IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

Gary Sorenson and Martha Sorenson and Hazel Jorgenson, Trustee of the Jorgenson Family Mineral Trust, individually and for all those similarly situated,	)	
Plaintiffs,	)	**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**
vs.	)	
Burlington Resources Oil & Gas Company, L.P., a Delaware limited partnership,	)	Case No. 4:13-cv-132
Defendant.	)	

Before the Court is a motion to dismiss filed by Defendant Burlington Resources Oil & Gas Company ("Burlington Resources") on February 5, 2014. See Docket No. 26. Plaintiffs Gary Sorenson, Martha Sorenson, and Hazel Jorgenson as Trustee of the Jorgenson Family Mineral Trust, filed a response in opposition to the motion on February 28, 2014. See Docket No. 29. Burlington Resources filed a reply brief on March 14, 2014. See Docket No. 33. For the reasons set forth below, the motion is granted.[1]

I. BACKGROUND

This case arises from the practice of flaring natural gas in relation to oil and gas exploration and production. The putative class action was removed to federal court on November 14, 2013, by Defendant Burlington Resources. The state court action was commenced on or about October 16, 2013. The jurisdictional basis for the removal was diversity of citizenship and the Class Action

[1]This case is one of fourteen related to the flaring of natural gas in western North Dakota's Bakken oil fields. All of the cases were filed in state court and removed to federal court. Motions to dismiss raising nearly identical issues were filed in all the cases. The cases have not been consolidated.

Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d), 1446, and 1453. Plaintiffs Gary Sorenson, Martha Sorenson, and Hazel Jorgenson are North Dakota residents. Defendant Burlington Resources is a limited partnership organized under the laws of Delaware with its principal place of business in Texas.

The Defendant is the operator a number of oil and gas wells in North Dakota. The Plaintiffs own mineral interests in one or more wells which the Defendant operates and are entitled to royalties from the oil and gas produced. The Plaintiffs contend the Defendant illegally flares gas from the wells it operates. The Plaintiffs have been paid some royalties for oil and gas produced but contend they are due royalties on the gas they allege was illegally flared.

Natural gas is a byproduct of oil production. A certain amount of flaring occurs at each well depending on a number of factors, including the dynamics of the well itself and the distance to gathering lines and processing facilities. The amount of gas produced and flared varies from well to well. Generally, North Dakota law permits flaring for a one-year period from the date of first production and prohibits the practice thereafter. N.D.C.C. § 38-08-06.4(1) and (2). The North Dakota Industrial Commission ("Industrial Commission") may grant an exemption permitting flaring after the initial one-year period upon a showing of economic infeasibility. N.D.C.C. § 38-08-06.4(6). If gas is flared in violation of Section 38-08-06.4, the producer must pay royalties to the royalty owner and production taxes to the state. N.D.C.C. § 38-08-06.4(4).

In their first amended complaint the Plaintiffs assert claims for royalties due for gas flared in violation of N.D.C.C. § 38-08-06.4, a claim for declaratory relief under N.D.C.C. § 32-23-01 concerning royalties due on gas flared in violation of N.D.C.C. § 38-08-06.4, a claim for conversion of gas flared without the payment of royalties, a claim that flaring constitutes waste under the

common law and N.D.C.C. § 32-17-22, and a claim under the North Dakota Environmental Law Enforcement Act ("ELEA"), N.D.C.C. § 32-40-01, to collect royalties for gas flared in violation of N.D.C.C. § 38-08-06.4. The Plaintiffs bring their complaint on their own behalf (claims one through five) and as representative of all similarly situated persons (claims six through ten). The Plaintiffs seek to certify a class consisting of all persons owning royalty interests who have not been paid royalties for illegally flared gas. Class certification has yet to be addressed.

II. STANDARD OF REVIEW

A. RULE 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) allows a defendant to seek dismissal for lack of subject matter jurisdiction. "Jurisdictional issues, whether they involve questions of law or of fact, are for the court to decide." Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990). A Rule 12(b)(1) motion can either mount a facial attack on the complaint's claim of jurisdiction or the motion can attack the factual basis for jurisdiction. Precision Press, Inc. v. MLP U.S.A., Inc., 620 F. Supp. 2d 981, 986 (N.D. Iowa 2009) (citing Titus v. Sullivan, 4 F.3d 590, 593 (8th Cir. 1993)). A motion which is limited to a facial attack on the pleadings, and thus does not consider matters outside the pleadings, is subject to the same standard as a motion brought under Rule 12(b)(6). Mattes v. ABC Plastics, Inc., 323 F.3d 695, 698 (8th Cir. 2003) (citing Osborn, 918 F.2d at 729 n. 6 (distinguishing between a facial attack and a factual attack)). Facial challenges typically challenge the complaint for failure to allege an element necessary for subject matter jurisdiction. Precision Press, 620 F. Supp. 2d at 986. By contrast, in a factual attack the power of the court to hear the case has been challenged and consequently the court may consider matters outside the pleadings, such

as exhibits, testimony, and affidavits. Osborn, 918 F.2d at 729 n. 6; see also Harris v. P.A.M. Transp., Inc., 339 F.3d 635, 637 n.4 (8th Cir. 2003).

The jurisdictional arguments in this motion are premised on the Plaintiffs' failure to exhaust their administrative remedies. Because it is necessary to look outside the pleadings to resolve the issue, the motion presents a factual attack and the Plaintiffs do not have benefit of the Rule 12(b)(6) safeguards. Osborn, 918 F.2d at 729-30. Rather, Plaintiff bears the burden of showing that jurisdiction exists. Id. at 730; V S Ltd. P'ship v. Dep't of Hous. & Urban Dev., 235 F.3d 1109, 1112 (8th Cir. 2000).

B. RULE 12(b)(6)

Under Rule 12(b)(6), the Court must accept all well-pleaded factual allegations in the complaint as true. Goss v. City of Little Rock, 90 F.3d 306, 308 (8th Cir. 1996). Detailed factual allegations are not necessary under the Rule 8 pleading standard. Rather, a plaintiff must set forth grounds of its entitlement to relief which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A complaint does not "suffice if it tenders a naked assertion devoid of further factual enhancement." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The Court must also consider whether the allegations set forth in the complaint "plausibly give rise to an entitlement to relief." Id. at 679.

The Court generally only looks to the allegations contained in the complaint to make a Rule 12(b)(6) determination. McAuley v. Fed. Ins. Co., 500 F.3d 784, 787 (8th Cir. 2007). However, depending on the nature and circumstances of the case, the Court may consider matters outside the

complaint. "[I]n considering a motion to dismiss, the district court may sometimes consider materials outside the pleadings, such as materials that are necessarily embraced by the pleadings and exhibits attached to the complaint." Mattes, 323 F.3d at 697 n.4 (citing Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999).

III. LEGAL DISCUSSION

The Defendant has moved to dismiss, contending the Plaintiffs failed to exhaust their administrative remedies, that no private right of action exists under N.D.C.C. § 38-08-06.4, and the waste and conversion claims are preempted by Chapter 38-08. The Plaintiffs maintain Section 38-08-06.4 does create a private right of action, exhaustion is not required, and their waste and conversion claims are not preempted.

A. STATUTORY AND REGULATORY SCHEME

The production of oil and gas in North Dakota is controlled by Chapter 38-08 of the North Dakota Century Code. The Act for the Control of Gas and Oil Resources ("Act") was enacted in 1953. Its purpose was to

> encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas be had and that the correlative rights of all owners be fully protected.

N.D.C.C. § 38-08-01. The Act "equipped the Industrial Commission with comprehensive powers to regulate oil and gas development." Continental Resources, Inc. v. Farrar Oil Co., 559 N.W.2d 841, 845 (N.D. 1997). The Industrial Commission has very broad, general jurisdiction and authority

over all persons and property necessary to effectively enforce the Act. Id.; Amerada Hess Corp. v. Furlong Oil and Minerals Co., 348 N.W.2d 913, 916 (N.D. 1984). The Industrial Commission has broad investigative powers as well, including the power to summon witnesses, administer oaths, and subpoena records. N.D.C.C. § 38-08-12; N.D.A.C. § 43-02-03-54. The Industrial Commission has recognized that it has "broad authority to enforce the provisions of Chapter 38-08 of the North Dakota Century Code." See Pl's. Ex. N. at 2, Order No. 5645. The Industrial Commission has also recognized that its authority is limited to matters within the scope of authority bestowed upon it by the legislature. See Pl's Ex. K. at 2, Order No. 11352. However, that authority can only be described as broad and general. See N.D.C.C. § 38-08-04.

In furtherance of this authority, the Act sets forth procedures for practice before the Industrial Commission. The Industrial Commission may act upon its own motion and must act upon the petition of any interested person regarding any matter within its jurisdiction. N.D.C.C. § 38-08-11(4). Section 38-08-11(4) provides as follows.

> The commission may act upon its own motion or upon the petition of any interested person. On the filing of a petition concerning any matter within the jurisdiction of the commission, the commission must fix a date for a hearing and give notice. Upon the filing of a petition of any interested party, the commission must enter its order within thirty days after a hearing. A copy of any order of the commission must be mailed to all the persons filing written appearances at the hearing.

N.D.C.C. § 38-08-11(4). Provision is also made for any adversely affected person to seek reconsideration and/or appeal. N.D.C.C. § 38-08-13 (reconsideration); N.D.C.C. § 38-08-14 (appeal). Section 38-08-13 provides as follows:

> Any party adversely affected by any order of the commission may file a written petition for reconsideration in accordance with section 28-32-40. The commission shall grant or deny any such petition in whole or in part in accordance with the provisions of section 28-32-40 and rules adopted pursuant to it.

N.D.C.C. § 38-08-13. A petition for reconsideration is "deemed to have been denied if the agency does not dispose of it within thirty days after the filing of the petition." N.D.C.C. § 28-32-40(4). Section 38-08-14 provides as follows:

> Any party adversely affected by an order entered by the commission may appeal, pursuant to chapter 28-32, from the order to the district court for the county in which the oil or gas well or the affected property is located.

N.D.C.C. § 38-08-14. A party adversely affected by an order of the Industrial Commission who is unsuccessful in the district court may appeal to the North Dakota Supreme Court. Amerada Hess Corp., 348 N.W.2d at 916.

The "waste of oil and gas is prohibited" by the Act. N.D.C.C. § 38-08-03. The flaring of gas is restricted. N.D.C.C. § 38-08-06.4. Generally, flaring is permitted for one year after a well is completed. N.D.C.C. § 38-08-06.4(1). Section 38-08-06.4(1) provides as follows:

> 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.

N.D.C.C. § 38-08-06.4(1). After the initial one-year period has expired, certain actions to prevent flaring must be taken. N.D.C.C. § 38-08-06.4(2). Section 38-08-06.4(2) provides as follows:

> 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 which reduce the volume or intensity of the flare by more than sixty percent.

N.D.C.C. § 38-08-06.4(2). If a flaring violation occurs the producer must pay royalties to the royalty owner and production taxes to the State. N.D.C.C. § 38-08-06.4(4). Section 38-08-06.4(4) provides as follows:

> 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.

N.D.C.C. § 38-08-06.4(4). The Industrial Commission has authority to enforce the flaring regulations. N.D.C.C. § 38-08-06.4(5). Section 38-08-06.4(5) provides as follows:

> 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.

N.D.C.C. § 38-08-06.4(5). Producers may obtain a flaring exemption upon a showing of economic infeasibility. N.D.C.C. § 38-08-06.4(6). Section 38-08-06.4(6) provides as follows:

> 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.

N.D.C.C. § 38-08-06.4(6).

The Court concludes from the language, structure, and purpose of the regulatory scheme set out in Chapter 38-08 of the North Dakota Century Code, that the North Dakota Industrial Commission has been granted very broad authority to regulate and administer oil and gas related activities in the State of North Dakota. This broad jurisdiction clearly extends to determinations of whether gas is being flared in violation of Section 38-08-06.4. The Industrial Commission also has jurisdiction to determine the value and order the payment of royalties and taxes on improperly flared

gas. A clear and comprehensive administrative remedy is provided for any interested person who believes improper flaring is occurring. This right includes provisions for the filing of a petition, the right to a hearing, reconsideration, and a right to appeal to the district court.

The Plaintiffs' contention that the Industrial Commission has been granted only limited jurisdiction in Chapter 38-08, and discretionary authority to enforce Section 38-08-06.4 is unpersuasive. The legislative grant of broad authority and jurisdiction to the Industrial Commission, as repeatedly recognized by the North Dakota Supreme Court, is unrefutable. Cont'l Res., Inc., 559 N.W.2d at 845; Amerada Hess Corp., 348 N.W.2d at 916. While the 1993 amendment to Section 38-08-06.4 did change the "shall enforce" and "shall determine" language to "may enforce" and "may determine," this change clearly related to the Industrial Commission's authority to act on its own motion in enforcing Section 38-08-06.4. The amendment was a cost-saving device which relieved the Industrial Commission of the obligation to hold a hearing every time a monthly flaring report suggested an operator might be in violation of Section 38-08-06.4. See Pl's Ex. C. at pp. 3-4, and 11-12. Section 38-08-11 provides the Industrial Commission "may act upon its own motion" but upon the filing of a petition by any interested person "must fix a date for a hearing" and "must enter its order within thirty days." N.D.C.C. § 38-08-11(4). The 1993 amendment neither changed an interested person's absolute right to petition the Industrial Commission regarding flaring violations nor gave the Industrial Commission the right to ignore such a petition.

B. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The Defendant contends the Plaintiffs have failed to exhaust their administrative remedies and thus the Court lacks subject matter jurisdiction. The Plaintiffs contend several exceptions to the

exhaustion requirement apply and thus exhaustion is not required.

The North Dakota Supreme Court has "consistently required the exhaustion of remedies before the appropriate administrative agency as a prerequisite to making a claim in court." Brown v. State ex rel. State Bd. of Higher Educ., 711 N.W.2d 194, 197 (N.D. 2006) (citing Thompson v. Peterson, 546 N.W.2d 856, 861 (N.D. 1996)). Failure to exhaust administrative remedies deprives the court of jurisdiction and requires dismissal of the complaint. Id.; Schuck v. Montefiore Pub. Sch. Dist. No. 1, 626 N.W.2d 698, 703 (N.D. 2001); Tracy v. Cent. Cass Pub. Sch. Dist., 574 N.W.2d 781, 784 (N.D. 1998); Long v. Samson, 568 N.W.2d 602, 606 (N.D. 1997). The purpose of the exhaustion requirement is to effectuate the separation of powers doctrine. Brown, 711 N.W.2d at 198 (citing Tracy, 575 N.W.2d 781). Requiring a plaintiff to exhaust administrative remedies accords "recognition to the 'expertise' of the [agency's] quasi-judicial tribunal, permitting it to adjudicate the merits of the plaintiff's claim in the first instance." Id. at 197-98 (quoting Soentgen v. Quain & Ramstad Clinic, P.C., 467 N.W.2d 73, 82 (N.D. 1991)). Another important policy reason for requiring exhaustion is that it promotes judicial efficiency. Id. at 199. Administrative proceedings allow for the discovery of "relevant evidence, sharpen the issues, retain the possibility of avoiding judicial proceedings, provide a record which a court may ultimately review if the issue is still not fully resolved upon exhaustion of the administrative remedies, and provide the opportunity to eliminate or mitigate damages early in the dispute." Id. Even with respect to a declaratory judgment claim, a plaintiff must exhaust its administrative remedies before filing suit in district court. Tooley v. Alm; 515 N.W.2d 137, 139 (N.D. 1994).

Nevertheless, the exhaustion doctrine has several well-recognized exceptions. Medcenter One, Inc. v. N.D. State Bd. of Pharmacy, 61 N.W.2d 634, 638 (N.D. 1997). These exceptions

include instances when a legal question simply involves statutory interpretation, and agency expertise is not necessary in making factual determinations. Id. Futility is another recognized exception to the doctrine. See Brown, 711 N.W.2d at 198 (rejecting futility argument); see also Tracy, 574 N.W.2d at 783 (noting futility is an exception to the exhaustion doctrine). Whether exhaustion should be required depends upon a number of considerations including whether resolution of the dispute requires the expertise of an administrative body, involves the interpretation of a statute, or presents purely legal questions. Medcenter One, 61 N.W.2d at 638; Lende v. N.D. Workers' Comp. Bureau, 568 N.W.2d 755, 760 (N.D. 1997).

In this case the Plaintiffs have never filed a petition with the North Dakota Industrial Commission asking it to look into their flaring complaints. Rather, they have elected to bring their claims directly to court. The Plaintiffs contend exhaustion is not required because the case presents a matter of purely statutory construction, exhaustion would be futile, and nothing in Chapter 38-08 of the North Dakota Century Code requires them to exhaust their administrative remedies.

1. STATUTORY CONSTRUCTION

The Plaintiffs contend they should be excused from exhausting administrative remedies because the primary issues in this case concern statutory construction or pure questions of law and the expertise of the Industrial Commission is unnecessary to resolve them. North Dakota recognizes an exception to the exhaustion requirement when a case can be resolved by "a legal question [that] simply involves statutory interpretation and does not need the exercise of an agency's expertise in making factual decisions." Medcenter One, Inc., 561 N.W.2d at 638. However, the present case is very different from the situation presented in *Medcenter One*, as this is not a case of simple

statutory construction.

In *Medcenter One*, a hospital pharmacy brought an action for declaratory relief requesting that it be declared exempt from a statute requiring pharmacies to be majority-owned by pharmacists. Id. at 636-37. The North Dakota Board of Pharmacy had informed the hospital pharmacy, which had recently undergone remodeling and reorganization, that it would no longer be exempt from the statutory requirement of majority ownership by licensed pharmacists. Id. Instead of pursuing administrative remedies, the hospital pharmacy sued for declaratory relief asserting that it was exempt from the pharmacist-ownership requirement of N.D.C.C. § 43-15-35(5). Id. at 637. Because the claim could be resolved by answering the single legal question of whether the hospital pharmacy was exempt from compliance with Section 43-15-35(5), the exhaustion of administrative remedies was not required. Id. at 639.

The Court notes that the resolution of the royalty claims in this case does not hinge upon the resolution of a purely legal question such as was presented in *Medcenter One*. Rather, it rests upon the resolution of fairly technical and complex questions of fact and law. These include: (1) the volume of gas flared in violation of Section 38-08-06.4, if any; (2) the value of such flared gas; and (3) the application of the relevant Industrial Commission orders that pertain to each well. See N.D.A.C § 43-02-03-44 (requiring reporting of flared gas to the Industrial Commission); N.D.C.C. § 38-08-06.4(5) (requiring the Industrial Commission to value flared gas for purposes of royalty payment). The Industrial Commission has both the information and the expertise necessary to make these important determinations. Furthermore, the Industrial Commission frequently makes such determinations and has stated itself that "[i]t is not a simple task to determine the value of gas that has been flared" and "[a] number of factors determine the value of gas." See Pl.'s Ex. G at 2, Order

No. 5745. "The requirement for exhaustion is particularly weighty when the agency's decision involves factual issues or administrative expertise." Medcenter One, Inc., 561 N.W.2d at 638; Brown, 711 N.W.2d at 197-98 (noting that by insisting upon exhaustion, courts accord recognition to agency expertise). No decision-maker is better equipped to resolve such issues than the Industrial Commission itself which is possessed of the authority, experience, and expertise to make such determinations.

2. FUTILITY

The Plaintiffs contend exhaustion would be futile because the Industrial Commission cannot be forced to exercise its enforcement authority. They further contend that even if the Industrial Commission did hear their petition, the administrative remedy would be inadequate.

The Plaintiffs' argument cannot be reconciled with the statutory and regulatory scheme that mandates that the Industrial Commission resolve petitions for royalties under Section 38-08-06.4, and the numerous orders from the Industrial Commission requiring payment of royalties pursuant to Section 38-08-06.4. See supra § III. A. There is nothing discretionary about the command that upon the filing of a petition by any interested person the Industrial Commission "must fix a date for a hearing and give notice" and "must enter its order within thirty days after the hearing." N.D.C.C. § 38-08–11(4) (emphasis added).

A multitude of Industrial Commission orders demonstrate that it has jurisdiction to enforce Section 38-08-06.4, and that it has exercised its authority to do so on numerous occasions. See Pl.'s Exs. G, H, I, J, O and P, Order Nos. 5745, 20117, 5644, 11241, 5570, and 5571. For example, in 2007 the Industrial Commission found in Order No. 11241 that gas had been flared in violation of

Section 38-08-06.4 and described its authority as follows:

> Pursuant to NDAC Section 43-02-03-60.2, the value of gas flared from an oil well in violation of NDCC Section 38-08-06.4 shall be determined by the Commission after notice and hearing. The Commission will schedule such hearing during the regularly scheduled hearings in November, 2007 to make such determination.

See Pl's Ex. J, p. 2, ¶ 11, Order No. 11241.

These orders demonstrate that the issue of illegal flaring most often arises in the context of an application for a flaring exemption. There is no evidence the Industrial Commission has ever refused to hold a hearing on a petition alleging a violation of Section 38-08-06.4. On the other hand, the record does not reveal any instance where a royalty owner has petitioned for a hearing under Section 38-08-06.4.

Had the Plaintiffs initially brought their claims before the Industrial Commission, the Court has no doubt their petition would have been heard. Speculation otherwise is unavailing. Futility is not demonstrated by mere speculation or doubt regarding what actions an agency may take to resolve a claim. Midgett v. Wash. Group Int'l Long Term Disability Plan, 561 F.3d 887, 899 (8th Cir. 2009) (unsupported and speculative claims of futility do not excuse the failure to exhaust administrative remedies).

These orders also demonstrate that the Industrial Commission regularly orders the payment of royalties and production taxes on gas found to have been flared in violation of Section 38-08-06.4. See Pl's Exs. G, H, and J, Order Nos. 5745, 20117, 11241. In Order No. 11241 the Industrial Commission ordered that "[t]axes and royalties must be paid on the amount of gas flared from the well." See Pl's Ex. J, p. 3.

The Plaintiffs' concern regarding their ability to enforce the Industrial Commission's orders also falls short. These concerns are nothing more than speculation and ignore the Industrial

Commission's continuing jurisdiction, N.D.C.C. § 38-08-04, its authority to seek criminal and civil penalties, N.D.C.C. § 38-08-16, and its authority to bring an action against any person who violates its orders, N.D.C.C. § 38-08-17. There is nothing in the record to demonstrate producers do not comply with the Industrial Commission's orders. Doubts and concerns cannot support a futility argument, especially when there has been no attempt to exhaust. Kadlec v. Greendale Twp. Bd., 583 N.W.2d 817, 823 (N.D. 1998) (finding futility where the plaintiff's repeated attempts over two years to obtain relief through the administrative process had been thwarted and rejected by the township board).

The Plaintiffs' suggestion that the notice of this lawsuit they provided to the Industrial Commission supports the futility argument is not persuasive. The Plaintiffs provided notice of their lawsuit to the Industrial Commission at the same time the case was filed in state district court. The notice was self described as "Notice pursuant to N.D.C.C. § 32-40-07." See Pl's Ex. Z. Section 32-40-07 requires that notice be given to a number of agencies and individuals before proceeding with an action under the ELEA. Given that this lawsuit had already been commenced when the Industrial Commission received the ELEA notice, and the notice did not ask the Industrial Commission to take any action whatsoever, it is hardly surprising that no action was taken.

The Plaintiffs concerns regarding their ability to proceed on a class basis also do not demonstrate an inadequate remedy. Class status has yet to be addressed so the Plaintiffs' concerns are premature. An administrative remedy is "not inadequate simply because it may not result in the exact relief requested." Long, 568 N.W.2d at 606. Courts routinely dismiss purported class actions for failure to exhaust remedies. See Palmer v. Ill. Farmers Ins. Co, 666 F.3d 1081, 1086 (8th Cir. 2012) (dismissing purported class action for named plaintiff's failure to exhaust remedies). The

Plaintiffs have failed to demonstrate futility or lack of an adequate remedy.

3. NECESSITY OF PURSUING ADMINISTRATIVE REMEDIES

The Plaintiffs contend nothing in Chapter 38-08 expressly requires them to first bring their claims before the Industrial Commission. The Court concludes otherwise. Exhaustion is a judicial doctrine. McKart v. United States, 395 U.S. 185, 193-94 (1969) (exhaustion of administrative remedies is a well-established judicial doctrine). As long as administrative procedures are prescribed they must be followed before a party seeks judicial relief. Id. The North Dakota Supreme Court has repeatedly stressed that its decisions have consistently required exhaustion of remedies before the appropriate agency as a prerequisite to making a claim in court. Tracy, 574 N.W.2d at 783; Brown, 711 N.W.2d at 197. In Brown, the North Dakota Supreme Court stated:

> This Court has applied the exhaustion of remedies doctrine in numerous instances. See Soentgen v. Quain & Ramstad Clinic, P.C., 467 N.W.2d 73, 82 (N.D.1991) (stating a physician is required to exhaust all available internal remedies provided by a hospital before instituting a judicial action for damages arising from exclusion or expulsion); Schuck v. Montefiore Pub. Sch. Dist. No. 1, 2001 ND 93, ¶ 8, 626 N.W.2d 698 (stating this Court has consistently required employees to exhaust available administrative remedies prior to pursuing a claim in court); Long v. Samson, 1997 ND 174, ¶ 14, 568 N.W.2d 602 (holding a discharged university employee failed to exhaust administrative remedies and therefore was precluded from raising those claims); Peterson v. North Dakota Univ. Sys., 2004 ND 82, ¶ 14, 678 N.W.2d 163 (stating a dismissed faculty member was required to exhaust administrative remedies before bringing an action in district court); Transp. Div. of the Fargo Chamber of Commerce v. Sandstrom, 337 N.W.2d 160, 162-63 (N.D.1983) (affirming district court's dismissal of action for failure to exhaust administrative remedies because appellant did not follow the statutorily mandated procedures for challenging a rate increase before suing in court).

Brown, 711 N.W.2d at 197. The primary holding of all these cases is that a party must exhaust whatever administrative remedies or procedures are available before resorting to court action.

The Plaintiffs contend there is no process to follow but they ignore the command of Section

38-08-11(4), which states that upon the filing of a petition by any interested person, the Industrial Commission "must" set a hearing, and "must" enter an order within thirty days of the hearing. The only discretion the Industrial Commission has is whether to call a hearing on its own motion to enforce a flaring violation. N.D.C.C. § 38-08-11(4) (commission may act upon its own motion); N.D.C.C. § 38-08-06.4(5) (commission may enforce this section). The Court concludes that exhaustion is clearly required in this case because Chapter 38-08 sets forth comprehensive rules, procedures, and remedies in order to obtain relief for flaring violations. See supra § III. A.

The Plaintiffs' reliance upon *Lende* to support their argument is misplaced. In *Lende* an injured worker applied for and was granted benefits for a work-related injury by the North Dakota Workers' Compensation Bureau ("Bureau"). Lende, 568 N.W.2d at 757. Some years later the claimant petitioned the Bureau for a determination of permanent partial impairment ("PPI"). Id. The claimant and the Bureau worked together for over a year to resolve the matter but the Bureau took no final action. Id. The Claimant then applied to the state district court for a writ of mandamus directing the Bureau to issue the PPI order. The Bureau responded by denying the claimant's request for PPI benefits. The claimant petitioned the Bureau for reconsideration. After making numerous requests and waiting over six months for a hearing to be set on her petition for reconsideration, the claimant filed an appeal in district court. Id. at 758. The Bureau moved to dismiss, arguing the claimant had failed to exhaust her administrative remedies. The North Dakota Supreme Court held that further exhaustion was not required under these circumstances. Id. at 760. The North Dakota Supreme Court explained that the North Dakota Administrative Agencies Practice Act, N.D.C.C. Ch. 28-32, did not require a claimant to pursue a petition for reconsideration as a prerequisite to an appeal to the district court and, in any case, after thirty days of inaction an appeal

was authorized by N.D.C.C. § 28-32-14(4). Id. The North Dakota Supreme Court stressed that the claimant had attempted to exhaust her remedies and the Bureau failed to provide any justification for its "unreasonable delay." Id. at 760-61. Unreasonable delay may render an agency's remedy inadequate. Id. at 761. Unlike the Plaintiffs in this case, the claimant in *Lende* followed the specified process and made multiple attempts to obtain relief from the state agency. Lende, 568 N.W.2d at 761 ("[t]here is no evidence or claim Lende failed to cooperate in the administrative process or frustrated it in any way").

The Plaintiffs have failed to demonstrate they are not required to exhaust the administrative remedies set forth in Chapter 38-08 of the North Dakota Century Code. Consequently, claims one, two, six, and seven must be dismissed for lack of subject matter jurisdiction.

C. PRIVATE RIGHT OF ACTION

The Defendant contends no private right of action exists under Section 38-08-06.4, and thus claims one and two should be dismissed for failure to state a claim upon which relief can be granted. The Plaintiffs contend Section 38-08-06.4 can be read to support the finding of both an express and implied private right of action, and because they have a private right of action they are not required to exhaust any administrative remedies. Werlinger v. Champion Healthcare Corp., 598 N.W.2d 820, 833 (N.D. 1999) (a party "with a private right of action has the option to proceed either by way of the judicial system, or by way of the administrative scheme present within the applicable governmental agency").

1. EXPRESS PRIVATE RIGHT OF ACTION

Section 38-08-06.4 does not expressly create a private right of action. When the legislature intends to create a private right of action, it declares as much in no uncertain terms, such as when it states that a person may "bring suit," N.D.C.C. § 38-08-17(2) (action to enjoin violation of Industrial Commission orders), or "may bring an action for compensation in . . . court," N.D.C.C. § 38-11.1-09 (surface owner compensation). The legislature employed no such terminology in Section 38-08-06.4. The statutory remedy includes the right to petition the Industrial Commission for hearing and seek judicial review of any adverse order. Section 38-08-06.4 makes no mention of direct court action, a suit or lawsuit, or any other language which may be construed as indicating resort to the judicial system is authorized. Only after a party has exhausted its administrative remedies is resort to the judicial system authorized. See N.D.C.C. § 38-08-14 (appeal to district court).

2. IMPLIED PRIVATE RIGHT OF ACTION

Any determination that a private right of action should be implied from a North Dakota statute requires a showing that (1) the plaintiff is one of the class for whose special benefit the statute was enacted; (2) there is an indication of legislative intent, explicit or implicit, either to create such a remedy or deny one; and (3) it is consistent with the underlying purposes of the legislative scheme to imply such a remedy. Empower the Taxpayer v. Fong, 817 N.W.2d 381, 383 (N.D. 2012); Ernst v. Burdick, 687 N.W.2d 473 (N.D. 2004). A party claiming an implied right of private action bears the burden of establishing that the legislature intended to create the remedy. Id.

a. CLASS MEMBERSHIP

The Court has no trouble concluding the Plaintiffs are members of a class of persons for whose special benefit Section 38-08-06.4 was enacted. The Plaintiffs are royalty owners. Section 38-08-06.4 gives royalty owners the right to be paid for any illegally flared gas. While there are a number of persons who benefit from Section 38-08-06.4, it is not necessary for the person claiming class membership to show he is the primary beneficiary. All that is required is a demonstration that one is within the class of persons "for whose benefit some of the statutory safeguards were enacted." Ernst, 687 N.W.2d at 477-78. The Court finds that royalty owners are clearly members of the class for whose benefit Section 38-08-06.4 was enacted.

b. LEGISLATIVE INTENT

In analyzing whether there is any indication of legislative intent to create or deny a private right of action, legislative silence in failing to expressly create a private right of action "is a strong indication it did not intend such a remedy." Ernst, 687 N.W.2d at 478. The language of Section 38-08-06.4 is easily understood and clearly demonstrates an intent to create an administrative remedy. See supra § III. A. Section 38-08-06.4(5) provides that the Industrial Commission has enforcement authority, may determine the value of improperly flared gas, and order payment of royalties due. Section 38-08-06.4 makes no mention of court action. See R. B. J. Apartments, Inc. v. Gate City Sav. & Loan Ass'n, 315 N.W.2d 284, 289 (N.D. 1982) (implication of a private right of action on the basis of legislative silence would be an unwarranted intrusion upon the legislative domain). All an interested party who believes a flaring violation has occurred need do is file a petition as outlined in Section 38-08-11. The Industrial Commission is then obliged to hold a hearing. The remedy is

clearly administrative with a right to appeal adverse determinations to the district court. See N.D.C.C. § 38-08-14. The Court recognizes this may not be the Plaintiffs' preferred remedy, but it is a remedy nonetheless and the remedy the legislature provided when it enacted Chapter 38-08. The Court expressly finds no indication of any legislative intent to create a private right of action in Section 38-08-06.4.

c. PURPOSE OF THE LEGISLATIVE SCHEME

The final factor asks whether implying a private right of action is consistent with the underlying purpose of the legislative scheme. When considering the underlying purpose of a statutory provision, consideration should be given to the entire enactment of which it is part, and as far as possible, the provision should be given an interpretation that is consistent with the intent and purpose of the entire act. Werlinger, 598 N.W.2d at 832.

Section 38-08-06.4 is intended to balance the need for oil and gas development while curbing the wasteful practice of gas flaring. This purpose is accomplished by permitting the flaring of gas for one year after the well begins producing, providing that producers must pay royalty owners for gas flared in violation of Section 38-08-06.4, and permitting producers to seek exemptions when economic infeasibility is shown. The statutory scheme provides the Industrial Commission with broad authority and interested persons with a clear administrative remedy while promoting the efficient and cost-effective resolution of flaring disputes. Implying a private right of action would render the administrative remedy in Section 38-08 effectively moot. Requiring royalty owners to pursue their rights via the administrative remedies set forth in Chapter 38-08 rather than going directly to court furthers the statutory scheme. The Court concludes that implying a private right

of action would be inconsistent with this legislative scheme.

Having determined that the legislature did not intend to create a private right of action in Section 38-08-06.4, the Court concludes that claims one and two shall be dismissed for failure to state a claim upon which relief can be granted.

D. ENVIRONMENTAL LAW ENFORCEMENT ACT

The Plaintiffs also attempt to avoid the exhaustion requirement and the lack of a private right of action in Section 38-08-06.4 by pleading an ELEA claim. However, artful pleading will not permit them to do what is otherwise prohibited.

The ELEA provides a procedural mechanism by which an individual may sue in district court to recover damages for violation of "any environmental statute, rule, or regulation." N.D.C.C. § 32-40-06. The stated purpose of the ELEA is to "provide relief to those aggrieved by a failure of others to abide by or enforce the state's environmental laws." N.D.C.C. § 32-40-02. The legislature also expressed an intent in the ELEA that "[t]he remedies provided by this chapter shall be cumulative and shall not replace statutory or common law remedies." N.D.C.C. § 32-40-04. The ELEA was enacted in 1975, but there are no reported decisions discussing its meaning or application. The only guidance to be found is an Attorney General's opinion from 1977. In that opinion, North Dakota's Attorney General states that the ELEA "grants jurisdiction to the court to enforce, by private lawsuit, laws and regulations which otherwise may be enforceable only by the state agency." See Pl's Ex. X., 1977 Op. Att'y Gen. N.D. 40, 1977 WL 35929 (N.D.A.G.). "Attorney General opinions interpreting statutes are entitled to respect and [should be followed] if they are persuasive." Werlinger, 598 N.W.2d at 833.

In their first amended complaint, the Plaintiffs assert that Section 38-08-06.4 is an "environmental statute" and that, pursuant to Section 32-40-06, they may sue in district court for damages for violation of Section 38-08-06.4. The Plaintiffs seek the same damages in both their Section 38-08-06.4 claim and their ELEA clam--the payment of royalties for gas illegally flared. The Plaintiffs do not seek damages resulting from environmental harm or an injunction prohibiting flaring. The only reason to pursue an ELEA claim rather than, or in addition to, a claim under Section 38-08-06.4 would be to avoid the administrative remedies set forth in Chapter 38-08.

While it would appear to the Court that the ELEA provides a cumulative remedy if the Industrial Commission fails or refuses to act, the specific and comprehensive administrative remedies set out in Chapter 38-08 must still be exhausted prior to any resort to the courts. A plaintiff may not employ artful pleading in order to avoid administrative remedies. Morgan v. U.S. Postal Serv., 798 F.2d 1162, 1165 (8th Cir. 1986). By requiring exhaustion, it is possible to harmonize Chapter 38-08 and Chapter 32-40. See N.D.C.C. 1-02-07 (whenever possible, conflicting statutes should be construed so as to give effect to both provisions). If the process set forth in Chapter 38-08 is followed by both the Plaintiffs and the Industrial Commission, there will be no need to resort to Chapter 32-40. The Plaintiffs have failed to ask the Industrial Commission to take any action, and thus have failed to exhaust the administrative remedies available to them.

If the Court were to permit the Plaintiffs to proceed with their ELEA claim without exhausting their administrative remedies it would render those remedies meaningless and destroy the doctrine's utility. Fort Berthold Land & Livestock Ass'n. v. Anderson, 361 F. Supp. 2d 1045, 1051 (D.N.D. 2005). This would result in the waste of judicial resources and offend the separation of powers doctrine. Brown, 711 N.W.2d at 198-99. It would also be contrary to the legislative

intent expressed in the ELEA that it does not replace other statutory or common law remedies. N.D.C.C. § 32-40-04. The Court finds nothing in Chapter 32-40 to suggest its purpose is to permit a party to avoid pursuing available administrative remedies. The Court concludes the Plaintiffs' ELEA claims (claims five, and ten) shall be dismissed for failure to exhaust administrative remedies.

E. WASTE AND CONVERSION

The Plaintiffs' claims for waste and conversion also fail. Section 1-01-03 of the North Dakota Century Code establishes a hierarchy of legal authority. It is well-established that statutes trump the common law. N.D.C.C. § 1-01-03; Burr v. Trinity Med. Ctr., 492 N.W.2d 904, 907-08 (N.D. 1992) (cautioning that codified law commands more respect than common law doctrines). In addition, Section 1-01-06 provides "in this state, there is no common law in any case in which the law is declared by the code." N.D.C.C. § 1-01-06; Bornsen v. Pragotrade, LLC, 804 N.W.2d 55, 60 (N.D. 2011) (citing Section 1-01-06 and noting statutory enactments take precedence over common law doctrine). "When legislation covers the entire field, previous provisions of either the common or statutory law in conflict therewith become no longer operative." In re White, 284 N.W. 357, 358 (1939).

The North Dakota Supreme Court's opinion in *Continental Resources* is instructive. In *Continental Resources* two producers, Continental and Farrar, held oil and gas leases covering a spacing unit but could not agree on a drilling plan. Cont'l Res., Inc., 559 N.W.2d at 842-43. Continental petitioned the Industrial Commission to compel pooling. Id. at 843. The Industrial Commission ordered the forced pooling of all oil and gas interests in the unit. Despite this, Farrar continued to resist development and maintained any horizontal drilling would constitute a subsurface

trespass. Id. at 844. Continental sued, seeking a declaration that horizontal drilling would not be a trespass. The trial court found the forced pooling order was a proper exercise of the state's police power by the Industrial Commission and superseded the law of trespass. The North Dakota Supreme Court affirmed, finding that common law trespass was superseded by the forced pooling order, and that as long as the forced-pooling order was complied with there could be no trespass. Id. at 846. In doing so the North Dakota Supreme Court noted that traditional property law concepts such as the rule of capture contributed to waste and inefficiency in oil and gas development. This led oil producing states to enact regulatory statutes, such as Chapter 38-08, which modified traditional common law property rules. Id. at 844-45. Waste and conversion are traditional property law concepts. *Continental Resources* supports the conclusion that the provisions of Chapter 38-08, along with the orders and rules of the Industrial Commission implementing those provisions, necessarily supersede many common law property claims.

Section 38-08-06.4 covers the entire field when it comes to flaring and is the controlling law on flared gas. It preempts common law conversion and waste claims while providing the exclusive remedy for claims of illegal flaring. Under Chapter 38-08, the legislature has given the Industrial Commission "comprehensive powers to regulate oil and gas development," including the power to determine whether waste exists. Cont'l Res., Inc., 559 N.W.2d at 845. In furtherance of these objectives and obligations, the legislature has equipped the Industrial Commission with the power to adopt and enforce rules and orders, and jurisdiction to determine whether gas flared by an operator constitutes a violation entitling royalty owners to compensation. N.D.C.C. §§ 38-08-04(5), 38-08-06.4(4) and (5).

Flaring is without question a wasteful, albeit sometimes necessary and unavoidable, practice.

Chapter 38-08 declares that the waste of oil and gas is prohibited. N.D.C.C. § 38-08-03. In order to limit waste, the flaring of gas is specifically regulated by Section 38-08-06.4. A claim of waste or conversion related to flared gas would conflict with Chapter 38-08's stated purpose and the public interests set forth in Section 38-08-01. It would also conflict with the remedy for illegal flaring set forth in Section 38-08-06.4(4). The rights and remedies set forth in Chapter 38-08 must prevail over the common law claims for waste and conversion. To hold otherwise would undermine the authority of the Industrial Commission.

Section 38-08-06.4 precludes not only common law claims for waste and conversion, but also claims under North Dakota's general waste statute found at N.D.C.C. § 32-17-22, because Section 38-08-06.4 is far more specific as to flaring than Section 32-17-22. Rojas v. Workforce Safety & Ins., 723 N.W.2d 403, 406 (N.D. 2006) (when statutes conflict and cannot be harmonized, the special provision prevails and will be construed as an exception to the general provision) Thus, the Court concludes as a matter of law that the Plaintiffs' claims for waste and conversion (claims three, four, eight, and nine) are preempted and precluded by statute.

IV. CONCLUSION

The Court has carefully reviewed the entire record, the parties' filings and the relevant law. The Court concludes the Plaintiffs have failed to exhaust their administrative remedies and thus the Court lacks subject matter jurisdiction. For the reasons set forth above, the motion to dismiss (Docket No. 26) is **GRANTED** and the case is dismissed without prejudice. The briefs submitted by the parties were very thorough and more than adequate to decide the issues presented. The hearing scheduled for June 30, 2014, is cancelled. The Plaintiffs may pursue their claims before the

North Dakota Industrial Commission.

IT IS SO ORDERED.

Dated this 14th day of May, 2014.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court