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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)

APPELLANT'S REPLY BRIEF

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ARGUMENT

[¶1] The Continental Appellees ("Continental") and the Benefit Fund Appellees (the "Benefit Fund") (collectively, the "Appellees") concede—as they must—that Statoil may not hale the State of North Dakota (the "State") into federal court and that a state court judgment would not bind the United States.

[¶2] Instead, Continental argues that the United States' sovereignty mandates dismissal. And, both Appellees argue that Statoil has an alternative forum, based on the hypothetical possibility that the State might waive its immunity. These arguments are unavailing. If accepted, they would render the Rule 19(b) analysis meaningless where the party that cannot be joined is a sovereign. But, Rule 19 does not say that. The Rule is not superfluous is this context.

[¶3] The Appellees also argue that any prejudice to the United States cannot be mitigated by omitting its claims from these actions. But, they do not demonstrate how any prejudice from allowing these actions to proceed is greater than any other action where the state court is asked to render an opinion on an issue of property law that may be persuasive in a subsequent action. And both Appellees ignore the potential result if these actions cannot proceed: if Statoil cannot obtain judicial determination of the proper recipients of the proceeds from its wells, it may decide to hold the funds in suspense, thus depriving the proper recipients indefinitely. Allowing these

actions to proceed will provide relief—and clarity—to hundreds of parties who were properly before the district court.

I. Continental Misconstrues *Pimentel.*

[¶4] Continental argues that the federal Supreme Court's decision in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), "is dispositive, or nearly so," and that *Pimentel* requires that these actions be dismissed. Continental Br. ¶9. Not so. While Continental criticizes Statoil for relying on some decisions decided before *Pimentel,* and implies that they are no longer good law, *id.* ¶16, it does not address—or even acknowledge—the decisions that Statoil cited applying *Pimentel*. *See* Appellant's Br. ¶27 n.8. Those decisions reject the rule that Continental proposes.

[¶5] *Pimentel* involved certain assets possessed by deceased former Philippine President Ferdinand Marcos that were claimed by the Republic, by a special commission created to manage any property that Marcos wrongfully obtained, and by a class of victims of Marcos' human rights violations. 553 U.S. at 855. In concluding that the action could not proceed without the Republic and the Commission (who were immune from suit in U.S. courts), the Court held that the lower courts had given insufficient weight to the prejudice to these sovereigns if the action proceeded in their absence. *Id.* at 865. In so deciding, the Court pointed to several key concerns not present here.

[¶6] First, *Pimentel* involved the "doctrine of foreign sovereign immunity" which implicated ***international*** "[c]omity and dignity." *Id.* at 865-66. The

Court emphasized the historic importance—to international relations—of this immunity doctrine and the need for respect among nations. *Id.* at 866. Courts applying *Pimentel* have distinguished that concern in cases involving the United States or Indian tribes. *See, e.g.*, *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1071 (9th Cir. 2010) (*Pimentel* "narrowly held that a particular suit could not go forward when it threatened to prejudice the interests of a foreign sovereign."); *Diné Citizens Against Ruining Our Env't v. U.S. Office of Surface Mining Reclamation and Enf't*, No. 12-cv-1275-AP, 2013 WL 68701, at *4 (D. Colo. Jan. 4, 2013) ("[M]ost vitally, *Pimentel* involved 'foreign' sovereign immunity, raising comity concerns between co-equal sovereigns."); *Klamath Tribe Claims Comm. v. United States*, 106 Fed. Cl. 87, 96 n.16 (Fed. Cl. 2012) (*Pimentel* distinguishable because it cited the "comity and dignity interests of the Republic" in addressing the injury caused by the Marcos regime).

[¶7] Second, ***there was another forum***. 553 U.S. at 858; *see also Hayes v. Chaparral Energy, LLC*, No. 14-CV-495-GKF-PJC, 2016 WL 1175238, at *4 n.5 (N.D. Okla. March 23, 2016) ("[T]he parties in *Pimentel* had an alternative forum in which to resolve their dispute."); *Diné Citizens*, 2013 WL 68701, at *4 ("[I]n *Pimentel*, an alternative forum was available . . . ."). Indeed, contrary to Continental's suggestion that *Pimentel* requires an action to be dismissed any time the absent party is a sovereign—regardless of whether an alternative forum exists, *see* Continental Br. ¶9—the Court was

clear that its analysis might be different if the Philippine court failed to render a timely decision:

> The balance of equities may change in due course. One relevant change may occur if it appears that the Sandiganbayan cannot or will not issue its ruling within a reasonable period of time.

553 U.S. at 873; *see also Diné Citizens*, 2013 WL 68701, at *4 ("[T]he Court suggested that if that forum delayed unreasonably in issuing a decision, the parties might be able to again bring their case in United States federal court.").

[¶8] These issues are not implicated here where a domestic sovereign is absent and no alternative forum exists. Neither *Pimentel* nor the authority interpreting it supports the blanket rule that Continental proposes; *i.e.*, that where a sovereign is absent, a court may never consider the merits of the claims as to the other parties. "If 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).

II. Statoil Has No Alternative Forum.

[¶9] In order to weigh the fourth Rule 19(b) factor, a court must first determine what constitutes an "alternative forum" under Rule 19. Then, the court must determine whether an alternative forum exists here. Finally, if one does not, the court must weigh that factor against the others.

[¶10] No party has identified authority defining an "alternative forum" under Rule 19. Statoil has proposed a definition, drawing from analogous concepts concerned with similar issues: the federal venue transfer provision in 28 U.S.C. § 1404(a) and the doctrine of forum *non conveniens*. *See* Appellant's Br. ¶¶32-33. That is, an alternative forum exists where "plaintiff has a right to sue . . . independently of the wishes of defendant." *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960) (interpreting the venue transfer statute). The Appellees offer no contrary definition (nor meaningful criticism of the analogy). Instead, Continental complains that this definition "would render the first three Rule 19(b) factors superfluous." Continental Br. ¶32. Continental confuses the *definition* of an "alternative forum" with the *effect* of a lack thereof. True, courts recognize this factor as "perhaps the most important," *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1293 (10th Cir. 2003) (internal alterations and citation omitted), and the lack of an alternative forum will "weigh heavily, if not conclusively against dismissal." *Pasco Int'l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 501 n.9 (7th Cir. 1980). But, the heavy weight accorded this factor does not compel a diluted definition.

[¶11] Continental concedes that the Eleventh Amendment to the U.S. Constitution prevents Statoil from haling the State into federal court. Continental Br. ¶29. Instead, Continental argues that North Dakota has previously waived its immunity in another interpleader action and speculates

that it might do so again. *Id.* ¶30. As set forth above, and in Statoil's Appellant's Brief, the mere prospect of wavier does not create an "alternative forum."

[¶12] Moreover, Continental's argument is not supported by the case it references. *Brigham Oil & Gas, L.P. v. North Dakota Board of University & School Lands* was filed in Williams County District Court and named, among others, the United States and the State as defendants. The United States removed the action to federal court and moved to dismiss itself on immunity grounds. *See Brigham Oil & Gas, L.P. v. N.D. Bd. Of Univ. & Sch. Lands*, No. 4:11-cv-058, 2011 WL 5879469, at *1 (D.N.D. Nov. 23, 2011). The federal court dismissed the United States. The action was remanded to state court where it proceeded to partial judgment ***without the United States***. *Brigham Oil & Gas, L.P. v. N.D. Bd. Of Univ. & Sch. Lands*, No. 53-2011-CV-00495 (Williams Cty. Apr. 2, 2013).

[¶13] While the case was in federal court, the State filed an answer. Contrary to Continental's argument, this is not sufficient to demonstrate waiver of Eleventh Amendment immunity. *See Union Elec. Co. v. Missouri Dep't of Conservation*, 366 F.3d 655, 660 (8th Cir. 2004). Rather, the law requires "clear and voluntary action constituting a waiver of Eleventh Amendment immunity by a State defendant;" this is not met by simply making "a general appearance in federal court and defend[ing] an action on the merits." *Id.* at 659-60. Indeed, every decision that Continental cites for

the proposition that a court may "ignore" the Eleventh Amendment "if a state does not raise it," Continental Br. ¶ 29, involved a situation in which a state affirmatively raised its immunity or explicitly waived it. None support the proposition that filing an answer in the district court constitutes waiver. Nor could they. Eleventh Amendment immunity "may be raised at any time during judicial proceedings, including on appeal." *In re South Dakota*, 692 F.2d 1158, 1160 (8th Cir. 1982).

[¶14] Because filing an answer does not itself demonstrate waiver, and because the action was quickly remanded to state court, *Brigham Oil* cannot help predict what the State may do here. If anything, *Brigham Oil* supports the proposition that these actions may proceed in state court in the United States' absence. And, given the State's explicit invocation of its immunity in the more-recent *EEE Minerals* action, *see* Appellant's Br. ¶36, it seems likely that it will invoke its immunity in any future action.

[¶15] Indeed, the quibbling over past waivers or non-waivers of immunity illustrates the value of the *Hoffman* definition of alternative forums. No one can predict what any party will do in any subsequent action. It would be inequitable to conclude that an alternative forum exists based on speculation that a party might waive valid jurisdictional defenses. Instead, an alternative forum exists only where a plaintiff can bring the action "independently of the wishes of defendant." *Hoffman*, 363 U.S. at 344.

III. Any Prejudice to the United States is Minimal.

[¶16] The first Rule 19(b) factor asks the Court to assess "the extent" to which a judgment "might prejudice [the absent party] or the existing parties." N.D. R. Civ. P. 19(b)(1). Continental and the Benefit Fund diverge on the prejudice (if any) that a state court judgment would have on the United States' interest. But, both concede that any judgment in the state court actions would not be binding on the United States. And, they fail to address how any prejudice in these actions would be greater than any other action where a state court is asked to formulate a principle of state property law.

[¶17] The Benefit Fund argues strongly that there will be *no* effect as "no precedent in this action will be remotely binding" in a subsequent action because the federal interest is determined entirely by federal law. Benefit Fund Br. ¶19. Continental—suggesting that state law would govern a determination of the federal interest—argues that a state court judgment "would cloud the United States' record title to the property" because it "would necessarily reveal the district court's opinion of the United States claims." Continental Br. ¶¶20, 10.

[¶18] If the Benefit Fund is correct, then the United States would suffer no prejudice from these actions proceeding. But, assuming Continental is correct, Continental does not explain—if the United States' claims are omitted—how any "cloud" is greater than would be created by any other state court property decision; that is, a non-binding exposition of state law that

may influence a subsequent action in a different court. *See* Appellant's Br. ¶¶50-52.

[¶19] Further, any analysis of prejudice to the United States—or the existing parties—must consider what will occur if these actions are dismissed. If the district court judgments are affirmed, Statoil will not be able to determine the proper recipients of the oil and gas proceeds from the units at issue. Continental concedes as much. Continental Br. ¶35.

[¶20] In that event, Statoil is unlikely to "double pay" the proceeds. Rather, it may hold the proceeds in suspense indefinitely. Continental claims concern that it could be separately sued by the United States in its capacity as a federal lessee. But any such "prejudice" arises from Continental's status as a federal lessee, not from these actions. Indeed, any risk to Continental is likely increased if these actions are dismissed. If a party holds a lease from the United States—and the United States elects to enforce the lease knowing the ownership is still in dispute—it is ***more likely*** to do so when there is no action pending to resolve the dispute.

[¶21] Dismissal may result in all defendants, as well as the United States, waiting longer to get paid any proceeds. The only hope of resolution would be an action between the State and the United States with all the defendants, and Statoil, as parties. In the meantime, any suit against Statoil for nonpayment may be dismissed under Rule 19. That is not what Statoil desires (and it is not fair to the other royalty owners). Statoil wants to pay

the proceeds without the risk of multiple claims. If a state court judgment binds everyone but the United States, then, at least, the remaining dispute will be narrowed to the two parties that have the ability to resolve it.

[¶22] A court can adequately protect the interests of the United States by determining rights to proceeds for everyone but the United States; and then placing the amount that could be claimed by the United States in escrow. Once the United States and the State resolve their ownership dispute the escrowed amounts can be released as appropriate.

IV. The Benefit Fund's Separate Arguments Lack Merit.

[¶23] The Benefit Fund has largely deferred to Continental on the substantive issues raised in this appeal. *See* Benefit Fund Br. ¶5. Instead, it raises a number of rhetorical points—largely without reference to authority. Only one merits a clarification.

[¶24] The Benefit Fund argues that Statoil has "rejected the suggestion of escrowing disputed funds," *id.* ¶18, because Statoil's "own argument below" was that escrowing funds "is a totally unsatisfactory litigation approach." *Id.* ¶16. The full quote from the hearing is:

> [I]nitially I think it is interesting that ***Continental*** has suggested ***both*** that if Statoil were to place the funds into escrow, that would have been a satisfactory pre-litigation remedy. But placing the funds into escrow is a totally unsatisfactory litigation approach.

Tr. of May 6, 2016 Hr'g ("Tr.") 46:23-47:2 (emphasis added). The Benefit Fund misreads the transcript.

[¶25] In fact, Statoil has asked the court to order the disputed funds escrowed from the beginning, and maintained that view throughout. *See* Am Compl., App. 66 (requesting "the deposit with the Court of all funds presently being held in suspense."); Tr. 13:4-9 ("[T]he Court could avail itself of the procedure contemplated under North Dakota law by ordering the contested funds deposited in a local bank in the name of the United States and of the State . . . ."); Tr. 47:2-8 ("If the funds were completely place[d] into escrow . . . the practical prejudice to the United States would be no different than the other actions currently pending."); Appellant's Br. ¶18 ("The district court can require Statoil to pay any royalties that may be claimed by the United States into escrow . . . and omit the United States' claim from the action.").

[¶26] The Benefit Fund's other arguments arise from similar misconceptions or misunderstandings of the record, or are addressed above.

CONCLUSION

[¶27] For the foregoing reasons, the district court's judgments should be vacated.

Dated: February 16, 2017

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

[¶28] I hereby certify 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 2,654 words, excluding those portions of the brief exempted by the rules. I relied on my word processor, Microsoft Word 2010, to obtain the word count.

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