovereign immunity with respect to actions "to adjudicate a disputed title to real property." 28 U.S.C. § 2409a. However, any such action must be filed in federal district court, not state court. Accordingly, for the reasons explained in more detail below, the district court's judgment should be affirmed.

B. Continuation of these Actions in the Absence of the United States will prejudice the United States and the Existing Parties to this Action.

[¶12] Statoil misstates and attempts to downplay the importance of the first Rule 19(b) factor, claiming the only consideration should be the prejudice to the absent party. Statoil Br. ¶ 39. Although prejudice to the absent party is certainly important in this case, given that party's sovereignty, potential prejudice to the existing parties must also be considered. *See* N.D.R.Civ.P. 19(b)(1). N.D.R.Civ.P. 19(b)(1). In this case, there is a substantial risk that the defendant lessees could be subject to multiple liability if the United States is not joined. The potential prejudice to the lessees, combined with the prejudice to the United States, strongly favors affirmance of the district court's decision.

1. Proceeding in the Absence of the United States Will Cause Substantial Prejudice to the United States' Interest as a Sovereign.

[¶13] If the Court were to remand this action for consideration on the merits, it would cause significant prejudice to the United States' interest in its sovereignty and its right to avoid being haled into court, absent its consent. *See Pimentel*, 553 U.S. 851 (2008). In *Pimentel*, various creditors of the estate of former Filipino dictator Ferdinand Marcos, and his wife, Imelda, including a class of plaintiffs who had obtained a $2 billion judgment based on their misdeeds while in office, sought access to a $35 million Merrill Lynch account that had apparently been controlled by the Marcos. *See id.* at 857–58. Merrill Lynch, unsure of how to distribute the funds in its possession,

instituted an interpleader action in U.S. District Court, naming, among other parties, the Republic of the Philippines ("the Republic") and the Philippine Presidential Commission on Good Governance ("the Commission")—both of which are foreign sovereigns immune from suit in U.S. Courts. *See id.* at 858–59. The Republic and the Commission asserted sovereign immunity and were dismissed from the lawsuit, but they also claimed, along with some of the remaining parties, that the lawsuit should not continue in their absence under Rule 19. *See id.* at 859.

[¶14] The district court ultimately concluded that the case could proceed in the absence of the Republic and Commission, and awarded the interpleaded funds to the plaintiff class with the $2 billion judgment against the Marcos. *See id.* at 860. The Ninth Circuit Court of Appeals affirmed, concluding the Republic and Commission were not prejudiced by the decision to proceed in their absence because their claims were unlikely to succeed on the merits. *See id.* The Supreme Court, however, reversed the Ninth Circuit's decision, concluding it was an error to even consider the merits of the claims made by the absent sovereigns. *See id.* at 864. The Court held:

> The Court of Appeals erred in not giving the necessary weight to the absent entities' assertion of sovereign immunity. The court in effect decided the merits of the Republic and the Commission's claims to the Arelma assets. Once it was recognized that those claims were not frivolous, it was error for the Court of Appeals to address them on their merits when the required entities had been granted sovereign immunity. The court's consideration of the merits was itself an infringement on foreign sovereign immunity; and, in any event, its analysis was flawed.

Id.

[¶15] Here, as in *Pimentel*, it would have been an error for the district court to even consider the merits of the lawsuits in the absence of the United States. The very act of considering the merits of a lawsuit in the absence of a sovereign entity that claims an interest in the subject matter of the suit prejudices the absent entity's interest in sovereign immunity. As the United States Supreme Court succinctly stated: "A case may not proceed when a required-entity sovereign is not amenable to suit. . . . [D]ismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Id.* at 867; *see also Minnesota v. United States*, 305 U.S. 382, 386–88 (1939) (concluding a condemnation action against Indian trust lands could not proceed in the absence of the United States and that the action should therefore be dismissed because the United States was immune from suit in the original forum); *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1069 (9th Cir. 2010) (recognizing as a general rule under *Minnesota v. United States* that "an action to establish an interest in Indian lands held by the United States in trust generally may not proceed without [the United States]"); *Ali v. Carnegie Inst. of Washington*, 306 F.R.D. 20, 29 n.6 (D.D.C. 2014) (explaining that the principles outlined in *Pimentel* apply to sovereigns generally, not just foreign sovereigns, and citing case law in support of this conclusion). The potential prejudice to the United States sovereignty,

standing alone, is a sufficient reason to affirm the district court's decision to dismiss the cases below.

[¶16] In its appellate brief, Statoil, without even mentioning the potential prejudice to the United States' sovereignty, claims that any prejudice to the United States is lessened because its interests are aligned with its lessees, who are parties to the case. Statoil Br. ¶¶ 39–43. Statoil's argument should be rejected because it is legally incorrect and is based on a misunderstanding of the type of prejudice the United States will face if these lawsuits proceed without it. As an initial matter, all of the cases and other authority prominently featured in Statoil's argument were decided or published *before* the Supreme Court issued its opinion in *Pimental*. *See Davis ex rel. Davis v. United States*, 343 F.3d 1282 (10th Cir. 2003); *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1259-60 (10th Cir. 2001); *Wyandotte Nation v. City of Kansas City*, 200 F. Supp. 2d 1279 (D. Kan. 2002); 3A James Moore, *Moore's Federal Practice* ¶ 19.07 (2d ed. 1995). It seems likely that the courts that issued those opinions and the author of the cited treatise may have altered their analysis had they had the benefit of the Supreme Court's opinion in *Pimental*, which was decided in 2008. As a result, the authorities cited by Statoil should be given limited, if any, weight.

[¶17] Moreover, Statoil's argument fails to recognize the type of prejudice to the absent sovereign that the Court in *Pimentel* was concerned about—namely, sovereignty itself. *See Pimentel*, 553 U.S. at 865–66 (holding

that the lower courts "failed to give full effect to sovereign immunity when" they considered the merits of the case in the absence of the Republic and the Commission). Instead, Statoil's argument and the cases on which it relies focus on prejudice to the absent sovereign's interest on the merits of the underlying litigation. *See* Statoil Br. at ¶¶ 39–43; *Wyandotte Nation*, 200 F. Supp. 2d at 1292. Statoil's focus on whether there will be prejudice to the absent sovereign on the merits is contrary to *Pimentel*'s instruction that the merits should not even be considered in the absence of an interested sovereign. *See Pimentel*, 553 U.S. at 864 ("The court's consideration of the merits was itself an infringement on foreign sovereign immunity . . . .").

[¶18] *Pimentel* expressly recognizes only one exception to the rule that a case may not proceed in the absence of an interested sovereign: cases where the sovereign's claim is frivolous. *See id.* at 867–68. Because there has been no assertion that the United States' claims are frivolous in these cases, the Court should reject Statoil's argument that the cases can proceed without the United States and affirm the judgments of the district court.

2. Statoil's Argument Does Not Account for Potential Prejudice to Existing Parties.

[¶19] The First Rule 19(b) factor is not limited to consideration of potential prejudice to the absent party; it also directs the court to consider potential prejudice to the existing parties. Here, a judgment rendered in the absence of the United States could prejudice the Defendants by creating a situation where they are forced to pay two parties for production from the

same parcel of property. N.D.R.Civ.P. 19(b)(1). Because the United States is not a party to these proceedings, it will not be bound by any judgment that might be entered on the merits. As a result, even if such a judgment were to hold, either expressly or impliedly, that the United States owns less land than it currently claims, it would not relieve the United States' lessees from their obligation to pay royalties on the oil and gas produced from the full extent of the land claimed by the United States. As a result, the Defendant lessees could be obligated to pay royalties twice for production from the same lands.

[¶20] Likewise, even though the United States would not be bound by any judgment, a judgment rendered in favor of other mineral owners would cloud the United States' record title to the property. It could also force the United States to initiate a separate proceeding to protect its interests in the property, which would waste judicial and party resources and raise concerns about federalism and due process. *National Farmers Union Prop. & Cas. Co. v. Schmidt*, 219 N.W.2d 111, 114 (N.D. 1974). The risk of prejudice to the existing parties together with the risk of prejudice to the absent sovereign means that the first Rule 19(b) factor strongly supports dismissal.

C. A Judgment Cannot Be Shaped to Lessen the Prejudice to the Absent and Existing Parties and Afford Adequate Relief.

[¶21] The second and third equitable factors direct the Court's attention to whether a judgment can be shaped or modified to lessen the potential prejudice, and the adequacy of a judgment rendered in the required

person's absence. N.D.R.Civ.P. 19(b)(2)–(3). Here, there is no way to shape the remedy or include protective provisions in the judgment to avoid the prejudice that would result. Because the United States cannot be bound by the judgment, it is impossible to protect the Defendants from the potential for double liability. *Woodland v. Woodland*, 147 N.W.2d 590, 602 (N.D. 1966). Moreover, a judgment entered in in either of cases would be inadequate because it could not effectively resolve the sole issue before the district court—who owns the minerals under the spacing units. N.D.R.Civ.P. 19(b)(3). Specifically, a judgment would not resolve, and cannot resolve, the scope of the United States' interest in the minerals underlying the property. An action to determine adverse claims to real property only resolves the claims of the named parties. It does not affect the interests of a party who appears of record and is not named as a plaintiff or defendant. *See Woodland*, 147 N.W.2d at 602.

[¶22] Statoil nevertheless claims that an adequate judgment can be shaped by requiring a certain amount of the proceeds from the wells at issue to be deposited with the court. Statoil Br. ¶ 45. Contrary to Statoil's argument, such a solution has no effect on the prejudice to the United States' sovereignty or the existing parties. First, such a solution would still require the district court to reach the merits of the dispute, and as explained above, the mere act of reaching the merits is prejudicial to the United States. Second, because the United States is not a party, it would not be bound to

honor any order requiring that disputed proceeds of production be deposited with the court. The United States could still demand to be paid, which means the existing parties' risk of double payment remains as well.

[¶23] Moreover, Statoil's focus on holding funds in escrow and shaping a remedy so that it is adequate for the "existing" parties misstates the purpose of the Rule 19(b) factors. The U.S. Supreme Court rejected such a party-centric understanding of adequacy in *Pimentel*:

> As to the third Rule 19(b) factor—whether a judgment rendered without the absent party would be adequate, Fed. Rule Civ. Proc. 19(b)(3)—the Court of Appeals understood "adequacy" to refer to satisfaction of [one class of claimants'] claims. But adequacy refers to the "public stake in settling disputes by wholes, whenever possible." This "social interest in the efficient administration of justice and the avoidance of multiple litigation" is an interest that has "traditionally been thought to support compulsory joinder of absent and potentially adverse claimants." Going forward with the action without the [two foreign sovereign entities] would not further the public interest in settling the dispute as a whole because the [two foreign sovereign entities] would not be bound by the judgment in an action where they were not parties.

553 U.S. at 870-71 (internal citations omitted); *see also Davis ex rel. Davis*, 343 F.3d at 1292-93. Accordingly, the possibility that a judgment on the merits in the cases below would satisfy Statoil, and perhaps some of the other defendant-claimants, while leaving the pertinent claims of the sovereign party unresolved, does not render that judgment "adequate."

[¶24] Similarly, Rule 19(b)(2)'s reference to the possibility that prejudice could be "lessened or avoided" by some alternative form of relief is meant to "call[] the court's attention to the possibility of granting remedies

other than those specifically requested that would not be merely partial or hollow but would minimize or eliminate any prejudicial effect of going forward without the absentees." *Ali*, 306 F.R.D. at (D.D.C. 2014) (quoting 7 Charles Alan Wright & Arthur R. Miller, et al., *Federal Practice and Procedure* § 1608 (3d ed.)). As the D.C. Circuit explained, a remedy can typically be shaped to avoid prejudice in cases where there may be enough "pie" to satisfy the claims of all parties, present and absent. *See Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986). A remedy *cannot* be shaped "when, as in this case, the parties' interest is in a specified *percentage* of the pie, and the combined requests of the parties exceed 100% of the pie." *Id.* In such circumstances, the present and absent parties' claims are to some degree mutually exclusive, and "the problem of indispensability of an absent party is accentuated." *Id.* Such is the case here, where there are multiple, conflicting claims to a finite amount of produced oil and gas.

[¶25] Finally, Statoil appears to concede that any judgment entered in this case will necessarily reveal the district court's opinion regarding the United States' interest, and that the United States' interest cannot simply be excluded from the judgment. *See* Statoil Br. ¶¶ 49–52. Importantly, Statoil's concession is actually an admission that the second and third factors favor dismissal. Notwithstanding its admission, however, Statoil goes on to claim that the second and third factors should essentially be disregarded because

the United States' interest will also be prejudiced by other pending litigation in state and federal courts. *See id.*

[¶26] Contrary to Statoil's argument, the question before this Court is not whether other judgments may prejudice the United States; it is whether a judgment entered in the two cases on appeal would prejudice the United States. Moreover, Statoil has offered no evidence that the cases it cites would prejudice the United States. Indeed, one case cited by Statoil, *EEE Minerals, LLC v. State*, was dismissed by the U.S. District Court for the District of North Dakota *because* the plaintiffs failed to join the United States as a party. Case No. 1:16-cv-115, 2016 WL 7209805, at *10 (D.N.D. Oct. 3, 2016). The other case, *Wilkinson v. Board of University and School Lands*, Sup. Ct. No. 2016-199, concerns lands that are many miles upriver from the lands at issue in this case—lands in which the United States claims no interest. A factual finding regarding the location of the high water mark in *Wilkinson* will not dictate the scope of the United States' interest in these cases. Accordingly, because the judgment cannot be shaped to provide adequate relief for all interested parties, the second and third Rule 19(b) factors also favor dismissal.

D. The U.S. District Court Is an Alternate Forum that May Be Available to Statoil, and Even if it Were Not, Both Cases Were Still Properly Dismissed.

[¶27] The fourth factor turns on whether there is an alternative forum for the plaintiff to bring its claim. N.D.R.Civ.P. 19(b)(4). The district court concluded the fourth factor favored dismissal because it was possible that

Statoil could bring its claim in the U.S. District Court for the District of North Dakota under the Quiet Title Act. 28 U.S.C. § 2409a. The Quiet Title Act waives the United States' sovereign immunity with respect to "civil action[s] . . . to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). Because this is a civil action to adjudicate a disputed claim to real property in which the United States claims an interest, it fits squarely within the waiver of sovereign immunity set forth in the Quite Title Act. However, the Quiet Title Act requires that any such action naming the United States be brought in U.S. District Court. 28 U.S.C. § 1346(f). Accordingly, as the district court recognized, the United States could likely be made a party to this action if it were brought in federal district court in North Dakota. Statoil does not dispute this conclusion.

[¶28] Instead, Statoil argues that the sovereign immunity of the State of North Dakota prevents Statoil from joining the State as a defendant in a quiet title interpleader action in federal court. Statoil Br. ¶¶ 29–31. Statoil further contends, or at least implies, that this should be determinative under Rule 19(b), and that it should be allowed to continue with the present action. *Id.* ¶ 28 (arguing the availability of an alternative forum is the most important Rule 19(b) factor).

[¶29] Statoil correctly notes that the Eleventh Amendment may bar federal courts from exercising jurisdiction over suits against non-consenting

states. *See Sossamon v. Texas*, 563 U.S. 277, 284 (2011). "A State, however, may choose to waive its immunity in federal court at its pleasure." *Id.* Moreover, the Eleventh Amendment is not an automatic bar to a federal court's exercise of jurisdiction, but rather *must* be asserted by a state as a defense; a federal court may ignore the issue altogether if a state does not raise it. *See Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998); *see also Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1252 (10th Cir. 2007); *In re Hechinger Inv. Co. of Del., Inc.*, 335 F.3d 243, 250 (3d Cir. 2003); *McClendon v. Ga. Dep't of Cmty. Health*, 261 F.3d 1252, 1257 (11th Cir. 2001); *Katz v. Regents of the Univ. of Cal.*, 229 F.3d 831, 834-35 (9th Cir. 2000). Thus, Statoil's assertion that the State of North Dakota *could* assert its sovereign immunity if Statoil brought this case in federal court does not inevitably lead to the conclusion that Statoil lacks an alternative forum, because the State of North Dakota could just as easily waive or fail to assert its sovereign immunity for purposes of such an action.

[¶30] In fact, North Dakota has previously waived its sovereign immunity for the purpose of similar quiet title interpleader actions brought in federal court. *See Brigham Oil & Gas, L.P. v. N.D. Bd. of Univ. & Sch. Lands*, No. 4:11-CV-058, 2011 WL 5879469 (D.N.D. Nov. 23, 2011). Moreover, the North Dakota State Engineer has moved to intervene in this case, even though it was not initially joined as a defendant, in order to protect certain of the State's interests that could be affected by this action. *See, e.g.*, State

Engineer's Motion to Intervene as a Defendant (Doc. ID# 149). Accordingly, there is a strong possibility that North Dakota would consent to jurisdiction in a federal court for purposes of the present quiet title interpleader action, rather than force inefficient, piecemeal litigation. *Cf. Minerals Management Division*, N.D. Dep't of Trust Lands, https://land.nd.gov/minerals/ (last visited Mar. 30, 2016) ("The objective of the Division is to optimize the revenue from mineral interests by ensuring the minerals are exploited in an effective and responsible manner.").

[¶31] Statoil acknowledges that the State of North Dakota could waive its immunity to suit in federal court, thus providing Statoil with an appropriate forum for the present action. Statoil asserts, however, that it is unlikely that the State would waive its sovereign immunity because it did not do so in the *EEE Minerals, LLC* case. Statoil Br. ¶¶ 36–37. *EEE Minerals, LLC*, however, serves as a poor example because it was very different in scope from the instant cases. Case No. 1:16-cv-115, 2016 WL 7209805 (D.N.D. Oct. 3, 2016). The Plaintiffs in *EEE Minerals, LLC* sought on behalf of a putative class to quiet title to the oil, gas, and other minerals in and under twenty-seven townships of land—that is more 600,000 acres or nearly 1,000 square miles of property. *See id.* at *1–2. The cases on appeal, by contrast, are not class actions and together involve only six sections of land. Thus, there are good reasons why the State of North Dakota chose to assert its sovereign immunity in *EEE Minerals, LLC* but may not do so in cases like

those on appeal. *See Brigham Oil & Gas, L.P. v. N.D. Bd. of Univ. & Sch. Lands*, No. 4:11-CV-058, 2011 WL 5879469 (D.N.D. Nov. 23, 2011) (declining to assert sovereign immunity in an interpleader action similar to the cases on appeal).

[¶32] Statoil also argues—citing case law related to the *forum non conveniens* doctrine and the federal change of venue statute, but no case law related to Rule 19—that there is no "alternative forum" under Rule 19(b) unless it is certain the alternative court could exercise jurisdiction over all parties. *See* Statoil Br. ¶ 32–33. Statoil's argument applies the first Rule 19(b) factor with too much rigidity, and if adopted, would render the first three Rule 19(b) factors superfluous. Rule 19(b) does not state that there *must* be an alternative forum. It states that the availability or non-availability of an alternative forum should be considered as part of the Court's analysis.

[¶33] Moreover, given that the cases were dismissed without prejudice, it makes even less sense to allow Statoil to assert that no appropriate, alternative forum is available without a conclusive determination that such is the case. The possibility of an alternative forum, as an equitable matter, should weigh in favor of dismissal, not against it, as Statoil claims. If the state court decisions are affirmed, and Statoil thereafter is unable to join the State of North Dakota as a defendant in a federal action,

then Statoil may again bring its cases before the state district court, if desired.

[¶34] Finally, even if the Court were to conclude that there is no alternative forum, the district court's dismissal of the cases below should still be affirmed because respect for the United States' sovereignty outweighs Statoil's concern about a forum. A number of courts have recognized that where an absent party cannot be joined because of its sovereign status, the plaintiff's lack of an alternative forum for relief does not on its own prevent dismissal. *See, e.g.*, *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1283-84 (10th Cir. 2012) (concluding that unavailability of a remedy does not preclude dismissal when the absent party is a sovereign, and citing other cases in support of this conclusion); *Klamath Tribe Claims Comm. v. United States*, 106 Fed. Cl. 87, 95-96 (2012) (same). Accordingly, if the Court concludes, as argued above, that the prejudice, adequacy of judgment, and alternative relief factors described by Rule 19(b) weigh in favor of dismissal, the Court should affirm the dismissal of these cases regardless of whether Statoil could find another forum.

[¶35] Ultimately, Statoil is seeking to force two sovereigns—the United States and the State of North Dakota—to adjudicate a dispute about their respective interests in the oil and gas in and under certain lands. If either of those sovereigns wished to resolve their dispute, there is no question they could find a forum. Indeed, the State of North Dakota has, on multiple

occasions, sued the United States in federal court under the Quiet Title Act. *See, e.g.*, *Block v. North Dakota*, 461 U.S. 273, 275–77 (1983); *North Dakota v. United States*, 787 F.3d 918, 920 (8th Cir. 2015); *North Dakota v. Block*, 789 F.2d 1308, 1309 (8th Cir. 1986). If those sovereigns will not consent to be sued in the same forum, Statoil may be without a remedy until such time as it obtains consent.

CONCLUSION

[¶36] For the reasons set forth above, Defendants and Appellees Continental Resources, Inc., Noble Royalties Access Fund XI, Noble Royalties Access Fund 12 LP, Mirada Energy, LLC, Orrion Energy, LLC, Slawson Exploration Company, Inc., Split Cree Enterprises LLC, Wild Basin Oil & Gas, LLC, and Zavanna, LLC respectfully request that the district court's judgments be affirmed.

DATED this 29th day of January, 2017.

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CERTIFICATE OF SERVICE

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