20220088
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 19, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Allen Dominek and Arlen Dominek, Plaintiff/Appellants, vs. Equinor Energy L.P. f/k/a and a/k/a Brigham Oil & Gas L.P. and Statoil Oil and Gas L.P., and Grayson Mill Williston, LLC, Defendants/Appellees.	Supreme Court No. 20220088 U.S. District Court No. 1:19-cv-288

Certification Order Entered on March 16, 2022
U.S. District Court No. 1:19-cv-288
United States District Court for the District of North Dakota
The Honorable Daniel L. Hovland, Presiding
ORAL ARGUMENT REQUESTED

REPLY BRIEF OF APPELLANTS, ALLEN DOMINEK AND ARLEN DOMINEK

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I. <u>This is a lawsuit about a mineral lease and royalty allocation and the ramifications of mistakes made in the past are no reason to bar the courts.</u>

[¶1] Defendants and amici curiae argue this Court should not rule on the certified questions and should do any number of things which this Court is without jurisdiction to do in this proceeding. For example, administrative exhaustion is a discretionary jurisprudential doctrine.[1] There is no basis in the American federalist system for a state court (even the highest state court) to order a federal court to exercise its jurisprudential discretion, and especially to do so in a specific way. There is also no "political question." That the decision in this case could have far-reaching ramifications for some operators who misinterpreted the law does not transform this dispute into a "political question."

[¶2] The filings of the amici demonstrate that some operators follow Equinor's interpretation, and some follow the Dominek's interpretation. Continental's brief demonstrates how much more complex overlapping spacing units can (and will) become. The allocation problems created by Equinor's interpretation become untenably complicated as development in the Bakken progresses. The allocation problems created by Equinor's interpretation go away under the Domineks' and Continental's interpretation. The reason is simple – the words "for all purposes" never meant "for purposes of allocating royalties" because the ND Industrial Commission has no jurisdiction to allocate royalties.

[¶3] When Whiting proffered this mistaken interpretation back in 2010 (R44-5 to R44-10), it made a mistake interpreting the law and went to the North Dakota Industrial Commission ("NDIC") in search of a solution to a problem that did not exist. *See* R44-8. That act has since spiraled into the unfortunate predicament that some operators now face.

[1] At least when not specifically and explicitly mandated by statute, which is the case here.

While the amici now argue that this Court should defer to the NDIC to set the policy, the actual exchange with the NDIC over the operative language at issue illustrates that it was not the NDIC who set a policy. Both the NDIC and Whiting's actual comments are far from statements of policy:

> MR. HICKS [Assistant Director]: I don't think anybody with the Commission ever thought that we would be affecting a 2,560 in this manner as you described it if we would space it 1,280.
> HEARING EXAMINER: What was the legislature's intent, do you think, in saying that it's pooled for all purposes?
> MR. MORRISON: I don't know. You know, I mean, that's pretty standard for a pooling agreement, a pooling declaration, or a pooling statute….

R44-8:19:8-17. Whiting's counsel continued and essentially offered the exact interpretation now offered by Equinor. And the language now used by Equinor (Appellee Brief, part IV and ¶42), the anti-daisy chain language, was that written by Whiting's counsel after this exchange:

> MR. HICKS: …And the other thing I have is a suggestion that maybe you submit a proposed order on the type of language you'd like to see in this.
> MR. MORRISON: That's fair.

R44-8:13:10-13. For Equinor and others to point back to this proceeding and argue that it is the NDIC who should resolve this dispute is circular and ignores history.[2] This problem was created by Whiting and the NDIC in that very proceeding, although obviously operators like Continental disagreed and correctly interpreted the law and their leases.

[¶4] The procedural posture of this case in the federal district court, a case for unpaid royalties and breach of lease obligations, provides important context for the arguments now being made to this Court. Equinor filed a motion for summary judgment. R24. In its brief

[2] The Attorney General's litigation position is also not necessarily the NDIC's official policy and the Assistant Attorney General's assertions in the amicus brief, unsupported by sworn statements or other evidence, are not official policy of the NDIC by themselves.

in support, Equinor argued that there were no facts in dispute and that the sole legal issue was whether the owners in Section 24 are entitled to share in the Weisz 11-14 XE #1H well ("Section Line Well"). R25:2.

[¶5] Domineks filed a cross-motion for summary judgment and argued Equinor must allocate royalties only to the interest owners in the spacing unit created for the Section Line Well, i.e., the interest owners in Sections 11, 12, 13, and 14. R32. The mineral lease states:

> Lessor shall receive on production from the unit so pooled royalties only on the portion of such production allocated to this lease; such allocation shall be that proportion the unit production that the total number of surface acres covered by this lease and included in the unit bears to the total number of surface acres in such unit.

R33:2. The mineral lease prohibits allocation of royalties to any mineral owner with an interest outside the pooled unit for the Section Line Well (comprised of Section 11, 12, 13, and 14), including any interest in Section 24.[3]

[3] The lease language, not surprisingly, matches the Domineks' and Continental's interpretation (an interpretation that becomes obvious when one starts from an understanding of the basis for spacing and pooling, i.e., drainage and the law of capture). Equinor and its amici erroneously seek support in NDIC orders and practice, in federal guidance, and in interpretations of statutes *in pari materia* with NDIC orders. Like a pilot in a storm relying on nonfunctioning panel gauges to check the weather status and forgetting to just look out the window, Equinor misses the obvious problems with its exercise in statutory interpretation, which conflicts with the reality of the actual drilling patterns in the Bakken based on drainage, which is also the very basis for the pooling authority. Continental's numerous examples of what will happen when base unit wells are plugged or other such developments occur illustrate why the only sensible interpretation is that the 2560 unit was created for an obvious purpose – to allocate production *to that 2560*. Reallocation as demanded by Equinor defeats the entire purpose for the creation of the 2560 unit.

II. Exhaustion of administrative remedies is inappropriate.

A. This Court is without jurisdiction to order exhaustion of administrative remedies.

[¶6] "The ideal of comity between local and federal courts is not a trifling concept. Comity is 'neither a matter of absolute obligation, on the one hand, nor a mere courtesy and good will, upon the other.'" *Watchtower Bible Tract Soc'y of N.Y., Inc. v. Municipality of Santa Isabel*, No. 04-1452 (GAG), 2013 U.S. Dist. LEXIS 84193, at *18-19 (D.P.R. June 11, 2013). Equinor does not explain why it has not yet submitted its exhaustion argument to the federal district court, even though the Complaint in the federal district court case was filed over two years ago. In any event this Court lacks jurisdiction to decide Equinor's exhaustion argument, much less determine that the NDIC should decide the dispute. *See Kitsap County v. Allstate Ins. Co.*, (1998), 136 Wash. 2d 567, 577, 964 P.2d 1173, 1178. ("In providing an answer to the question, we recognize that when a federal court certifies a question to this court, this court answers only the discrete question that is certified and lacks jurisdiction to go beyond the question presented."); *see also Louisiana-Pacific Corp. v. Asarco Inc.*, 131 Wn.2d 587, 604, 934 P.2d 685 (1997) ("We do not have jurisdiction to go beyond the specific question presented by the Certification Order."). "[T]he certification procedure does not transfer decision-making authority to the state courts, or ask for the state courts to resolve any state law issues before returning the case to the federal court. Instead, the federal court, in essence, seeks clarity from the state court on specific state law issues while retaining all decision-making authority." *Certified Questions of State Law: An Empirical Examination of Use in Three U.S. Courts of Appeals*, 53 U. Tol. L. Rev. 1, 11. The federal district court alone has the power to decide its own jurisdiction and rule on the exhaustion argument.

B. The NDIC is without jurisdiction to provide relief to the Domineks and exhaustion is therefore futile.

[¶7] Amici argue that the NDIC should decide the issues in this case and cite to *Cont'l Res., Inc. v. Counce Energy BC #1*, LLC, 2018 ND 10, ¶ 6, 905 N.W.2d 768, 771. Their reliance on *Counce* is misplaced. In *Cont'l Resources v. Counce*, this Court vacated a judgment and concluded that the district court lacked subject matter jurisdiction because the plaintiff failed to exhaust administrative remedies. What amici do not tell the Court is that Counce Energy then sought relief from the NDIC as ordered, and the NDIC granted a motion to dismiss by Continental, explaining: "Administrative agencies are creatures of legislative act and have only the authority that is granted to them or necessarily implied from the grant." R34-4:3:15 (citing *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 584 (N.D. 1984)). With respect to what it titled the "Distribution of Revenue Issues" the NDIC dismissed the case for lack of jurisdiction and said:

> The North Dakota Supreme Court on several occasions has described the Commission as having "very broad, general jurisdiction and authority to regulate the production of oil and gas and the oil and gas industry in this State" (*Amerada Hess Corp. v. Furlong Oil and Minerals Co.*, 348 N.W.2d 913, 916 (N.D. 1984)), and is "equipped … with comprehensive powers to regulate oil and gas development." *Continental Res., Inc. v. Farrar Oil Co.*, 559 N.W.2d 841, 845 (N.D. 1997). However, the jurisdiction of the Commission is not unlimited. The Commission has no jurisdiction to decide contractual issues. *Schank v. North Am. Royalties, Inc.*, 201 N.W.2d 419 (N.D. 1972); Order No. 24709. BC2's requests for relief relate to contractual issues, including the payment of revenues and Continental's offsetting of BC2's proportionate share of unpaid costs against its proportionate share of the production revenues, all relating to the private rights dispute between BC2 and Continental which the Commission does not have jurisdiction to resolve.
>
> (16) The Commission lacks jurisdiction to resolve contractual or royalty distribution disputes and therefore should deny BC2's request.

R34-4:4:15 (emphasis added). The NDIC simply does not decide private rights disputes like the current case at the federal district court. As such, the NDIC has no jurisdiction to

decide the issues so exhaustion would be futile and it is therefore not required. *Kadlec v. Greendale Twp. Bd. of Twp. Supervisors*, 1998 ND 165, ¶ 25, 583 N.W.2d 817 (citing *Tracy v. Central Cass Public School*, 1998 ND 12, P 13, 574 N.W.2d 781).

[¶8] The NDIC's involvement in the Whiting case amounted to agreeing to allow Whiting to draft a proposed order with language Whiting claimed resolved the problem it had created for itself. That was a mistake. The solution is not to compound the mistake and make the NDIC the arbiter of private disputes regarding allocation of royalties.

III. Domineks' position regarding Question 5 will benefit from some additional discussion.

[¶9] In their initial brief, Domineks argued that the answer to Question 5 is "yes." More accurately, while the answer to the overall question remains "yes," the answer is partly "no" with respect to the second sentence of the language from Order No. 27791 quoted in the certification order for Question 5, which states: "This order does not modify, amend or alter previous pooling orders for other spacing units or require the reallocation of production allocated to separately owned tracts within any spacing unit by any existing pooling orders or any pooling agreements." Ultimately, given that the second sentence of Order No. 27791 was written by Whiting's counsel in a proposed order to address the concerns it had created for itself, the *intent* of the language is apparent and discussed in some detail *supra*. Domineks will not argue that Whiting's counsel intended anything other than what he said he intended at the hearing, so the intent of the provision cannot reasonably be questioned. R44-8.

[¶10] The other language in Order No. 27791, however, came from the NDIC in part when the Assistant Director said this to Whiting's counsel: "…what we're doing now is clarifying that that is the well and that is the spacing unit that's going to be allocated for

that well. Would it be appropriate to list that well in the pooling order? And the other thing I have is a suggestion that maybe you submit a proposed order on the type of language you'd like to see in this." R44-8:13:5-12 (emphasis added). Mr. Hicks requested sentence one of what became the language in Question 5 of the Certification Order. *Id*.

[¶11] In other words, each pooling order applies to the spacing unit (and NDIC order) that created the unit, and it pools those interests *only as to that unit*, meaning it does not result in reallocation across unit boundaries as Equinor now argues based on the pre-existing pooling orders (which again were only triggered by the allocation from this new order pooling all interests in the unit, but limiting its own effect to doing *only* that before the daisy-chain argued for by Equinor began). Equinor might not agree this is what the NDIC had in mind at that time, but a close review of the full transcript is the best way to fully understand what happened in 2010. R44-8. And it was as simple as an operator going in search of a solution to a problem that did not exist and was created by that operator's misinterpretation of law. R44-8. Unfortunately, the ripple effects of that mistake in 2010 had consequences beyond Whiting's case.[4]

[¶12] Ultimately, the language referenced in Question 5 of the Certification Order (and the same language as it is referenced in Question 4) is not controlling in this dispute, although the way in which that language was developed is elucidating as to how this dispute arose. So the Dominek's amend their prior position: the answer to Question 5 is yes with

[4] The ND Petroleum Council hedges its language regarding on whose behalf it speaks. Obviously one of its largest members disagrees with its position, and the industry is far from lockstep on the issue. Fortunately, it appears that major operators like Continental got it right and any implication from the Petroleum Council that the Dominek's position will cause chaos for "the industry" is obviously at least partly untrue – not all of the operators got it wrong.

respect to the first sentence, but concede the answer is probably "no" as to the language in the second sentence given the history and intent provided by amici and Equinor. It is again, though, inapposite to the controlling issues in the Dominek's opinion.

IV. Equinor and amici misinterpret the words "for all purposes" and there is no statutory authority to reallocate royalties as they argue.

[¶13] The crux of Equinor's and amici's argument is that N.D.C.C. § 38-08-08 says "for all purposes" and therefore it must dictate reallocation of royalties to overlapping units.

[¶14] Courts that have reviewed this language disagree. In *Kysar v. Amoco Prod. Co.*, 2004-NMSC-025, ¶ 29, 93 P.3d 1272, 1279, the Tenth Circuit certified numerous questions to the New Mexico Supreme Court related to New Mexico laws, one of which contained the "for all purposes" language. *Id*. The New Mexico Court recognized that this language relates to the effect of pooling on holding leases by production, and also discussed its impact on the geographic scope of the implied easement and surface use. Nowhere in its discussion of similar language from both federal and state sources does it arrive at the conclusion Whiting did in 2010, which is that this language actually requires a daisy-chain reallocation of royalties across overlapping spacing units and unit boundaries. *Id*. Neither do any of the other courts whose opinions the New Mexico Court reviews. *Id*. Nor has this Court when it has considered the import of the same language in different contexts. *See Egeland v. Cont'l Res., Inc.*, 2000 ND 169, ¶ 16, 616 N.W.2d 861.[5]

[5] The Domineks also agree with part six of Continental's amicus brief, ¶¶15-30, and if permissible specifically incorporate the arguments there by reference. With respect to Continental's argument regarding the BLM guidance relied on by NDPC and NDIC, it should also be noted that the NDIC and NDPC fail to grasp that PIM 2018-012 (national BLM) basically recognized that their interpretation is unique in the country. In its bulletin to "All Field Office Officials" in the United States it said "If language in State-issued spacing and/or pooling order differs from the above policy, as may be the case in North

[¶15] Equinor now admits, of course, that "[t]here is no single order or statute that directs Equinor to allocate production from the Weisz 11-14 XE #1 well to owners of oil and gas interests in Section 24." Appellees' brief, ¶13. This admission is dispositive with respect to Certified Question No. 1 and the answer is "no".

V. The Domineks are entitled to relief.

[¶16] The Domineks are people with a real legal dispute. They are owed royalties under a contract and they have expended significant amounts of money to try to obtain those royalties. To now say that providing them a remedy might be right but is simply too inconvenient for the industry ignores that the Domineks filed their claims in the justice system. They asked for their royalties to be paid under their contract. If they are owed royalties, they must be paid. The magnitude of Equinor's mistake is not their problem.

Dated this 19th day of August, 2022.

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Dakota, the Agencies will work with the appropriate State and Federal oil and gas regulatory agencies…." R26-10:1 (emphasis added). The "above policy" this language references is a royalty allocation policy that matches precisely with the one offered by the Domineks and Continental (in other words, the BLM agrees with the Dominek's view). *Id*.

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[¶1] Plaintiffs/Appellant's Reply Brief contains 12 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 word processing software in Times New Roman 12-point font.

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Allen Dominek and Arlen Dominek, Plaintiff/Appellants, vs. Equinor Energy L.P. f/k/a and a/k/a Brigham Oil & Gas L.P. and Statoil Oil and Gas L.P., and Grayson Mill Williston, LLC, Defendants/Appellees.	Supreme Court No. 20220088 U.S. District Court No. 1:19-cv-288 **CERTIFICATE OF SERVICE BY ELECTRONIC MAIL**

[¶1] I hereby certify that on August 19, 2022, the following document:

- REPLY BRIEF OF PLAINTIFFS/APPELLANTS ALLEN DOMINEK AND ARLEN DOMINEK

was electronically filed with the Clerk of Supreme Court through the E-filing Portal which served copies by e-mail on the following:

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