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

ENERPLUS RESOURCES (USA) CORPORATION, a Delaware corporation,	)	
Plaintiff,	)	Case No. 1:16-cv-00103-DLH-CSM
vs.	)	
WILBUR D. WILKINSON, et al.,	)	
Defendants.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS BY DEFENDANTS WILKINSON AND SODERSTROM AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND DEPOSIT OF EXCESS MONEY

In this diversity action, plaintiff Enerplus Resources (USA) Corporation seeks to recover some $2.9 million in erroneous overpayments ("Excess Money") on an overriding royalty interest ("ORRI") that was granted to resolve prior litigation as part of a Settlement Agreement dated October 4, 2010. *See generally* Doc. 1. On that same day, the parties signed an ORRI Assignment that conveyed the ORRI to defendant Wilbur Wilkinson and his former attorney, defendant Ervin Lee. Subsequent ORRI payments to them were made to defendant Wilkinson's current attorney, defendant Reed Soderstrom, who presently holds the Excess Money in his IOLTA account. *See generally* Doc. 1 ¶¶ 1-24.

Both the Settlement Agreement and ORRI Assignment contain mandatory and exclusive forum-selection clauses. In the Settlement Agreement, the parties

> expressly agree that any disputes arising under this Agreement and/or the transactions contemplated herein shall be resolved in the United States District Court for the District of North Dakota Northwest Division and such court shall have exclusive jurisdiction hereunder and no party shall have the right to contest such jurisdiction or venue.

Doc. 1-3 at 10 of 94. In the ORRI Assignment, the parties

> expressly acknowledge and agree that this Assignment and any disputes arising out of or related to this Assignment and/or the transactions contemplated herein shall be resolved in the State Courts of the State of North Dakota or an applicable Federal District Court sitting in North Dakota and such court shall have exclusive jurisdiction hereunder and neither Assignor or Assignee shall have the right to contest jurisdiction or venue.

Doc. 1-4 at 3 of 17.[1] Thus, this suit by Enerplus in this Court fits squarely within the scope of both forum-selection clauses. Nevertheless, Wilkinson filed suit against Enerplus in the Three Affiliated Tribes Fort Berthold District Court ("Tribal Court"), attached the Settlement Agreement as Exhibit A to his pleading, and alleges Enerplus "has not fully paid its obligation imposed by the October 4, 2010 settlement agreement." Doc. 1-8 at 4 of 47.

Because Wilkinson (and Soderstrom on his behalf) have refused to return the Excess Money and have disregarded the contractual forum selection by suing Enerplus in Tribal Court, Enerplus filed this action naming as defendants Wilkinson, Lee, and Soderstrom as well as the Tribal Court. Enerplus seeks an injunction against continuation of the Tribal Court Case as well as a declaratory judgment, equitable restitution and accounting for return of the Excess Money, and attorneys' fees. *See generally* Doc. 1 ¶¶ 25-60.

Wilkinson (again represented by Soderstrom), as well as Soderstrom pro se, have now answered (Doc. 8) and filed a combined motion to dismiss and opposition to Enerplus' motion for preliminary injunction and deposit of the Excess Money into Court. Docs. 9 & 10. Generally stated, they seek to evade the forum-selection clause by relabeling their allegations in Tribal Court or asserting that the Settlement Agreement has somehow expired or become invalid; they totally ignore the equally-applicable forum-selection clause in the ORRI Assignment. And they

[1] The Division Orders signed by Wilkinson and Lee contain essentially identical forum-selection clauses. Doc. 1-5 at 3 of 10; Doc. 1-7 at 3 of 10.

devote more than half of their brief to immaterial boilerplate on tribal court jurisdiction and exhaustion. They briefly oppose injunctive relief based on similar rhetoric.

These arguments by Wilkinson and Soderstrom misportray the facts, disregard applicable law, and serve only to evade and obscure the reality of this case. In Section I below, Enerplus will first refute several key misrepresentations by Wilkinson and Soderstrom. In Section II, Enerplus will demonstrate why their legal arguments are erroneous and immaterial. Finally, in Section III, Enerplus replies in support of its motion for preliminary injunction and deposit of the Excess Money into Court.

I. SETTING THE RECORD STRAIGHT

Wilkinson and Soderstrom repeatedly misrepresent the facts and allegations of this case, sometimes by misstatement and other times by material omission. Thus, as the following examples illustrate, their assertions cannot be accepted at face value.

A. Jurisdictional Basis for This Case

First, they incorrectly assert that Enerplus's "claim for federal jurisdiction is based upon a Settlement Agreement that contains a forum selection clause." Doc. 10 at 2. But the complaint alleges: "Jurisdiction is proper as there is complete diversity of citizenship between the parties to this action . . . ." Doc. 1 ¶ 6. The citizenship of the parties stands essentially admitted (Doc. 1 ¶¶ 1-5; Doc. 8 at 1-2) as does the fact that the Excess Money far exceeds $75,000. *See* Doc. 1 ¶ 19; Doc. 10 at 17 (citing Doc. 10-14). Thus, the contention by Wilkinson and Soderstrom that this Court lacks jurisdiction under Rule 12(b)(1) is specious.

B. Operative Tribal Court Pleading

Second, Wilkinson and Soderstrom then invoke Rule 12(b)(6) but go outside the pleadings to assert that "the Amended Petition filed by Defendants[2] in Tribal Court bring forth claims entirely outside the Settlement Agreement" and "renders most of Plaintiff's arguments moot." Doc. 10 at 2. They attach as their Exhibit A (Doc. 10-1) what purports to be an amended petition "received" in Tribal Court, but then neglect to inform this Court that (a) the proposed amended petition is pending on motion for leave to amend (*see* Exhibit 1 attached hereto); (b) Wilkinson's motion to amend informs the Tribal Court that the proposed pleading "maintains the allegations against the same defendant from the original complaint" (*id.*); and (c) Enerplus has opposed the motion for leave to amend as futile (*see* Exhibit 2 attached hereto).[3] Thus, Wilkinson's original petition for breach of the Settlement Agreement remains the operative pleading in the Tribal Court Case, and Wilkinson has informed the Tribal Court that he is maintaining his allegations against Enerplus from the original pleading. His rhetoric may have changed but reality has not.

C. Settlement Payments

Third, Wilkinson and Soderstrom have misrepresented the facts regarding the genesis of Wilkinson's dispute with his former attorney Lee. They falsely assert that "Peak *chose* to wire all of Wilkinson's advance money to" Lee or "*Gave* $140,000.00 to Attorney Ervin Lee instead of defendant Wilkinson." Doc. 10 at 3 (emphasis added). But the Settlement Agreement directed how the payment was to be made:

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[2] There is only one plaintiff in the Tribal Court Case – Wilkinson.

[3] In late June 2016, Wilkinson filed a reply in Tribal Court in support of his motion for leave to amend, but without addressing the futility of his proposed amendment or the forum-selection clause in the ORRI Assignment. *See* Exhibit 3 (attached hereto); Section I.D., *infra*.

> . . . the Wilkinson Settlement Payment *shall* be delivered to the trust account of Ervin Lee, the attorney for Wilkinson and thereupon Peak North *shall* be relieved of any and all liabilities, claims, demands and causes of actions and obligations with respect to such Settlement Payment[ ] and all obligations of Peak North with respect to such Settlement Payment[ ] *shall* be deemed satisfied in full.

Doc. 1-3 at 5 of 94 (emphasis added). Thus, the matters about which Wilkinson and Soderstrom now complain were expressly mandated by contract. In any event, allegations such as these merely confirm how this dispute is firmly rooted in the Settlement Agreement and "the transactions contemplated" therein. *See, e.g.*, Doc. 10 at 17 (alleging as the "cause and origin of this case" "errors from the very beginning of Enerplus' interactions with Wilkinson, including: Enerplus' misapplication of Wilkinson's $140,000.00 to an individual who kept all of that sum . . .").

D. Peak North Merger Into Enerplus

One final example of the many inaccurate assertions of fact and law by Wilkinson and Soderstrom is their contention that Enerplus "Assigned defendant Wilkinson's interest in violation of the [BIA Mineral] lease agreement." Doc. 10 at 3. In reality, there is no assignment, no requirement for BIA approval, and no way to escape the ORRI forum-selection clause via the BIA lease form.

In support of their allegation, Wilkinson and Soderstrom cite only their Exhibit E (Doc. 10-5) which is a certificate *of merger* from the Delaware Secretary of State, as filed in North Dakota, establishing that Peak North Dakota, LLC ("Peak North") merged with and into Enerplus Resources (USA) Corporation. Doc. 10-5. This document is not an assignment and negates any need for assignment as a matter of law.

By operation of the merger, Enerplus is the statutory successor and legal equivalent to Peak North for purposes of Wilkinson enforcing any rights or obligations under the Settlement Agreement or transactions contemplated therein. 8 Delaware Code § 259(a) ("all rights of

creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it"); *see also* N.D. Cent. Code Ann. § 10-19.1-102(2)(f) ("surviving organization is responsible and liable for all the liabilities and obligations of each of the constituent organizations"). Similarly, upon merger Enerplus succeeded by operation of law to the property rights of Peak North. 8 Delaware Code § 259(a) ("all property . . . shall be vested in the corporation surviving or resulting from such merger . . . ; and all property . . . and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation"); *see also* N.D. Cent. Code Ann. § 10-19.1-102(2)(e)(1) (when merger becomes effective, "[a]ll property . . . and every other interest of . . . each of the constituent organizations vests in the surviving organization *without any further act or deed*") (emphasis added).

Thus, the merger obviated any need for assignment of any lease or other assets, so there is no basis for the contention that an assignment occurred or that BIA approval was required. *Cf.* 25 C.F.R. § 169.207 (2016) (requirements for BIA consent to assignment of right-of-way over Indian lands do not apply to transfers "that are the result of a corporate merger, acquisition or transfer by operation of law"). Indeed, even assuming the Enerplus-Peak North transaction had involved an assignment rather than a merger, no approval would be required as to Wilkinson's ORRI because BIA regulations expressly provide that "[a]greements creating overriding royalties . . . shall not be considered as interests in the leases" for purposes of the regulations requiring government approval of a lease assignment. 25 C.F.R. § 211.53(d); 25 C.F.R. § 212.53.

Ultimately, the BIA lease form offers Wilkinson no escape from the exclusive forum-selection clauses here because it was incorporated as part of the ORRI Assignment, where Wilkinson agreed that "[t]he ORRI conveyed herein shall be paid in accordance with the terms and conditions set forth in Form 5-5432 titled 'Oil And Gas Mining Lease-Allotted Indian Lands', a copy of which is attached hereto as Exhibit 'B' and by this reference incorporated herein . . . ." Doc. 1-4 at 2 of 17, 12-16 of 17. Thus, whatever claim or dispute Wilkinson and Soderstrom may seek to contrive from BIA Form 5-5432 arises out of or is related to the ORRI Assignment, which is a "contemplated transaction" under the Settlement Agreement and therefore is within the scope of the mandatory forum-selection clause in (a) the Settlement Agreement, (b) the ORRI Assignment, or (c) both. Nothing about this federal contract form provides any basis for maintaining the Tribal Court Case in violation of the contracts Wilkinson signed.[4]

II. OPPOSITION TO MOTION TO DISMISS

A. Background of Prior Litigation and Settlement

The Settlement Agreement, ORRI Assignment and related transactions marked the end to protracted litigation in several courts, including efforts by Wilkinson to sue non-Indians in Tribal Court. Doc. 1 ¶ 9; Doc. 1-2 (order dismissing prior Tribal Court suit by Wilkinson). Consideration for the agreements included an immediate settlement payment, future payments via assignment of ORRI, and mutual promises to abide by exclusive forum-selection clauses that

[4] In kitchen-sink fashion, Wilkinson and Soderstrom complain royalty payments on ORRI have allegedly been affected by Enerplus' flaring, shutting in wells pursuant to a purported BIA waiver, or otherwise not responding to requests by Wilkinson or Soderstrom regarding the ORRI or Wilkinson's desire to sell it back to Enerplus. *See, e.g.*, Doc. 10 at 3-4; Docs. 10-4 to 10-12. These new allegations asserted in an effort to evade the forum-selection clauses cannot alter the reality that all of them involve the amount of ORRI paid or owed and therefore are disputes arising out of or related to the ORRI Assignment or a transaction contemplated therein or in the Settlement Agreement.

require dispute resolution in the federal and/or state courts of North Dakota. Doc. 1 ¶¶ 10-15. After their protracted history of multiple lawsuits in multiple jurisdictions, the parties mandated that "*any*" disputes "*shall* be resolved" in the designated court which "*shall* have *exclusive* jurisdiction"; the contracts further prohibited any party from contesting jurisdiction or venue in the contractually designated forum. Doc. 1-3 at 10 of 94, and Doc. 1-4 at 3 of 17 (emphasis added). The forum-selection clause in the Settlement Agreement applies to "any disputes arising under this Agreement and/or the transactions contemplated herein." Doc. 1-3 at 10 of 94. Those contemplated transactions included the ORRI Assignment to Wilkinson and his Division Order. Doc. 1-3 at 5-6 of 94; *see also* Docs. 1-4 and 1-5. The forum selection clause in the ORRI Assignment applies to "any disputes arising out of or related to this Assignment and/or the transactions contemplated herein." Doc. 1-4 at 3 of 17.

By their terms, the forum-selection clauses are not limited to disputes within the four corners of a particular document; instead, they extend outward and forward into the future to encompass contemplated transactions, related disputes, or both. Thus, the parties by their agreements made it clear that if disputes arose in the future, they must be confined to a contractually-designated non-Tribal court so as to avoid a repeat of the multi-jurisdiction litigation then being concluded.

B. ORRI Assignment Forum-Selection Clause

In addition to the forum-selection clause in the Settlement Agreement, the Complaint here expressly invokes and attaches the ORRI Assignment, which contains its own forum-selection clause. Doc. 1 ¶ 12; Doc. 1-4 at 3 of 17. But Wilkinson and Soderstrom barely acknowledge the existence of *any* forum-selection clause, and they totally ignore the one contained in the ORRI Assignment. *See* Docs. 9 & 10. This omission is remarkable given their most recent filing in Tribal Court, wherein they assert that Wilkinson's proposed "Amended

Petition focuses on claims derived entirely from the Over-Riding Royalty Interest ("ORRI")" and deals with "an alleged overpayment according to the terms of the ORRI." Exhibit 3 at 1 (attached). Their silent disregard of the forum-selection clause in the ORRI Assignment betrays their untenable position for at least three reasons.

First, any dispute about ORRI performance or payment is inherently a dispute "arising out of or related to" the ORRI Assignment – the contract that established and conveyed the ORRI and established the standards to govern future payment of ORRI. Any argument to the contrary by Wilkinson or Soderstrom is merely revisionist history. *See also* note 4, *supra*.

Second, the forum-selection clause in the ORRI Assignment also extends to "the transactions contemplated herein." Doc. 1-4 at 3 of 17. There can be no more essential or fundamental transaction contemplated in the performance of an ORRI than the regular payment of the royalty sums due to the holder of the ORRI. Enerplus alleges those amounts have been overpaid by some $2.9 million, but Wilkinson claims otherwise and Soderstrom continues to hold the money. Once again, this dispute is squarely within the forum-selection clauses. *See also* note 4, *supra*.

Third, the ORRI Assignment incorporates BIA Lease Form 5-5432 and federal regulations. *See* Section I.D., *supra*. So any attempt by Wilkinson and Soderstrom to end-run the forum-selection clauses by alleging some breach of federal contract form or regulation as to the ORRI only serves to redirect the resolution of such claim through the forum-selection clause in the ORRI Assignment.[5] *See also* note 4, *supra*.

[5] Indeed, this is the direction taken in Wilkinson's most recent Tribal Court filing. Exhibit 3 at 1, 2 (contending the "heart of the matter deals with a breach of the Lease Agreement" and the proposed amended pleading in Tribal Court purportedly "asserts breach of contract by [Enerplus] through assignment and the shutting-in of wells").

C. Arguments by Wilkinson and Soderstrom

While they ignore the plainly applicable forum-selection clause in the ORRI Assignment, Wilkinson and Soderstrom do offer various arguments in support of their contention that the forum-selection clause in the Settlement Agreement is somehow inapplicable to this case or Wilkinson's current action in Tribal Court. None of these arguments has any merit.

1. The Settlement Agreement Has Not Expired.

Wilkinson and Soderstrom contend the Settlement Agreement has somehow expired or is no longer enforceable because it has served its purpose, in that settlement monies were paid, ORRI was assigned, and the prior suits were dismissed. Citing paragraph 5 of the Settlement Agreement, they claim that the parties "also stated that the settlement, detailed in section 2 of the Settlement Agreement, fully satisfied the obligations of both parties." Doc. 10 at 5. But in reality, paragraph 5 merely states that Wilkinson (and one other party) accept the ORRI Assignment and settlement payment "in full satisfaction of Peak North's and any other Plaintiffs obligations, if any, under either the Letter Agreement and/or the Termination Agreement [i.e., two agreements that had given rise to the disputes being settled]." Doc. 1-3 at 9 of 94. Nothing in paragraph 5 of the Settlement Agreement establishes that Peak North agreed that *Wilkinson* had fully performed his obligations *under the Settlement Agreement*, which included his promise to resolve future disputes in accordance with the exclusive and binding forum-selection clause. Nor is there any provision for termination or expiration of the Settlement Agreement.

In short, there is no basis to assert that the Settlement Agreement "has been fulfilled according to its terms" (Doc. 10 at 5) when one of those terms was the mandatory and exclusive forum-selection clause for the resolution of disputes arising under the Settlement Agreement or the transactions contemplated therein, specifically including the ORRI Assignment.

2. The Settlement Agreement Remains Valid.

Wilkinson and Soderstrom contend the merger of Peak North into Enerplus somehow "likely voids the Settlement Agreement" or renders it "suspect." Doc. 10 at 6. But this contention rests on the false propositions that there was an assignment of leases between Peak North and Enerplus without the allegedly required BIA approval. Enerplus has already demonstrated the multiple errors in this argument. *See* Section I.D., *supra.*

3. No Requirement for Exhaustion of Tribal Remedies.

Wilkinson and Soderstrom argue that Enerplus has allegedly failed to exhaust tribal remedies. But they can make this immaterial argument only by ignoring what this Court has recognized as the clear rule in the Eighth Circuit: "when the negotiating parties have agreed to an appropriate forum, exhaustion of tribal remedies is not required." *Larson v. Martin*, 386 F. Supp. 2d 1083, 1088 (D.N.D. 2005) (citing *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995)).

At the risk of stating the obvious, Wilkinson contracted for a forum other than tribal court, and he repeatedly signed his name to contracts that expressly abrogated his "right to contest . . . jurisdiction or venue" in the contractually-designated forum. Doc. 1-3 at 10 of 94; Doc. 1-4 at 3 of 17. Parties such as Wilkinson, who "agreed to be sued in the federal district court . . . are not privileged to force the dispute into the tribal court." *FGS Constructors*, 64 F.3d at 1233. Pages of boilerplate case law about the tribal exhaustion doctrine based on cases with no forum-selection clause cannot change the law and contracts that control the determination of this case.

4. Tribal Court Jurisdiction is Immaterial.

Wilkinson and Soderstrom devote several more pages to a pointless attempt to establish that there is tribal court jurisdiction over Wilkinson's claims. Once again, this argument is

immaterial given the forum-selection clauses that Wilkinson signed. The tribal exhaustion doctrine exists only to give tribal courts an opportunity to consider their jurisdiction in the first instance in appropriate cases. But when the parties have chosen their forum in advance by contract, they have already answered any question about tribal court jurisdiction and waived any basis to proceed to tribal court. *See FGS Constructors*, 64 F.3d at 1233.

In any event, the contention that tribal court jurisdiction exists here is erroneous for various reasons, including the following.

First, the Settlement Agreement provides it "shall be interpreted and enforced under the substantive law of the State of North Dakota, to the extent state law applies, and under federal law, to the extent federal law applies." Doc. 1-3 at 10 of 94. The ORRI Assignment contains an essentially identical choice-of-law provision. Doc. 1-4 at 3 of 17. So there is nothing for the Tribal Court to decide because it has no jurisdiction to interpret or apply any law other than tribal law. Indeed, the Supreme Court has declared it "quite wrong" to describe a tribal court as a court of "general jurisdiction" having concurrent jurisdiction over claims governed by the law of another sovereignty. *Nevada v. Hicks*, 533 U.S. 353, 367 (2001).

Second, any assertion of tribal court jurisdiction over a nonmember such as Enerplus is "presumptively invalid." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008); *Montana v. United States*, 450 U.S. 544, 565 (1981). And there is no basis to suggest that either of the limited *Montana* exceptions could here overcome this presumptive invalidity.

As to the first exception for certain consensual relationships, it is absurd for Wilkinson and Soderstrom to argue that Peak North or Enerplus "should have anticipated that it was exposing itself to assertions of tribal sovereignty over conduct related to those agreements" by

contracting with Wilkinson, a member of the tribe. Doc. 10 at 15. Instead, the parties expressly contemplated and agreed that their transactions would be governed by federal law and North Dakota law and would be resolved in either a federal or North Dakota forum. The only reasonable anticipation is that parties to a contract will abide by its express terms, particularly an agreement by Wilkinson that he would not henceforth resort to Tribal Court for the resolution of disputes.

And the second *Montana* exception cannot apply because Wilkinson's economic self-interest is not equivalent to the economic or political security of a tribe. As the Supreme Court has explained, the second *Montana* exception "is only triggered by nonmember conduct that threatens the Indian tribe . . . ." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657 n.12 (2001) (emphasis deleted). "The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Plains Commerce Bank*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566). A claim for the return of Excess Money to which Wilkinson was never entitled causes him no harm and certainly poses no peril to the political integrity or survival of any tribe.

III. REPLY IN SUPPORT OF PRELIMINARY INJUNCTION MOTION

Near the end of their brief, Wilkinson and Soderstrom offer a conclusory argument in opposition to Enerplus' motion for preliminary injunction and an order requiring Soderstrom to deposit the Excess Money into the Court (Docs. 3 & 4). Their insubstantial arguments largely repeat arguments already refuted above.

For example, they assert there is no basis for injunctive relief because the Settlement Agreement "either is void, has expired or does not apply in this matter." Doc. 10 at 16. But as demonstrated above, the Settlement Agreement – and the ORRI Assignment – were signed by Wilkinson, remain in full force and effect, and contain mandatory and exclusive forum-selection

clauses that fully encompass this dispute. Given the long history of past disputes, the parties to the Settlement Agreement and contemplated transactions agreed to preclude Wilkinson, or anyone else, from attempting to litigate disputes in Tribal Court. There is no basis to oppose injunctive relief enforcing the forum-selection clause when Wilkinson expressly waived any right to contest jurisdiction or venue in this designated forum. *See FGS Constructors*, 64 F. 3d at 1233 (parties who agree to be sued in federal district court have no privilege to force a dispute into tribal court).

In another argument at odds with controlling law, Wilkinson and Soderstrom argue against a preliminary injunction by asserting that Enerplus "is afforded the same legal remedies in Tribal Court as in Federal Court – the only difference is location." Doc. 10 at 16. But as the United States Supreme Court has explained, tribal sovereignty

> is a sovereignty outside the basic structure of the Constitution. . . . The Bill of Rights does not apply to Indian tribes. . . . Indian courts differ from traditional American courts in a number of significant respects.

Plains Commerce Bank, 554 U.S. at 337 (internal quotations and citations omitted). "To start with the most obvious one, it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes." *Nevada v. Hicks*, 533 U.S. at 383 (Souter, J., concurring). Thus, Enerplus most certainly faces irreparable injury if forced to litigate this dispute in a forum lacking such basic protections – particularly when Enerplus contracted to resolve disputes in this federal forum and Wilkinson waived the possibility of dispute resolution in Tribal Court.

Nor can there be any harm to Wilkinson by merely holding him to the contracts he signed. There is nothing in this litigation that presents a purported risk of "denying Tribal Sovereigns to adjudicate matters involving their sovereign lands." Doc. 10 at 17. The only interests at stake here are the rights of Wilkinson and Enerplus, and they contracted for dispute

resolution in this forum based on agreements calling for the application of North Dakota and/or federal law. The Tribal Court has no interest in asserting general or concurrent jurisdiction to resolve disputes under the law of another sovereign – because tribal courts have no such jurisdiction. *Nevada v. Hicks*, 533 U.S. at 367.

Finally, the response by Wilkinson and Soderstrom confirms that the Excess Monies are anything but "safe and secure." Doc. 10 at 17. In their answer Wilkinson and Soderstrom admit that "Soderstrom is prohibited from disbursing the Excess Money to anyone other than Plaintiff" and that Soderstrom "has a fiduciary relationship to Plaintiff because he has control over Plaintiff's Excess Money." Doc. 1 ¶¶ 50 & 56; Doc. 8, Section IV (admitting paragraphs 50 and 56). But even as he admits his fiduciary relationship to Enerplus and his duty to pay over the Excess Money, Soderstrom continues to represent Wilkinson and advance arguments solely for the purpose of depriving Enerplus of the Excess Money to which it is entitled. An order requiring payment of the Excess Money into Court is essential to maintain the status quo with this Court as a truly neutral guardian of the Excess Money.

In summary, Enerplus faces expensive and time-consuming litigation by Wilkinson in a forum not subject to important constitutional protections – even though Wilkinson signed multiple contracts that plainly call for dispute resolution in this forum. A preliminary injunction prohibiting continuation of the Tribal Court Case and ordering Soderstrom to pay the Excess Money into Court is essential to vindicate the sanctity of contracts and to ensure proper dispute resolution under North Dakota and federal law.

IV. CONCLUSION

Accordingly, Enerplus Resources (USA) Corporation requests that the motion to dismiss by defendants Wilkinson and Soderstrom be denied and that its motion for preliminary injunction and order for deposit of Excess Money into Court be granted.

Date: July 11, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail address:

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I further certify that a copy of the foregoing was sent to the following email address and deposited in the U.S. mail, postage prepaid, addressed as follows:

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