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STATE OF NORTH DAKOTA

IN THE SUPREME COURT STATE OF NORTH DAKOTA

Statoil Oil & Gas LP, Plaintiff and Appellant, v. Abaco Energy LLC, et al., Defendants and Appellees,	Supreme Court No. 20160261 Williams County No. 53-2015-CV-744
and	
Statoil Oil & Gas LP, Plaintiff and Appellant, v. 1280 Royalties LLC, et al., Defendants and Appellees.	Supreme Court No. 20160262 Williams County No. 53-2015-CV-1437

Appeal from Judgment dated June 16, 2016, in 53-2015-CV-744
Hon. David W. Nelson, Presiding
and from Judgment dated June 10, 2016, in 53-2015-CV-1437
Hon. Paul W. Jacobson, Presiding

BRIEF OF DEFENDANTS/APPELLEES BENEFIT FUND ET AL.

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STATEMENT OF ISSUES

[1] Whether, in equity and good conscience, these actions should proceed in the absence of the United States as a party.

LEGAL ARGUMENT

A. Standard of Review

[2] The district court granted a motion to dismiss this action under N.D.R.Civ.P. 12(b)(7) and 19(b), because the United States is a necessary party without whose presence relief could not be accorded among the existing parties. This Court's review is limited to whether the district court abused its discretion, as Statoil has conceded. (Appellant Br., ¶ 22.)

[3] Oddly, Statoil notes that "the 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." Id. at ¶ 23 (quoting In re Las Colinas, Inc., 426 F.2d 1005, 1010 (1st Cir. 1970)). This is odd because, on Statoil's motion to clarify its decision, the district court issued a well-researched, seven-page order of its own work product explaining its decision in detail. (Order Clarifying Reasons for Decision, Docket #217 [A. 127-133].) This is simply not an instance in which the district court "adopts a party's

proposed findings verbatim." (Appellant Br., ¶ 23) (quoting Ramey Const. Co., Inc. v. Apache Tribe of Mescalero Reservation, 616 F.2d 464, 467 (10th Cir. 1980)). If this Court were to determine that a lower standard of review is appropriate in cases where the district court has adopted a party's proposed findings or order verbatim, that determination would have no bearing in this case.

[4] There is no dispute that the United States is "a person who is required to be joined if feasible." N.D.R.Civ.P. 19(b). Nor is there any dispute that the United States "cannot be joined." Ibid. The sole issue in this action is "whether, in equity and good conscience, the action should proceed among the existing parties, or should be dismissed." Ibid. The district court's analysis concluded that the matter should be dismissed. This Court's inquiry is whether the district court abused its discretion in reaching that conclusion.

B. The Benefit Fund Defendants join the arguments of Continental Resources et al.

[5] Continental Resources, Inc., and other parties have filed an appellee brief in this matter. The Benefit Fund Defendants agree with their codefendants' detailed analysis of the Rule 19(b) factors regarding whether the action may proceed in the absence of the United States as

a party. Rather than rehashing that analysis, the Benefit Fund Defendants join in the Continental Resources brief.

C. Only the federal courts may adjudicate this case

[6] Statoil argues that it cannot bring this action in federal court because the State of North Dakota will not consent to that court's jurisdiction. Statoil's argument relies on decisions from various federal courts under an unrelated federal statute rather than jurisprudence under either N.D.R.Civ.P. 19 or F.R.Civ.P. 19. (Appellant Br., ¶ 32.)

[7] Statoil's argument also relies on the unsupported assumption that the State of North Dakota will not consent to the jurisdiction of the federal courts. Statoil never tried to resolve the underlying dispute in the federal courts. It is pure speculation for it to argue that it *cannot* do so. It supports its speculation by reference to an unfortunate lawsuit whose only precedential value lies in teaching law students to measure twice and cut once when starting lawsuits, EEE Minerals v. State of North Dakota, McKenzie County District Court No. 27-2014-CV-282 and District of North Dakota No. 1:16-cv-115. That case, in addition to likely holding a record for the longest-pending (2 years) putative class action in which class certification was never even sought and likely

holding another record for being the putative class action brought against the largest number of defendants (more than 200) who had not even allegedly committed a tort or other wrongful act, was also an exception to the rule under which the district court dismissed this case: Rule 19 gives way to Rule 23 in actions brought on behalf of a class. N.D.R.Civ.P. 19(d).

[8] But looking at EEE Minerals closer, one finds that the federal court dismissed the action not for failure to join the State of North Dakota or because the State of North Dakota objected to its jurisdiction, as Statoil seems to imply. Rather, the case was finally "dismissed for failure to join necessary parties, namely the United States." (EEE Minerals, District of North Dakota No. 1:16-cv-115, Docket #287, Order Granting Def. Mot. to Dismiss, p. 18.) Notably, the State of North Dakota apparently did consent to the federal court's jurisdiction in that action, "by failing to file the statutorily required motion to remand within 30 days of removal pursuant to 28 U.S.C. § 1447(c)." (EEE Minerals, Docket #207, Pl. Resp. to Mot. to Dismiss, p. 1.) So, if this Court does look to the monstrosity that was the EEE Minerals "class action," what it will see is that the party necessary to

adjudicate these disputes is the United States and that the State of North Dakota may indeed consent to federal jurisdiction. The other thing that the Court may see is that either the United States District Court for the District of North Dakota *and* the North Dakota District Court in and for Williams County in multiple lawsuits, along with all of the hundreds of parties in the EEE Minerals case *and* those now before this Court, are wrong about Rule 19—or Statoil is. (See Appellant Br., ¶ 37, n. 11, arguing that the federal court erred in applying Rule 19 in a similar context.)

[9] Even the State of North Dakota alleged below that Statoil had failed to join a necessary party, namely the United States. (Amended Answer of the N.D. Board of University and School Lands, ¶ 21 [A. 94].) Its attorneys informed the district court that they "honestly [hadn't] discussed . . . with [their] clients how they would respond to" this action being filed in federal court. (Tr. of Mot. Hr'g, 15:11-15.) Statoil appears to be alone in the world in believing that this case can do justice without a judgment binding on the United States.

[10] Leaving aside all the speculation that Statoil urges the Court to entertain, here is the simple truth: The state courts *cannot*

adjudicate the rights of the United States in the disputed minerals. The federal courts *may* be able to adjudicate the rights of the State of North Dakota in the disputed minerals. It is, perhaps, premature to say that the federal courts *can* resolve the parties' disputes in their entirety, but it is undeniable that the district court below has no way to do so. Only the federal court has any chance of entering a judgment that actually resolves these disputes.

D. Statoil fails to recognize non-court remedies by which the underlying dispute can actually be resolved

[11] Statoil recognizes that there is no authority "defining an 'alternative forum' in the Rule 19 context." (Appellant Br., ¶ 32.) And then it goes on to define an "alternative forum" as only being a court of law to whose jurisdiction no party has any right to object. This argument is flawed because Rule 19 is focused on the availability of a *remedy* and does not even use the word "forum." N.D.R.Civ.P. 19(b)(4) ("whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder"). Statoil completely ignores that there are forums other than the courts, namely the state and federal legislatures, in which the underlying disputes can—and should—be

addressed. Indeed, the North Dakota Legislative Assembly is currently considering "A BILL for an Act . . . relating to the ownership of minerals inundated by Pick-Sloan Missouri basin project dams." S.B. 2134 (2017). That bill was almost certainly introduced because of the abundant and hopeless litigation that has arisen regarding ownership of those minerals, including the instant action and many others. These lawsuits are hopeless because they spin the wheels of the courts and the parties while offering no chance that title can actually be quieted and royalties paid unless the United States and the State of North Dakota are both joined as parties.

[12] Rule 19's focus on remedy over forum is critical. Statoil has an adequate remedy by resort to the legislature. Statoil claims that the state district court cannot adjudicate the United States' interest and the federal district court cannot adjudicate the State of North Dakota's interest. Assuming that Statoil is correct and no court can fully adjudicate these disputes, the conclusion that dismissal was inappropriate remains incorrect. While there is no guarantee that the legislature will provide a remedy, there is at least some hope that it will. The state courts cannot offer that hope.

E. Existing parties will not protect the interests of the United States

[13] Statoil argues that the presence of "parties whose interests are aligned with the United States and . . . [of] the United States' lessees" in this action will mitigate any prejudice to the federal government. (Appellant Br., ¶ 39.) That argument is not supported by the record and was actively disputed by the very parties that Statoil suggests are here to represent the United States' interests.

[14] There is nothing in the record from which the Court can determine (a) whether all of the United States' mineral interests are leased, (b) whether all of the lessees are parties hereto, or (c) whether those lessees are entirely devoid of conflicts of interest or their own mitigating factors such as having taken protective leases from competing mineral owners including the State of North Dakota. It is improper to presume that Statoil has joined enough parties who want the federal government to win or that joinder of those parties provides adequate protection for the United States in this action.

[15] Even if we made that presumption, the record rebuts it. Some of those very lessees, whose interests Statoil claims are "perfectly aligned with the United States," (Appellant Br., ¶ 42), pointed out at

the hearing below that they "would still be obligated to pay royalties [to the United States] no matter what [the district court] would rule." (Tr. of Mot. Hr'g, 32:2-4.) This is not a means of protecting the United States' interest. It is, rather to the contrary, an additional source of prejudice that the parties will suffer in the United States' absence. It cannot be said that title is in any way "quieted" by a judgment that declares the United States owns X but results in its lessees paying it based on ownership greater than X. That, however, is precisely the type of judgment that is likely to be entered if this case proceeds in state court.

F. Ordering Statoil to hold monies disputed between the federal and state governments begs the question

[16] Statoil argues that the district court could shape its remedies by ordering "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." (Appellant Br., ¶ 45.) Statoil's own argument below was that other parties' suggestions of placing funds into escrow "is a totally unsatisfactory litigation approach" because "the practical prejudice to the United States would

be no different than the other actions currently pending." (Tr. of Mot. Hr'g, 46:24-47:8.)

[17] Ordering Statoil to hold the disputed monies in escrow begs the question in this action, which is the entitlement of private and public persons to those monies. If the district court were to order Statoil to deposit even just the monies claimed by the United States with the court or into another form of escrow, there would necessarily have to be a formal adjudication of what the United States claims. No party to this action is in a position to inform the courts what the United States claims, and certainly the district court is in no position to adjudicate the question. The state court's very order to do anything with the United States' monies, including deciding how much are claimed and ordering them into escrow, would violate its sovereign immunity.

[18] Statoil already rejected the suggestion of escrowing disputed funds and, even if this Court accepts escrow as a remedy, only a court whose judgment is binding on the United States can adjudicate which funds to put into escrow in the first place. Statoil's new suggestion would cause all the parties to suffer for no reason.

G. Conflicting results are likely if this action proceeds in the absence of the United States

[19] Statoil suggests that it is entitled to "seek adjudication of [its] claims by excluding the United States from the action and, later, bringing suit against the United States to resolve the remaining dispute." (Appellant Br., ¶ 50.) It acknowledges that this approach only "*may* establish some legal precedent that *may* bear on a subsequent action." Ibid. (emphasis supplied). The reality is that no precedent in this action will be remotely binding on the latter action filed in federal court, because the United States' property interests are, in large part, a creature of federal law that preempts state law and the federal courts are not bound by state court interpretations of federal law. See U.S. Const., Art. VI, cl. 2; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Altria Group v. Good, 555 U.S. 70, 76 (2008).

[20] The very riparian rights that lie at the core of this dispute—between the United States that created those rights, the State of North Dakota that has made strides in reinterpreting those rights, and the private landowners caught in the struggle—will be interpreted under purely federal law when raised in the federal courts. Everything—from the equal footing doctrine to navigability to the definition of the shore

of navigable waters to the correct surveying methodology to locate the shore—comes from federal law. See, e.g., 43 U.S.C.A. § 752; Cadastral Survey: Notice of Availability of the Next Edition of the Manual of Surveying Instructions, 74 Fed. Reg. 48,776 (Sep. 24, 2009); PPL Montana, LLC v. Montana, 132 S.Ct. 1215 (2012); Hardin v. Jordan, 140 U.S. 371 (1891); Howard v. Ingersoll, 54 U.S. 381 (1851); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839).

[21] Statoil suggests that the parties will all be served best by prosecuting sequential lawsuits in different courts to adjudicate the mineral ownership in the subject lands. If there is any merit in that suggestion, Statoil nevertheless has chosen the wrong sequence of lawsuits. The correct order would be to sue the United States and all of the private landowners—and the State of North Dakota, which may consent to be sued—in federal court first. The federal courts will—without doubt, due to the availability of binding federal appellate courts—properly apply federal law. The federal courts will—without doubt, due to their ability to certify questions to this Court under N.D.R.App.P. 47(a)—properly apply state law, as well. And then, if the State of North Dakota has not consented to suit in federal court, Statoil

can bring what remains to the state court to enter judgment according to the *binding* precedent of the federal courts.

[22] Even absent prejudice to the United States or to the parties caused by proceeding in its absence, Statoil's insistence on starting in state court leaves the possibility that our state courts will misinterpret or misapply federal law and a conflicting result will be reached when the federal courts finally do weigh in. The best-case scenario would then be a third round of this litigation in state court to correct an erroneous judgment. The worst-case and more likely scenario would be that Statoil and the non-government parties to this action would be faced with two different judgments as to their rights, disquieting their title and defeating the entire purpose of this action.

H. Any error by the district court in dismissing this action was harmless

[23] Statoil does not discuss the numerous other reasons why this action was properly dismissed by the Williams County district court. The most critical reason is that, for many of the numerous defendants that Statoil has hailed into court, there is no actual dispute of their mineral ownership because their lands are nowhere near the lands claimed by the State of North Dakota.

[24] It is not our state courts' job to decide for Statoil which landowners to sue. That is Statoil's task to perform before bringing suit. N.D.R.Civ.P. 11(b)(3). As to the lands not in dispute, the complaint fails to state a cause of action. N.D.R.Civ.P. 12(b)(6). Statoil force-pooled these landowners' mineral rights together, drilled wells, and then sued them without regard to whether their title is actually clouded by the State's claims. Rather than forcing every individual landowner with the misfortune of having had his or her mineral rights force-pooled with Statoil's to conduct extensive and expensive title review and pay attorney fees, Statoil should first use its superior knowledge of title in its producing units to determine which landowners are actually in competition with the State of North Dakota's expanded territorial claims and only name those parties in any action it brings to resolve the dispute.

CONCLUSION

[25] The district court did not err. This action cannot, in equity and good conscience, proceed in the absence of the United States as a party. No remedy that the district court could possibly provide will eliminate—or even reduce—any of the doubts that this action is intended to resolve.

[26] It is possible that the action may proceed in federal court. It is possible that the underlying disputes cannot be resolved before any court and the parties must call upon the other branches of government. But it is *not* possible for the district court to resolve those disputes. For that reason, it was proper to dismiss the action. The judgment below should be affirmed.

Respectfully submitted this 30th day of January, 2017.

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