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.	**REPLY IN SUPPORT OF MOTION TO DISMISS** Case No. 1:16-CV-00304-DLH-CSM Judge Daniel L. Hovland Magistrate Judge Charles S. Miller, Jr.

I. THIS COURT MUST DISMISS THIS MATTER BECAUSE THE TRIBE HAS A COLORABLE CLAIM THAT THE PIPELINE PASSES THROUGH TRIBAL LANDS FOR WHICH PLAINTIFF FAILED TO OBTAIN TRIBAL PERMISSION TO ENTER OR BUILD A PIPELINE.

The Tribe is the owner of the mineral estate under Lake Sakakawea. As with every other encumbrance of tribal land, the Plaintiff was required to obtain the lawful consent of the Tribe. 25 U.S.C.§ 177, *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); 25 U.S.C. § 476 (e) ("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")). MHA Const. Article IX §1 (expressly including the power over tribal lands contained in

the quoted provision of 25 U.S.C. § 476). Plaintiff attempted to obtain the required tribal consent, and it even offered to pay $2,000,000 for tribal consent, but the Tribe's governing body voted down a resolution which Plaintiff had drafted which would have provided tribal consent.

Up until that point this was a standard transactional legal matter where the parties merely had not reached an agreement. That changed when, for the reasons that Plaintiff stated in its complaint and motion (e.g. economic harm, contracts and negotiations for contracts which were contingent on completion of the pipeline, and potential bankruptcy), Plaintiff had nothing more to lose by deciding to bore through the Tribe's mineral estate without the required consent. When the Tribe, predictably and well within its legal authority, instructed Plaintiff to stop, Plaintiff, again with nothing more to lose by trying, filed a complaint in this Court seeking to enjoin the Tribe from exercising the Tribe's property rights. And still with nothing more to lose, Plaintiff made multiple material misrepresentations of the law and the facts to this Court in its ex parte motion for a TRO. Most significantly, its whole case was dependent upon a 1949 statute which had been superseded by the Fort Berthold Mineral Restoration Act of 1984.[1]

[1] In its motion for TRO Plaintiff falsely stated that it had to be off a non-Indian land owner's land by November 1; but it aroused the Tribe's suspicion by failing to provide documentation which would have existed if its claim were true; and at hearing the Tribe's suspicion turned out to be correct: the contract was for one year, through April 2017. The same affiant who misrepresented that contract made other unsubstantiated allegations of terms of other contracts, also without permitting the Court or Defendants to review the contracts. Plaintiff repeatedly and emphatically asserted that its "drop dead date" for resuming boring was August 22, 2016, but when Plaintiff was forced to abandon that averment, it attempted to shift to a slight varied, but equally conclusory assertion that its project will fail if it is stopped for any additional period of time. Notably it still fails to provide documents which would back up its new "drop dead date." As the adage goes, "fool me once, shame on you, fool me twice, shame on me." This Court should not accept Plaintiff's new, slightly revised, conclusory allegation, and the Court would be well within its authority to deny the motion for preliminary injunction based upon unclean hands.

Plaintiff does not dispute and therefore concedes the legally obvious point that **if** the Tribe holds beneficial interest to land under the Lake, Plaintiff would have had to exhaust tribal remedies, Resp. §II; that tribal sovereign immunity would bar its claims, Resp. §III; that its conclusory assertion that tribal officers were acting outside the scope of their authority is false, Resp. 1; and that the Tribe is a necessary and indispensable defendant, Resp. *passim*.[2] The tribal right to prevent trespass on its own lands is very firmly established by multiple legal authorities. Although the Supreme Court has taken substantial 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*).

Plaintiff acknowledges that it attempted to obtain, but failed to obtain tribal consent.

Plaintiff's case is therefore wholly dependent upon its assertion that the pipeline does not pass through any tribal interests in land under the lake. Because this case is before the Court prior to exhaustion of tribal court remedies, Plaintiff bears the burden to show that based upon established and undisputable facts, the Tribe does not even have a colorable claim of ownership of any of the lands through which the pipeline passes. The Tribe plainly has a colorable claim. *E.g.*, *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]"); *Ethridge v. UCAR Pipeline, Inc*., 2014 U.S. Dist. LEXIS

[2] Because it is clear that the Tribe actually holds legal interests in the mineral estate that Plaintiff is invading, the Tribe is a necessary party. The Tribe notes though that the standard for being a necessary party is based upon the absent party's claimed interests; and as is undisputable here the Tribe claims a legal interest in the mineral estate based upon the Fort Berthold Mineral Restoration Act of 1984.

70694, *8-9 (W.D. La. 2014). But even putting aside the burden of proof, the Court has before it an easy case: the pipeline is passing through the mineral estate which Congress expressly returned to the Tribe in 1984 and Plaintiff's attempted reliance upon a superseded 1949 statute is without merit.

The Fort Berthold Mineral Restoration Act of 1984, P.L. 98-602, 98 Stat. 3149 §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." Combining Plaintiff's concession that if there is trust land under the lake, it would have to exhaust tribal remedies and that there would not be a waiver of sovereign immunity, with the fact that land under the lake is trust land, the obvious result is that this case cannot proceed because Plaintiff has not exhausted tribal court remedies, because the claim is barred by sovereign immunity, and because tribal officers were unquestionably within their right to direct Plaintiff to cease with their unauthorized invasion of the Tribe's mineral estate.

While the Court will not need to proceed further, Defendants also note that Plaintiff misstates the effect of the 1949 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. 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.

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)). 30 U.S.C. § 185 gives the federal government power over "federal lands," but that statute expressly defines federal land to exclude land held in trust for an Indian or an Indian Tribe. The Indian Mineral Leasing Act and Indian Mineral Development Act, acts applicable to tribal trust lands, expressly recognize that tribes have authority over tribal mineral lands, and therefore establish the very tribal authority which Plaintiff incorrectly asserts is lacking. Plaintiff's whole complaint is based upon that incorrect assertion, and the complaint therefore must be dismissed.

As it has noted before, the Tribe reiterates that the issue is not whether federal approval was required, but instead whether tribal approval was also required. In fact, for every interest in tribal trust land (with the possible exception of land that the United States is itself directly taking from the Tribe by express act of Congress) the consent of both the United States and the Tribe is required. 25 U.S.C. 177 states:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

See also Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 118 (1960) (discussing purpose of the act). It is therefore ironic, and would be self-defeating to Plaintiff if Plaintiff were correct that there is no federal law requiring tribal consent. The Non-Intercourse Act applies to all tribally held interests in land, including fee interests, aboriginal title, and rights of occupancy. *San Xavier Dev. Auth. v Charles*, 237 F.3d 1149 (9th Cir. 2001); 18 Op. Atty. Gen 235 (1885). Under

25 U.S.C. § 177, if there is no federal act which lifts the general restriction on alienation contained in 25 U.S.C. § 177, then that restriction applies and Plaintiff loses.

Plaintiff's argument is further based upon the exact same incorrectly expansive interpretation of *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991, F.2d 458 (8th Cir. 1993) (mis-analyzed in Plaintiff's Response at 2, 5) which the United States Court of Appeals for the Eighth Circuit has previously rejected. *Reservation Tel. Coop. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F.3d 181, 184-186 (8th Cir. 1996). As the Eighth Circuit explained in *Reservation Telephone Coop*, the general rule is that exhaustion is required, and the exact argument which Plaintiff puts forward here was rejected because it would improperly expand an exception to swallow the general rule. The Court explained that the exception based upon federal preemption only applies if "the very tribal remedies which the plaintiffs would have had to exhaust before challenging tribal authority in federal court were preempted by express statutory provisions." *Id.* The Court noted that in *Northern States Power* there was a federal act which expressly prohibited the particular tribal remedy, but in *Reservation Telephone Coop*. there was no such express prohibition and therefore the general rule requiring exhaustion applied.

There is no federal law which expressly preempts the Tribe from ordering Plaintiff to stop its unauthorized invasion of the Tribe's real property. In fact, federal law expressly required that Plaintiff obtain tribal approval, but Plaintiff blithely chose to proceed with pipeline work even after the Tribe refused to provide the required approval.

Plaintiff counterproductively attempts to bolster its argument by asserting that the Tribe has not established the facts which would establish tribal jurisdiction. Resp. at 4 (inexplicably asserting that Defendants "offer no evidence []that the pipelines have perforated the mineral

estate"); Resp. at 5. But Plaintiff's argument has the law backward on two material points, and its argument confirms that exhaustion of tribal remedies is required. First, the burden of proof is on Plaintiff. All plaintiffs bear the burden to establish federal court jurisdiction, but additionally here there is an express federal statute, which Plaintiff also fails to cite to this Court, which expressly places the burden on 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.A. § 194

Second, 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 exhaustion 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.*, 480 U.S. at 19. 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.*, 27 F.3d at 1300 (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.

II. PLAINTIFF CANNOT AVOID TRIBAL SOVEREIGN IMMUNITY BASED UPON *EX PARTE YOUNG*.

In section I of its brief, Plaintiff argues that its invoked federal jurisdiction under *Ex Parte Young* based upon Plaintiff's conclusory allegation in paragraphs 9 and 57-58 of its complaint that the tribal officers acted outside the scope of their authority. Again it is plainly wrong, and again it is wrongly attempting to have an exception swallow the general rule that sovereigns have immunity from unconsented suit. Case law consistently holds that the sovereign immunity of a state or tribe is not avoided by such conclusory assertions. *E.g., Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 690 (1949)(holding that on an action against a federal officer for specific relief, "it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies"). Plaintiff's conclusory allegation does not meet that pleading requirement here.

As "scope of authority" is used in *Ex Parte Young*, a "tribal official—even if sued in his 'individual capacity'—is only 'stripped' of tribal immunity when he acts 'manifestly or palpably beyond his authority.'" *Shenandoah v. Halbritter*, 275 F. Supp. 2d 279, 287 n.5 (N.D. N.Y. 2003) (citing *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 359 (2d Cir. 2000)). *See also Carey v. Espinosa*, Case no. A-011-1009 (Little Traverse Bay Band App. May 2, 2011) (applying *Ex Parte Young* by analogy to suits against tribal officers and holding that a court must look "to whether or not the type of action is within the employee's scope of duties or authority, not the alleged circumstances of a particular action" and that "since termination of employment is clearly a type of action within the scope of the Defendants' authority", the individually named defendants

had sovereign immunity for claims based upon alleged wrongful terminations); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985) (tribal officers are immune from suit if they are acting within the scope of authority which the Tribe delegated to them).

To overcome an official's sovereign immunity, "a claimant must allege and prove that the officer has acted outside of the scope of his authority." *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir. 1989) (citing *Larson*, 337 U.S. at 690). A mere claim of error in the exercise of an official's authority is not sufficient; the official's actions must be completely without authority. *Larson*, 337 U.S. at 690; *Bassett*, 221 F. Supp. 2d at 280 (holding that a claim against a tribal official "lies outside the scope of tribal immunity only where the complaint pleads—and it is shown—that a tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe"). Such allegations are not based upon a lack of delegated power where, for example, the official,

> was empowered by the sovereign to administer a general sales program encompassing the negotiation of contracts, the shipment of goods and the receipt of payment. A normal concomitant of such powers, as a matter of general agency law, is the power to refuse delivery when, in the agent's view, delivery is not called for under a contract and the power to sell goods which the agent believes are still his principal's to sell.

Larson, 337 U.S. 691-92.

If a tribal governmental agent's actions relate to the performance of his or her official duties, the actions are generally treated as being within the scope of his or her authority. *E.g.*, *Romanella v. Hayward*, 933 F. Supp. 163 (D. Conn. 1996) (holding that tribal employees responsible for the maintenance of a casino parking lot were entitled to assert the Tribe's immunity from suit in their individual capacities even if they may have been negligent, because the claims related directly to their performance of their official duties), *aff'd*, 114 F.3d 15 (2d Cir. 1997). *Compare Romanella* to *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 168 n.3, 171-72

(1977) (suit to enjoin tribal officers permissible where they were acting in individual capacities as fishermen, rather than tribal officers).

For example, in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 910 F. Supp. 2d 1188, 1198 (D.S.D. 2012), the District Court held that the "because the Tribal Court has jurisdiction, in the first instance, to determine whether the Tribal Court judgment and thus the appellate bond has any validity in the wake of the Supreme Court's decision in *Plains Commerce Bank*, the Tribal Court is not acting beyond the scope of its authority in considering that issue and is entitled to tribal sovereign immunity at this juncture of the proceedings."

Additionally, because 30 U.S.C. § 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).

CONCLUSION

For all of the reasons stated in the tribal officer's motion to dismiss and this reply, the Court is required to dismiss this case. Plaintiff must, at the very least, exhaust tribal remedies, and seek any injunctive relief in that forum.

Respectfully submitted this 9th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2016, a copy of the foregoing REPLY IN SUPPORT OF MOTION TO DISMISS 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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