

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION**

KODIAK OIL & GAS (USA) INC.,)	
)	
Plaintiff,)	
)	
vs.)	
)	Case No. _____
JOLENE BURR,)	
TED LONE FIGHT,)	
GEORGIANNA DANKS,)	
EDWARD S. DANKS and)	
JUDGE DIANE JOHNSON,)	
In Her Capacity as the Chief Judge)	
of the Fort Berthold District Court,)	
)	
Defendants.)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Kodiak Oil & Gas (USA) Inc. (“Kodiak”), by and through its attorneys and for its complaint against defendants Jolene Burr, Ted Lone Fight, Georgianna Danks, Edward S. Danks and defendant Judge Diane Johnson, does hereby state and allege as follows:

INTRODUCTION

1. By this complaint, Kodiak seeks protection from a lawsuit filed against Kodiak by Jolene Burr, Ted Lone Fight, Georgianna Danks, and Edward S. Danks (collectively “Defendants”) in the Fort Berthold District Court (“Tribal Court”), wherein they seek to recover royalties on gas flared within the Fort Berthold Indian Reservation (“FBIR”). In their lawsuit, Defendants claim to be enrolled or nonenrolled members of the Three Affiliated Tribes of the Fort Berthold Indian Reservation (“Tribe”) and owners of mineral interests within FBIR boundaries; they seek royalties based on a 2013 resolution by the Tribe’s Business Council that purports to regulate the flaring of gas and require the payment of royalties. The Tribal Court plainly lacks jurisdiction over Defendants’ lawsuit because the Tribe lacks legislative or

regulatory jurisdiction over the leasing, development and production of oil and gas on land within the FBIR, over the conduct of Kodiak as a nonmember of the Tribe, or both.

PARTIES

2. Plaintiff Kodiak is a Colorado corporation with its principal place of business in Denver, Colorado. Kodiak is not a member of the Tribe. Kodiak is engaged in oil and gas production, including on land located within the boundaries of the FBIR.

3. Upon information and belief, Defendant Jolene Burr is a resident of North Dakota who claims to be an enrolled or nonenrolled member of the Tribe.

4. Upon information and belief, Defendant Ted Lone Fight is a resident of North Dakota who claims to be an enrolled or nonenrolled member of the Tribe.

5. Upon information and belief, Defendant Georgianna Danks is a resident of North Dakota who claims to be an enrolled or nonenrolled member of the Tribe.

6. Upon information and belief, Defendant Edward S. Danks is a resident of North Dakota who claims to be an enrolled or nonenrolled member of the Tribe.

7. Defendant Judge Diane Johnson is the Chief Judge of the Tribal Court. She is sued only in her official capacity. Upon information and belief, it is within Defendant Judge Johnson's authority to terminate Tribal Court consideration of Defendants' lawsuit against Kodiak.

8. At the behest of Defendants, Defendant Judge Johnson has acted, has threatened to act, or may act under the purported authority of the Tribe to the injury of Kodiak and in violation of federal limitations placed upon the authority of the Tribe regarding oil and gas development on the FBIR and regarding the conduct of non-Indians on the FBIR. Because her actions exceed the Tribe's lawful authority, Defendant Judge Johnson is subject to suit for prospective relief in this forum. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2035

(U.S. 2014) (*Ex parte Young* doctrine extends to officials of Indian tribes); *Burlington N. & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (same).

JURISDICTION AND VENUE

9. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 because it presents the federal question of whether the Tribal Court has adjudicative authority over Kodiak, a nonmember of an Indian tribe, engaged in oil and gas production over which the Tribe has no regulatory authority. “[W]hether a tribal court has adjudicative authority over nonmembers is a federal question.” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008).

10. A case of actual controversy exists between the parties as hereinafter alleged warranting this Court’s declaration pursuant to 28 U.S.C. § 2201.

11. Exhaustion of tribal court remedies is only a prudential rule based on comity. *Strate v. A-1 Contractors*, 520 U.S. 438, 449, 453 (1997). Exhaustion of tribal court remedies is not required here because Defendants have asserted no colorable claim of Tribal Court jurisdiction. Where the absence of tribal court jurisdiction is plain, as set forth below, exhaustion of tribal court remedies would serve no purpose other than delay and is unnecessary. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001); *Strate*, 520 U.S. at 459 n.14; *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1093 (8th Cir. 1998).

12. Venue in this district is proper under 28 U.S.C. § 1391(b) in that a substantial part of the events or omissions giving rise to the claims occurred in this judicial district and, upon information and belief, all defendants are residents of the state in which this district is located.

FACTS COMMON TO ALL COUNTS

13. The suit filed in Tribal Court by Defendants against Kodiak and others is captioned *Burr, et al. v. XTO Energy Inc., et al.*, Case No. CV-2014-0048 (“Tribal Court

Lawsuit”). A true and accurate copy of the Amended Complaint dated February 10, 2014 and served on Kodiak on June 5, 2014 is attached hereto as Exhibit A.

14. In the Tribal Court Lawsuit, Defendants seek to recover royalties on gas flared from mineral interests within the exterior boundaries of the FBIR. Defendants allege that Kodiak is one of several companies operating oil wells on FBIR that are being flared.

15. Defendants base the Tribal Court Lawsuit on Tribal Resolution No. 13-070-VJB, which they allege “mirrors” North Dakota law on flaring as set forth in N.D.C.C. § 38-08-06.4. A true and accurate copy of the Tribal Resolution is attached hereto as Exhibit B.

16. The Tribal Resolution states that “the Business Council finds it in the best interest of the MHA Nation to regulate the flaring of gas on the Fort Berthold Indian Reservation as provided above, due to the lack of enforcement by the Bureau of Land Management of NTL-4a ‘Notice to Lessees and Operators of Onshore federal and Indian Oil and Gas Leases: Royalty or Compensation for Oil and Gas Lost’ which covers the flaring of gas on Indian lands.” Exhibit B at 3.

17. A true and accurate copy of Bureau of Land Management NTL-4A referenced in the Tribal Resolution is attached hereto as Exhibit C.

TRIBAL COURT JURISDICTION PLAINLY LACKING

18. Defendants, as the parties seeking to invoke Tribal Court jurisdiction over a non-Indian, bear the burden of establishing such jurisdiction. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654, 659 (2001).

19. The adjudicative jurisdiction and authority of the Tribal Court is no broader than the legislative or regulatory jurisdiction and authority of the Tribe. *Nevada v. Hicks*, 533 U.S. at 357-58, 370 n.9.

20. The Tribal Court plainly lacks adjudicative jurisdiction over the Tribal Court Lawsuit because the Tribe plainly lacks legislative and regulatory jurisdiction over alleged gas flaring by Kodiak for two reasons.

21. First, Congress has asserted exclusive federal authority over oil and gas development on Indian lands. *See, e.g., Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 373 (1968) (federal supervisory authority over oil and gas leases on allotted lands is exercised in “considerable detail”); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 199 (1985) (“comprehensive” federal regulations govern operation of oil and gas leases on tribal lands); *Pawnee v. United States*, 830 F.2d 187, 189 (Fed. Cir. 1987) (Congress has placed the Secretary of the Interior “at the center of the leasing of Indian mineral lands”); *Rainbow Resources, Inc. v. Calf Looking*, 521 F. Supp. 682, 684 (D. Mont. 1981) (enjoining exercise of tribal court jurisdiction over oil-well dispute involving non-Indian because “Congress has chosen to grant exclusive authority for the regulation, administration and supervision of oil and gas leases” to Interior Secretary). Pursuant to the authority granted by Congress, the Secretary of the Interior, acting through agencies within the Department of Interior, has adopted comprehensive regulations governing the leasing, development and production of oil and gas resources on Indian lands, including regulation of gas flaring. *See, e.g.*, 25 C.F.R. 212.1 *et seq.*; 30 C.F.R. 1201.100 *et seq.*; 43 C.F.R. 3160.0-1 *et seq.*; NTL-4A (attached as Exhibit C).

22. Second, the United States Supreme court has declared the exercise of tribal court jurisdiction over a non-Indian such as Kodiak to be presumptively invalid. *See, e.g., Montana v. United States*, 450 U.S. 544, 565 (1981); *Plains Commerce Bank*, 554 U.S. at 330.

23. The two limited *Montana* exceptions to the presumptively invalid exercise of tribal jurisdiction over non-Indian conduct do not apply to the Tribal Court Lawsuit because

Defendants cannot establish that the regulation of non-Indian conduct involving gas flaring implicates Tribal self-governance and internal relations or imperils the existence of the Tribe as a political entity. *Plains Commerce Bank*, 554 U.S. at 332, 335-41. Both *Montana* exceptions stem “from the same sovereign interests” of a tribe. *Id.* at 341.

24. The first *Montana* exception does not apply because Defendants have not asserted that they have a consensual relationship with Kodiak. Even if such a consensual relationship were alleged or found to exist, it could not create Tribal jurisdiction that does not exist. *Plains Commerce Bank*, 554 U.S. at 336-40. Gas flaring on land within the FBIR is a matter governed exclusively by federal law as to Indian lands (*supra*, paragraph 21) and by North Dakota state law as to fee lands. *See Nevada v. Hicks*, 533 U.S. at 361, 365 (“State sovereignty does not end at a reservation’s border”; States have “inherent jurisdiction on reservations” unless “stripped by Congress”); *Plains Commerce Bank*, 554 U.S. at 328 (“once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it”).

25. The second *Montana* exception does not apply because gas flaring on the FBIR does not menace the political existence of the Tribe, threaten catastrophic consequences for Tribal government, or imperil the subsistence of the tribal community. *Plains Commerce Bank*, 554 U.S. at 341. Federal law and regulations have long governed Indian oil and gas development on the FBIR, and the “project of tribal self-government has proceeded without interruption.” *Id.* “The exception is only triggered by nonmember conduct that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered ‘necessary’ to self-government.” *Atkinson Trading*, 532 U.S. at 657 n.12.

26. To whatever extent Defendants may be seeking relief in the Tribal Court Lawsuit based on North Dakota law, the Tribal Court lacks jurisdiction because it is not a court with

general or concurrent jurisdiction over claims governed by the law of another sovereignty.

Nevada v. Hicks, 533 U.S. at 366-67.

**COUNT I
DECLARATORY JUDGMENT**

27. Kodiak incorporates by reference as if fully stated herein the allegations contained in paragraphs 1 through 26.

28. There is an actual controversy between Kodiak and Defendants regarding the jurisdiction of the Tribal Court over the claims against Kodiak in the Tribal Court Lawsuit.

29. Kodiak seeks a judgment from this Court declaring that the Tribal Court lacks jurisdiction over Kodiak in the Tribal Court Lawsuit.

**COUNT II
INJUNCTION**

30. Kodiak incorporates by reference as if fully stated herein the allegations contained in paragraphs 1 through 29.

31. The assertion, exercise and maintenance of Tribal Court jurisdiction over Kodiak in the Tribal Court Lawsuit is unlawful.

32. If Defendants and Defendant Judge Johnson are not enjoined from such unlawful conduct, Kodiak faces irreparable injury in the form of conflicting federal and Tribal regulation, potential litigation under conflicting standards in different courts, interference with and uncertainty in business decisionmaking, and litigation delay and expense.

33. No federal grant provides for Tribal governance of Kodiak's alleged conduct involving flaring of gas on Indian lands; instead, federal law and federal regulatory authorities govern oil and gas development, including flaring, on Indian lands within the FBIR and displaces any basis for Tribal authority over gas flaring.

34. Kodiak's alleged conduct involving gas flaring does not implicate the Tribe's sovereign interests or imperil the subsistence of the Tribal community, so the Tribe has no inherent or retained sovereignty over Kodiak as to matters alleged in the Tribal Court Lawsuit.

35. Defendants should be enjoined from prosecuting and maintaining the Tribal Court Lawsuit against Kodiak.

36. Defendant Judge Johnson in her official capacity should be enjoined from entertaining or adjudicating the Tribal Court Lawsuit against Kodiak.

WHEREFORE, plaintiff Kodiak Oil & Gas (USA) Inc. prays as follows:

1. For a declaratory judgment that the Fort Berthold District Court does not have jurisdiction over the Tribal Court Lawsuit;

2. For an injunction prohibiting defendants Jolene Burr, Ted Lone Fight, Georgianna Danks, and Edward S. Danks from prosecuting and maintaining their claims against Kodiak in the Tribal Court Lawsuit;

3. For an injunction prohibiting defendant Judge Diane Johnson in her official capacity from entertaining or adjudicating claims against Kodiak in the Tribal Court Lawsuit; and

4. For such other and further relief as the Court deems appropriate, just and equitable.

Dated this 29th day of July, 2014.

Respectfully submitted,

/s/ Patrick B. McRorie

Patrick B. McRorie ND Bar No. 6598
LATHROP & GAGE LLP
950 Seventeenth Street, Suite 2400
Denver, CO 80202
720-931-3200
720-931-3201 (Facsimile)
Email: pmcrorie@lathropgage.com

Michael J. Abrams
Pro hac vice application forthcoming
LATHROP & GAGE LLP
2345 Grand Boulevard, Suite 2200
Kansas City, MO 64108
816-292-2000
816-292-2001 (Facsimile)
Email: mabrams@lathropgage.com

ATTORNEYS FOR PLAINTIFF
KODIAK OIL & GAS (USA) INC.