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; CHIEF NELSON HEART, in his official capacity as Chief of Police for the Mandan, Hidatsa & Arikara Nation, Defendants.	Case No. 16-cv-00304-DLH-CSM **RESPONSE TO DEFENDANTS' MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND BRIEF IN SUPPORT**

Plaintiff Paradigm Energy Partners, LLC ("Paradigm") responds in opposition to Defendants' Motion to Dissolve Temporary Restraining Order and Brief in Support ("Motion").

INTRODUCTION

While the Motion presents an array of legal arguments, those arguments cannot avoid the existence of a valid Easement for a fuel-carrying pipeline right-of-way ("ROW" or "Easement") issued to Paradigm by the Department of Army, Corps of Engineers ("Corps"), covering the lands under Lake Sakakawea. *See* Exhibit 6 to Paradigm's Memorandum in Support of Motion for Emergency TRO ("Paradigm's Memo."). That ROW, issued pursuant to the Corps' authority under the Mineral Leasing Act, 30 U.S.C. § 185, expressly identifies the Lake as the "lands of the United States." *Id.* at 1. Despite having the opportunity to raise objections prior to the issuance of the ROW, Defendants (and the Mandan, Hidatsa & Arikara Nation (the "Nation")), said nothing.

Defendants' Motion presents nothing more than a collateral challenge to the Corps' ROW, as well as a collateral challenge to a related ROW issued by the Bureau of Indian Affairs ("BIA"). *See* Mot. at 7-9, 11-13, 15-17. Any dispute Defendants have with these ROWs is for the federal agencies—not Paradigm. Defendants have no statutory or inherent authority to interfere with Paradigm's ROW by issuing a Cease & Desist Order, and the Court has the authority to enjoin such conduct.

Nothing in the Motion's tangle of facts and law disturbs the Court's conclusion that Paradigm "has a strong likelihood of success on its claims against the Defendants." TRO [Dkt. #10] at 7. Indeed, Defendants' Motion underscores the need for a preliminary injunction to preserve the status quo while the Court considers "questions so serious and difficult as to call for more deliberate investigation." *Dataphase Sys., Inc. v. C L Sys., Inc*, 640 F.2d 109, 113 (8th Cir. 1981). Were the law otherwise, any defendant could muddy the waters, avoid a preliminary injunction, and achieve victory through delay rather than on the merits. *Dataphase* and Fed. R. Civ. P. 65 prevent this, and Defendants' Motion should be denied.

I. Defendants Cannot Use This Proceeding to Collaterally Attack the ROWs Issued by the Corps and BIA.

While Defendants repeatedly claim that Paradigm is challenging their beneficial title to minerals under Lake Sakakawea (*see* Mot. at 9-13), Paradigm has made no such challenge. The *real* challenge in this case is levied by Defendants, who are contesting the validity of the ROW issued by the Corps, as well as a related ROW over tribal lands issued by the BIA. *See* Mot. at 12-13, 18. With respect to the Corps' Easement, Defendants claim that "Tribal and allotted trust lands along the pipeline route are under the jurisdiction of the BIA, not the Army, and therefore approval… is delegated to the Secretary of the Interior, not the Army." *Id.* at 12 n.3. From this, Defendants conclude that Paradigm "does not have a valid federal right-of-way." *Id.*; *see also*

Defendants' Motion to Dismiss [Dkt. #8], at 18 n.4. Defendants also claim that the BIA did not grant a sufficient ROW covering subsurfaces "well beyond the lake boundaries," which are not subject to this lawsuit. *See* Mot. at 12-13.

Defendants' challenge, while meritless, is lodged in the wrong forum, and certainly cannot be litigated by serving a tribal Cease & Desist Order. Both the Corps' Easement and the BIA's ROW are final agency actions pursuant to the Administrative Procedure Act, 5 U.S.C. § 704 ("APA"). As such, they are "entitled to a presumption of regularity." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *see also Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1317 (8th Cir. 1981) (same).

This presumption is particularly appropriate where, as here, Defendants and the Nation knew about Paradigm's permit applications lodged with the Corps and BIA, but raised no objection during the public comment periods. *See, e.g.*, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004) (holding party "forfeited any objection to the [environmental assessment]" by failing to object during public comment period); *Friends of Norbeck v. U.S. Forest Serv.*, 661 F.3d 969, 974 (8th Cir. 2011) (same). Defendants' unspecified concerns about the safety of Paradigm's pipelines (*see* Mot. at 7 n.2) ring hollow in light of the Nation's silence during the comment period.

Because the Corps' ROW is presumed by federal law to be valid, any party contesting the validity of the ROW bears the burden of proof. *See Hillsdale Loss Prevention v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1165 (10th Cir. 2012). Simply put, "the burden of proof rests with the parties who challenge such action." *Id.*

Just as important, the APA creates specific procedures that a party must follow to challenge a final agency action. *See* 5 U.S.C. §§ 701-06 (adopting procedures for appealing

agency action); *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 42 (D.C. Cir. 2015) (discussing procedures). Parties like Defendants cannot "use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions." *Big Lagoon Rancheria v. California*, 789 F.3d 947, 953 (9th Cir. 2015); *see also City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1153 (8th Cir. 2013) (refusing to allow party to circumvent APA procedures through litigation); *Adams v. RTC*, 927 F.2d 348, 354 n.15 (8th Cir. 1991) (same).

Defendants spend a considerable portion of their Motion arguing that the Nation has a beneficial ownership in the minerals under Lake Sakakawea, and that such ownership renders the Corps' ROW invalid. *See* Mot. at 1-8, 12 n.3. On account of this mineral interest, Defendants claim that the BIA, instead of the Corps, should have issued the ROW to Paradigm. *See id.* at 12 n.3. Whatever the substance of these arguments eventually may be, the Nation's beneficial mineral ownership is irrelevant to the issue before the Court.[1] Defendants cannot use their Cease & Desist Order, or this lawsuit, as an "end-run" around the presumptively valid ROWs issued by the Corps and BIA. *Big Lagoon Rancheria*, 789 F.3d at 953. Defendants and the Nation can present their challenges to the ROWs to the appropriate federal agencies, but their Motion should be denied.

[1] It is axiomatic that, while a mineral owner has the right to extract minerals from the subsurface, "the *landowner* continues to own both the surface and the subsurface of the lands." 1-2 Williams & Meyers, OIL AND GAS LAW § 218 (emphasis added); *accord Emeny v. United States*, 412 F.2d 1319, 1323 (Fed. Cl. 1969) (explaining lessee's right to minerals did not eliminate landowners' right to surface "and everything in such lands" except minerals); *Lightning Oil Co. v. Anadarko E&P Onshore LLC*, 480 S.W.3d 628, 635 (Tex. App. 2015) ("[T]he surface owner controls the earth beneath the surface estate.").

II. Defendants Have No Authority to Act Under *Montana*.

Defendants appear to claim that the Nation has independent authority under *tribal law* to require consent to Paradigm's pipelines under Lake Sakakawea. *See* Mot. at 3-8. Since the lands at issue are owned by the United States, the tribe has no "authority to regulate entry onto or use of these lands." *South Dakota v. Bourland*, 508 U.S. 679, 691 (1993).

Even if the principles of *Montana v. United States*, 450 U.S. 544 (1981) applied to Paradigm's ROW, Defendants' argument resembles the position taken by the Nation in *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 457-48 (1997). Here, as in *Strate*, the Nation sought to exercise tribal jurisdiction over a public highway created by a federally-granted ROW over tribal lands held in trust by the United States. *See id.* at 454-55. The Supreme Court rejected the Nation's claim, holding that no federal statute conferred tribal jurisdiction over the lands in question, and the Nation had no claim to jurisdiction based on "inherent sovereignty." *Id.* at 456-57. Consequently, the Court found that the Nation had no jurisdiction over non-members' activities in the ROW area. *See id.*

The same result obtains here. Under *Montana*, with two limited and inapplicable exceptions, the exercise of tribal power requires "express congressional delegation." 450 U.S. at 564. No express congressional delegation exists to confer authority to Defendants (or the Nation) to require consent to the Corps' ROW. The Mineral Leasing Act, 30 U.S.C. § 185, confers no such authority. It empowers the Secretary of the Interior or appropriate agency head to issue "[r]ights-of-way through Federal lands." 30 U.S.C. § 185(a). Similarly, the Indian Right of Way Act authorizes the Secretary of Interior to issue ROWs through tribal trust lands. *See* 25 U.S.C. § 323 (emphasis added). Defendants have no authority to issue easements or ROWs under these statutes.

Nor do any of the statutes cited in Defendants' Motion confer such express authority. *See* Mot. at 5-6, 9, 11, 19. The Nonintercourse Act (25 U.S.C. § 177), for example, does not apply to lands owned by the federal government. *See, e.g.*, *Fed. Power. Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960) (explaining "obvious purpose" of Act is was "to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, *except the United States*," not to interfere with federal takings of such lands) (emphasis added). Likewise, the Indian Reorganization Act (25 U.S.C. § 476) makes no mention of granting rights-of-way on lands owned by the United States (or where the tribe owns a beneficial mineral estate). Defendants, therefore, have no express statutory "authority to regulate entry onto or use of these lands."[2] *Bourland*, 508 U.S. at 691; *see also Montana*, 450 U.S. at 564 (requiring "express congressional delegation").

What remains are only the two narrow exceptions, recognized in *Montana*, through which tribes might exercise "inherent sovereignty." *See* 450 U.S. at 564-66. Defendants' Motion does not discuss the first *Montana* exception covering the inapplicable circumstance where a non-tribal member "enter[s] consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565. As explained in Paradigm's Memorandum in Support of its Motion for TRO, there is no consensual relationship here that would "have a nexus" to Defendants' unlawful conduct. *See* Paradigm's Memo. at 14 n.1 (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001)).

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[2] In its string of inapposite statutes, Defendants cite the definition of "Indian country" in 18 U.S.C. § 1151, and claim that "[t]he land only loses its status as Reservation if Congress clearly expresses an intent to remove the land from the Reservation. Mot. at 6 (citing *Nebraska v. Parker*, 136 S.Ct. 1072 (2016)) (emphasis removed). Congress precisely indicated that intent in 1949, when the Nation conveyed all of its "right, title, and interest" in the land under Lake Sakakawea to the United States. Pub. L. 81-437, 63 Stat. 1026 (1949).

Defendants briefly discuss *Montana*'s second exception concerning "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Mot. at 7 n.2. In a footnote, Defendants claim that "the construction and operation of a volatile and flammable oil and gas line" and unspecified "evidence" of improper installation threaten the health or welfare of the Nation. *Id.* As explained in Paradigm's Memorandum in Support of a TRO, the Sacagawea Pipelines were subject to rigorous NEPA reviews conducted by the Corps, BIA, and Fish and Wildlife Service, all of which found no significant environmental impact. *See* Paradigm's Memo. at 5 (citing Exhibit 4 to Paradigm's Memo. at ¶¶ 20).

Even if Defendants' allegations were true, "if *Montana*'s second exception requires no more, the exception would severely shrink the rule." *Strate*, 520 U.S. at 457-58. As in *Strate*, Defendants "misperceive[ ]" the second exception as going "beyond what is necessary to protect tribal self-government or to control internal relations." *Id.* at 459 (quoting *Montana*, 450 U.S. at 564). "The conduct must do more than injure the tribe, *it must 'imperil the subsistence' of the tribal community*." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008) (quoting *Montana*, 450 U.S. at 566) (emphasis added). Defendants allege no such peril, and therefore the second *Montana* exception offers no grounds for their assertion of inherent authority. *See id.*

III. Defendants Are Subject to the *Ex Parte Young* Doctrine.

As the Court explained in its TRO, "the *Ex parte Young* doctrine allows suits for declaratory and injunctive relief against government officials in their official capacities—notwithstanding the sovereign immunity possessed by the governmental entity itself." TRO [Dkt. #10] at 7-8. "When the complaint *alleges* that the named officer defendants have acted

outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked...." *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993) (citation and internal quotation omitted) (emphasis added). Here, Paradigm has alleged that Defendants acted outside their sovereign authority. *See* Compl. at ¶¶ 9, 57, 58.

Defendants offer two challenges to the *Ex parte Young* doctrine, neither of which is persuasive:

First, Defendants claim that they took "action pursuant to [the Nation's] federally approved constitutional authority… as well as its inherent authority[.]" Mot. at 14. For the reasons set forth in Section II above, the Nation had no such authority. *See Plains Commerce Bank*, 554 U.S. at 341 (holding tribe lacked inherent authority); *Bourland*, 508 U.S. at 694-95 (holding tribe lacked statutory authority).

Second, Defendants claim that Paradigm lacks "a private right of action to enforce the statute alleged to be violated." Mot. at 15. No statutory right of action is necessary under the circumstances of this case, where "federal common law circumscribes a tribe's inherent authority to regulate non-members." *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1181-82 (9th Cir. 2012) (explaining that "*Ex parte Young* is not limited to claims that officials are violating the federal Constitution or federal statute; it applies to federal common law as well"); *see also Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota*, 362 F.3d 512, 517 (8th Cir. 2004). Rather, "a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002)). Here, Defendants have violated federal law by seeking to "exercise… tribal power beyond what

is necessary to protect tribal self-government or to control internal relations[.]" *Montana*, 450 U.S. at 564. *Ex parte Young*, therefore, applies to Defendants.[3]

IV. Defendants Offer No Credible Challenge to the *Dataphase* Factors.

As the Court noted at its status conference on August 29, this is not a trial on the merits. The central question is whether Paradigm has established the factors set forth in *Dataphase* for a TRO and preliminary injunction, "the most significant" of which is *the probability* of success on the merits. *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013) (citation and internal quotation omitted). This factor is not given to "wooden or mathematical" standards, but instead is based on "the case's particular circumstances," particularly where the plaintiff offers "serious and difficult issues of law which clearly call for more deliberate investigation." *Wiley v. Glickman*, 1999 WL 33283314, **3-4 (D.N.D. Apr. 7, 1999) (citing *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998)).

Nothing in Defendants' Motion alters the Court's previous finding that Paradigm has a "strong likelihood of success on its claims." TRO [Dkt. #10] at 7. Likewise, Defendants offer no substantive factual rebuttal to Paradigm's showing of irreparable harm, which was supported by a sworn Declaration from Paradigm's Chief Operating Office, Criss Doss. *Compare* TRO [Dkt. #10] at 9-10 (summarizing likely financial ruin to Paradigm if pipeline construction is halted) *with* Mot. at 17-19 (suggesting Paradigm showed only "monetary damage"). As the Court noted (and Defendants do not contest), Paradigm stands to lose hundreds of millions of dollars if Defendants succeed in halting construction. TRO [Dkt. #10] at 9. For this reason alone, "[t]he threat of unrecoverable economic loss… qualif[ies] as irreparable harm." *Iowa*

[3] Defendants' Motion suggests that the TRO runs afoul of the doctrine of exhaustion of tribal remedies. *See* Mot. at 9-10. As explained in *Strate*, "When… it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule," exhaustion "would serve no purpose other than delay." 520 U.S. at 459-60 and n.14.

Utils. Bd. v. FCC, 109 F.3d 418, 426 (8th Cir. 1996) (citations omitted). At the hearing on September 1, Mr. Doss is prepared to testify about his Declaration and the harm Paradigm will suffer without a preliminary injunction.

Similarly, Defendants cannot rebalance the equities or the public interest in their favor and against a TRO or preliminary injunction. *Contra* Mot. at 19-20. Defendants have no authority to interfere with a pipeline project for which Paradigm has all necessary federal, state, private *and tribal* approvals. *See* Exhibit 4 to Paradigm's Memo. at ¶ 16; *Bourland*, 508 U.S. at 691 (holding federal jurisdiction over fee lands "affirmatively abrogate[s] the [Nation's] authority to regulate entry onto or use of these lands"). Defendants also have offered no legitimate justification for waiting until the last minute to serve a Cease & Desist Order, thereby jeopardizing a project that has the enthusiastic approval of members of the Tribe and North Dakota's congressional delegation. *See* Exhibit 4 to Paradigm's Memo. at ¶¶ 21, 24-26.

CONCLUSION

For the foregoing reasons, Paradigm respectfully requests that the Court deny Defendants' Motion to Dissolve the TRO.

Respectfully submitted this 31st day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2016, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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