

**UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION**

SARAH VOGEL, individually and for all)	
those similarly situated,)	Case No.: 4:13-cv-00133-DLH-CSM
)	
Plaintiff,)	
)	FIRST AMENDED COMPLAINT AND
v.)	DEMAND FOR JURY TRIAL
)	
WPX ENERGY WILLISTON, LLC, a)	
Delaware corporation,)	
)	
Defendant.)	
)	

PARTIES

1. Plaintiff Sarah Vogel (“Plaintiff”) brings this action for herself and all those similarly situated. Plaintiff is a resident of Bismarck, Burleigh County, North Dakota.
2. Defendant WPX Energy Williston, LLC (“Defendant”) is a limited liability company organized under the laws of Delaware with its principal offices at One Williams Center, Tulsa, Oklahoma. Defendant can be served with process by serving its registered agent in the State of North Dakota, CT Corporation System, 314 E Thayer Avenue, Bismarck, North Dakota 58501-4018.
3. Defendant is the operator of an oil well classified as a “horizontal” well, the Elk 16-21H well, located in the NENW of Section 16, Township 150 North, Range 92 West, Mountrail County, North Dakota having API number 33-061-01295-00-00 (“Elk 16-21H Well”).
4. Plaintiff owns mineral interests from which oil and gas are being produced from the Elk 16-21H Well and is entitled to royalties from production from the Elk 16-21H Well.

JURISDICTION AND VENUE

5. Plaintiff filed this case on October 16, 2013, in state court in North Dakota where the court had subject matter jurisdiction over the case and personal jurisdiction over Defendant. On November 15, 2013, Defendant removed the case to this Court under 28 U.S.C. Section 1332(d), the Class Action Fairness Act (“CAFA”).
6. Venue is proper in this District because Plaintiff’s claims for relief arose in this District.

BACKGROUND

7. The Elk 16-21H Well was spudded on February 12, 2011. It began to produce hydrocarbons in May of 2011.
8. Defendant pays or should pay royalties to Plaintiff from the Elk 16-21H Well.
9. The oil and gas production from the Elk 16-21H Well is from the Van Hook-Bakken Pool.
10. The Elk 16-21H Well has produced oil and gas, and has flared gas since first production through at least November of 2013. For the months since first production, the Elk 16-21H Well has produced and sold oil, and produced, sold, and flared gas in the following quantities as reported by Defendant to the North Dakota Industrial Commission, Department of Mineral Resources, Oil & Gas Division (the “Industrial Commission” or “NDIC”):

Production Month	Days of Production	BBLs Oil Produced	BBLs Oil Sold	MCF of Gas Produced	MCF of Gas Sold	MCF of Gas Vented or Flared
Apr-11	0	0	0	0	0	0
May-11	7	7051	5995	0	0	0
Jun-11	30	33648	34256	0	0	0
Jul-11	31	26952	26663	0	0	0
Aug-11	31	19590	19361	0	0	0

Sep-11	30	17735	17247	0	0	0
Oct-11	29	13963	14018	0	0	0
Nov-11	30	18023	18321	1128	0	1028
Dec-11	31	14085	13919	30936	0	30836
Jan-12	31	15216	15839	30936	0	30836
Feb-12	29	14510	13725	4390	0	4290
Mar-12	31	14042	14344	5490	0	5271
Apr-12	30	8564	8632	5354	0	5097
May-12	31	11799	12206	8766	0	8398
Jun-12	30	10276	10016	8020	0	7652
Jul-12	31	10001	10284	7326	0	6944
Aug-12	31	9595	10053	7452	0	7070
Sep-12	30	9705	9483	7012	0	7012
Oct-12	31	9936	9700	6905	0	6905
Nov-12	30	9206	8901	5866	1513	4353
Dec-12	31	8815	8805	2231	2056	27
Jan-13	31	5876	6462	3046	2720	115
Feb-13	28	7698	7626	4767	3721	773
Mar-13	31	5832	5961	3265	3042	0
Apr-13	30	3719	3286	735	651	0
May-13	31	8103	8213	4699	4331	0
Jun-13	30	7338	7197	4741	4381	0
Jul-13	31	7806	8014	4860	4478	0
Aug-13	31	8513	8456	5066	4753	0
Sept-13	30	7579	7379	4764	3625	806
Oct-13	31	5728	6276	3868	3165	455
Nov-13	30	10829	10764	7659	1390	6186

11. Upon information and belief, Defendant produced and flared gas from the date of first production in May of 2011 until November of 2011, but did not meter or report any quantities of gas to the NDIC.

12. Gas flared from wells such as the Elk 16-21H Well after one year from first production is governed by the provisions of subsection 2 of N.D.C.C. § 38-08-06.4, providing:

2. After the time period in subsection 1, flaring of gas from the well must cease and the well must be:

- a. Capped;
- b. Connected to a gas gathering line;
- c. Equipped with an electrical generator that consumes at least seventy-five percent of the gas from the well;
- d. Equipped with a system that intakes at least seventy-five percent of the gas and natural gas liquids volume from the well for beneficial consumption by means of compression to liquid for use as fuel, transport to a processing facility, production of petrochemicals or fertilizer, conversion to liquid fuels, separating and collecting over fifty percent of the propane and heavier hydrocarbons; or
- e. Equipped with other value-added processes as approved by the industrial commission that reduce the volume or intensity of the flare by more than sixty percent.

13. Based on current reported production, the Elk 16-21H Well flared 49,923 Mcfs of gas after the one-year period from the date of first production from the well. The flared volumes occurred in the following volumes per month:

Production Month	MCF of Gas Vented or Flared
May-12	1625
Jun-12	7652
Jul-12	6944
Aug-12	7070
Sep-12	7012
Oct-12	6905
Nov-12	4353
Dec-12	27
Jan-13	115
Feb-13	773
Sept-13	806
Oct-13	455
Nov-13	6186

14. Any permitted flaring of gas from the Elk 16-21H Well was to cease after one year, and any gas flared from the well thereafter is in violation of subsection 2 of N.D.C.C. § 38-08-06.4.

15. Subsection 6 of N.D.C.C. § 38-08-06.4 exempts a producer from the requirements of subsections 1 and 2 of N.D.C.C. § 38-08-06.4 under certain conditions:

A producer may obtain an exemption from this section from the industrial commission upon application that shows to the satisfaction of the industrial commission that connection of the well to a natural gas gathering line is economically infeasible at the time of the application or in the foreseeable future or that a market for the gas is not available and that equipping the well with an electrical generator to produce electricity from gas or employing a collection system described in subdivision d of subsection 2 is economically infeasible.

16. Defendant has not applied for nor been granted an exemption under subsection 6 of N.D.C.C. § 38-08-06.4 for gas flared from the Elk 16-21H Well for the production months Plaintiff alleges violated subsection 2 of N.D.C.C. § 38-08-06.4 as set forth above.

17. Subsection 4 of N.D.C.C. § 38-08-06.4 allows royalty owners to recover royalties on the value of gas flared in violation of N.D.C.C. § 38-08-06.4:

For a well operated in violation of this section, the producer shall pay royalties to royalty owners upon the value of the flared gas and shall also pay gross production tax on the flared gas at the rate imposed under section 57-51-02.2.

18. The North Dakota Industrial Commission, in its discretion, may enforce the requirements of N.D.C.C. § 38-08-06.4 as provided in subsection 5:

The industrial commission may enforce this section and, for each well operator found to be in violation of this section, may determine the value of flared gas for purposes of payment of royalties under this section and its determination is final.

19. Defendant has not applied for nor obtained flaring exemptions for the Elk 16-21H Well for the production months Plaintiff alleges violated subsection 2 of N.D.C.C. § 38-08-06.4 as set forth above. As a result, Defendant owes Plaintiff royalties pursuant to subsection 4 on the value of the gas flared in violation of subsection 2 of N.D.C.C. § 38-08-06.4.
20. Plaintiff is entitled to sue for and recover royalties under the provisions of N.D.C.C. § 38-08-06.4 for flared gas from the Elk 16-21H Well for the production months Plaintiff alleges violated subsection 2 as set forth above.
21. Defendant has not paid royalties for the 49,923 Mcfs of gas produced and flared from the Elk 16-21H Well after the first year of production thus far.
22. Defendant continues to produce oil and gas from the Elk 16-21H Well and will continue to flare gas from such well in violation of the provisions of N.D.C.C. § 38-08-06.4.
23. Plaintiff is entitled to royalties for future gas flared from the Elk 16-21H Well.
24. The provisions of N.D.C.C. § 38-08-06.4 were enacted in part to mitigate the adverse health and environmental effects on the air of North Dakota caused by the flaring of gas from oil wells in the State of North Dakota and to prevent the destruction of the gas, a valuable natural resource of the State of North Dakota.
25. Defendant's violation of N.D.C.C. § 38-08-06.4 injures the public by ignoring the State's effort to mitigate the adverse health and environmental effects of flaring gas.
26. Apart from the injury to the public in general, Plaintiff's injuries include an impairment of Plaintiff's mineral interest and results in the loss of the royalties that are to be paid to Plaintiff pursuant to N.D.C.C. § 38-08-06.4. Plaintiff is aggrieved as provided in N.D.C.C. § 32-40-03.

27. Plaintiff has suffered the loss of royalties due for gas flared from the Elk 16-21H Well in violation of subsection 2 of N.D.C.C. § 38-08-06.4 as set forth above.
28. Plaintiff will suffer the loss of royalties in the future for gas flared from the Elk 16-21H Well in violation of subsection 2 of N.D.C.C. § 38-08-06.4.
29. Gas produced from an oil well within the State of North Dakota is a use of the reservoir energy from the reservoir from which the gas is produced.
30. Gas from an oil well in North Dakota is improperly produced if produced in violation of the laws and regulations of the State of North Dakota, including the orders of the Industrial Commission.
31. Flaring of gas from an oil well in North Dakota, if improperly produced, constitutes waste as provided in N.D.C.C. § 38-08-02.
32. The waste of gas being produced from an oil well in North Dakota is prohibited as provided in N.D.C.C. § 38-08-03.
33. Pursuant to N.D.C.C. § 38-08-06, the Industrial Commission determines the amount of oil and gas that may be produced within a given district without waste as defined in N.D.C.C. § 38-08-02 and such amount is designed not to exceed the reasonable market demand for such oil and gas.
34. Defendant is required, pursuant to N.D.C.C. § 38-08-06.3, to provide an information statement that will allow the royalty owner to clearly identify the amount of oil or gas sold and the amount and purpose of each deduction made from the gross amount.
35. Gas flared from wells such as the Elk 16-21H Well within one year of first production is governed by the provisions of subsection 1 of N.D.C.C. § 38-08-06.4, providing:

As permitted under rules of the industrial commission, gas produced with crude oil from an oil well may be flared during a one-year period from the date of first production from the well.

In other words, a producer *may* flare gas within the first year of production and avoid paying royalties on that gas *if* it fully complies with applicable rules and orders of the Industrial Commission concerning production of oil and gas. The corollary of that rule is that if a producer fails to comply with those rules and orders, it may not avoid paying royalties on the gas under the statute on those volumes of gas flared during the first year of production out of compliance with applicable rules and orders of the Commission.

36. The Industrial Commission has provided the following rules concerning the flaring of gas in the Elk 16-21H Well:

- a. NDIC Order Nos. 14420, 16582, 16851, 16860, 17196, 17306, 17045, and 18398 in Case Nos. 12168, 14306, 14770, 16134 dated March 10, 2011, May 5, 2011, August 30, 2011, September 29, 2011, and May 7, 2012 (“Order 14420 and others”).
- b. As stated in Paragraph 139, page 24 of Order 14420, the Industrial Commission has ordered as follows:

(139) All wells in the Van Hook-Bakken Pool shall be allowed to produce at a maximum efficient rate for a period of 60 days commencing on the first day oil is produced through well-head equipment into tanks from the ultimate producing interval after casing has been run; after that, oil production from such wells shall not exceed an average of 200 barrels per day for a period of 60 days; after that, oil production from such wells shall not exceed an average of 150 barrels per day for a period of 60 days; thereafter, oil production from such wells shall not exceed an average of 100 barrels of oil per day; if and when such wells are connected to a gas gathering and processing facility the foregoing restrictions shall be removed, and the wells shall be allowed to produce at a maximum efficient rate. The Director is authorized to issue an administrative order allowing unrestricted production at a

maximum efficient rate for a period not to exceed 120 days, commencing on the first day oil is produced through well-head equipment into tanks from the ultimate producing interval after casing has been run, if the necessity therefor can be demonstrated to his satisfaction.

- c. As stated on page 2 of Order No. 16582, dated May 5, 2011, the Industrial Commission has ordered as follows:

All current wells and all wells hereafter completed in the Van Hook-Bakken Pool shall be allowed to produce at a maximum efficient rate until June 30, 2011.

- d. As stated on page 18 of Order No. 16851, page 24 of Order No. 16860, page 18 of Order No. 17196, and page 18 of Order No. 17306, dated August 30, 2011, the Industrial Commission has ordered as follows:

All wells in the Van Hook-Bakken Pool shall be allowed to produce at a maximum efficient rate for a period of 60 days commencing on the first day oil is produced through well-head equipment into tanks from the ultimate producing interval after casing has been run; after that, oil production from such wells shall not exceed an average of 200 barrels per day for a period of 60 days; after that, oil production from such wells shall not exceed an average of 150 barrels per day for a period of 60 days; thereafter, oil production from such wells shall not exceed an average of 100 barrels of oil per day; if and when such wells are connected to a gas gathering and processing facility the foregoing restrictions shall be removed, and the wells shall be allowed to produce at a maximum efficient rate. The Director is authorized to issue an administrative order allowing unrestricted production at a maximum efficient rate for a period not to exceed 120 days, commencing on the first day oil is produced through well-head equipment into tanks from the ultimate producing interval after casing has been run, if the necessity therefor can be demonstrated to his satisfaction.

- e. As stated on page 2 of Order No. 17045, dated September 29, 2011, the Industrial Commission has ordered as follows:

All current wells and all wells hereafter completed in the Van Hook-Bakken Pool shall be allowed to produce at a maximum efficient rate until December 31, 2011.

- f. As stated on page 2 of Order No. 18398, dated May 7, 2012, the Industrial Commission has ordered as follows:

All current wells and all wells hereafter completed in the Van Hook-Bakken Pool shall be allowed to produce at a maximum efficient rate until July 31, 2012.

37. Under Order 14420 the Elk 16-21H Well could be produced at the maximum efficient rate for the first 60 days of production under Paragraph 139. After that, the well could produce an average of 200 barrels of oil per day for 60 days; thereafter, an average of 150 barrels per day for the next 60 days; and thereafter at an average of 100 barrels per day unless the Industrial Commission entered administrative orders allowing unrestricted oil production for up to 120 days. Under orders 16582, 17045, and 18398, the Elk 16-21H Well could be produced at a maximum efficient rate from May 5, 2011 to June 30, 2011, September 29, 2011 to December 31, 2011, and May 7, 2012 to July 31, 2012. For January 1, 2012 to May 6, 2012, a time when no further administrative orders were in effect, Defendant reported to the NDIC that it exceeded the applicable daily average limit of 100 barrels of oil by more than two to four times the permitted amount, and also reported to the NDIC that it flared all gas produced from the Well during that time.
38. Upon information and belief, the Elk 16-21H Well was not connected to a gas gathering and processing facility until November of 2012. For the period of January 1 through May 6, 2012, before it was connected to a gathering and processing facility, Defendant reported the Elk 16-21H Well produced 47,119 Mcfs of gas that was flared. The flaring

of the 47,119 Mcfs of gas during that period was in violation of Paragraph 139 of Order 14420 and others.

39. Defendant reported to the NDIC that the Elk 16-21H Well produced 84,130 Mcfs of gas that was flared during the first year of production. The flaring of the 47,119 Mcfs of gas during the period of January through May 2012 was not in compliance with or as provided by Paragraph 139 of Order 14420 and others. Defendant failed to fully comply with rules as provided by the Industrial Commission that would have allowed it to flare gas in the first year of production without having to pay royalties on the flared gas, and as a result, Defendant owes royalties on the value of that flared gas.
40. Defendant operates at least 80 oil wells from which gas is produced in North Dakota in counties including Mountrail County and Dunn County. Those wells are or were operated with gas being flared in violation of N.D.C.C. § 38-08-06.4 and the Industrial Commission's orders on flaring within one year of first production.
41. On information and belief, Defendant does not pay royalties for all or a portion of the gas flared from the oil wells it operates.
42. The number of royalty owners, and royalty owners who are not paid royalties for gas flared in oil wells operated by Defendant in violation of N.D.C.C. § 38-08-06.4 and the Industrial Commission's orders on flaring within one year of first production exceeds one hundred.
43. Plaintiff brings this Complaint on her own behalf and as representatives of all similarly situated persons against Defendant for its failure to pay royalties on gas flared from oil wells operated by Defendant as further alleged in this Complaint. Plaintiff seeks for

herself and as representative of all similarly situated persons declaratory relief as well as money damages as further alleged in this Complaint.

44. For purposes of this case, the term “Flared Gas” means the following: Natural gas and associated natural gas liquids in such natural gas flared during the past six (6) years from each oil well in North Dakota operated by Defendant classified by the Industrial Division as a “Horizontal” or “Horizontal Re-entry” wellbore, for which at least one of the following conditions applies:

- a. gas flared from a well one year after first production not covered by a flaring exemption applied for and obtained from the Commission under subsection 6 of N.D.C.C. § 38-08-06.4 (the “North Dakota Anti-Flaring Statute”); or
- b. gas flared from a well within the first year of production either (i) before the NDIC issued rules permitting flaring or (ii) after the NDIC issued rules limiting the maximum barrels of oil to be produced per day until the well is connected to a gathering system and processing plant, and despite those rules, Defendant reported to the NDIC that it exceeded that maximum oil production allowable during at least part of the first year.

45. Plaintiff seeks to certify the following Class: All persons, including individuals, estates, trusts, corporations, partnerships, and other business entities owning royalty interests in North Dakota:

- a. From which there has been Flared Gas; and
- b. Defendant has not paid royalties for the Flared Gas.

The Class definition excludes:

- i. Defendant; its officers, directors and employees; any entity in which Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of Defendant;
- ii. any federal, state, or municipal governmental entity, and any agencies or subdivisions thereof;
- iii. Indian tribes;
- iv. any person who has given a valid release concerning the claims asserted in this suit;
- v. individuals or entities that are indicated to be working interest owners by Defendant's business records; and
- vi. the district judge assigned to this case, his current spouse, and all persons (and their current spouses) within the third degree of relationship to such district court judge and his spouse.

46. The requirements of Rule 23(a) of the Federal Rules of Civil Procedure are met.

47. Class members are so numerous that their individual joinder is impracticable. The precise number of Class members is unknown to Plaintiff, but it is clear that the number greatly exceeds the number to make joinder possible or practicable.

48. Common questions of law and fact exist such that a resolution of those questions will drive a common remedy for the common injury suffered by the Class. These common questions of law and fact also predominate over the questions affecting only individual class members. Some of the common legal and factual questions include:

- a. Whether Defendant flared natural gas in violation of the North Dakota Anti-Flaring Statute;
- b. Whether Defendant must pay the Class royalties on Flared Gas;

- c. Whether the Class is entitled to declaratory relief adjudicating that Defendant is required to pay royalties on the value of Flared Gas and future Flared Gas;
 - d. Whether Defendant is guilty of conversion of Flared Gas;
 - e. Whether Defendant has committed waste of North Dakota's valuable natural resources; and
 - f. Whether Defendant should cease flaring gas flared in violation of North Dakota law.
49. The class members have been damaged by Defendant's misconduct. The class members are within the class of persons entitled to be paid royalties for violations of subsections 1 and 2 of N.D.C.C. § 38-08-06.4, and they are entitled to recover royalties on the value of the Flared Gas.
50. Plaintiff's claims are typical of the claims of the other class members. Plaintiff is a royalty owner in wells with Flared Gas operated by Defendant, and Plaintiff has not been paid royalties on that Flared Gas despite Defendant's obligation to pay such royalties.
51. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff is familiar with the basic facts underlying the class members' claims. Plaintiff's interests do not conflict with the interests of the other class members that she seeks to represent. Plaintiff has retained counsel competent and experienced in class action litigation and intend to and will prosecute this action vigorously.
52. The class action device is superior to other available means for the fair and efficient adjudication of the claims of Plaintiff and the class members. Individual litigation of the legal and factual issues raised by the conduct of Defendant would increase delay and expense to all parties and to the court system. The class action device presents far fewer management difficulties and provides the benefits of a single, uniform adjudication, economies of scale and comprehensive supervision by a single court.

53. Defendant has acted or refused to act on grounds that apply generally to the class, so that final declaratory relief is appropriate respecting the class as a whole. Specifically, Plaintiff seeks an order declaring Defendant's creation of Flared Gas attributable to Class's interests without payment of royalties to be a violation of the North Dakota Anti-Flaring Statute; declaring that Defendant may not create future Flared Gas attributable to Class's interests without payment of royalties and affirmatively hereafter requiring Defendant to pay royalties for Flared Gas attributable to Class's interests.

FIRST CAUSE OF ACTION: ACTION FOR ROYALTIES ATTRIBUTABLE TO FLARED GAS IN VIOLATION OF N.D.C.C. § 38-08-06.4.

54. For the First Cause of Action, Plaintiff repeats and realleges each and every prior allegation of this Complaint.

55. Defendant operated the Elk 16-21H Well so that at least 49,923 Mcfs of gas was flared after the one-year period from the date of first production from the well through November 2013.

56. Defendant owes Plaintiff for royalties attributable to gas flared from the Elk 16-21H Well for those periods following one year after the day of first production from each well.

57. Defendant operated the Elk 16-21H Well within one year of first production so that gas was flared during the time periods alleged above in violation of N.D.C.C. § 38-08-06.4 and the Orders cited above.

58. Defendant owes Plaintiff for royalties attributable to gas flared from the Elk 16-21H Well during the first year of production.

SECOND CAUSE OF ACTION: DECLARATORY RELIEF AGAINST DEFENDANT FOR PAST AND FUTURE FLARED GAS

59. For the Second Cause of Action, Plaintiff repeats and realleges each and every prior allegation of this Complaint.

60. Plaintiff believes and therefore alleges that Defendant has flared gas and likely will continue to flare gas from the Elk 16-21H Well without paying required royalties on the value of the Flared Gas, as required under subsection 4 of N.D.C.C. § 38-08-06.4.

61. Plaintiff is entitled to declaratory relief adjudicating that Defendant is obligated to pay royalties on the value of all Flared Gas and future Flared Gas from the Elk 16-21H Well flared in violation of section 4 of N.D.C.C. § 38-08-06.4.

62. Plaintiff is entitled to the declaratory relief as permitted under N.D.C.C. § 32-23-01.

**THIRD CAUSE OF ACTION: CONVERSION OF GAS FLARED WITHOUT
PAYMENT OF ROYALTIES.**

63. For the Third Cause of Action, Plaintiff repeats and realleges each and every prior allegation of this Complaint.

64. Plaintiff is entitled to royalties for gas flared from the Elk 16-21H Well during the first year of production as alleged above, and royalties for gas flared thereafter through the present for the Elk 16-21H Well.

65. Defendant has not paid and refuses to pay royalties to Plaintiff for gas flared from the Elk 16-21H Well during the first year of production and royalties for gas flared thereafter through the present.

66. Defendant's actions constitute a tortious detention of personal property due to the Plaintiff in defiance of the rights of Plaintiff.

67. Plaintiff is entitled to the highest value of the gas flared for the time during which royalties were not paid as well as fair compensation for the time and money Plaintiff has expended and will expend to obtain the compensation due to Plaintiff.

**FOURTH CAUSE OF ACTION: COMMON LAW WASTE OF GAS FLARED
WITHOUT PAYMENT OF ROYALTIES.**

68. For the Fourth Cause of Action, Plaintiff repeats and realleges each and every prior allegation of this Complaint.
69. The flaring of gas from the Elk 16-21H Well as described in the allegations of the *Background* of the Complaint constitutes an unreasonable or improper use, abuse, mismanagement, or omission of duty by Defendant touching Plaintiff's rights in the mineral estate from which production from the Elk 16-21H Well is taken ("Common Law Waste").
70. The laws of North Dakota require Defendant to use and manage production of gas from oil wells in North Dakota in compliance with North Dakota laws and the Industrial Commission's orders, including those set forth in the allegations of the *Background* of the Complaint.
71. Defendant's flaring of gas from the Elk 16-21H Well as previously alleged in this Complaint constitutes Common Law Waste for which Plaintiff is entitled to compensation, including that provided in N.D.C.C. § 32-17-22.

**FIFTH CAUSE OF ACTION: ACTION UNDER N.D.C.C. § 32-40-06 TO
ENFORCE PAYMENT OF ROYALTIES ATTRIBUTABLE TO GAS FLARED IN
VIOLATION OF N.D.C.C § 38-08-06.4 AND N.D.A.C. § 43-02-03-60.2**

72. For the Fifth Cause of Action, Plaintiff repeats and realleges each and every prior allegation of this Complaint.
73. Plaintiff is an aggrieved person under the provision of the *North Dakota Environmental Law Enforcement Act of 1975* found at N.D.C.C. § 32-40-01 et seq. This statute provides

for and reaffirms a private right of action to enforce the environmental anti-flaring provisions under N.D.C.C. § 38-08-06.4. N.D.C.C. § 32-40-06 states:

...[a]ny person ... aggrieved by the violation of any environmental statute, rule, or regulation of this state may bring an action in the appropriate district court, either to enforce such statute, rule, or regulation, or to recover any damages that have occurred as a result of the violation, or for both such enforcement and damages.

74. By flaring in violation of N.D.C.C. § 38-08-06.4, Defendant has violated an environmental statute, rule or regulation for the protection of natural resources including minerals under the provisions of N.D.C.C. § 38-08-06.4 and N.D.A.C. § 43-02-03-60.2.

75. Plaintiff is entitled under N.D.C.C. § 32-40-06 to sue to enforce the provisions of N.D.C.C. § 38-08-06.4 and to recover damages suffered from Defendant as a result of the Defendant's violation of N.D.C.C. § 38-08-06.4 and N.D.A.C. § 43-02-03-60.2.

76. Plaintiff, pursuant to N.D.C.C. § 32-40-06, gave timely notice by certified mail of Plaintiff's intent to file suit and the violation of N.D.C.C. § 38-08-06.4 as generally set forth in this Complaint to the following:

- A. Defendant;
- B. The North Dakota Industrial Commission;
- C. The State's Attorney for Mountrail County; and
- D. The Attorney General of the State of North Dakota.

77. Defendant's flaring of gas from the Elk 16-21H Well as previously alleged in this Complaint constitutes a violation of N.D.C.C. § 38-08-06.4 from which Plaintiff is entitled to recovery of damages as permitted under N.D.C.C. § 32-40-06.

SIXTH CAUSE OF ACTION: CLASS CLAIMS FOR ROYALTIES ATTRIBUTABLE TO FLARED GAS IN VIOLATION OF N.D.C.C. § 38-08-06.4.

78. For the Sixth Cause of Action, Plaintiff repeats and realleges each and every prior allegation of this Complaint.

79. Plaintiff seeks certification of the Proposed Class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure for the purposes of seeking remedies for the Proposed Class under this Sixth Cause of Action.

80. Defendant has operated or is operating oil wells in which Flared Gas occurs.

81. Defendant owes Proposed Class for royalties attributable to Flared Gas.

82. Plaintiff seeks certification of the Proposed Class pursuant to Rule 23(b) for this Sixth Cause of Action as (a) the requirements of Rule 23(a) are satisfied; (b) a class action will fairly and efficiently provide for the adjudication of the Proposed Class's claims under this Sixth Cause of Action; and (c) Plaintiff will fairly and adequately protect the interests of the Proposed Class.

83. The adjudication of the Proposed Class's claims under this Sixth Cause of Action will be fairly and efficiently accomplished as:

- a. the members of the Proposed Class have a common interest in obtaining royalties for Flared Gas;
- b. the prosecution of separate actions by individual members of the Proposed Class would create a risk of inconsistent or varying adjudications with respect to those individual members, which would establish incompatible standards of conduct for Defendant.
- c. separate adjudication by an individual member of the Proposed Class as a practical matter would be dispositive of the interests of other members of the

Proposed Class not parties to the adjudication or substantially impair or impede their ability to protect their interests;

- d. the common questions of law or fact predominate over any questions affecting only individual members;
- e. other means of adjudicating the claims and defenses are impracticable or inefficient;
- f. the claims under this Sixth Cause of Action are not known to be subject of a class action, a government action, or other proceeding;
- g. the management of a class action would not pose unusual difficulties; and
- h. no conflict of laws issues are involved, as such issues are matters of North Dakota law or are governed by North Dakota law.

SEVENTH CAUSE OF ACTION: CLASS CLAIMS FOR DECLARATORY RELIEF AGAINST DEFENDANT FOR PAST AND FUTURE FLARED GAS.

84. For the Seventh Cause of Action, Plaintiff repeats and realleges each and every prior allegation of this Complaint.

85. Plaintiff seeks certification of the Proposed Class pursuant to Rule 23(b)(2) for the purposes of seeking declaratory relief for the Proposed Class under this Seventh Cause of Action.

86. Plaintiff believes and therefore alleges that Defendant has flared and likely will continue to flare gas from some or all of the oil wells it operates in North Dakota, resulting in further Flared Gas (“Future Flared Gas”) and damage to the Class.

87. Plaintiff seeks and is entitled to declaratory relief adjudicating that Defendant is obligated to pay the Class royalties for past Flared Gas and Future Flared Gas if Future Flared Gas is produced.

88. Plaintiff seeks certification of the Proposed Class pursuant to Rule 23(b) for this Seventh Cause of Action as (a) the requirements of Rule 23(a) are satisfied; (b) a class action will fairly and efficiently provide for the adjudication of the Proposed Class's claims for declaratory relief under this Seventh Cause of Action; and (c) Plaintiff will fairly and adequately protect the interests of the Proposed Class.

89. The adjudication of the Proposed Class's claims under this Seventh Cause of Action will be fairly and efficiently accomplished as:

- a. the members of the Proposed Class have a common interest in requiring Defendant to pay royalties for the Future Flared Gas;
- b. the prosecution of separate actions by individual members of the Proposed Class would create a risk of inconsistent or varying adjudications with respect to those individual members, which would establish incompatible standards of conduct for Defendant;
- c. separate adjudication by an individual member of the Proposed Class as a practical matter would be dispositive of the interests of other members of the Proposed Class not parties to the adjudication or substantially impair or impede their ability to protect their interests;
- d. the common questions of law or fact predominate over any questions affecting only individual members;
- e. other means of adjudicating the claims and defenses are impracticable or inefficient;
- f. the claims under this Seventh Cause of Action are not known to be subject of a class action, a government action, or other proceeding;

- g. the management of class action would not pose unusual difficulties; and
- h. no conflict of laws issues are involved, as such issues are matters of North Dakota law or are governed by North Dakota law.

**EIGHTH CAUSE OF ACTION: CLASS CLAIMS
FOR CONVERSION OF FLARED GAS.**

90. For the Eighth Cause of Action, Plaintiff repeats and realleges each and every prior allegation of this Complaint.
91. Plaintiff seeks certification of the Proposed Class pursuant to Rule 23(b)(2) for the purposes of its claim for money damages for the Proposed Class under this Eighth Cause of Action.
92. The Proposed Class is entitled to compensation for Defendant's conversion of the Proposed Class's Flared Gas.
93. Defendant has not paid and refuses to pay royalties to the Proposed Class for Flared Gas.
94. Defendant's actions towards the Proposed Class constitute a tortious detention of personal property due to the Proposed Class in defiance of the rights of the Proposed Class.
95. The Proposed Class is entitled to the highest value of the Flared Gas as well as fair compensation for the time and money Plaintiff has expended and will expend to obtain the compensation due to the Proposed Class.
96. Defendant should compensate Proposed Class for Defendant's conversion of the Flared Gas.
97. Plaintiff seeks certification of the Proposed Class pursuant to Rule 23(b) for this Eighth Cause of Action as (a) the requirements of Rule 23(a) are satisfied; (b) a class action will

fairly and efficiently provide for the adjudication of the Proposed Class's claims under this Eighth Cause of Action; and (c) Plaintiff will fairly and adequately protect the interests of the Proposed Class.

98. The adjudication of the Proposed Class's claims under this Eighth Cause of Action will be fairly and efficiently accomplished as:

- a. the members of the Proposed Class have a common interest in obtaining compensation for Defendant's conversion of the Flared Gas;
- b. the prosecution of separate actions by individual members of the Proposed Class would create a risk of inconsistent or varying adjudications with respect to those individual members, which would establish incompatible standards of conduct for Defendant;
- c. separate adjudication by an individual member of the Proposed Class as a practical matter would be dispositive of the interests of other members of the Proposed Class not parties to the adjudication or substantially impair or impede their ability to protect their interests;
- d. the common questions of law or fact predominate over any questions affecting only individual members;
- e. other means of adjudicating the claims and defenses are impracticable or inefficient;
- f. the claims under this Eighth Cause of Action are not known to be subject of a class action, a government action, or other proceeding;
- g. the management of a class action would not pose unusual difficulties; and

- h. no conflict of laws issues are involved, as such issues are matters of North Dakota law or are governed by North Dakota law.

**NINTH CAUSE OF ACTION: CLASS CLAIMS
FOR COMMON LAW WASTE OF FLARED GAS.**

- 99. For the Ninth Cause of Action, Plaintiff repeats and realleges each and every prior allegation of this Complaint.
- 100. Plaintiff seeks certification of the Proposed Class pursuant to Rule 23(b)(2) for the purposes of their claim for money damages for the Proposed Class under this Ninth Cause of Action.
- 101. The Proposed Class is entitled to compensation for Defendant's Common Law Waste of the Proposed Class's Flared Gas.
- 102. The flaring of Flared Gas constitutes an unreasonable or improper use, abuse, mismanagement, or omission of duty by Defendant touching the Proposed Class's rights in the mineral estate from which production of the Flared Gas occurs.
- 103. The laws of North Dakota require Defendant to use and manage production of gas from oil wells in North Dakota in compliance with North Dakota laws and the Industrial Commission's orders, including those set forth in the allegations of the Background of the Complaint.
- 104. Defendant's flaring of the Flared Gas constitutes Common Law Waste for which the Proposed Class is entitled to compensation, including that provided in N.D.C.C. § 32-17-22.

105. Plaintiff seeks certification of the Proposed Class pursuant to Rule 23(b) for this Ninth Cause of Action as (a) the requirements of Rule 23(a) are satisfied; (b) a class action will fairly and efficiently provide for the adjudication of the Proposed Class's claims under this Ninth Cause of Action; and (c) Plaintiff will fairly and adequately protect the interests of the Proposed Class.

106. The adjudication of the Proposed Class's claims under this Ninth Cause of Action will be fairly and efficiently accomplished as:

- a. the members of the Proposed Class have a common interest in obtaining compensation for Defendant's Common Law Waste of the Flared Gas;
- b. the prosecution of separate actions by individual members of the Proposed Class would create a risk of inconsistent or varying adjudications with respect to those individual members, which would establish incompatible standards of conduct for Defendant;
- c. separate adjudication by an individual member of the Proposed Class as a practical matter would be dispositive of the interests of other members of the Proposed Class not parties to the adjudication or substantially impair or impede their ability to protect their interests;
- d. the common questions of law or fact predominate over any questions affecting only individual members;
- e. other means of adjudicating the claims and defenses are impracticable or inefficient;
- f. the claims under this Ninth Cause of Action are not known to be subject of a class action, a government action, or other proceeding;

- g. the management of a class action would not pose unusual difficulties; and
- h. no conflict of laws issues are involved, as such issues are matters of North Dakota law or are governed by North Dakota law.

TENTH CAUSE OF ACTION: CLASS CLAIMS FOR ACTION UNDER N.D.C.C. § 32-40-06 TO ENFORCE PAYMENT OF ROYALTIES ATTRIBUTABLE TO GAS FLARED IN VIOLATION OF N.D.C.C § 38-08-06.4 AND N.D.A.C. § 43-02-03-60.2

107. For the Tenth Cause of Action, Plaintiff repeats and realleges each and every prior allegation of this Complaint.
108. The proposed class is made up of aggrieved persons under the provision of the *North Dakota Environmental Law Enforcement Act of 1975* found at N.D.C.C. § 32-40-01 et seq. This statute reaffirms a private right of action to enforce the environmental anti-flaring provisions under N.D.C.C. § 38-08-06.4.
109. By flaring in violation of N.D.C.C. § 38-08-06.4, Defendant has violated an environmental statute, rule or regulation for the protection of natural resources including minerals under the provisions of N.D.C.C. § 32-40-06.
110. Apart from the injury to the public in general, injuries to the Proposed Class include an impairment of the Proposed Class's mineral interest and results in the loss of the royalties that are to be paid to members of the Proposed Class pursuant to N.D.C.C. § 38-08-06.4. Plaintiff is an aggrieved as provided in N.D.C.C. § 32-40-03.
111. The Proposed Class is entitled under N.D.C.C § 32-40-06 to sue to enforce the provisions of N.D.C.C. § 38-08-06.4 and N.D.A.C. § 43-02-03-60.2 and to recover damages suffered from Defendant as a result of the Defendant's violation of N.D.C.C. § 38-08-06.4 and N.D.A.C. § 43-02-03-60.2.

112. Plaintiff, pursuant to N.D.C.C. § 32-40-06, gave timely notice by certified mail of Plaintiff's intent to file suit and the violation of N.D.C.C. § 38-08-06.4 as generally set forth in this Complaint to the following:

- A. Defendant;
- B. The North Dakota Industrial Commission;
- C. The State's Attorney for Mountrail County; and
- D. The Attorney General of the State of North Dakota.

113. Plaintiff seeks certification of the Proposed Class pursuant to Rule 23(b)(2) for the purposes of seeking enforcing the provisions of N.D.C.C. § 38-08-06.4 and N.D.A.C. § 43-02-03-60.2 and to recover damages by the Proposed Class suffered as a result of the Defendant's violation of N.D.C.C. § 38-08-06.4 and N.D.A.C. § 43-02-03-60.2.

114. Plaintiff seeks certification of the Proposed Class pursuant to Rule 23(b) for this Tenth Cause of Action as (a) the requirements of Rule 23(a) are satisfied; (b) a class action will fairly and efficiently provide for the adjudication of the Proposed Class's claims for declaratory relief under this Seventh Cause of Action; and (c) Plaintiff will fairly and adequately protect the interests of the Proposed Class.

115. The adjudication of the Proposed Class's claims under this Tenth Cause of Action will be fairly and efficiently accomplished as:

- a. the members of the Proposed Class have a common interest in requiring Defendant to pay royalties for the Flared Gas and Future Flared Gas;
- b. the prosecution of separate actions by individual members of the Proposed Class would create a risk of inconsistent or varying adjudications with respect to those

individual members, which would establish incompatible standards of conduct for Defendant;

- c. separate adjudication by an individual member of the Proposed Class as a practical matter would be dispositive of the interests of other members of the Proposed Class not parties to the adjudication or substantially impair or impede their ability to protect their interests;
- d. the common questions of law or fact predominate over any questions affecting only individual members;
- e. other means of adjudicating the claims and defenses are impracticable or inefficient;
- f. the claims under this Tenth Cause of Action are not known to be subject of a class action, a government action, or other proceeding;
- g. the management of class action would not pose unusual difficulties; and
- h. no conflict of laws issues are involved, as such issues are matters of North Dakota law or are governed by North Dakota law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter an order:

- A. Ordering Defendant to pay damages to Plaintiff in an amount to be proven at trial;
- B. Declaring that Defendant's production and flaring of gas and future production and flaring of gas violates North Dakota law unless Defendant pays royalties to Plaintiff for the value of such Flared Gas, or otherwise complies with N.D.C.C. § 38-08-06.4;
- C. Ordering Defendant to pay Plaintiff's reasonable attorneys' fees as allowed by law, and Plaintiff's costs and disbursements;

- D. Ordering certification of the Proposed Class pursuant to Rule 23(b) of the Federal Rules of Civil Procedure with reasonable notice to the Class;
- E. Ordering Defendant to pay damages to the Proposed Class in an amount to be proven at trial;
- F. Declaring that Defendant's production and flaring of gas and future production and flaring of gas violates North Dakota law unless Defendant pays royalties to the Proposed Class for the value of such Flared Gas, or otherwise complies with N.D.C.C. § 38-08-06.4;
- G. Ordering Defendant to pay reasonable attorneys' fees as allowed by law, as well as costs and disbursements in bringing the Proposed Class's Claims; and,
- H. For such other relief that the Court deems appropriate.

Dated this 3rd day of January, 2014.

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ATTORNEYS FOR PLAINTIFF

DEMAND FOR JURY TRIAL

Plaintiff previously and timely demanded a jury trial on all issues triable by a jury, and hereby renews said demand.

Dated this 3rd day of January, 2014.

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