No. 13-3773

In the United States Court of Appeals for the Eighth Circuit

RAMONA TWO SHIELDS and MARY LOUISE DEFENDER WILSON, individually and on behalf of others similarly situated,

Plaintiffs-Appellants,

v.

SPENCER WILKINSON, JR., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of North Dakota – Bismark, No. 4:12-cv-00160-DLH.
The Honorable **Daniel L. Hovland**, Judge Presiding.

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

Counsel for Plaintiffs-Appellants

KENNETH E. MCNEIL
SHAWN L. RAYMOND
SUSMAN GODFREY L.L.P.
1000 Louisiana, Suite 5100
Houston, Texas 77002
Telephone: (713) 651-9366

ANDRES C. HEALY
SUSMAN GODFREY L.L.P.
1201 3rd Avenue, Suite 3800
Seattle, Washington 98101
Telephone: (206) 505-3843

Of Counsel

MARIO GONZALEZ
GONZALEZ LAW OFFICE, PROF. LLC
522 7th Street, Suite 202
Rapid City, South Dakota 57701
Telephone: (605) 716-6355

JOHN M. OLSON
JOHN M. OLSON, P.C.
1011 Southport Loop
Bismarck, North Dakota 58504
Telephone: (701) 426-9393

COUNSEL PRESS · (866) 703-9373 PRINTED ON RECYCLED PAPER

SUMMARY OF THE CASE & REQUEST FOR ORAL ARGUMENT

Appellees engineered and executed a scheme to swindle hundreds of millions of dollars in oil-and-gas lease revenue from Appellants Ramona Two Shields and Mary Louise Defender Wilson and the class of Native Americans they propose to represent. Yet the District Court concluded that Appellants could not, as a matter of law, pursue their North Dakota common-law claims against Appellees simply because Appellees involved the United States in their swindle. Based on that fact alone, the District Court found that Federal Rule of Civil Procedure 19 required dismissal of Appellants' entire case.

Not only is the District Court's rationale contrary to existing Supreme Court and Eighth Circuit law, but it sets a dangerous precedent. If upheld, the District Court's ruling would allow *all* future tortfeasors to immunize themselves from *any* liability arising from *any* wrongful act in which they join the United States, including acts that cause the United States to breach fiduciary duties owed to individual Native Americans. Such a result would have the perverse effect of giving private parties an incentive to cause the United States to breach its obligations and expose itself to liability. Rule 19 and its "equity and good conscience" standard do not and cannot require such a result.

In light of the significance of the case, Appellants request oral argument of up to 30 minutes per side.

CORPORATE DISCLOSURE STATEMENT

Appellants are not corporate entities and have no corporate affiliation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

JURISDICTIONAL STATEMENT

Appellants appeal from the final order and judgment entered against them by the District Court on November 27, 2013, which disposed of all claims under Federal Rule of Civil Procedure 19. (Add. 1-14; App. 80-93.[1]) Appellants filed a timely notice of appeal on December 20, 2013. (App. 95.)

This Court has appellate jurisdiction to review this decision under 28 U.S.C. § 1291. The District Court had jurisdiction over this action under 28 U.S.C. § 1331 because federal law forms an essential part of the causes of action at issue.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred as a matter of law in finding the United States to be a required and indispensable party under Federal Rule of Civil Procedure 19 despite the fact that the United States is nothing more than a joint tortfeasor to the North Dakota common-law claims Appellants brought against Appellees.

- *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5 (1990).
- *Northport Health Servs. of Ark. v. Rutherford*, 605 F.3d 483 (8th Cir. 2010).
- *Bailey v. Bayer CropScience L.P.*, 563 F.3d 302 (8th Cir. 2009).
- Advisory Committee Notes to Federal Rule of Civil Procedure 19.

[1] "Add." refers to the Addendum to this Brief. "App." refers to Appellants' Separate Appendix, filed concurrently.

2. Whether the District Court erred as a matter of law in finding the United States to be a required party under Federal Rule of Civil Procedure 19(a)(1)(B)(i) in this case because the United States has no legally protected interest at risk of impairment or impediment in its absence.

- *Gwartz v. Jefferson Mem'l Hosp. Ass'n*, 23 F.3d 1426 (8th Cir. 1994).
- *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829 (8th Cir. 2009).
- *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968).
- *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1 (1st Cir. 1998).
- Federal Rules of Civil Procedure 19(a) and 24(b)(2).

3. Whether the District Court abused its discretion as a matter of law in this case by failing to apply all of the Federal Rule of Civil Procedure 19(b) factors and by applying the wrong legal standards in its evaluation of those factors it did consider.

- *Kern v. TXO Prod. Corp.*, 738 F.2d 968 (8th Cir. 1984).
- *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968).
- *Rochester Methodist Hosp. v. Travelers Ins.*, 728 F.2d 1006 (8th Cir. 1984).
- *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1 (1st Cir. 1998).
- Federal Rules of Civil Procedure 19(b).

STATEMENT OF THE CASE

This case concerns a billion-dollar swindle, and Appellants' one-and-only chance to hold Appellees Spencer Wilkinson Jr., Rick Woodward, Robert Zinke, Dakota-3, LLC, Dakota-3 E&P Company, LLC, Dakota-3 Energy, LLC, Zenergy, Inc., and Zenergy Properties 6 Ft. Berthold Allottee, LLC, accountable for their wrongful acts.

Appellants Ramona Two Shields and Mary Louise Defender Wilson are individual Native Americans with storied government careers. Ms. Two Shields spent 34 years working for the U.S. Navy, where she earned numerous commendations and became department head for the Navy's contracts and shipping branches. (App. 67 ¶195.) Ms. Defender Wilson worked for the Bureau of Indian Affairs ("BIA") as a land officer and for Senator Quentin Burdick as a legislative aide. (App. 69 ¶196.) Her husband was one of the 29 Navajo Code Talkers the U.S. military used during World War II to encode transmissions. (*Id.*)

Each of these women also is what is commonly referred to as an "Indian allottee," which means they are owners and heirs to property or "allotments" held in trust for their benefit by the United States. (App. 24 ¶¶2-3.) Ms. Two Shields is an owner and heir to trust Allotments 651A and M 868A, which are located on the Fort Berthold Reservation in North Dakota. (*Id.*) Ms. Defender Wilson also is an owner and heir to trust Allotment M 868A. (*Id.*)

Allottee status is both special and important. Among other things, it precludes Appellants from leasing their allotments or any interest in those allotments without the approval of the United States. This includes the leasing of any oil-and-gas rights. (App. 28 ¶20.) By statute, the United States may approve leases of allottee oil-and-gas interests only if it "determines that approving the lease or agreement is in the best interest of the Indian owners of the Indian land." 25 U.S.C. § 396, as amended by Pub. L. 105-188, 112 Stat. 620 (1998). (App. 40 ¶¶68-72.) The effectuating regulations make clear that a lease "is in the best interest of the Indian owners" only if it "maximizes their best economic interests." 25 C.F.R. § 212.1(a). (*Id.*) Congress required this federal oversight specifically "to prevent exploitation of and prejudice to the Indians' interest, or injustice to them," at the hands of greedy oil-and-gas speculators like Appellees.[2] (App. 260.)

In this case, Appellants' allotments are located in a sweet spot in the Bakken Oil Shale Formation—the biggest domestic oil find in the last century. (App. 28 ¶20, 37 ¶56.) Notably, the United States has been aware of this potential for years; however, only recently have advances in fracking technology made drilling more feasible. (App. 29 ¶27, 37 ¶56, 39 ¶66.) Appellees also were keenly aware of the

[2] "The legislative history of the 1909 Act supports the view that Congress was much interested in having Interior review the leasing of the Indian lands so as to prevent exploitation of and prejudice to the Indians' interest, or injustice to them." *Pawnee v. United States*, 830 F.2d 187, 189 n.2 (Fed. Cir. 1987) (citing H.R. Rep No. 1225, 60th Cong., 1st Sess. at 1-2 (1908).

opportunity presented by the Bakken Shale and hatched a scheme to make themselves fabulously wealthy at the expense of Appellants, the class they seek to represent, and the entire Fort Berthold Reservation community. (App. 31 ¶¶31-39.)

The scheme was relatively straightforward. Appellees Spencer Wilkinson and Robert Woodward would secure funding from a still-unknown third party. (*Id.*) Funding in hand, they would work with the remaining Appellees to obtain oil-and-gas leases from individual Indian allottees at bargain prices, which they could later flip to oil-and-gas companies for a huge profit. (App. 32 ¶37.)

Only one thing stood in their way—the BIA and its statutory and regulatory obligation to scrutinize each and every oil-and-gas lease involving the interests of an individual allottee and approve only those it determined to be "in the best interest of the Indian mineral owner." 25 U.S.C. § 396. (App. 40 ¶¶70-71.) Appellees had a solution for that as well. They would get their friend, Marcus Wells, elected tribal chairman and use him—along with "cash favors" from the tribal casino Wilkinson managed and other threats and pressures—to make sure the BIA approved every lease they put in front of it regardless of whether the terms maximized the economic interests of the affected allottees. (App. 32¶ 37.)

Between 2006 and 2010, Appellees obtained oil-and-gas leases to approximately 42,000 acres of allottee land for less than $22 million in upfront payments. (App. 245.) They typically gave upfront lease "bonuses" of $110 to

$200 despite the fact that other companies were offering $1,000. (App. 30 ¶30, 51 ¶124, 53 ¶133, 57 ¶150, 62 ¶170.) Moreover, none of the leases Appellees got the BIA to approve included a royalty rate higher than 18% despite the fact that other companies were giving higher percentages. (*Id.*) That difference alone shorted allottees tens of millions of dollars. (*Id.*)

The BIA did not deny a single lease put in front of it by Appellees. (App. 33 ¶38.) It never once attempted to negotiate better terms for Appellants or the class they seek to represent despite knowing that other companies were offering higher bonuses and better royalties—a plain violation of its obligation to "maximize[] their best economic interests." (App. 33 ¶38, 63 ¶172.) Rather, as the BIA later admitted, it bowed to the pressure being exerted by Appellees and their agents:

> "This was the driving force behind it: We had companies in the office. We had councilmen and mineral owners in the office—hundreds each day—and everyone saying, 'We want our money now. We want our leases now.' I think if we had said, 'Let's wait a while,' people would have strung us up."

(App. 51 ¶127.)

By 2010, Appellees had obtained BIA-approved oil-and-gas leases to roughly 85,000 acres of allottee and tribal land on the Fort Berthold Reservation without a single denial by the BIA. (App. 30 ¶29.) In November 2010, they perfected their swindle. (App. 62 ¶¶169-70.) They packed all of their leases into

one of their entities, Dakota-3 E&P, and sold it to Williams Companies for $925 million—raking in a profit of nearly $900 million. (*Id.*)

This sale raised an obvious red flag, however. Appellants wondered how Appellees had been able to get so many leases approved on the terms they did when, as their sale to Williams Companies demonstrated, those leases were so much more valuable. In November 2012, Appellants filed a class action lawsuit against Appellees in the United States District Court for the District of North Dakota. They alleged North Dakota common-law claims of aiding and abetting, tortious inducement, and conspiracy to aid and abet a breach of fiduciary duty imposed by federal law. (App. 73 ¶¶205-20, 231-37.) As a remedy, they requested money damages and related relief, including disgorgement, imposition of a constructive trust, and/or an accounting of Appellees' ill-gotten gains. (App. 74 ¶¶221-30, 238-39.)

Separately, Appellants filed suit against the United States for breach of its fiduciary duties in the only forum possible: the United States Court of Federal Claims. (Court of Federal Claims Complaint, District Court Docket #64-2.) 28 U.S.C. § 1491(a)(1) (requiring any claim against the United States founded upon "any Act of Congress or any regulation of an executive department" to be brought in the United States Court of Federal Claims). That case remains pending before the Honorable Judge Lawrence J. Block.

On February 19, 2013, Appellees filed motions to dismiss the District Court action. (District Court Docket #31-#34, #37-#39, #41, #43, #57-#58.) They argued in part that the District Court should dismiss Appellants' claims under Federal Rule of Civil Procedure 19 because Appellants did not (and could not) join Appellees' joint tortfeasor, the United States, as a defendant in the District Court action. In their Response, Appellants pointed out that (1) black-letter law establishes that joint tortfeasors need not be joined in an action, and (2) regardless, the United States had no protected interest in the case and could protect any interest it did have—protected or otherwise—through simple coordination of the two pending actions.

Long after the close of briefing (and only after Appellees sent an *ex parte* letter requesting its participation), the United States filed a motion for leave to file an *amicus* brief out of time. (District Court Docket #78.) In its brief, the United States argued that Rule 19 required dismissal. Appellants asked the United States if it would be willing to bring Appellees into the Court of Federal Claims action under Rule 14(a) of the Rules of the Court of Federal Claims, which would have allowed the parties to resolve their common issues in a single forum. (App. 179 lns. 17-25.) The United States refused. (*Id.*) It likewise refused to intervene or otherwise participate in the District Court action in any capacity. (*Id.*)

The District Court held oral arguments on November 15, 2013. (Add. 1; App. 80.) On November 26, 2013, the District Court issued its Order, dismissing Appellants' suit against Appellees under Rule 19. (*Id.*) The following day the Clerk entered judgment in Appellees' favor. (Add. 15; App. 94.) As of the filing of this brief, Appellants' action against the United States remains pending.

SUMMARY OF THE ARGUMENT

The District Court's conclusion that the United States is a required and indispensable party under Rule 19 puts Appellants in a terrible Catch-22:

- Federal procedural law prohibits Native Americans from suing the United States in federal district court for damages arising out of a breach of a statutory fiduciary duty. Pursuant to 28 U.S.C. § 1491(a)(1), Native Americans such as Appellants and the class they propose to represent can bring such a claim only in the Court of Federal Claims.
- Federal procedural law also prohibits Native Americans from suing third parties, like Appellees, in the Court of Federal Claims—even when, as in this case, these third parties made a windfall from improperly causing the United States to breach its fiduciary duties. 28 U.S.C. § 1491(a)(1).

Procedural peculiarity should not be converted to substantive gutting of recognized rights. The result reached by the District Court is legally and equitably unnecessary and defies both good public policy and longstanding principles of common-law joint tortfeasor liability:

- A common-law cause of action for aiding and abetting has been recognized for centuries and also is recognized in North Dakota. *Kavadas v. Lorenzen*, 448 N.W.2d 219, 221 (N.D. 1989) (holding that "two or more tortfeasors

who act in concert in committing a tortious act or aid or encourage the act" are jointly and severally liable to the injured plaintiff).

- Also long-recognized is that "it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990).
- Appellants' North Dakota common-law aiding-and-abetting lawsuit against Appellees is no different from what would routinely proceed before any court. *Revoir v. Kan. Super Motels of N.D., Inc.*, 224 N.W.2d 549, 551 (N.D. 1974) (finding joinder unnecessary because joint and several liability applied and thus "the plaintiff can sue one or more as he chooses" (citation omitted)); *United States v. Kenealy*, 646 F.2d 699, 705-06 (1st Cir. 1981).
- Courts routinely permit cases to proceed in which a trust beneficiary sues third parties that improperly influenced a trust officer to breach it obligations to that beneficiary. *Kenealy*, 646 F.2d at 705-06 (Those "who knowingly join a fiduciary in (a breach of fiduciary duty) likewise become jointly and severally liable with him for such profits." (quoting *Jackson v. Smith*, 254 U.S. 586, 589 (1921)).

No justification exists for not applying these traditional joint tortfeasor rules in this case. Furthermore, the District Court did not properly analyze the factors under Rule 19(a) and Rule 19(b).

- The District Court did not require either Appellees or the United States to demonstrate that the United States has a legally protectable interest at risk in this litigation in any practical sense, as required by Rule 19(a).
- The District Court relied instead on the fact that the United States played a role in Appellees' independent torts and on the theoretical possibility of inconsistent rulings to find the United States to be a required party. Yet neither of these amount to legally protectable interests.
- Otherwise, any party committing an underlying breach would be an indispensable party in any aiding and abetting case brought against third parties—which plainly is not the law.

The United States is not named in this lawsuit and will in no way be harmed if Appellants' case proceeds against Appellees. It cannot be ordered to pay any damages alleged in this action and will not be bound by any res judicata or collateral estoppel principles.

Even if the United States had an interest in this case, any possible risk of impairment could be solved through coordination:

- The procedural rules of both the Court of Federal Claims and the District Court allow for coordinated discovery in the two forums.
- The Court of Federal Claims has a track record of coordination, including going to the scene of the dispute to try a case. *In re W. Elec. Co., Inc. Semiconductor Patent Litig.*, 415 F. Supp. 378, 380 (J.P.M.L. 1976); *Elk v. United States*, 87 Fed. Cl. 70, 72 (Fed. Cl. 2009) (Allegra, J.). In this case, the Court of Federal Claims could try Appellants' case against the United States in North Dakota before or with the District Court.

The District Court's failure to conduct a proper analysis under Rule 19 creates a gross inequity by denying Appellants their day in court against Appellees. The public policy consequences are also unnecessarily severe:

- The result gives third parties carte blanche to improperly influence government officials in the exercise of their fiduciary duties to Native Americans—in order to make illegal financial windfalls—without being subject to any legal claim brought by the victims.
- The result below also requires Native Americans to sue one and only one party: the United States. Either the American taxpayer pays the bill, or the victim is left without a remedy, while the private parties that made the financial windfall face no consequences at all.

Native Americans—particularly those affiliated with the tribes who hold interests in the Fort Berthold Reservation—have been exploited for generations by private parties and the United States. (App. 34 ¶¶41-52.) Federal courts should not go so far out of their way to reinforce that pattern in defiance of long-standing common law principles.

The District Court's decision is not good law and should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

The Eighth Circuit reviews "de novo any conclusions of law informing the district court's Rule 19(a) determination," including whether a cognizable interest exists. *Gwartz v. Jefferson Mem'l Hosp. Ass'n*, 23 F.3d 1426, 1428 (8th Cir. 1994).

It reviews "the district court's dismissal under Rule 19(b) for an abuse of discretion." *United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249, 1251 (8th Cir. 1998). Such an abuse "can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984). Moreover, "[a] district court by

definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

II. THE TRADITIONAL JOINT TORTFEASOR RULE PRECLUDES THE UNITED STATES FROM BEING A REQUIRED PARTY HERE.

As a threshold matter, this Court does not need to look any further than Appellants' claims against Appellees—North Dakota common-law claims for aiding and abetting, tortious inducement, and conspiracy to aid and abet or tortiously induce (App. 73 ¶¶205-20, 231-37)—to conclude as a matter of black-letter law that Rule 19 *does not* require joinder of the United States in this case. None of the arguments Appellees and the United States made to the District Court refute the settled understanding that that Rule 19 did not alter the long-standing principle that "it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990).

A. Because the United States Is Alleged to Be a Joint Tortfeasor to Appellants' North Dakota Common-Law Claims Against Appellees, Rule 19 Does Not Apply.

The Supreme Court, this Court, and the very Advisory Committee that drafted Rule 19 have all explained that "Rule 19 did not change the long-standing rule 'that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.'" *Northport Health Servs. of Ark., LLC v. Rutherford*, 605 F.3d 483, 491 (8th Cir. 2010) (quoting *Temple*, 498 U.S. at 7 ("It has long been the rule that

it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit. Nothing in the 1966 revision of Rule 19 changed that principle.")). As a result, it is understood that "tortfeasors with joint and several liability are *merely permissive parties*." *Bailey v. Bayer CropScience L.P.*, 563 F.3d 302, 308 (8th Cir. 2009) (emphasis added); *accord, e.g.*, *Temple*, 498 U.S. at 7 (quoting the Advisory Committee Notes to Rule 19(a)). "Joinder of these tortfeasors continues to be regulated by Rule 20," which *permits* a party to join an action—not Rule 19, which *requires* it. Advisory Committee Notes to Rule 19; *Temple*, 498 U.S. at 7.[3]

This long-standing principle controls regardless of how Rule 19 might apply if the absent party was not a joint tortfeasor. After all, "the long-standing rule" would cease to exist if it depended on the application of Rule 19. *Northport Health*, 605 F.3d at 491; *see* Advisory Committee Notes to Rule 19 (explaining that Rule 20 governs joint tortfeasor cases). As other courts have noted:

> When a plaintiff is harmed by the acts of several persons, all may be essential sources of evidence in a suit against any. But if this possibility automatically required that all be joined, the rule that joint tortfeasors are not by virtue of their jointness indispensable parties . . . would be overthrown.

[3] As explained *supra* at pages 8-9, Appellants have no objection to allowing the United States to join this action. However, the United States has repeatedly declined any invitation to participate in this case. (App. 179 lns. 17-25.)

Salton, Inc. v. Philips Domestic Appliances & Pers. Care B.V., 391 F.3d 871, 880 (7th Cir. 2004) (reversing the district court's dismissal under Rule 19 because "Philips's suit against Salton is thus a genuine joint tortfeasor case and Philips was not required to join another alleged tortfeasor"); *see Lustgraaf v. Behrens*, 619 F.3d 867, 885 (8th Cir. 2010) (rejecting the argument that "Michelle Behrens, as a trustee . . . must be joined because . . . it is based on the flawed premise that joint tortfeasors are necessary parties under Rule 19(b)").

Recent Supreme Court and Eighth Circuit case law also demonstrate that Rule 19 does not apply in a case like this one. In *Temple v. Synthes Corp., Ltd.*, for example, the Supreme Court found it so clear that the district court and the Fifth Circuit had erred by applying Rule 19 to a joint tortfeasor case that it reversed in a unanimous per curiam opinion, explaining:

> Here, no inquiry under Rule 19(b) is necessary, because the threshold requirements of Rule 19(a) have not been satisfied. As potential joint tortfeasors with Synthes, Dr. LaRocca and the hospital were merely permissive parties.

498 U.S. at 6-7. Likewise, in *Newman-Green, Inc. v. Alfonzo-Larrain*, the Supreme Court dispensed with the defendants' Rule 19 argument by stating simply: "given that all of the guarantors (including Bettison) are jointly and severally liable, it cannot be argued that Bettison was indispensable to the suit." 490 U.S. 826, 838 (1989).

The Eight Circuit has followed the Supreme Court's lead. In *Bailey v. Bayer CropScience L.P.*, it saw no reason to conduct any meaningful Rule 19 analysis. 563 F.3d at 308. Noting that the absent parties were alleged to be joint tortfeasors, the Court explained that "none of these [Rule 19] factors mandate joinder" because "[i]t has long been the rule that . . . tortfeasors with joint and several liability are merely permissive parties." *Id.* (internal quotation mark omitted). Similarly, in *Northport Health v. Rutherford*, the Court held simply "that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit" to reject the defendant's Rule 19 argument. 605 F.3d at 491. It declined to do any Rule 19 analysis. *Id.*; *e.g.*, *Lustgraaf*, 619 F.3d at 885 (rejecting the defendants' argument because "it is based on the flawed premise that joint tortfeasors are necessary parties under Rule 19(b)").

This case is no different. Under longstanding North Dakota law, "two or more tortfeasors who act in concert in committing a tortious act or aid or encourage the act" are jointly and severally liable to the injured plaintiff. *Kavadas v. Lorenzen*, 448 N.W.2d 219, 221 (N.D. 1989). "[T]he plaintiff can sue one or more as he chooses." *Revoir v. Kan. Super Motels of N.D., Inc.*, 224 N.W.2d 549, 551 (N.D. 1974) (citation omitted) (finding joinder unnecessary because joint and several liability applied).

Federal law is the same. Those "who knowingly join a fiduciary in (a breach of fiduciary duty) likewise become jointly and severally liable with him for such profits." *United States v. Kenealy*, 646 F.2d 699, 706 (1st Cir. 1981) (parentheses in original) (quoting *Jackson v. Smith*, 254 U.S. 586, 589 (1921)) (finding a federal common law right of action against those accused of knowingly participating and/or conspiring to participate in a federal official's fiduciary breach).

As a result, under either standard, Appellees and the United States are simply joint tortfeasors with joint and several liability for any torts they committed. Rule 19 therefore does not apply, and the United States cannot be a required or indispensable party. *Temple*, 498 U.S. at 7; *e.g.*, *Bailey*, 563 F.3d at 308.

B. No Reason Exists Not to Apply the Traditional Joint Tortfeasor Rule in This Case.

In the District Court, Appellees and the United States made two arguments to try to distinguish the traditional joint tortfeasor rule. Neither has merit.

First, relying on a single Eleventh Circuit case, *Laker Airways, Inc. v. British Airways, PLC*, Appellees argued that courts must apply the full Rule 19 framework even in the joint tortfeasor context. 182 F.3d 843, 847-48 (11th Cir. 1999). This runs directly counter to this Court's own established precedent in *Bailey*, *Northport Health*, and *Lustgraaf*, as explained *supra* pages 15-20. For that reason alone, *Laker Airways* should be disregarded.

Laker Airways also is entirely unpersuasive on its own merits. In it, the Eleventh Circuit notes the Supreme Court's decision in *Temple*, but then based its decision to apply Rule 19 almost entirely on *Haas v. Jefferson National Bank*, 442 F.2d 394, 398 (5th Cir. 1971)—a Fifth Circuit case decided nearly two decades *prior* to *Temple*. *Laker Airways*, 182 F.3d at 847-48 (also citing *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 105-06 (C.D. Cal. 1971)). That reliance is significant because, in *Temple*, the Supreme Court reversed the Fifth Circuit for doing exactly what it did in *Haas*: applying Rule 19 to joint tortfeasors. *Compare Laker Airways*, 182 F.3d at 847, *with Temple*, 498 U.S. at 7. As the Supreme Court explained:

> Temple contends that it was error to label joint tortfeasors as indispensable parties under Rule 19(b) and to dismiss the lawsuit with prejudice for failure to join those parties. We agree. . . . It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.

498 U.S. at 7.

Thus, even the Fifth Circuit now relies strictly on *Temple* and the traditional joint tortfeasor rule in cases like this one:

> [T]he district court abused its discretion in deciding to dismiss under rule 12(b)(7), because TCC is not a necessary party *as a matter of law*, based on the *unqualified, broad rule established by* Temple, *that joint tortfeasors are not necessary parties*.

August v. Boyd Gaming Corp., 135 F. App'x 731, 734 (5th Cir. 2005) (unpublished decision) (emphasis added); *cf. United States v. Meraz-Enriquez*, 442 F.3d 331, 333 (5th Cir. 2006) (explaining that unpublished Fifth Circuit cases may be cited as persuasive authority regarding Fifth Circuit law). As in the Eighth Circuit, the analysis now begins *and ends* with the "unqualified, broad rule" that plaintiffs do not need to join all joint tortfeasors in a single lawsuit.

Second, as amicus, the United States argued that Appellants' joint tortfeasor argument was "belied by the fact that [Appellants] have never attempted to advance any claims against the United States under the Federal Tort Claims Act" ("FTCA"). The argument is a straw man.

The FTCA does not waive the United States' sovereign immunity for all torts—only some torts. 28 U.S.C. § 1346(b). And its waiver specifically does *not* include the torts at issue here, which stem from an "alleged . . . failure to follow *federal* law." *Hornbeck Offshore Transp., LLC v. United States*, 569 F.3d 506, 509 (D.C. Cir. 2009) (citing cases).

But the fact that the breach of fiduciary duty alleged in this case may not be actionable under the FTCA has no bearing on whether breach of fiduciary duty constitutes a tort under North Dakota common law (or any other law). One has nothing to do with the other. And, without question, both North Dakota and federal

common law treat fiduciary breach as a tort. In *L.C. v. R.P.*, for example, the North Dakota Supreme Court applied the RESTATEMENT (SECOND) OF TORTS § 897 to analyze a fiduciary breach claim. 563 N.W.2d 799, 802 (N.D. 1997); RESTATEMENT (SECOND) OF TORTS § 897 & cmt. b (1979) ("A fiduciary who commits a breach of his duty as a fiduciary is guilty of *tortious conduct* to the person for whom he should act." (emphasis added)). And this Court has previously described a claim by allottees against federal officials for breach of fiduciary duty as "in effect a *tort claim* against the government." *Wardle v. Nw. Inv. Co.*, 830 F.2d 118, 123 (8th Cir. 1987) (emphasis added)); *see also Kenealy*, 646 F.2d at 706 (finding that those who aid and abet a government official's fiduciary breach to be jointly and severally liable with him).

Accordingly, because joint tortfeasors are by definition "merely permissive parties" that need not be joined, the District Court's analysis should have begun *and ended* with a single fact—that the United States is nothing more than a joint tortfeasor to the claims Appellants allege against Appellees. *E.g.*, *Bailey*, 563 F.3d at 308; *see Temple*, 498 U.S. at 7. On this ground alone, the District Court's order and judgment must be reversed.

III. EVEN IGNORING THE JOINT TORTFEASOR RULE, THE UNITED STATES IS NOT A REQUIRED PARTY HERE.

While the "long-standing" joint tortfeasor rule provides the clearest grounds for reversal, it is not the only basis. The District Court also erred as a matter of law in finding the United States a required party under Rule 19(a)(1)(B)(i) because the United States is not "so situated" here that it has a "legally protectable" interest at risk of practical impairment in its absence.

Moreover, no alternative grounds exist to justify the court's Rule 19(a) "required party" conclusion. The District Court can award complete relief among the existing parties, and none are at risk of multiple or inconsistent obligations.

A. The Rule 19(a) Framework Requires Specific Showings That Neither Appellants Nor the United States Demonstrated.

Under Rule 19(a), a party is required only if it makes one of three showings:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

If none of these showing are made, "the inquiry is at an end, and the motion to dismiss for failure to join the party in question must be denied." *Rochester Methodist Hosp. v. Travelers Ins. Co.*, 728 F.2d 1006, 1016 (8th Cir. 1984). Here, neither Appellees nor the United States made any of these required showings.

B. The United States Has No Legally Protectable Interest at Risk of Practical Impairment in its Absence in This Case.

The District Court relied on only one of the three Rule 19(a) bases to find the United States a required party: Rule 19(a)(1)(B)(i)'s concern that the absent party is "so situated" that it has a cognizable interest in the action at risk of practical impairment if not joined. (Add. 7-8; App. 86-87.) It found the United States had an interest (1) "in defending the BIA and the Secretary of the Interior's leasing decisions," (2) "in the correct application and interpretation of oil-and-gas leasing statutes and regulations," and (3) "in ensuring that Native American lessees are not subjected to competing obligations." (Add. 6; App. 85.) It further found Appellants' suit threatened each. (Add. 6-8; App. 85-87.) This was error.

The District Court wholly failed to account for the fact that Rule 19(a)(1)(B) does not protect just any claimed interest. Like Rule 24(a)(2), it requires joinder only when a "cognizable" interest is at risk. *See United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 839 (8th Cir. 2009) (explaining that "[a] court must carefully analyze" the asserted interested to see if the absent party "is so situated

that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest"); *Dakota ex rel Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 786 (8th Cir. 2003) (explaining that the "interest" requirement is the same under both Rule 19 and Rule 24); Advisory Committee Notes to Rule 24 (same). And, as this Court has made clear, "[a]n interest is cognizable . . . only where it is 'direct, substantial, *and legally protectable*.'" *Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 485 F.3d 1006, 1008 (8th Cir. 2007) (emphasis added) (citation omitted).

As a result, economic interests—even significant ones—do not qualify for protection. *St. Louis Sewer*, 569 F.3d at 839 (noting that "an economic interest in low electricity prices does not qualify as a significantly protectable interest"). The litigation must put at risk the absent party's "property or other legal rights." *Id.* Likewise, "speculative" interests do not qualify for protection. *Id.* If the asserted detriment to the asserted interest is "contingent upon the occurrence of a sequence of events . . . made after any judgment or consent decree entered in this case," then the interest cannot justify mandatory joinder. *Id.* at 839-40.

Because these basic principles demonstrate that none of the three interests identified by the District Court are "legally protectable," none *could* trigger Rule 19(a)(1)(B)(i), and the District Court's order must be reversed.

1. The United States Has No Protected Interest in Defending the BIA and the Secretary of the Interior's Leasing Decisions.

First, it is settled law that "[t]he mere fact . . . that Party A, in a suit against Party B, intends to introduce evidence that will indicate that a non-party, C, behaved improperly does not, by itself, make C a necessary party." *Pujol v. Shearson Am. Exp., Inc.*, 877 F.2d 132, 136 (1st Cir. 1989); *e.g.*, *Edmondson v. State of Neb. ex rel. Meyer*, 383 F.2d 123, 127 (8th Cir. 1967) (finding absent party had no protected interest in the case simply because of "plaintiffs' allegation of his fraud and collusion with" the present party).

Contrary to the District Court's findings (Add. 6-8; App. 85-87), this is true even though different courts may reach different decisions about the same conduct. *See Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir. 1998). The "risk that a defendant who has successfully defended against a party may be found liable to another party in a subsequent action arising from the same incident—*i.e.*, a risk of inconsistent adjudications or results—does not necessitate joinder of all of the parties into one action pursuant to Fed. R. Civ. P. 19(a)." *Id.*

The fact that a government entity is involved does not change this outcome. *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962, 976 (9th Cir. 2008). As the Ninth Circuit held in *Cachil Dehe*, as with any other party, Rule 19

simply does not protect the government from the possibility that different courts might arrive at a "different interpretation" regarding its legal obligations. *Id.*

Not surprisingly then, this Court, along with others, has uniformly rejected the idea that a party must be joined simply because its conduct is at issue. *See Pujol*, 877 F.2d at 136 ("It is therefore not surprising that cases interpreting Rule 19 consistently hold that such 'slandered outsiders' need not be joined.").

- For example, this Court held in *Edmondson*, 383 F.2d at 127:

> Edmondson asserts that his interest in the outcome is provided by plaintiffs' allegation of his fraud and collusion with Rhodes. . . . [But t]he mere fact that proof of Edmondson's actions in the Kansas court amounted to fraud cannot serve as a basis for mandatory intervention without a showing that a legal detriment flows from this finding. The mere fact that Edmondson's reputation is thereby injured is not enough.

- The First Circuit held in *Pujol*, 877 F.2d at 136 (last alteration added):

> Bonelli told the district court that she "certainly intends to introduce evidence of wrongdoing at the Subsidiary which triggered all the wrongdoing and all the aggressive acts of [Shearson] . . . which caused damages" to her. . . . The mere fact, however, that Party A, in a suit against Party B, intends to introduce evidence that will indicate that a non-party, C, behaved improperly does not, by itself, make C a necessary party.

- The Seventh Circuit held in *Salton*, 391 F.3d at 880:

> [T]o prove misappropriation by Salton, Philips will have to show that E & E broke its contract with Philips by revealing Philips's trade secrets to Salton without authorization. But that is true in any case of tortious interference with contract. Just as in the closely

> related case of joint tortfeasors, there is no rule that you cannot sue the interferer without also suing the party to your contract whom the defendant inveigled into breaking the contract.

- And the Court of Claims held in *Brown v. United States*, 42 Fed. Cl. 538, 564 (Fed. Cl. 1998), *aff'd*, 195 F.3d 1334 (Fed. Cir. 1999):

> [A] party is not 'necessary' for the sole reason that the plaintiff needs to obtain evidence from it . . . [or because,] as the government maintains, it would be forced to defend the actions of another entity without that entity's presence at trial.

The District Court cited nothing to distinguish the settled principle these cases reflect. (Add. 6-8; App. 85-87.) Nor have Appellees or the United States. In each of the cases they cited to the District Court to support their argument, the absent party's conduct was at issue *and* it had a cognizable interest at risk—the "plus" that triggered Rule 19(a). *E.g.*, *Nichols v. Ryvsay*, 809 F.2d 1317, 1333 (8th Cir. 1987); *Paiute-Shoshone Indians v. City of Los Angeles*, 637 F.3d 993, 997 (9th Cir. 2001); *see E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070 (9th Cir. 2010);

In *Nichols v. Ryvsay*, for example, this Court did not find the United States indispensable to a suit against private parties seeking the return of specific parcels of land simply because the "suit, on the merits, would depend entirely on whether the United States acted legally or illegally." 809 F.2d at 1333 (discussing only the Rule 19(b) factors). It found it to be indispensable because, "if appellants prevailed in this suit, the United States would be reinstated as trustee over the land, with the

concomitant resumption of fiduciary responsibility." *Id.*

In other words, not only were the actions of the United States at issue, but the suit *also* threatened to require the United States to take title to property. *Id.* As the Court hammered home in its conclusion, this interest drove its Rule 19 decision: "it seems absurd to argue, as the plaintiff does, for an order declaring that the United States still holds the allotment in trust for [appellants] and ordering the federal defendants to ensure the necessary records reflect such title, . . . and then assert that the United States is not indispensable." *Id.* (alterations in original) (internal quotation marks omitted).

Similarly, in *Paiute-Shoshone Indians v. City of Los Angeles*, the Ninth Circuit paid no attention in its Rule 19(a) inquiry to the fact that "step one" of the plaintiff's theory was that the United States had violated statutory requirements "when it exchanged the Bishop Tribal Land." 637 F.3d at 997. The court relied entirely on the "crucial fourth step":

> [That *e*]*ven if a finder of fact were to decide that the United States violated the Act and that those violations render the land exchange null and void*, the title to the Bishop Tribal Land would revert to the United States, not to Plaintiff. To achieve the relief that it seeks, Plaintiff would require an additional order, apart from an order ejecting the City, requiring the United States either to cede title to Plaintiff or to hold the land in trust for Plaintiff's benefit. . . . *And, before a court could bind the United States by such an order, the United States must be a party*.

Id. at 998 (emphasis added). In short, just like this Court's decision in *Nichols*, the Ninth Circuit's determination did not turn on the fact that the United States' conduct was at issue, but on the fact that the plaintiff could not obtain the relief it requested absent joinder of the United States—the "plus" that triggered Rule 19(a).

Here, however, no "plus" exists. Appellants' suit asks nothing of the United States. (App. 73 ¶¶205-39.) Appellants seek strictly *money damages* from Appellees, specifically those damages caused by Appellees' independent torts. (App. 74 ¶¶221-30, 238-39.) And as both this Court and the Advisory Committee Notes to Rule 19 explain, "the award of money damages in lieu of specific relief" can be used to avoid joinder issues that might otherwise exists were a party to seek specific relief. *Sandobal v. Armour & Co.*, 429 F.2d 249, 257 (8th Cir. 1970) ("The plaintiff seeks only monetary damages from the Company for his alleged wrongful discharge, and of course this relief can be granted without the presence of the Union."); *see Rochester*, 728 F.2d at 1012 (explaining in the sovereign immunity context that a suit "that seeks injunctive or other specific relief is much more likely to be deemed one against the United States than one that seeks damages"). Thus, regardless of whether the United States might be a required party had Appellants sought different relief, their narrow pleading allows them to "sidestep[] the need to join the United States as a party" in this case. *Idaho ex rel. Evans v. States of*

Oregon & Washington, 444 U.S. 380, 392 (1980) (looking to the specific relief requested to determine that the plaintiff had "sidestepped the need to join the United States").

The nature of Appellants' claim likewise distinguishes Appellees' reliance on the Ninth Circuit's decision in *E.E.O.C. v. Peabody W. Coal Co.* There, the Ninth Circuit relied heavily on the fact that the defendant had done nothing more than comply with a government-mandated contract term. *Cf.* 610 F.3d at 1080 ("The central problem is that Peabody is caught in the middle of a dispute not of its own making."). Here, that is not the case. (App. 31 ¶¶31-39.) Appellants are suing Appellees for the independent torts they committed, namely *causing* the United States to breach its fiduciary obligations by, among other things, "[o]rchestrating political influence to select weak BIA superintendents with little knowledge of oil and gas leasing" and "[u]sing direct persuasion and influence . . . to pressure the BIA to approve the cheap individual allottee leases." (App. 32 ¶37.)

Moreover, unlike in *Peabody*, Appellants do not seek *an injunction* barring Appellees from complying with their leases; nor do they ask the court to "set-aside" those leases. *Cf.* 610 F.3d at 1082. Appellants seek only money damages. And the Supreme Court's decision in *Poafpybitty v. Skelly Oil Co.* precludes any attempt to confuse the two forms of relief. 390 U.S. 365, 367 (1968). There, like

here, Native American allottees filed suit against 25 U.S.C. § 396 lessors for money damages *without joining the United States*. *Id.* And there, like here, the allottees' suit was dismissed for that purported failure. *Id.* at 367-68. The Supreme Court reversed, explaining in part:

> [T]here is *no justification* for concluding that the severe sanction of cancellation of the lease is the only relief for all breaches of the lease terms or for any failure to pay royalties. Both the lessor and the lessee may wish to resolve their disagreement *by the payment of damages and not by the cancellation of a basically satisfactory lease*.

Id. at 374 (emphasis added).

In short, the precise relief requested matters. *Idaho*, 444 U.S. at 392 (looking to the specific relief requested); *Sandobal*, 429 F.2d at 257 (same). And here, Appellants do not seek any relief that requires joinder of the United States.

Because a non-party does not have a protected interest *solely* in defending its conduct, the first interest relied upon by the District Court is not legally cognizable and fails to justify its Rule 19(a) determination.

2. The United States Has No Protected Interest in the Correct Application and Interpretation of Statutes and Regulations.

Second, it is settled law that an absent party does not have a protected interest "in the correct application and interpretation of . . . statutes and regulations." (Add. 6; App. 85.) *E.g.*, *Janney Montgomery Scott, Inc. v. Shepard*

Niles, Inc., 11 F.3d 399, 407 (3d Cir. 1993) ("To the extent it involves the doctrine of stare decisis, we are not inclined to hold that any potential effect the doctrine may have on an absent party's rights makes the absent party's joinder compulsory under Rule 19(a) whenever 'feasible.'"); *Delgado*, 139 F.3d at 3 (no protected interest in a court's adjudication of a party's legal rights or responsibilities).

The reason is simple. Every potential party has some degree of interest in the application and interpretation of the law. *See North Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 469 (9th Cir. 1986) ("The 'subject matter of this dispute concerns NPS procedures regarding mining plan approval. Naturally, all miners are 'interested' in how stringent the requirements will be. But miners with pending plans have no legal entitlement to any given set of procedures."). But this interest is not "legally protectable." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) ("Generally, there is no legally protected interest in particular agency procedures."); *see Poafpybitty*, 390 U.S. at 367 (holding that allottees could sue private § 396 lessors under state law despite the fact that the alleged breach implicated the government's trust responsibilities).

Otherwise, Rule 19 would require joinder of the United States and any other party subject to a particular statutory or regulatory scheme any time litigation involves that scheme. "Such a holding would greatly expand the class of

'necessary' or compulsory parties Rule 19(a) creates." *Janney*, 11 F.3d at 407. That is not the law. "[A]n absent party has no legally protected interest at stake in a suit merely to enforce compliance with administrative procedures." *Cachil Dehe Band*, 547 F.3d at 976; *Makah*, 910 F.2d at 558.

This analysis does not change simply because the United States is the absent party here. *See Cachil Dehe Band*, 547 F.3d at 976. Rule 24 makes this clear. It specifically addresses the ability of a federal government officer or agency to intervene in a matter involving the application or interpretation of a statute or regulation. Fed. R. Civ. P. 24(b)(2). It does so, however, not under the *mandatory* provisions of Rule 24(a) but under the *permissive* provisions of Rule 24(b):

> **(b) Permissive Intervention.**
>
> * * *
>
> **(2) By a Government Officer or Agency.** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:
>
> **(A)** a statute or executive order administered by the officer or agency; or
>
> **(B)** any regulation, order, requirement, or agreement issued or made under the statute or executive order.

Fed. R. Civ. P. 24(b)(2).

This treatment is critical. As explained *supra* at pages 24-25, the "interest" requirements of Rule 19(a)(2)(i) and Rule 24(a)(2) are the same. *See Dakota ex rel Barnett*, 317 F.3d at 786. A party "is entitled to intervene in an action" under Rule

24(a)(2) only "when his position is comparable to that of a person under Rule 19(a)(2)(i)." Advisory Committee Notes to Rule 24. Thus, if the United States had the interest in statutory interpretation it claims, it could always intervene under Rule 24(a) as a matter of right, and Rule 24(b)(2) would be entirely superfluous.

Because "courts should not interpret one provision in a manner that renders other sections of the same statute inconsistent, meaningless, or superfluous," *Cody v. Hillard*, 304 F.3d 767, 776 (8th Cir. 2002) (citation and internal quotation marks omitted), the mere existence of Rule 24(b)(2) proves the United States does not have a "cognizable" interest in the application and interpretation of statutes or regulations—even those specifically "administered by the officer or agency." And "[t]he permissive nature" of Rule 24(b)(2) "necessarily implies that, if intervention is denied, the applicant is not legally bound *or prejudiced* by any judgment that might be entered in the case." *Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 524 (1947) (emphasis added) (discussing Rule 24(b) generally).

3. The United States Has No Protected Interest in Protecting Oil-and-Gas Lessees from the Possibility of Inconsistent Results.

Third, the United States has no protected interest "in ensuring that Native American lessees are not subjected to competing obligations." (Add. 6; App. 85.)

As an initial matter, this final claimed interest is the least clear and thus the least persuasive. For example, the District Court never explains how the result it

seeks to avoid—"a chilling effect in the bidding of new leases" (Add. 7; App. 86)—is not *per se* unprotected under Rule 19 because the claimed harm would be entirely economical and entirely speculative at this point. *St. Louis Sewer*, 569 F.3d at 839 (explaining that, to be protected, an interest cannot be economical and that the harm cannot be "contingent upon the occurrence of a sequence of events . . . made after any judgment or consent decree entered in this case").

Nor does the District Court identify who it believes the United States has an interest in protecting—whether Appellees or *potential* future "Native American lessees." In fact, the District Court appears to confuse the *lessors* with the *lessees* in this case. Under 25 U.S.C. § 396, the *lessors* are the Native American allottees. Section 396 *lessees* need not be Native American (though they can be).

The District Court also never explains what legal basis allows the United States even to claim the interest it does in protecting lessees. (Add. 6-8; App. 85-87.) This is likely because the United States actually owes a duty under § 396 to Appellants (the lessors)—not lessees. *See* 25 C.F.R. Part 212 (noting all the obligations the United States owes § 396 lessors). As the Supreme Court explained in *Poafpybitty*, though, this duty does not preclude individual Indian allottees from suing § 396 lessors like Appellees without the United States. 390 U.S. at 374. In fact, in *Poafbypitty*, the Supreme Court held that allottees could pursue their state

law money damage claims against § 396 lessees like Appellees here without the United States because, *as the United States agreed*, an allottee's "right to sue should not depend on the good judgment or zeal of a government attorney." *Id.*

On any one of these grounds, this Court can and should reverse. *See LLC Corp. v. Pension Ben. Guar. Corp.*, 703 F.2d 301, 305 (8th Cir. 1983) ("The resolution likewise does not subject PBGC to a substantial risk of inconsistent obligations *because PBGC is under no duty to litigate ERISA provisions for the benefit of plan participants*." (emphasis added)).

Even setting these shortcomings aside, however, a bigger problem exists. For purposes of Rule 19, "'[i]nconsistent obligations' are not . . . the same as inconsistent adjudications or results." *Delgado*, 139 F.3d at 3. Rule 19 does not protect against the possibility of different courts reaching different "adjudications or results" regarding the same conduct. *Id.* ("[T]he mere possibility of inconsistent results in separate actions does not make the plaintiff in each action a necessary party to the other."); *e.g.*, *Cachil Dehe Band*, 547 F.3d at 976 (no protection against "different interpretation[s]" of governing federal compact); *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 318 (3d Cir. 2007) ("[T]he possibility of a subsequent adjudication that may result in a judgment that is inconsistent as a matter of logic, [does not] trigger the application of Rule 19."

(alterations in original) (citation and internal quotation marks omitted)). Competing obligations arise only when "a party is unable to comply with one court's order without *breaching another court's order concerning the same incident*." *Delgado*, 139 F.3d at 3 (emphasis added).

Yet here, reading the District Court's order as a whole, it is clear that its Rule 19(a) conclusion depends entirely on its concern for the possibility of inconsistent results—not obligations:

> The fundamental question presented in this lawsuit is whether the United States breached its fiduciary obligations to the Plaintiffs by approving their oil and gas leases with the Defendants. . . . This fundamental issue forms the basis for the companion case pending in the Court of Federal Claims. The risk of *inconsistent rulings* is real and of significant importance. *Inconsistent rulings* would certainly create confusion with the public as the Secretary of the Interior would not necessarily be bound by any judgment rendered in this Court.

(Add. 11-12; App. 90-91 (emphasis added).) Because this concern is unprotected as a matter of law, the District Court's order must be reversed.

In addition, this litigation could not possibly result in a cognizable inconsistent obligation, *i.e.*, one that obliges a party to breach "another court's order concerning the same incident." *E.g.*, *Delgado*, 139 F.3d at 3; *see* Fed. R. Civ. P 19(a)(1)(B) (focusing on the effect of the action at issue). It would be legally impossible to create such an obligation with respect to either the United States or

any potential future oil-and-gas lessee because neither are parties to this action, and absent parties are, as a matter of law, not bound by any order or judgment that might issue. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 871 (2008) (reiterating settled rule that absent parties "would not be bound by the judgment in an action where they were not parties"); *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968) ("Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered.").

This litigation also could not place Appellees at risk of competing obligations because no other *court order* "concerning the same incident" exists for Appellees to breach. *Delgado*, 139 F.3d at 3. In fact, no other *litigation* involving Appellees and this incident exists. That precludes any possibility of a competing obligation. *See St. Louis Sewer*, 569 F.3d at 839 (speculative or contingent harms irrelevant); *Gwartz*, 23 F.3d at 1428 ("The focus is on relief between the parties and not on the speculative possibility of further litigation between a party and an absent person.").

For any one of the reasons stated above, the final interest relied upon by the District Court to justify its Rule 19(a) determination fails as a matter of law. Appellants thus ask this Court to conclude that the United States is not a required party to this action and to reverse and remand this action for further proceedings.

C. The United States Is Not "So Situated" Here That It Has a Protected Interest at Risk of Practical Impairment in Its Absence.

Notably, even if the United States could identify a cognizable interest at risk in this case (it cannot) that would not be enough to require its joinder. Appellees also would need to show that the United States is "so situated" that, as a practical matter, that interest could be impaired in its absence. They have not and cannot make that showing here for three reasons:

- *First*, Appellees have the same interest in "making every argument" and "establishing the facts" as the United States.
- *Second*, nothing precludes the United States from intervening under Rule 24(b)(2), and its refusal to do so demonstrates its true motive: to protect Appellees from ever being held responsible for their illegal actions.
- *Third*, even the United States' unprotected concerns can be accommodated through simple coordination of Appellants' related cases.

The District Court therefore erred as a matter of law in finding the United States to be a Rule 19(a)(1)(B)(i) required party.

1. Appellees Have the Same Interest as the United States.

It is settled law that an absent party is not required if an existing party has the same interest in "making every argument on the merits that the absent parties

would or could make." *Henne v. Wright*, 904 F.2d 1208, 1212 n.4 (8th Cir. 1990); *see Rochester*, 728 F.2d at 1016 (noting that Travelers was "making every argument that HHS [the government] would or could make if it had been allowed to intervene formally"). That is the case here.

Appellants' claims depend on a threshold showing of a breach of fiduciary duty by the United States. Thus, even if the United States had a protected interest in any of the three issues it claims, no party has shown that Appellees do not share the same interest in making every argument the United States would make if it were a party to this case. *See Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994) ("The proponent of a motion to dismiss under Rule 12(b)(7) has the burden of producing *evidence* showing the nature of the interest possessed by an absent party *and that the protection of that interest will be impaired by the absence*." (emphasis added)).

Nor could they. The interests of Appellees and the United States are completely aligned, and Appellees have vigorously argued that the United States owed no obligation to Appellants. This precludes any possibility of prejudice to the United States. *See Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 746 (8th Cir. 2001) (finding prejudice only because no party shared the interests of the United States in defending its title to its property).

In fact, the most any party has claimed is that Appellees need the United States to be joined so that they can obtain discovery from it. (Add. 11; App. 90.) However, this "is not a proper Rule 19 consideration." *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 188 (2d Cir. 1999). Rule 19 does not require a party to be joined simply because a party claims it "needs to obtain evidence from it." *Costello Publ'g Co. v. Rotelle*, 670 F.2d 1035, 1044 (D.C. Cir. 1981). As this Court has explained, the present party only has to have "*the same interest* in establishing the facts that [the absent party] does." *Gwartz*, 23 F.3d at 1429 (emphasis added) ("Disposition of Gwartz's claims in the absence of JAA, however, will not as a practical matter impair or impede JAA's ability to protect its interest because Gwartz has *the same interest* in establishing the facts that JAA does." (emphasis added)). Other courts agree.

- As the Tenth Circuit explained in *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1499 (10th Cir. 1983):

  > [N]o cases . . . approve of the use of rule 19 simply to allow greater discovery, and we can discern no policy which such an expansion of the rule would promote.

- As the Second Circuit explained in *Smithsonian Institute*, 189 F.3d at 188 (alteration in original):

  > Rule 19 . . . does not list the need to obtain evidence from an entity or individual as a factor bearing upon whether or not a party is necessary or indispensable to a just adjudication.

- And as the Court of Federal Claims held in *Brown*, 42 Fed. Cl. at 564:

> We cannot conclude that the Tribe is a necessary party under Rule 19 on the basis of potential discovery difficulties that the government might encounter.

Moreover, regardless of the rule, the Supreme Court has held that, as a practical matter, parties cannot be harmed by an individual's or entity's absence (at least from a discovery perspective) when third-party discovery is available. *See Newman-Green*, 490 U.S. at 838 ("[I]t is evident that none of the parties will be harmed by Bettison's dismissal. . . . Discovery directed to Bettison while he was a party would have been available even if he had not been a party."). Here, Appellees already have conceded that they can obtain discovery from the United States pursuant to the Department of Interior's own regulations. *See* 43 C.F.R. § 2.280. Any attempt to contort this right into an impediment is refuted by the very statute that authorizes these regulations. As 5 U.S.C. § 301 states: "This section does not authorize withholding information from the public or limiting the availability of records to the public."

Thus, even under Appellees' theory, no possibility of prejudice exists.

2. The United States Is Free to Intervene under Rule 24(b)(2).

Even if Appellees were not already making every argument on the merits that the United States would make, the United States is not "so situated" in this

litigation that it is at risk of having a "cognizable" interest impaired in its absence. *See* Fed. R. Civ. P. 19(a)(1)(B). To the contrary, as Rule 24(b)(2) demonstrates, nothing precludes the United States from moving to intervene in this action for the limited purpose of protecting any purported interest in the proper application and interpretation of the statutes and regulations at issue—an act that would not require the United States to waive its immunity. *Miller v. Tony & Susan Alamo Found.*, 134 F.3d 910, 916 (8th Cir. 1998) (explaining that the United States can intervene for a limited purpose without broadly waiving its sovereign immunity).

The fact that the United States refuses to take that step shows its real goal is to protect its joint tortfeasors from ever having to face justice for their wrongful conduct. As this Court has recognized, such obvious gamesmanship on the part of the United States weighs heavily if not dispositively against it in any Rule 19 inquiry. *See Rochester*, 728 F.2d at 1017 (explaining that "equity and good conscience *require us to deny the motion to dismiss* for failure to join" the United States where the Government sought to intervene only "to destroy the jurisdiction of the District Court" (emphasis added)).

3. Simple Coordination Between the District Court and the Court of Federal Claims Actions Would Accommodate Every Interest Claimed by the United States.

The United States also is not "so situated" that it risks having its interests decided in its absence because any interest—protected or otherwise—can be accommodated through simple coordination of the District Court action and the action in the Court of Federal Claims. *See In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 469 F. Supp. 2d 1348, 1350 (J.P.M.L. 2006) (relying on "prior experience" to conclude that "voluntary cooperation between the Court of Federal Claims and the [district] court on matters of overlapping concern will result in a prompt and efficient disposition of the entire litigation").

Unlike in each of the cases Appellees and the United States relied upon before the District Court to support their Rule 19(a) argument, Appellants are not completely barred from pursuing their claims against the United States in every forum. *Cf., e.g.*, *Nichols*, 809 F.2d at 1333 ("Because the statute of limitations in section 2401(a) bars this suit against the United States, we now turn to the argument that the United States is an indispensable party, and the suit must be dismissed in its absence."); *Paiute-Shoshone*, 637 F.3d at 998 (holding that tribe had failed to assert its claims against the United States within the five-year period provided by 25 U.S.C. § 70k); *see Peabody W. Coal Co.*, 610 F.3d at 1070

("EEOC is prevented by 42 U.S.C. § 2000e–5(f)(1) from filing suit against the Secretary on its own authority."). Given jurisdictional restraints, 28 U.S.C. § 1491(a)(1), they simply must do so in the Court of Federal Claims—an action they are already pursuing.

Accordingly, even assuming the United States has a recognizable interest in this case under Rule 19, those interests do not need to be resolved in its absence. The ordinary measures suggested by the Federal Judicial Center to resolve issues that arise when "related cases pending in different districts cannot be transferred to a single district" will ensure the United States has its say. FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, FOURTH, § 20.14 (2004), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/MCL40002.pdf/$file/MCL40002.pdf.

This includes, for example, simple coordination of the two cases—a solution courts have repeatedly used to avoid the need to even consider joinder issues. *See In re Long-Distance Tel.*, 469 F. Supp. 2d at 1350 (declining to consider whether it should transfer the Court of Federal Claims action to the district court because "voluntary cooperation . . . on matters of overlapping concern" would cure any issues that might arise). In fact, courts have previously denied motions by the United States to transfer cases, relying on the long history of "successfully engineered coordination of pretrial proceedings among a Court of Claims action

and related actions pending in various federal district courts." *In re W. Elec. Co., Inc. Semiconductor Patent Litig.*, 415 F. Supp. 378, 380 (J.P.M.L. 1976).

Appellants have already suggested this approach to Appellees, the United States, and the District Court. Appellants would not object to having each of their cases tried together by Judge Block and Judge Hovland in North Dakota. *See Elk v. United States*, 87 Fed. Cl. 70, 72 (Fed. Cl. 2009) (Allegra, J.) (noting that the Court had travelled to Rapid City, South Dakota, to conduct the trial). Appellants also have offered to designate the Court of Federal Claims action as the lead case and defer to its rulings regarding the legality of the actions of the United States. And Appellants have offered to coordinate and share discovery—a gesture routinely found to eliminate the need even to transfer a case, much less dismiss one. *In re: Children's Pers. Care Prods. Liab. Litig.*, 655 F. Supp. 2d 1365, 1366 (J.P.M.L. 2009) (no transfer necessary because party agreed to share discovery); *In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig.*, 446 F. Supp. 242, 244 (J.P.M.L. 1978) (same).

Because any of these measures would eliminate any possible prejudice to the United States or any party in this case, Rule 19(a) does not, by definition, require the United States to be formally joined in this case. *In re W. Liquid Asphalt Cases*, 487 F.2d 191, 201 (9th Cir. 1973) ("The day is long past when courts, particularly

federal courts, will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages.").

D. No Alternative Grounds Exist to Affirm the District Court's Legal Conclusion That the United States Is a Required Party.

The District Court relied on only one of three possible three bases to justify its Rule 19(a) determination: Rule 19(a)(1)(B)(i). As explained *supra* at pages 24-39, its conclusion was wrong as a matter of law. As a result, this Court need not consider the remaining Rule 19(a) bases.

If it did, however, nothing would change. Regardless of whether the United States is present as a party, Appellees are not at substantial risk of multiple or inconsistent obligations as contemplated by Rule 19(a)(1)(B)(ii). Nor does the absence of the United States preclude complete relief per Rule 19(a)(1)(A).

1. The Absence of the United States Does Not Put Appellees at Substantial Risk of Multiple or Inconsistent Obligations.

As explained *supra* at pages 35-39, the absence of the United States from this action cannot put Appellees at risk of any cognizable inconsistent obligations.

Moreover, to the extent Appellees try to avoid this reality by complaining that they might "be required to compensate for the *full amount* of the alleged injury" despite the fact that, as they contend, they were "not the *sole* cause of the alleged harm," that too is not a cognizable concern. It is the "common result of

joint and several liability and should not be equated with prejudice" sufficient to trigger Rule 19(a)(1)(B)(ii). *Janney*, 11 F.3d at 412 ("The possibility that Shepard Niles may bear the whole loss if it is found liable is not the equivalent of double liability. It is instead a common result of joint and several liability and should not be equated with prejudice.").

2. The District Court Can Grant Complete Relief.

In the Eighth Circuit, "[t]he requirement under Rule 19(a)(1) that complete relief be available does not mean that every type of relief sought must be available, only that meaningful relief be available." *Henne*, 904 F.2d at 1212 n.4. "The focus is on relief *between the parties* and not on the speculative possibility of further litigation between a party and an absent person." *Gwartz*, 23 F.3d at 1428 (emphasis added) (citation and internal quotation marks omitted).

Here, these standards are met. As explained, Appellants seek only money damages from Appellees, and nothing precludes the District Court from awarding that relief without the United States being present. *See Sandobal*, 429 F.2d at 257 (explaining that one of the "essential tests of an indispensable party" is whether "relief [can] be afforded to the plaintiff without the presence of the other party" and finding that standard met where the "plaintiff seeks only monetary damages" because "of course this relief can be granted without the presence of the" other);

Pasco Int'l (London) Ltd. v. Stenograph Corp., 637 F.2d 496, 501-02 (7th Cir. 1980) ("It is difficult to perceive how Croxford [the absent party] would be prejudiced by an unfavorable judgment for money damages against Stenograph [the present defendant]. Croxford would not be liable for any of those damages and could assert any of his defenses in any indemnity or contribution action brought against him by Stenograph." (footnote omitted)).

IV. THE DISTRICT COURT ABUSED ITS DISCRETION AS A MATTER OF LAW BY MISAPPLYING THE RULE 19(B) INDISPENSABLE PARTY TEST.

Because the United States is not required under Rule 19(a), it cannot be indispensable under Rule 19(b). Moreover, as this Court has found, because the United States is alleged to be nothing more than a joint tortfeasor, "none of these [Rule 19(b)] factors" can weigh in favor of joinder or dismissal. *Bailey*, 563 F.3d at 308. Thus, "the inquiry is at an end, and the motion to dismiss for failure to join the party in question must be denied." *Rochester*, 728 F.2d at 1016.

Nevertheless, were the Court to consider the District Court's Rule 19(b) analysis, it would find the District Court abused its discretion in at least two critical respects: by failing to consider whether any possible prejudice could be lessened under Rule 19(b)(2) and by applying the wrong legal standards to resolve the remaining factors. *See Koon*, 518 U.S. at 100 (holding that a court abuses its

discretion when it makes an error of law); *Kern*, 738 F.2d at 970 ("An abuse of discretion . . . can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment."). Appellants thus respectfully ask the Court to reverse its dismissal and remand for further proceedings.

A. The District Court Confused the Rule 19(b) Factors and Thus Failed to Consider Under Rule 19(b)(2) Whether Any Prejudice Could Have Been Avoided.

The District Court failed to apply the correct Rule 19(b) standard—a *per se* abuse of discretion. *Kern*, 738 F.2d at 970.

Rule 19(b) lists four factors a district court must consider in determining whether equity and good conscience require an action to be dismissed:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> > (A) protective provisions in the judgment;
> > (B) shaping the relief; or
> > (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and

> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

In *Provident*, the Supreme Court explained that these *four* factors protect *five* interests:

> First, the plaintiff has an interest in having a forum. . . . Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another. . . . Third, there is the interest of the outsider whom it would have been desirable to join. . . . Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. . . . [And fifth,] Rule 19(b) also directs a district court to consider the possibility of shaping relief to accommodate these four interests.

390 U.S. at 111-12.

The District Court failed to appreciate this distinction between factors and interests. It confused the second Rule 19(b) *factor* with the second *Provident interest* and described the Rule 19(b)(2) inquiry as follows:

> The second factor to be examined is the extent to which prejudice can be lessened or avoided by carefully crafting the judgment or taking other measures. *Of concern are the interests of the Defendants in avoiding multiple litigation, inconsistent relief, or sole responsibility for liability shared with another*.

(Add. 11; App. 90 (emphasis added).)

This error was far from harmless. As *Provident* demonstrates, "of concern" under Rule 19(b)(2) is not "the interests of the Defendants" but whether, in spite of

those interests, measures short of dismissal will lessen the prejudice. 390 U.S. at 111-12. In short, Rule 19(b)(2) is intended to serve as a safety net—a last resort requiring courts to do whatever they can to *avoid* dismissal. The District Court's failure to appreciate that fact is a *per se* abuse of discretion. *Kern*, 738 F.2d at 970.

Moreover, as a practical matter, the harm resulting from the District Court's treatment of Rule 19(b)(2) is only magnified here by the "heavy emphasis" it placed on the claimed interests of the United States. (Add. 8; App. 77.) Citing *Pimental*, the District Court explained: "in any Rule 19(b) discussion where immunity is asserted, and the sovereign's interest is not frivolous, dismissal is required where there is a potential for injury to that interest." (*Id.*) Thus, relying on what it termed the "unquestionably compelling" claimed interests of the United States, the District Court found "as a matter of law" that dismissal was required. (Add. 8-9, 13-14; App. 87-88, 92-93.)

As explained *supra* at pages 24-39, the United States actually has no *cognizable* interest at risk in this litigation—a fact that eliminates any need to consider Rule 19(b). However, even were that not the case, the District Court still misapplied *Pimental*, which explains that even a sovereign interest requires dismissal only if any prejudice cannot "be lessened or avoided by relief or measures alternative to dismissal" under Rule 19(b)(2). 553 U.S. at 869.

Here, the District Court never considered this possibility. Because it failed to treat Rule 19(b)(2) properly, it never addressed whether any possible prejudice to the United States could be avoided through simple coordination of this action with Appellants' pending action in the Court of Federal Claims. This is the very definition of an abuse of discretion. *Kern*, 738 F.2d at 970. The District Court's decision must therefore be reversed.

B. The District Court Applied the Wrong Legal Standard to Resolve the Remaining Rule 19(b) Factors.

In addition to failing to properly consider Rule 19(b)(2), the District Court abused its discretion as a matter of law by applying the wrong legal standards to evaluate each of the remaining factors, namely:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or existing parties;
>
> * * *
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

1. The District Court Abused Its Discretion by Relying on Legally Unprotected Interests to Resolve Rule 19(b)(1).

First, for all of the reasons explained *supra* pages 24-39, the United States does not have a cognizable interest in defending its conduct or "in the application

and interpretation of its own laws and regulations." (Add. 6; App. 85.) As those two interests constitute the only justification for the District Court's resolution of this factor (Add. 8-11; App. 87-90), the District Court abused its discretion as a matter of law in resolving this factor in favor of dismissal. *Kern*, 738 F.2d at 970.

Second, the sole prejudice to Appellees found by the District Court was that, if the action proceeded without the United States, they would be forced to defend its conduct. (Add. 11; App. 90.) But, as explained above, that too is not a cognizable example of prejudice. *See Brown*, 42 Fed. Cl. at 564 (explaining that a party is not "a necessary party under Rule 19 on the basis of potential discovery difficulties"); *supra* pages 40-43. Moreover, as the Supreme Court pointed out in *Newman-Green*, "it is evident that none of the parties will be harmed" by the absence of the United States here because third-party discovery is available. 490 U.S. at 838; *cf.* 5 U.S.C. § 301 ("This section does not authorize withholding information from the public or limiting the availability of records to the public.").

2. The District Court Erred in Relying on the Mere Possibility of Future Inconsistent Adjudications to Resolve Rule 19(b)(3).

As reframed by the Supreme Court in *Provident*, Rule 19(b)(3) concerns "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies," *i.e.*, the "public stake in settling disputes by wholes, *whenever possible*." *Provident*, 390 U.S. at 110 (emphasis added).

The District Court based its resolution of this factor entirely on its concern for the speculative possibility of "inconsistent rulings," stating: "The risk of *inconsistent rulings* is real and of significant importance." (Add. 12; App. 91 (emphasis added).) But as explained *supra* at pages 35-39, this "risk" does not qualify. Only "inconsistent obligations" matter, and those are not a viable concern in this case. *E.g.*, *Delgado*, 139 F.3d at 3.

Also, whatever the concern in the ordinary case, the Eighth Circuit has made clear that this factor cannot weigh in favor of dismissal in cases like this one where the claims could never be joined in the same forum. *See Rochester*, 728 F.2d at 1016 ("If Travelers is liable to Rochester, it may or may not be entitled to indemnity from HHS [the government], but that issue is not before us now *and would not be before us* if HHS had been permitted to intervene." (emphasis added)). Because it is actually *not possible* to ever settle Appellants' claims against Appellees in the same forum as its claims against the United States without the consent of the United States (which it refuses to give), the "public stake in settling disputes by wholes, *whenever possible*," is not implicated. *Cf. Provident*, 390 U.S. at 110 (emphasis added). Dismissal would only *preclude* the possibility of "complete relief," because it would preclude Appellants from ever pursuing their claims against Appellees.

The factor therefore weighs against dismissal. *Rochester*, 728 F.2d at 1016 (rejecting the argument that the factor weighed in favor of dismissal because while the plaintiff could proceed against the government in the Court of Federal Claims, "Rochester . . . cannot sue Travelers in the Claims Court").

3. The District Court Also Failed to Appreciate That Dismissal Would Deprive Appellants of a Remedy Against Appellees.

The last factor is Appellants' interest in having a forum—an interest the District Court found "arguably weighs in their favor." (Add. 12; App. 91.)

Contrary to the District Court's conclusion, this interest absolutely weighs in Appellants' favor. *Rochester* makes this clear. There, this Court rejected the district court's conclusion that Appellants interests in a forum would be mitigated by the fact that they could pursue claims against the United States in the Court of Federal Claims, explaining:

> Finally, if this action were dismissed, it is almost a certainty that Rochester would not have an adequate remedy. It cannot sue Travelers in the Claims Court.

728 F.2d at 1017.

Accordingly, because the United States does not have a cognizable interest in this case, Appellants' interest in an adequate remedy against each tortfeasor that wronged them, including Appellees, is preeminent and precludes dismissal. *E.g.*, *Pasco*, 637 F.2d at 500 ("The absence of an alternative forum would weigh

heavily, if not conclusively against dismissal . . . ."); *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1413 (10th Cir. 1996) (same); *cf. Kern*, 738 F.2d at 970 (explaining that a court abuses its discretion when it fails to give "significant weight" to the appropriate factors).

CONCLUSION

For all of the foregoing reasons, Appellants respectfully ask the Court to reverse the District Court's dismissal of Appellants claims and remand this action back to the District Court for further proceedings.

Respectfully submitted,

SUSMAN GODFREY L.L.P.

/s/ Kenneth E. McNeil

Kenneth E. McNeil
Shawn L. Raymond
(*all admitted to the Eighth Circuit Court of Appeals*)
1000 Louisiana, Suite 5100
Houston, Texas 77002
Telephone: 713/651-9366
Facsimile: 713/654-6666
kmcneil@susmangodfrey.com
sraymond@susmangodfrey.com

Andres C. Healy
(*admitted to the Eighth Circuit Court of Appeals*)
1201 3rd Ave., Suite 3800
Seattle, WA 98101

Telephone: 206/505-3843
Facsimile: 206/516-3883
ahealy@susmangodfrey.com

Lead Attorneys for Plaintiffs-Appellants
Ramona Two Shields and
Mary Louise Defender Wilson

OF COUNSEL:
Mario Gonzalez
GONZALEZ LAW OFFICE, PROF. LLC
522 7th Street, Suite 202
Rapid City, SD 57701
Telephone: 605/716-6355
mario@mariogonzalezlaw.com

John M. Olson
JOHN M. OLSON, P.C.
1011 Southport Loop
Bismarck, ND 58504
Telephone: 701/426-9393
olsonpc@midco.net

February 14, 2014.

CERTIFICATE OF COMPLIANCE

I hereby certify that this document, including all headings, footnotes, and quotations, but excluding summary of the case, the table of contents, table of authorities, any addendum containing statutes, rules or regulations, and any certificates of counsel, contains 13,519 words, as determined by the word count of the word-processing software used to prepare this document, specifically Microsoft Word 2007 in Times New Roman 14 point font, which is no more than 14,000 words permitted under Fed.R.App.P. 32(a)(7)(B)(i).

Dated: February 14, 2014.

/s/ Kenneth E. McNeil
Kenneth E. McNeil

Counsel for Appellants

CIRCUIT RULE 28A(h) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 28A(h), a version of the brief and addendum in non-scanned PDF format. I hereby certify that the file has been scanned for viruses and that it is virus-free.

/s/ Kenneth E. McNeil
Kenneth E. McNeil

Counsel for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 14, 2014, an electronic copy of the Brief of Plaintiffs-Appellants was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. The undersigned also certifies that the following participant in this case is a registered CM/ECF user and that service of the Brief will be accomplished by the CM/ECF system:

James U. White Jr.
ZENERGY, INC.
Suite 1700
6100 S. Yale Avenue
Tulsa, OK 74136

Mark Simeon Barron
FULBRIGHT & JAWORSKI
Suite 1000
1200 17th Street
Denver, CO 80120

Van H. Beckwith
BAKER & BOTTS
Suite 600
800 LTV Center
2001 Ross Avenue
Dallas, TX 75201

Lawrence Bender
Michael David Schoepf
FREDRIKSON & BYRON
Suite 150
200 N. Third Street
Bismarck, ND 58501-3879

Jared R. Boyer
Jodi Warmbrod Dishman
Ronald Theodore Shinn Jr.
MCAFEE & TAFT
Two Leadership Square, 10th Floor
211 N. Robinson
Oklahoma City, OK 73102-7103

Stuart D. Campbell
Tom Q. Ferguson
DOERNER & SAUNDERS
Suite 700
2 W. Second Street
Tulsa, OK 74103-3117

Matthew Alexander Dekovich
Daniel Mead McClure
FULBRIGHT & JAWORSKI
1301 McKinney, Suite 5100
Houston, TX 77010

Daniel Joseph Dunn
MARING & WILLIAMS
P.O. Box 2103
Fargo, ND 58107-2103

David S. Maring
MARING & WILLIAMS
Suite 307
400 E. Broadway Avenue
Bismarck, ND 58502-0795

I further certify that the following participant is not a registered CM/ECF user. On February 14, 2014, one copy of the Brief of Plaintiffs-Appellants was sent via first-class mail, proper postage prepaid to the following non-CM/ECF participant:

Jon W. Backes
MCGEE & HANKLA
15 Second Avenue, SW
P.O. Box 998
Minot, ND 58702-0998

/s/ Kenneth E. McNeil
Kenneth E. McNeil

Counsel for Appellants

Dated: February, 14, 2014.