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

PARADIGM ENERGY PARTNERS, LLC, Plaintiff, vs. MARK FOX, in his official capacity as Chairman of the Tribal Business Council of the Mandan, Hidatsa & Arikara Nation: and CHIEF NELSON HEART, in his official capacity as Chief of Police for the Mandan, Hidatsa & Arikara Nation, Defendants.	**BRIEF IN SUPPORT OF MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER** Case No. 1:16-CV-00304-DLH-CSM Judge Daniel L. Hovland Magistrate Judge Charles S. Miller, Jr.

INTRODUCTION

Defendants submit this brief in support of their motion to dissolve the Temporary Restraining Order ("TRO") which the Court issued without briefing or a hearing. There are multiple reasons, both factual and legal, why this Court must dissolve the TRO.

First, as shown in the affidavits and exhibits accompanying this motion, the order granting the TRO was wholly dependent upon Plaintiff's material omissions and misstatements of important facts and controlling legal principles, the most egregious of which are:

> (1) Plaintiff's failure to inform the Court that Congress restored the subsurface mineral estate in trust for the Tribe pursuant to § 202 of the Fort Berthold Mineral Restoration Act of 1984, 98 Stat. 3152, and the term "Indian lands" encompasses the Indian mineral estate; (2) Plaintiff sought and was denied consent from the Tribal Business Council (TBC) to bore under Lake Sakakawea on at least two occasions, June 9 and June 16, 2016; (3) Plaintiff at the June 9 TBC meeting represented to the TBC that it would not bore under the lake in order to obtain the TBC's consent to a crucial right of way that it did not have through tribal trust land near the lake; (4) Plaintiff led the TBC to believe that it was not boring and would

> not bore under the lake at the June 9 TBC meeting until it came back and obtained tribal consent; (5) Plaintiff deceived the TBC by representing that it would not bore without tribal consent on June 9, 2016 when in fact Plaintiff was already boring under the lake; (6) Plaintiff was boring before it obtained a lawful right of way from the BIA for tribal surface land, including land adjacent to the lake which Plaintiff was boring and was therefore in trespass; and (7) Plaintiff's agent made material factual misrepresentations in the preparation of the Environmental Assessment which both the BIA and the COE relied upon in issuing certain rights of way for the Sacagawea Pipeline, the most egregious of which were, (a) The EA falsely stated there was no tribal trust land adjacent to the lake (a falsehood Plaintiff used to state the BIA had no jurisdiction on adjacent lands) when in fact tribal trust land abutted the lake on the west side of the lake, and (b) the utter failure to mention the fact that the mineral estate under the lake was held by the United States in trust and was considered Indian land under federal law.

Under the actual facts and controlling principles of federal Indian law, Plaintiff has no chance of prevailing on the merits.

Second, this Court does not have jurisdiction over this case, and therefore lacks jurisdiction to issue any order other than an order dismissing the case. The *Ex Parte Young* doctrine does not work to abrogate the Defendants' sovereign immunity because the Defendants implemented a Cease and Desist Order enacted by an official act of the Tribal Business Council ("TBC") that the TBC was authorized to make pursuant to its federally approved Constitution and the its inherent authority to regulate and control the use of its lands and economic activity on its reservation. Plaintiff cites no federal law that preempts the TBC's issuance of the Cease and Desist Order. Nor can Plaintiff plead for relief that is "properly characterized as prospective" within the meaning of *Ex Parte Young* because the relief requested is in reality against the Tribe, seeking to enjoin an act that the Tribe, through its governing body, was authorized by law to make. Plaintiff can point to no federal law that preempted the Tribe's authority to issue the Cease and Desist Order. Moreover, the relief requested by the Plaintiff is legally barred by the Indian lands exception to the Quiet Title Act.

Third, Plaintiff's sole claimed injury is based upon a conjectured chain of events which it claims will lead to monetary damages, but for which it does not offer documentary evidence. The remaining two factors in the *Dataphase* analysis similarly weighed against a TRO.

The Court now being presented with true facts and controlling principles of law which show that Plaintiff's motion for a TRO was unfounded, should vacate its order and immediately dissolve the TRO.

If Plaintiff wants to contest the Cease and Desist Order issued by the Tribe, it should do so in the tribal forum. Any order by this Court countermanding the order by the Tribe is a gross affront to tribal sovereignty and to the Tribe's rights over its own land and resources. The Tribe was plainly within its right to instruct Plaintiff to stop Plaintiff's knowing and intentional trespass onto the Tribe's real property interests, and it is the Plaintiff which should be, and was, lawfully enjoined prior to this Court countermanding the Tribe's order.

ARGUMENT

I. THE TRO IS DEPENDENT UPON THE COURT'S ACCEPTANCE OF PLAINTIFF'S FALSE FACTUAL ASSERTION THAT THE SEGMENT OF THE PIPELINE AT ISSUE IS NOT PENETRATING LAND HELD IN TRUST FOR THE BENEFIT OF THE TRIBE, AND THEREFORE MUST BE DISSOLVED BECAUSE IT CANNOT APPLY TO A PIPELINE PASSING THROUGH THE TRIBES SUBSURFACE MINERAL ESTATE.

A TRO is an extraordinary remedy. *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). Any injunction regarding government functions is generally only permitted in "extraordinary circumstances," *Rizzo v. Goode*, 423 U.S. 362, 379 (1976), as officials should be given the "widest latitude" possible while performing their official duties. *Id*. at 378. A TRO should thus issue in cases clearly warranting it, not in doubtful cases. The factors which a court must consider in determining whether to issue a TRO are well established. They are "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will

succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981).

None of these four factors weighed in favor of a TRO against the tribal officers, and in fact they would all support a restraining order against the Plaintiff, to prevent Plaintiff's knowing and intentional trespass on the Tribe's real property interests. The Tribe had issued a cease and desist order to the Plaintiff, which was intended to be of limited duration until the Tribe could obtain further information regarding Plaintiff's apparent open and intentional trespass of tribal real property. Instead of then providing the Tribe that information and working with the Tribe to resolve any issues, Plaintiff incorrectly has decided to challenge the Tribe's powers, both as a sovereign and as a real property owner. It must lose that challenge, and its adoption of an adversarial stance instead of meeting with the Tribe to resolve issues risks much more.

Plaintiff asserted that this Court should issue a TRO, because, Plaintiff claimed, the pipeline segment will not pass through a tribal property estate. Compl. at ¶¶ 52, 57, 64. In its TRO, this Court correctly noted that it was issuing the TRO based upon its very preliminary knowledge of the facts and law at issue. The Court then grounded its decision on its acceptance of Plaintiff's assertion that the Tribe does not own a subsurface interest under Lake Sakakawea and that the Tribe had consented to Plaintiff's access over tribal lands near the lake, both of which are false. Artman Declaration, ¶29-30. Based upon that, the Court analyzed the matter based solely upon the Tribe's regulatory authority over federal and fee lands on its Reservation; excluding the added tribal authority as the owner of lands, in particular it's federally approved constitutional power to prevent the encumbrance of its mineral estate. This is a simple issue, and one that the Court got wrong solely because it accepted Plaintiff's incorrect assertion that the Tribe does not have any land ownership interests at stake. In fact, in its own response to the tribal

officers' motion to dismiss, Plaintiff does not dispute and therefore concedes the Tribal Officers' argument that tribal remedies must be exhausted if the Tribe holds beneficial interest to land under the Lake, Resp. §II; that tribal sovereign immunity would bar its claims, Resp. §III; and that its conclusory assertion that tribal officers were acting outside the scope of their authority is false, Resp., *passim.* The tribal right to prevent trespass on its own lands is very firmly established by multiple legal authorities, beginning with the foundational authority, the Indian Non Intercourse Act 25 U.S.C. § 177 which prohibits anyone from obtaining by "grant, lease" or "any title or claim" to Indian land unless authorized by Congress. Indian Tribes have a federally protected right to prevent trespass to their property rights in their own forums. *County of Oneida v Oneida Indian Nation* 470 US 226, 235-36, n. 6 and accompanying text (1985); *see also, Petrogulf Corp. v. ARCO Oil & Gas Co.,* 92 F. Supp. 2d 1111, 1114-1115 (D. Colo. 2000) (requiring exhaustion of tribal remedies in trespass action involving tribal mineral resources). Although the Supreme Court has taken some jurisdiction away from tribes over the past 40 years, it has never questioned the Tribe's right, common to all governmental landowners, to regulate access to tribal land, including the tribe's "traditional and undisputed power to exclude persons" from tribal land, *Duro v. Reina*, 495 U.S. 676, 696 (1990). *E.g., Plains Commerce Bank v. Long Family Land & Cattle Co.*, 544 U.S. 316 327-28 (2008) (reiterating the Tribe's right to regulate access to tribal land, citing *Duro*).

While the Court need not proceed further, Defendants also note that Plaintiff misstates the effect of the 1949 Garrison Dam takings statute to begin with. It is, of course, common for the United States to own land on Indian reservations in fee. Plaintiff leaps from its assertion that between 1949 and 1984 the United States allegedly owned the lakebed in fee to its assertion that the Tribe therefore lacks jurisdiction over that on-Reservation land. That leap is incorrect. Once Congress establishes an Indian reservation, the land remains Reservation regardless of land

ownership or other rights of way. 18 U.S.C. § 1151.[1] The land only loses its status as Reservation if Congress clearly expresses an intent to remove the land from the Reservation. *Nebraska v. Parker*, 136 S.Ct. 1072 (2016). And where land is Reservation, the tribe occupying that reservation retains the powers of a sovereign Indian tribe over that land, and this is indisputably so where, as here, the Tribe owns an interest in the land at issue.

Plaintiff incorrectly states that the Tribe has the burden to establish that the United States granted the Tribe governance of the subsurface under the lake on the Reservation. As with most of Plaintiff's other arguments, Plaintiff is misstating a core rule of federal Indian law. Since time immemorial, the Tribe has had sovereign power and ownership over its land, and the Tribe reserved that power over its current Reservation lands when it ceded title to its aboriginal land in return for its reservation. *United States v. Winans*, 198 U.S. 371, 381 (1905); *United States v. Wheeler*, 435 U.S. 313, 327 n.24 (U.S. 1978). Even if one could argue that there must be a federal act recognizing the Tribe's reservation of its inherent sovereign powers over reservation lands, the federal acts creating the Reservation, approving the Tribe's Constitution, and numerous other federal acts recognize the Tribe's retained sovereign power. Most notably, the Indian Reorganization Act, the statute under which the Tribe's Constitution was adopted and approved by the federal government, expressly provides: "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe") 25 U.S.C. § 476 (e) (emphasis added). In turn, Article IX §1 of the Tribe's Constitution,

[1] Section 1151 defines "Indian Country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation" 25 U.S.C. § 1151(a).

approved by the Secretary pursuant to §476, expressly states that the TBC has the "authority to manage and lease or otherwise deal with Tribal lands and resources in accordance with law and to prevent the sale, disposition, lease or encumbrance of Tribal lands, interests in lands, or other Tribal assets." There can be no question that a pipeline easement through the Tribe's mineral estate under the lake is an "encumbrance". *Westerlund v. Black Bear Mining Co.*, 203 F. 599, 605 (8th Cir. 1913) ("a right to an easement of any kind is an incumbrance [sic]"); *See, Ethridge v. UCAR Pipeline, Inc.*, 2014 U.S. Dist. LEXIS 70694, *8-9 (W.D. La. 2014). To suggest that the TBC has no authority to prevent Plaintiff from encumbering the Tribe's mineral estate is simply meritless.[2]

Plaintiff is also wrong when it asserts that the Tribe lacks power over trust land because the Mineral Leasing Act "give the federal government exclusive authority to grant rights-of-way through federal lands owned by the United States. Resp. at 4 (citing 30 U.S.C. § 185(a)). Its argument on this point is dependent upon its incorrect assertion that the pipeline does not pass over or through any Indian lands Even if 30 U.S.C. § 185 gives the federal government that exclusive power over "federal lands," that statute expressly defines federal land to exclude land held in trust for an Indian or an Indian Tribe from its definition of "federal lands." 30 U.S. C. 185(b)(1). See, *e.g., Alaska v. 13.90 Acres of Land*, 625 F. Supp. 1315, 1320 (D. Alaska 1985).

[2] The Court should also summarily reject the Plaintiff's argument that the Tribe lacks jurisdiction under *Montana v. United States*, 450 U.S. 554 (1981). An oil and gas line is always a threat to rupture and cause damage to tribal land and tribal members. Gas is volatile, it explodes. And when it does it causes death and damage. *See City & Cnty. of San Francisco v. United States DOT*, 796 F.3d 993, 995 (9th Cir. Cal. 2015). The Tribe has also received evidence that the oil line (bored without the Tribe's consent) may have been installed without proper safety inspections and conditions. Defendants' Exhibit 2. Plaintiff's suggestion that the construction and operation of a volatile and flammable oil and gas line poses no threat to the health or welfare of the Tribe is ludicrous. Moreover, the ROW granted to Sacajawea Pipeline LLC, under which Plaintiff claims its right to construct the pipelines expressly states at §§ 4-6 that the Grantee must comply with tribal law. (Artman Declaration, Exhibit 1 attached thereto).

Plaintiff's suggestion that Section 185 applies here despite the fact that the pipeline penetrates the tribal mineral estate flies in the face of Section 185's express statement that it does not apply to Indian lands. Congress has always understood the term Indian lands to include tribal mineral interests. *See e.g.* 30 U.S.C. § 1291 (9) ("Indian lands" means all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe"); 30 U.S.C. § 1702(3) ("Indian lands" means any lands or interest in lands of an Indian tribe or an Indian allottee held in trust by the United States . . . including mineral resources and mineral estates reserved to an Indian tribe"). Federal regulations are in accord, *see e.g.* 25 C.F.R. 212.3 ("Indian lands means any lands owned by . . . Indian tribe . . . which owns lands or interest in the minerals, the title to which is held in trust by the United States . . ."); 30 C.F.R. 700.5 ("Indian lands means all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe"). Furthermore, the term "mineral" is defined broadly under federal law:

> Minerals includes both metalliferous and non-metalliferous minerals; all hydrocarbons, including oil and gas, coal and lignite of all ranks; geothermal resources; and includes but is not limited to sand, gravel, pumice, cinders, granite, building stone, limestone, clay, silt, or any other energy or non-energy mineral.

25 CFR 225.3.

Because the pipeline passes through the Tribe's mineral estate under the lake, Section 185 does not apply. Nor is there anything in Section 185 that even remotely suggests that the ROW granted by the Army Corps. of Engineers is exclusive of the Tribe's right to require its additional consent before the bore can penetrate the tribal mineral estate, as Plaintiff suggests. Indeed, the

Army ROW itself expressly states in § 13 that it is subject to other "subsequently granted" easements. Docket No. 5-6. Section 25 also states that the Grantee "shall obtain such permission as may be necessary on account of any other existing rights". *Id.*

A. PLAINTIFF BEARS THE BURDEN TO PROVE ITS CLAIM THAT THE TRIBE DOES NOT HOLD PROPERTY INTERESTS FOR LAND FOR WHICH THE TRIBE CLAIMS SUCH INTERESTS.

The Court should reject the Plaintiff's offhand assumption that the Tribe has not shown that the bore penetrates the mineral estate. Putting aside for the moment that the term "minerals" is defined to include every subsurface mineral substance including sand and gravel, the burden of proof is on the Plaintiff, not the Tribe, for multiple reasons. First, as the plaintiff and movant, Plaintiff had the burden of proof on its request for a TRO. Second, as discussed throughout this brief, subject matter jurisdiction is dependent on Plaintiff's claim that there are no tribal property rights at issue, and the Plaintiff always has the burden to establish federal court jurisdiction. Third, a federal statue expressly places the burden on the Plaintiff:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

25 U.S.C. § 194.

Fourth, and requiring somewhat more explanation than the other three reasons, as with other law-applying fora, the factual record used to establish whether the tribal forum has jurisdiction are to be established in the tribal forum, not a different forum. One of the primary purposes of the tribal exhaustion doctrine is to permit the tribal law-applying entities to develop the factual record from which legal conclusions concerning jurisdiction can flow. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9,19 (1987). Once a tribe has created a factual record and issued a final ruling based upon it, a party can seek federal review of the final tribal court decision on the

federal law issues related to jurisdiction. "[O]n review, the district court must first examine the Tribal Court's determination of its own jurisdiction. . . . "[I]n making its analysis, the district court should review the Tribal Court's findings of fact under a deferential, clearly erroneous standard." *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation,* 27 F.3d 1294, 1300 (8th Cir. 1994) (citing *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990)) (emphasis added).

The first federal appellate court to reach the issue, the Ninth Circuit, explained that "[T]he *Farmers Union* Court contemplated that tribal courts would develop the factual record in order to serve the "orderly administration of justice in the federal court." *FMC*, 905 F.2d at 1313. All federal courts which have reached the issue, including the Eighth Circuit Court, have adopted the Ninth Circuit's analysis on this issue of law. *Duncan Energy Co.*, 27 F.3d at 1300 (citing *FMC*); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996) (citing *FMC*).

Because Plaintiff failed to exhaust tribal remedies, there is no "Tribal Court determination of its own jurisdiction" to review, and therefore this Court cannot proceed prior to exhaustion of tribal remedies.

B. THE TRIBE IS THE OWNER OF PROPERTY THROUGH WHICH THE PIPELINE PASSES UNDER LAKE SAKAKAWEA.

The Fort Berthold Mineral Restoration Act of 1984, P.L. 98-602, 98 Stat. 3152, §202 provides that other than some specific tracts not at issue here, "all mineral interests in lands located within the exterior boundaries of the Fort Berthold Indian Reservation [] which were acquired by the United States for construction, operation, or maintenance of the Garrison Dam and Project . . . are hereby declared to be held in trust by the United States for the benefit and use of the Three Affiliated Tribes of the Fort Berthold Reservation." (emphasis added).

Because the lands are held by the United States in trust for the Tribe, they are subject to the Tribe's regulatory control, and invasion of the subsurface mineral estate requires tribal consent. Article IV Section 1 of the Tribe's federally approved Constitution provides that the Tribe's Business Council has the authority to manage or otherwise deal with tribal land and resources and to prevent the lease or encumbrance of tribal land, interests in lands, or other tribal assets. Article V, Section 5(b) of the Tribe's federally approved constitution further provides that the Business Council has the power to protect and preserve the property and natural resources of the Tribe. There are multiple federal statutes through which a party can obtain authority to invade tribal mineral property, but, redundant to the provisions of MHA's federally approved Constitution, those federal statutes also require consent of the Tribe. *E.g.*, 25 U.S.C. §§ 324, 396(a) 2102; 25 C.F.R. § 211.46 (tribal council consent required under Indian Mineral Leasing Act).

For the lakebed, the Tribe repeatedly declined to provide the required consent to Plaintiff. Artman Declaration, ¶ 15-20. Plaintiff does not assert otherwise and in fact conspicuously omitted these facts in its motion for a TRO. Knowing that it lacked the Tribe's permission, Plaintiff decided to simply trespass. In fact, Plaintiff was already trespassing when it first sought the Tribe's consent to bore under the lake on June 9, 2016. When the Tribe directed Plaintiff to cease with what the Tribe believed to be Plaintiff's knowing trespass pending further tribal review and consideration of any information Plaintiff would choose to present to the Tribe, Plaintiff came to this Court, claiming that this Court should issue an ex parte temporary restraining order which will permit Plaintiff to continue with its invasion of the Tribe's congressionally recognized property interests, lest it lose its ill-gotten profits.

In seeking that order, Plaintiff simply misstated the facts. It asserts, based upon a 1949 statute which was superseded in relevant part by the Fort Berthold Mineral Restoration Act of

1984, that the land under Lake Sakakawea is owned by the United States in fee, instead of owned by the United States in trust for the Tribe, Compl. ¶18; and that therefore the consent it had sought, but had not received, from the Tribe, had not been needed. This Court then grounded its TRO on that incorrect factual statement.

Because Plaintiff is boring through the Tribe's property, Plaintiff was required to obtain the Tribe's permission. Plaintiff does not make, and cannot make, any serious argument to the contrary.[3] Therefore Plaintiff will not succeed on the merits of this case. It did not obtain authorization from the Tribe, and it needs to go back and obtain that authorization instead of seeking a TRO based upon a false factual assertion. This Court therefore should vacate its TRO because the TRO is contrary to the facts.

C. THE TRIBE IS THE OWNER OF PROPERTY THROUGH WHICH THE PIPELINE PASSES ADJACENT TO THE RIGHT BANK OF THE LAKE, AND PLAINTIFF HAS NO LAWFUL ROW THROUGH THOSE LANDS.

In addition to basing its argument which is dependent on provisions of a 1949 statute which Plaintiff fails to acknowledge had been superseded by a 1984 statute, Plaintiff also incorrectly implies to this Court that the whole of the pipeline segment at issue is under Lake Sakakawea and therefore federal property under the 1949 statute. Even if the 1949 statute had not been superseded

[3] Plaintiff implies that the right-of-way which it obtained from the United States under 30 U.S.C. § 185 includes a right-of-way through the Tribe's subsurface mineral estate. Any argument that 30 U.S.C. § 185 permits construction of a pipeline through the Tribe's real property (whether surface or subsurface) without the Tribe's authorization would be frivolous. Under 30 U.S.C. §185, Congress granted the Executive Branch authority to grant rights-of-way through "federal lands," and, as shown above, Congress expressly excluded lands held in trust for an Indian or an Indian Tribe from its definition of "federal lands." 30 U.S.C. § 185.

Additionally, the Tribal and allotted trust lands along the pipeline route are under the jurisdiction of the BIA, not the Army, and therefore approval of any right-of-way which crossed both Tribal and allotted trust lands and Corps.' lands is delegated to the Secretary of the Interior, not the Army. 30 U.S.C. § 185(c). Plaintiff therefore does not have a valid federal right-of-way, and much more plainly does not have a sufficient right-of-way over Tribal lands.

by the 1984 statute, the pipeline boring begins well beyond the lake boundaries, and passes through tribal mineral interests which are not under the lake at all, and which never became federal property under the now-superseded 1949 statute. But, in part because Plaintiff misled the Tribe regarding the subsurface parcels through which the pipeline would be located, Plaintiff failed to obtain lawful Tribal consent to pass through Tribal mineral interests on the right bank of the river. Among other Tribal tracts outside the lakebed, the pipeline passes through the tracts MT2194, Artman Declaration. ¶ 29, but Plaintiff did not obtain Tribal consent to pass through that Tribal mineral estate. Nor did the BIA grant a right-of-way through MT2194. The BIA only granted a linear right-of-way that was specifically limited as to length and the maps attached to the BIA Grant said nothing about a subsurface directional bore, which would obviously exceed the express linear limitation of the Grant.

II. THIS COURT LACKS JURISDICTION OVER THE COMPLAINT FOR THE REASONS STATED IN DEFENDANTS' SEPARATE MOTION TO DISMISS AND BRIEF IN SUPPORT AND BECAUSE THE RELIEF PLAINTIFF REQUESTS IS THE FUNCTIONAL EQUIVALENT OF A QUIET TITLE ACTION AGAINST THE TRIBE'S TRUST MINERAL ESTATE WHICH IS BARRED BY THE INDIAN LANDS EXCEPTION OF THE QUIET TITLE ACT.

On August 22, 2016, Defendants filed a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b). In that motion, Defendants analyzed why the Court lacks jurisdiction over Plaintiff's complaint and additional reasons for dismissal under FRCP 12(b). Because this Court lacks subject matter jurisdiction, it lacked jurisdiction to issue a TRO, and cannot issue any order other than one dismissing the case. To avoid repetition, Defendants incorporate the arguments in their motion to dismiss herein by reference. It is notable, however, that the Plaintiff has still not provided an explanation as to why Sacagawea Pipeline LLC, the holder of the rights-of-way at issue in the case and the obvious Real Party in Interest and a necessary party, is not the Plaintiff.

A. THE *EX PARTE YOUNG* DOCTRINE DOES NOT ABROGATE THE DEFENDANTS' SOVEREIGN IMMUNITY.

As shown above, the Defendants' actions were taken pursuant to an official action of the TBC which approved a Cease and Desist Order to stop the Plaintiff from boring and construction operations related to the oil and gas pipelines under the lake. The TBC took such action pursuant to its federally approved constitutional authority to prevent encumbrances on tribal land and protect its natural resources, text supra at 6-7, as well as its inherent authority to protect its land and resources and to regulate and control economic activity on reservation trust lands. *N.M. v. Mescalero Apache Tribe*, 462 U.S. 324, 335-336 (1983). Because the Defendants were carrying out an action that the TBC was authorized to make, the *Ex Parte Young* doctrine does not abrogate the Defendants' sovereign immunity for suit. There is no "ongoing violation of federal law" and the relief requested would be against the Tribal government.

Thus, the holding in *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458, (8th Cir. 1993) is not applicable to the actions taken by the Defendants here. In *Northern States*, the complaint alleged, and the court held, that a tribal ordinance purporting to regulate nuclear waste was expressly preempted by a federal statute. 991 F.2d at 460. The Plaintiff's complaint makes no such allegation here, and indeed cannot so allege because neither of the two federal laws relied upon even remotely suggest that the Cease and Desist Order is preempted by controlling federal law. The 1949 Takings Act is simply an Act to acquire Indian land for a dam project, it says nothing about preempting tribal law and in fact a subsequent act of Congress restored the mineral estate under the lake to the Tribe. Further, other controlling federal laws cited above, most notably 25 U.S.C. §§ 177 and 476 (e), expressly confirm the Tribe's right to issue the Cease and Desist Order to prevent the encumbrance of Tribal land or assets

without the Tribe's consent, something the Tribe is expressly empowered to do under Article IX of its federally approved Constitution.

Nor, as shown above, does 30 U.S.C. § 185 serve as a basis to abrogate the Defendants' immunity under *Ex Parte Young*. Nothing in § 185 suggests that it is the exclusive means of granting a legal right to bore a pipeline under the lake here. On the contrary, the statute itself expressly states that it does not even apply to Indian land. Section 185 therefore cannot be alleged as a basis for an *Ex Parte Young* exception because it does not contain the express preemption language of the type at issue in *Northern States*.

Additionally, because § 185 does not apply to Indian land, it does not "substantively apply" to the Tribe and therefore cannot be a basis for an *Ex Parte Young* action. *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 88, (2d Cir. 2001). The court in *Garcia* also held that in order to invoke the *Ex Parte Young* fiction, a plaintiff must have a private right of action to enforce the statute alleged to be violated. *Id*. The Plaintiff has not alleged that it has a private right of action against the Defendants under § 185, and the only court to address the issue has held that no such private right exists. *Riviera Drilling & Expl. Co. v. Gunnison Energy Corp.*, 2009 WL3158163 (D. Colo. Sept. 29, 2009).

B. THE REQUIRED VEHICLE TO DETERMINE THE SCOPE OF THE TRIBE'S PROPERTY INTEREST IS A QUIET TITLE ACTION, BUT PLAINTIFF HAS NOT PLED, AND COULD NOT PLEAD, A QUIET TITTLE ACTION AGAINST THE TRIBE FOR THE LAKEBED OR OTHER LANDS.

A quiet title action is the exclusive means for litigating a dispute regarding whether the United States' ownership of land is in fee or in trust. *Spirit Lake Tribe v. N. Dakota*, 262 F.3d 732 (8th Cir. 2001). In *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 (1983), the State of North Dakota and the United States both asserted ownership of portions of a riverbed, and in the United States Supreme Court it squarely presented the argument that the Quiet Title Act

of 1972, P.L. 92-562, 86 Stat. 1176, was not the exclusive means for a state to bring a federal suit claiming ownership of a riverbed based upon the equal footing doctrine. The United States Supreme Court equally as squarely rejected that argument, because "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property."

In *Spirit Lake Tribe*, 262 F.3d 732 (8th Cir. 2001), the Eighth Circuit applied *Block* to claims of tribal ownership in a much more difficult context than the present matter. In *Spirit Lake Tribe*, it was the Tribe itself which was seeking to litigate whether the United States owned the lakebed of Devils Lake in trust or in fee. Even though the litigation pitted the United States as fee owner against the United States as trust owner, and was based upon an alleged federal breach of its trust obligations to the Tribe, the Eighth Circuit held that the exclusive means for resolving the competing claims of ownership was a quiet title action (which the Court then held was barred under the applicable statute of limitations).

As discussed throughout this brief, Plaintiff's case is wholly dependent upon its assertion that the Tribe does not hold equitable title to the subsurface under the lake, although Plaintiff knows that the Tribe claims such ownership. Resolution of that dispositive issue would have to be through a quiet title action. *Spirit Lake Tribe, supra; Block, supra.* For example, in *Northern New Mexicans Protecting Land Water & Rights v. United States*, 2016 U.S. Dist. LEXIS 16644, *80-81 (D.N.M. Jan. 30, 2016), non-governmental plaintiffs brought a suit against the United States, asserting a right of way over Indian lands. The Court dismissed those claims, holding that the claim was one to quiet title regarding the scope of the land which the United States owned in trust for the tribe, and that plaintiff therefore could not evade the Quiet Title Act by pleading the claim under any other law.

> When plaintiffs cannot proceed via the Quiet Title Act, they do not have a freewheeling right to sue under a different statute. *See Sw. Four Wheel Drive Ass'n v. Bureau of Land Management*, 363 F.3d at 1071. The Tenth Circuit has held that, "if [an association] cannot state a claim under the Quiet Title Act, it has no other recourse against the United States" to obtain title. *Sw. Four Wheel Drive Ass'n v. Bureau of Land Management*, 363 F.3d at 1071. The Court therefore dismisses its other claims and requests for relief. *See Catron Cnty. v. United States*, 934 F. Supp. 2d at 1308-09 (holding that Catron County's claims for a declaratory judgment and a writ of mandamus were both linked to the question of title over an alleged right-of-way and were therefore barred, because "the Quiet Title Act provides the exclusive remedy"); *Friends of Panamint Valley v. Kempthorne*, 499 F. Supp. 2d 1165, 1177-78 (E.D. Cal. 2007)(dismissing for lack of subject matter jurisdiction declaratory judgment and mandamus claims, because such claims "can only be brought pursuant to the Quiet Title Act's narrow waiver of sovereign immunity").

2016 U.S. Dist. LEXIS 16644 at *80-81.

Since 1984 the United States has held title to the mineral estate under the Lake in trust for the Tribe, and the Plaintiff's complaint alleges that it has the right to bore through mineral tracts identified as trust land by the BIA. Any challenge to that claim of federal trust ownership would be a quiet title action, one which is clearly barred by the Indian lands exception to the Quiet Title Act and therefore outside the scope of this Court's jurisdiction.

III. PLAINTIFF'S CLAIM OF IRREPARABLE INJURY WAS UNSUPPORTED BY EVIDENCE; AND PLAINTIFF EXPRESSLY ALLEGED THAT THERE WAS NO INJURY WHICH COULD BE REMEDIED BY AN INJUNCTION ISSUED AFTER AUGUST 22, 2016.

A plaintiff seeking a TRO is required to establish that it will suffer irreparable injury if the TRO is not granted. Plaintiff sought to satisfy that legal requirement based upon claims the irreparable injury would occur on August 22, 2016, if a TRO was not granted by that date. It repeatedly, affirmatively, and emphatically asserted that August 22, 2016, was the "drop dead" date: if a TRO was not granted by that date, a chain of events was irretrievably set in motion which would result in it never being able to complete the pipeline.

Plaintiff's own repeated factual assertions expressly disclaim any new irreparable injury which was remediable by the TRO which the Court entered, and that its motion became moot when

no injunction was issued on August 22, 2016. Plaintiff could perhaps have filed a new TRO after August 22, 2016, admitting that its original motion was based upon repeated and emphatic but false assertions that August 22, 2016, was the "drop dead" date. But based upon the motion which was before the Court, the Court lacked any factual basis for holding that there was any irreparable injury as of the date the Court issued its order.

Even before August 22, 2016, had passed, Plaintiff's claim of irreparable injury was unsupported. Plaintiff based its claim that irreparable injury would occur on August 22, 2016, upon a declaration which made numerous conclusory or vague assertions about a string of incidents, each contingent upon others, which it speculated would play out over the next several months if a TRO was not issued on August 22, 2016, and which it then asserted would irremediably lead to its demise. While there would be written documents which would relate to each of the incidents in that string, Plaintiff did not provide written documentation which supported its speculation regarding irreparable injury. For example, one of Plaintiff's conjectured "but for" causes of the parade of horribles was that a landowner had refused to extend the date by which Plaintiff must vacate that landowner's surface estate. Plaintiff did not provide any statement from the landowner, nor did it provide anything beyond its own conclusory assertion that consent to an extension from this one particular landowner was required. It did not provide a lease or other contract which supported its claim that it must be off the land on November 1, 2016, nor did it provide the lease terms related to extension. Even more important, Plaintiff fails to explain why construction on the land in question could not continue even though the bore under the lake had been stopped. Although it asserted that millions of dollars in damage would flow from it being denied access to the land beginning on November 1, 2016, it does not discuss whether it offered the landowner any additional compensation in exchange for an extension. The impression the

Tribe gets from Plaintiff's vague allegations is that Plaintiff asked a landowner to refuse to extend so that Plaintiff could then use that refusal in its filings in this Court. Plaintiff's other allegations regarding the parade of horribles—its contracts with contractors and potential pipeline users, the alleged time required to complete work, etc.--are similarly vague and conclusory. As such they were legally insufficient even before the "drop dead" date of August 22, 2016, passed. Plaintiff claimed it would suffer monetary damage, but it did not show irreparable injury.

IV. THE PUBLIC INTEREST AND THE BALANCING OF THE HARM WEIGH AGAINST A TRO.

As shown above, Plaintiff simply failed to obtain legal rights to construct the pipeline on portion of the Tribe's lands. There is a strong and centuries old public interest in protecting the Tribe's property interest from Plaintiff's unauthorized encroachment. The Indian Non Intercourse Act, 25 U.S.C. § 177 prohibits the Plaintiff from penetrating the Tribe's trust mineral estate under the lake. Section 177 "acknowledges and guarantees the Indian tribes' right of possession [of Indian lands], . . . and imposes on the federal government a fiduciary duty to protect the lands covered by the Act." *N. New Mexicans,* 2016 U.S. Dist. LEXIS 16644, *60 *quoting U.S. for & on Behalf of Santa Ana Indian Pueblo v. Univ. of N.M.*, 731 F.2d 703, 706 (10th Cir. 1984). There is no public interest which would support a federal court order permitting construction on or under trust land over which Plaintiff failed to obtain the required consent from the Tribal government. The important public interest at issue here is in preserving the status of the Tribe's sovereignty and in preserving the Tribe's ability "to maintain itself as a culturally and politically distinct entity." *New Mexico Navajo Ranchers Assoc.. v. Interstate Commerce Com.*, 702 F.2d 227, 233 (D.C. Cir. 1983) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71, 72, (1978)). Any perceived interest in constructing pipelines to transport oil and gas must succumb to these important federal interests.

Additionally, a party seeking injunctive relief must come to the Court with clean hands, but Plaintiff lacks clean hands. It engaged in construction on land for which it plainly lacked legal rights, and it obtained the Tribe's consent to a crucial right-of-way under false pretenses on June 9, 2016, after it had already begun construction of the bore, it obtained federal NEPA approval based upon knowing material misrepresentation of facts. Artman Declaration, ¶23-28. There is no public interest which would support an order which would permit Plaintiff to benefit from its own errors and misrepresentations, and its own negligent failure to obtain Tribal consent well before June 3, 2016.

CONCLUSION

For all of the reasons stated herein, the Court should dissolve the TRO which it issued on August 23, 2016.

Respectfully submitted this 30th day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2016, a copy of the foregoing **BRIEF IN SUPPORT OF MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER** was filed electronically with the Clerk of Court through the ECF filing system, which will send notification of such filing to all parties of record as follows:

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