

2007

Weststar Exploration Company, Inc. v. Cochrane Resources, INC., et al. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WESTSTAR EXPLORATION COMPANY,
INC.,

Plaintiff and Appellant,

vs.

COCHRANE RESOURCES, INC., et al.,

Defendants and Appellees.

Case No. 20070413-CA

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Introduction

In this lawsuit, Weststar alleges trespass and unjust enrichment based upon Appellees' (collectively "Newfield") unauthorized use of a 4-mile natural gas pipeline between 1999 and 2005. (R. 369-71.) Newfield does not deny it used the pipeline. Newfield did not seek or receive authorization to use the pipeline. And Newfield does not claim that it paid anyone for its use of the pipeline. Instead, Newfield argues that it should escape all liability or summary judgment because Weststar did not provide evidence sufficient to create a factual dispute concerning whether Weststar has an ownership interest in the pipeline.

In fact, in opposition to the motion for summary judgment Weststar provided an abundance of evidence of its ownership interest in the pipeline, all of which was undisputed. In 1991, the BLM granted Bonanza Gas Company, Inc. "a right to construct, operate, [and] maintain" the natural gas pipeline, which Bonanza did. (R. 589.) William Gilmore testified that Bonanza then assigned title to the pipeline to him. (R. 371.) Mr. Gilmore then assigned title to the pipeline to Weststar in 2000. (R. 362-65.) In 2004, Weststar assigned a 50% interest in the pipeline to Houston Exploration. (R. 822.)

In Newfield's response brief, it does not argue that it provided any evidence to dispute these facts in the district court.¹ Instead, Newfield argues that Weststar

¹ Weststar is appealing only the trial court's grant of summary judgment, not the denial of its motion to reconsider. While Weststar mentions in its opening brief the evidence presented with its motion to reconsider, Weststar's arguments do not rely upon this evidence. More important, the Court need not consider this evidence to

has not provided enough evidence that Bonanza ever transferred title to Mr. Gilmore. Specifically, Newfield points out that Weststar failed to produce a copy of an “unrecorded assignment” of title from Bonanza to Mr. Gilmore. (Resp. Br. at 17.) However, to be entitled to summary judgment Newfield must do more than call into question the credibility of Mr. Gilmore’s affidavit testimony—that Bonanza transferred title to him—by pointing out that there is no longer a written copy of the assignment. This is especially the case here, where Mr. Gilmore’s testimony is confirmed by numerous sources, most of which were part of the summary judgment record and one of which, admittedly, was submitted only as part of Weststar’s subsequent motion to reconsider.

First, in addition to Mr. Gilmore’s affidavit, the 2000 assignment from Mr. Gilmore to Weststar is evidence that Mr. Gilmore had title to the pipeline in 2000, title he only could have obtained from Bonanza. Second, Newfield identified as an “undisputed fact” that in 2004 Houston Exploration obtained a 50% percent interest in the pipeline. This interest was obtained by assignment from Weststar and through the chain of title originating with the transfer from Bonanza to Mr. Gilmore. (R. 338.) Third, evidence presented with Weststar’s motion to reconsider

reverse. Thus, Newfield’s arguments concerning an appeal from the denial of a motion to reconsider are inapposite and have no bearing on this appeal.

Further, Newfield identifies that its main concern in the district court was Weststar’s failure to abide by a scheduling order, a proper topic for a Rule 37, not a Rule 56, motion. The district court’s order granting summary judgment concerns whether there is a disputed issue of material fact, not whether Weststar complied with a discovery order.

demonstrates that the BLM currently recognizes that Weststar owns the pipeline; again, something that could be true only if Bonanza transferred title to Mr. Gilmore. (R. 579, 628.) All of the circumstantial and direct evidence indicates that Bonanza transferred title of the pipeline to Mr. Gilmore. Newfield has presented no evidence to dispute this fact, let alone shown that this material fact has no support at all. The district court erred in granting Newfield's motion for summary judgment.

The other argument Newfield advances, even if correct, does not provide an alternative ground to affirm the district court's order. Newfield argues that Weststar failed to join indispensable parties that have interests in the pipeline. This argument fails because (i) these entities are not necessary or indispensable, as defined in Rule 19; and (ii) even if they were, only dismissal without prejudice would have been warranted. Therefore, regardless of whether Newfield's alternative argument is successful, Newfield is not entitled to dismissal on the merits and thereby a free pass for 6 years of unauthorized use of Weststar's pipeline.

Argument

In the opening brief, Weststar argued that the district court erred when it concluded that it is undisputed Weststar has no ownership interest in the pipeline. Weststar first argued that the district court erred by requiring Weststar to demonstrate an ownership, instead of a mere possessory, interest to maintain its trespass and unjust enrichment claims. Weststar then argued that William Gilmore's affidavit testimony outlining his personal knowledge of how title of the pipeline was

transferred from Bonanza to Mr. Gilmore to Weststar is, in fact, itself undisputed, and is at least sufficient to create a disputed issue of fact concerning whether Weststar owned the pipeline during Newfield's unauthorized use.

In the response brief, Newfield argues that Weststar's argument that it was required to demonstrate only a possessory interest was not preserved because it was not presented to the district court before it entered summary judgment. (Resp. Br. at 12-13.) Newfield then argues that Weststar failed to present sufficient evidence of its ownership of the pipeline because it failed to provide a copy of an unrecorded assignment of title to the pipeline from Bonanza to Mr. Gilmore. (Resp. Br. at 14-15.)

As demonstrated below, both arguments fail. The argument that Weststar need only establish a possessory interest in the pipeline was raised in conjunction with the motion for summary judgment, by both Weststar and Newfield. (R. 268; 901:34-35.) Nonetheless, because it is undisputed on appeal that the issue of whether Weststar is the owner of the pipeline was preserved below, Weststar will address this argument first.

I. Weststar's Evidence That It Has a Sufficient Interest in the Pipeline Was Undisputed, and at the Very Least Creates a Question of Fact Sufficient to Preclude Summary Judgment

Newfield's response brief focuses on a single material fact. Newfield asserts that it is undisputed that Bonanza never transferred title to the pipeline to Mr. Gilmore because Weststar failed to produce a copy of an unrecorded assignment by

which this transfer took place. (Resp. Br. at 17.) Specifically, Newfield argues that “the record stands uncontradicted that Bonanza Gas owns the pipeline,” (id. at 11), even though Bonanza, which no longer exists, has stated through Mr. Gilmore, its former sole partner, that Bonanza does not own the pipeline. (R. 371, 479.) Ironically, insofar as there is an undisputed fact it is undisputed that Bonanza did transfer title of the pipeline to Mr. Gilmore, as Mr. Gilmore’s affidavit testimony to that effect stands undisputed. Regardless, all Weststar must demonstrate on appeal is that the district court erred in concluding that it is undisputed Bonanza did not transfer ownership Mr. Gilmore. This burden is easily satisfied.

A. The Evidence Presented by Weststar Establishes Its Ownership Interest

As outlined in the opening brief, Mr. Gilmore testified in his affidavit that he “received title to the Pipeline from Bonanza Gas Company . . . by unrecorded assignment.” (R. 371.) Mr. Gilmore then explained that “Bonanza was an entity which I formed[, and] I was the officer and sole partner of Bonanza at the time Bonanza assigned the Pipeline to me.” (Id.) Mr. Gilmore’s testimony is based upon his personal knowledge and therefore is sufficient to create a disputed issue of fact concerning the transfer. Weststar satisfied its burden in opposing summary judgment by setting forth “facts that would be admissible in evidence and show[ing] that the affiant is competent to testify to the matters stated therein.” Walker v. Rocky Mountain Recreation Crop., 508 P.2d 538, 542 (Utah 1973). This alone is a sufficient ground for this Court to reverse.

Even ignoring Mr. Gilmore's affidavit, however, there is ample evidence of the assignment from Bonanza to Mr. Gilmore. First, the written assignment of title from Mr. Gilmore to Weststar is evidence that Mr. Gilmore had title to transfer, title he could have obtained only from Bonanza.² (R. 371-72, 362-65.) Since Bonanza does not dispute the transfer, it is unclear on what basis Newfield does so. This additional evidence was before the court when it decided the motion for summary judgment. (Id.)

Second, the 2004 participation agreement between Weststar and Houston Exploration provided Houston Exploration a 50% interest in the use of the pipeline and named Weststar as operator of the pipeline. (R. 721-804.) Mr. Gilmore's deposition testimony also confirms Houston Exploration's interest in the pipeline, as does the 2004 assignment of the interest from Weststar to Houston Exploration. (R. 332-33, 335, 822.) In fact, Newfield set forth in its own summary judgment papers as an undisputed fact that Houston Exploration currently has this 50% interest. (R.

² In a footnote, Newfield cites Young v. Young, 1999 UT 38, 979 P.2d 338, for the proposition that a conveyance to a nonexistent entity is a nullity and therefore the transfer to Weststar was a nullity because Weststar was formally created a few months after Mr. Gilmore transferred title to it. (Resp. Br. at 13 n.6.) Young, however, concerned a trust that never existed. In contrast, Weststar does exist, and like any corporation Weststar was capable of being bound by Mr. Gilmore's acts prior to its incorporation. Tanner v. Sinaloa Land & Fruit Co., 134 P. 586, 589 (Utah 1913) (while "parties who undertake to organize a corporation cannot bind the corporation by their contracts and agreements made before the company is incorporated[, t]he authorities . . . practically all agree that a corporation may by corporate action adopt the contracts of its promoters"). In any event, such questions surrounding Weststar's ownership demonstrate, at most, an issue of fact that cannot be resolved as a matter of law.

338.) Weststar could only have transferred this interest to Houston Exploration if Mr. Gilmore had previously transferred his interest to Weststar; again, something Mr. Gilmore could have done only if the transfer between Bonanza and Mr. Gilmore occurred. Contrary to Newfield's suggestion, this additional evidence was before the district court when it entered summary judgment. (R. 332-33, 335, 721-804, 819-22, 901:53, 56.)

Third, Mr. Gilmore testified in his deposition that he was the sole owner of Bonanza and that Bonanza transferred its interest in the pipeline to Mr. Gilmore. (R. 479.) And contrary to Bonanza's suggestion in a footnote, (Resp. Br. at 10-11 n.4), the relevant portions of Mr. Gilmore's deposition testimony were presented to the district court with Newfield's summary judgment papers. (R. 332-33, 479.)

Fourth, the BLM currently recognizes that Weststar owns the pipeline, something that could be true only if Bonanza transferred title to Mr. Gilmore before Mr. Gilmore transferred title to Weststar. (R. 579, 628.) Newfield is correct that this evidence was only before the district court when it decided Weststar's motion to reconsider and therefore the Court need not consider it. However, it is noteworthy that the very evidence Newfield asserts, and the district court concluded, provides no basis to conclude Weststar owns the pipeline was sufficient for the BLM to conclude just the opposite, a fact of which the Court may take judicial notice.³

³ Arkla Exploration Co. v. Texas Oil & Gas Corp., 734 F.2d 347, 361 n.22 (8th Cir. 1984) ("Even though IM 84-35 is not part of the record on appeal, the Court is fully empowered to take judicial notice of it as it is an order or rule issued by BLM pursuant to its delegated authority."); see also New York Indians v. United States,

Regardless, for all the reasons set forth above, the Court need not consider the BLM evidence to reverse the district court's order. There is ample evidence of Weststar's ownership interest to create an issue of fact sufficient to overcome summary judgment.

B. Neither Rule 1002 Nor the Statute of Frauds Precludes Mr. Gilmore's Affidavit Testimony From Creating a Question of Fact Concerning Weststar's Ownership Interest in the Pipeline

Newfield's response to the overwhelming evidence that Bonanza transferred title to the pipeline to Mr. Gilmore is twofold. First, Newfield misconstrues Weststar's alternative arguments—e.g., that the transfer of ownership from Bonanza to Mr. Gilmore would have taken place by operation of Texas law even if there had been no formal transfer⁴—as Weststar's only arguments, and repeatedly asserts that Weststar has abandoned its claim that Weststar owns the pipeline. (Resp. Br. at 5,

as these documents are not referred to in the findings of fact by the court below, this court cannot consider them; but as they are documents of which we may take judicial notice, we think the fact that they are not incorporated in the findings of the court will not preclude us from examining them, with a view of inquiring whether they have the bearing claimed. While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, which were not called to its attention, or other similar matters of judicial cognizance.”).

⁴ Specifically, Weststar identified an alternative method whereby, even if Bonanza had not formally transferred the pipeline to Mr. Gilmore, the same transfer would have occurred by operation of Texas law when Bonanza dissolved. Courseview, Inc. v. Phillips Petroleum Co., 312 S.W.2d 197, 203 (Tex. 1957); (R. 371, 479, 581-84.) In response, Newfield argues that title would not have automatically transferred if Bonanza had creditors and taxes due when it dissolved. (Resp. Br. at 20.) In the end, Newfield's argument highlights, at best, that disputed issues of fact remain to be resolved, and therefore, summary judgment was inappropriate.

10, 11, 17, 20.) Second, Newfield argues that Mr. Gilmore's affidavit is inadmissible and that Weststar was somehow required to produce a copy of the written assignment between Bonanza and Mr. Gilmore to create an issue of fact concerning Weststar's present ownership. (Resp. Br. at 17-18.) Weststar will address each argument in turn.

Newfield's first argument that Weststar has abandoned its claim that Weststar owns the pipeline is puzzling. Two-thirds of the argument section in Weststar's opening brief is dedicated to this claim. (Opening Br. at 10-14.) Weststar made the same arguments it reiterates here: (i) Mr. Gilmore's affidavit is based upon his personal knowledge and is evidence that Bonanza transferred title to Mr. Gilmore; (ii) the assignment from Mr. Gilmore to Weststar is further evidence not only of the transfer of title from Bonanza to Mr. Gilmore but also that Weststar now owns the pipeline; and (iii) because Houston Exploration now has an interest in the pipeline, Weststar must have had some interest in the pipeline when it entered into the agreement with Houston Exploration in 2004. (Opening Br. at 10-11.)

Newfield ignores this evidence and simply asserts that "the record stands uncontradicted that Bonanza Gas owns the pipeline," even though Bonanza no longer exists and its sole partner when it did exist—Mr. Gilmore—has testified that Bonanza transferred title to the pipeline. (Resp. Br. at 11.) No entity has ever challenged Weststar's ownership of the pipeline, ownership now confirmed by the BLM. Weststar not only did not abandon the argument that it owns the pipeline, but

demonstrated in its opening brief that Newfield provided no evidence to suggest otherwise.

Newfield's second argument is that Mr. Gilmore's affidavit is inadmissible and that to preclude summary judgment Weststar was required to produce a written copy of the assignment from Bonanza. (Resp. Br. at 17-18.) This argument also fails. Newfield asserts, without any explanation, that Mr. Gilmore's affidavit violates Rule 1002 of the Utah Rules of Evidence, which requires an original writing to prove its content. (Resp. Br. at 17.) Not only was this argument not raised in the district court and not adequately briefed in the response brief,⁵ it has no application here. In this case, it is not the precise language of the assignment that is crucial but the fact that the assignment occurred. As this Court has explained, where the existence of a document, such as a license, instead of its content is at issue, the "best evidence rule, by its terms, has no applicability." Billings v. Nielson, 738 P.2d 1047, 1049 (Utah Ct. App. 1987) ("Rule 1002 exists because presenting to the court the exact words of some writings is of more than average importance, particularly in dispositive or operative documents. A slight difference in words may result in a great difference in rights.") (citing Kennedy v. Lynch, 513 P.2d 1261 (N.M. 1973)). Here, Mr. Gilmore's testimony is that the assignment took place. The fact that the written document cannot be located is beside the point.

⁵ W. Jordan City v. Goodman, 2006 UT 27, ¶29, 135 P.3d 874 (appellate courts are "not a depository in which the appealing party may dump the burden of argument and research"); State v. Thomas, 961 P.2d 299, 304 (Utah 1998) (appellate courts "will not address arguments that are not adequately briefed").

The position Newfield advances cannot be correct. It would leave a homeowner without standing to bring a trespass action if he could not produce the original document by which every prior homeowner took title of the property. In other words, if a document in a chain of title is lost, a homeowner would have no standing even when (i) the two entities involved in the now-undocumented transaction testify that the transaction occurred, (ii) nobody else claims to own the property, (iii) the homeowner provides the written documents by which he took title, and (iv) the alleged trespasser does not deny he was on the property without authorization or that the homeowner was thereby damaged. Newfield has provided no support for such an extraordinary rule, and Rule 1002 does not supply it.

Newfield next asserts that Mr. Gilmore's affidavit is insufficient because the statute of frauds requires Weststar to produce the written assignment from Bonanza to Mr. Gilmore. (Resp. Br. at 17.) The statute of frauds does not hold that a transaction never occurred if the written document by which it occurred cannot later be located. Mr. Gilmore testified that the assignment occurred via an unrecorded written assignment. (R. 371.) This satisfies the statute of frauds. Mr. Gilmore does not purport to transfer title by his testimony, but only to testify about the transfer. The fact that the document cannot be located does not demonstrate that the writing never existed, especially where, as here, the parties to the transaction confirm that the transaction did take place via written instrument.

In the end, Weststar’s evidence that it owns the pipeline is both admissible and unopposed. Newfield’s position—that it is undisputed that Bonanza owns the pipeline—has no evidence to support it and is refuted by the testimony of Bonanza’s former sole partner, Mr. Gilmore. While Newfield may question Mr. Gilmore’s credibility, such questions become relevant only at trial, not when ruling on motions for summary judgment. Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983). At the very least, there is a disputed issue of fact concerning whether Weststar owns the pipeline, a dispute that precludes summary judgment. The Court should reverse the district court’s order granting summary judgment. Newfield should not be permitted to escape all liability for its years of unauthorized use of the pipeline.⁶

II. A Possessory Interest Is All that Is Required to Maintain an Action for Trespass or Unjust Enrichment. Weststar Has Presented Ample Evidence of Its Possessory Interest in the Pipeline to Create an Issue of Material Fact, Making Summary Judgment Inappropriate

Wholly apart from Weststar’s ownership interest in the pipeline, summary judgment was inappropriate because Weststar provided evidence of its possessory interest in the pipeline, which is sufficient to confer Weststar standing to advance its trespass and unjust enrichment claims. Contrary to established Utah law, the trial court required Weststar to prove an “ownership interest” in the pipeline to survive

⁶ Newfield suggests in its fact section, but does not argue, that one Appellee, Cochrane Resources, Inc. could not have trespassed or been unjustly enriched because for a time it operated the pipeline under court order. (Resp. Br. at 4-5.) While Weststar does not dispute that Cochrane could act as authorized by court order, (R. 457), there is no indication that a court order authorized Cochrane to use the pipeline to benefit its own wells without charge, (R. 461), or to reconstruct the pipeline such that Weststar could not use the pipeline for its own wells. (R. 417.)

summary judgment. (R. 539.5.) Similarly, Newfield insists that an ownership interest is a prerequisite to Weststar's claims.⁷

While trespass and unjust enrichment claims are often filed by owners of property, proof of an ownership interest is not required. A possessory interest is adequate. John Price Assoc., Inc. v. Utah State Conf., Bricklayers Locals Nos. 1, 2, & 6, 615 P.2d 1210, 1214 (Utah 1980) ("Trespass is a possessory action. The gist of an action for trespass is infringement on the right of possession."); Desert Miriah, Inc. v. B&L Auto, Inc., 2000 UT 83, ¶13, 12 P.3d 580 (outlining the elements of an unjust enrichment claim). The 2004 participation agreement with Houston Exploration designating Weststar as the operator demonstrates that Weststar had a possessory interest in the pipeline during the last year of Newfield's unauthorized use. New American Oil & Mining Co. v. Troyer, 76 N.E. 253, 254 (Ind. 1905) (R. 332-33; 901: 16, 53, 56; 782, 785, 804.) Prior to 2004, Weststar had the possessory interests that both Houston Exploration and Weststar currently hold pursuant to the participation agreement. Throughout the six years of Newfield's unauthorized use, this possessory interest alone is sufficient to preclude summary judgment.

⁷ Newfield also argues that Weststar has raised a new argument. (Response Br. at 12.) However, Weststar raised this argument during oral argument on the motion for summary judgment. (R. 901:34-35.) In addition, Newfield in its summary judgment papers argued that the proper standard is possession, not ownership. (R. 268.)

III. Because Weststar is the Operator of the Pipeline and Its Relationship with Collins, Ware and Houston Exploration Is Governed by Contractual Agreements That Allow Weststar to Bring this Lawsuit, No Other Parties Need to Be Joined

As an alternative ground to affirm, Newfield raises the argument that Weststar has failed to join indispensable parties who also have interests in the pipeline. (Resp. Br. at 23-25.) This argument fails not only because the parties with interests—Houston Exploration, Mr. Ware, and Mr. Collins—are not indispensable under Rule 19 of the Utah Rules of Civil Procedure, but also because even if they were indispensable, only dismissal without prejudice would be appropriate. Therefore, Newfield’s argument does not supply an alternative ground to affirm the district court’s order dismissing Weststar’s claims on the merits.

Rule 19 requires the joinder of necessary parties in order to “protect the interest of absent persons as well as those already before the court from multiple litigation or inconsistent judicial determinations.” Grand Cty. v. Rogers, 2002 UT 25, ¶28, 44 P.3d 734. Under Rule 19, a court must “first determine whether a party is necessary” and then, if the party is necessary, the court must “consider whether joinder of the necessary party is feasible.” Id. at ¶29. Only if the party is necessary and joinder is feasible must the party be joined. Id. Then, only after the court concludes that joinder is not feasible, does the court “address the indispensability of the party [under Rule 19(b)] . . . and decide whether the action should proceed or be dismissed.” Id.; see also Landes v. Capital City Bank, 795 P.2d 1127, 1132 (Utah 1990) (“Only if a party is found necessary under the rule 19(a) analysis and the party

cannot feasibly be joined does a court need to analyze indispensability under rule 19(b).”).

Mr. Collins, Mr. Ware, and Houston Exploration are not necessary parties under Rule 19(a). The two agreements that provide these entities interests in the pipeline also authorize Weststar to bring a lawsuit on their behalf. First, under the 1988 operating agreement by which Mr. Collins and Mr. Ware obtained an interest in the pipeline, Weststar, as the operator, is obligated to engage in litigation on behalf of the non-operators to “protect or recover” their joint interests. (R. 427, 547.) Second, the participation agreement between Weststar and Houston Exploration allows Weststar, as the operator, to sue on behalf of itself and Houston Exploration. (R. 772.)

The 1988 operating agreement authorizes Weststar to bring a lawsuit such as this to recover for damages to the lease property. For example, the Accounting Procedure Joint Operations (“APJO”) attached to the 1988 operating agreement recognizes the operator’s capability to bring such a lawsuit on behalf of the non-operating interest holders. (R. 427, 429.) The operator is charged with conducting “Joint Operations” which includes “all operations necessary or proper for the development, operation, protection and maintenance of the Joint Property.” (R. 429.) This includes bringing this lawsuit, as recognized in the APJO’s provision for “Direct Charges,” under which the operator may charge the Joint Account with the “[e]xpense of handling, investigating and settling litigation or claims, discharging of

liens, payment of judgments and amounts paid for settlement of claims incurred in or resulting from operations under the agreement or necessary to protect or recover the Joint Property.” (R. 427 (emphasis added).) This lawsuit is necessary to protect or recover the pipeline from the physical reconstruction and unauthorized and unremunerated use. Thus, Mr. Collins and Mr. Ware are not indispensable parties under Rule 19.

Further, Newfield states that the trespass and damage done to the pipeline was prior to Houston Exploration’s ownership interest was acquired. (Resp. Br. at 23.) Thus, under Newfield’s own logic, Houston Exploration is not an indispensable party to this litigation. The trespass to the pipeline began in 1999, and most of the damage occurred prior to March 1, 2004, when Houston Exploration acquired its interest in the pipeline. (R. 804, 822, 369-71.) However, even if some of the claims did arise after Houston Exploration acquired its interest (the unauthorized use and damage to the pipeline was not discovered until August 2004 and continued until June 2005), Houston Exploration is not an indispensable party. (R. 369-71; 335.) Like the 1988 operating agreement, the agreement entered into between Weststar and Houston Exploration allows Weststar, as the operator, to sue on behalf of itself and the non-operator. (R. 772.)

Newfield states that the participation agreement allows the operator to “settle any single uninsured third party claim or suit arising from operations hereunder if the expenditure does not exceed \$10,000.” (Resp. Br. at 23; R. 901: 54; 772.)

Newfield's argument fails for two reasons. First, this provision uses the word "expenditure," not "recovery," and therefore Weststar's prior counsel's statement at oral argument that Weststar may seek millions in damages is irrelevant.⁸ Second, because only a limited amount of the damage occurred once Houston Exploration acquired its interest in the pipeline in 2004, the damages during this time period may be minimal, and if so, then Weststar can maintain this lawsuit under the agreement.

Because Weststar, in its relationship with Mr. Collins, Mr. Ware, and Houston Exploration, is charged as the operator to protect and maintain the property, which includes the pipeline, it may bring this lawsuit on behalf of the non-operating interest holders. Their interests in the pipeline are represented through Weststar, and Weststar may be obligated as the operator to disperse funds awarded in the lawsuit among the non-operating interest holders.

Mr. Collins, Mr. Ware, and Houston Exploration therefore are not necessary parties. Under Rule 19(a), "a party is necessary if 'in his absence complete relief cannot be accorded among those already parties.'" Landes, 795 P.2d at 1130 (quoting Utah R. Civ. P. 19(a)(1)). Also, a party is necessary "if he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a

⁸ Additionally, the operating agreement itself allows for authority to be delegated to the operator if expenditures exceed the \$10,000 amount. (R. 772.)

substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.” Id. (citing Utah R. Civ. P. 19(a)(2)). In Landes, the named party was authorized to sue on behalf of the party that was alleged to be a necessary party. Id. at 1131.

Landes is similar to this case, in which Weststar is authorized by virtue of its role as operator to bring this suit in maintenance and protection of the subject property. The Landes court held that the party was not necessary under these circumstances, even stating that joining the party would be “redundant,” because complete relief for all entities with an interest could be obtained by the party to the lawsuit. Id. The same holds true here—adding the allegedly necessary parties would be redundant.

Moreover, “[j]oinder is not mandated under Rule 19(a)(1) where, even though certain types of relief are unavailable due to a party’s absence, other meaningful relief can be provided.” Wood & Locker, Inc. v. Doran & Associates, 708 F. Supp. 684, 689-690 (W.D. Pa. 1989) (holding that allegedly necessary parties to an operating agreement were not necessary parties in an action to rescind the agreement).⁹

Here, meaningful relief is available to all non-operating interest holders under the operating and participation agreements. As operator, Weststar must

⁹ “Rule 19 of the Utah rules is essentially similar to rule 19 of the Federal Rules of Civil Procedure. Therefore, in addition to applicable Utah cases, we look to the abundant federal experience in the area for guidance.” Landes, 795 P.2d at 1130.

disperse funds proportionally due those parties in accordance with the agreements. They are therefore not necessary parties to this case and this Court should not uphold the district court's dismissal on this basis. Mr. Collins, Mr. Ware, and Houston Exploration have a means to obtain relief under these agreements should Weststar not disperse an award according to its obligations; such an action would in no way be barred by res judicata from this lawsuit. Accordingly, Rule 19(a)(2) also does not render these parties "necessary" for this case. Because these parties are not necessary as a matter of law, indispensability need not be considered. Landes, 795 P.2d at 1130 (holding that "the court of appeals improperly considered indispensability without first deciding the necessary party question"). The other parties holding ownership interests in the pipeline have complete and meaningful relief as non-operating interest holders under the agreements. Thus, the alternative ground for dismissal cited by Newfield fails.

Even if the Court performs the Rule 19 factual analysis itself and concludes that there are necessary parties that could not be feasibly joined,¹⁰ the Court should nonetheless reverse the district court's order insofar as the dismissal was with prejudice. Bonneville Tower Condominium Mgt. Comm. v. Thompson Michie Assocs., 728 P.2d 1017, 1020 (Utah 1986) (holding that dismissal with prejudice for failure to join an indispensable party would be an abuse of discretion); see also

¹⁰ Newfield states that Houston Exploration was not damaged by the trespass. (Resp. Br. at 23.) Therefore, Newfield is asking only that Mr. Collins and Mr. Ware be added.

Kemp v. Murray, 680 P.2d 758, 761 n.3 (Utah 1984), (dismissal under Rule 19 “does not preclude a plaintiff from renewing his claim in a complaint naming the indispensable party or the real party in interest.”). Regardless of the merits of Newfield’s Rule 19 argument, the Court should reverse the district court’s order and remand the case so Weststar’s claims can be resolved on the merits.

Conclusion

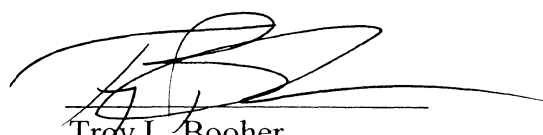
The Court should reverse the district court’s order granting summary judgment because Weststar presented evidence to create a disputed issue of fact concerning whether Weststar owned the pipeline between 1999 and 2005, the time period of Newfield’s unauthorized use. Weststar’s trespass and unjust enrichment claims should be adjudicated on the merits.

In addition, Weststar presented evidence of its possessory interest in the pipeline during this same time period, which is also a sufficient ground for reversal.

Finally, no other parties need to be joined to this action. However, insofar as the Court concludes that indispensable parties must be joined, the Court must reverse that portion of the district court’s order that dismissed Weststar’s claims with prejudice. Regardless, the Court should reverse and remand.

RESPECTFULLY SUBMITTED this 26th day of February, 2008.

SNELL & WILMER L.L.P.



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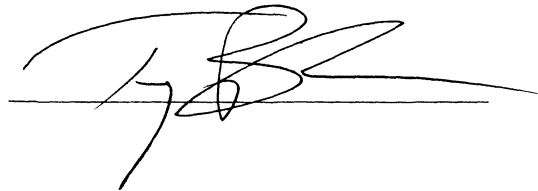
CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February, 2008, I caused to be sent by regular U.S. Mail a true and accurate copy of the foregoing, addressed as follows:

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A handwritten signature in black ink, appearing to be 'G. McEachnie', written over a horizontal line.