UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT
Case No. 16-3715

Enerplus Resources (USA) Corporation, Plaintiff-Appellee,	)
vs.	)
Wilbur D. Wilkinson, an individual; The Three Affiliated Tribes, Fort Berthold District Court, Reed A. Soderstrom, agent for Wilbur D. Wilkinson; and Ervin J. Lee, an individual, Defendants-Appellants.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA,
(The Honorable Daniel L. Hovland)
District Court Case No. 1:16-CV-00103

BRIEF OF APPELLANTS, WILBUR D. WILKINSON AND REED A. SODERSTROM

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SUMMARY OF THE CASE AND ORAL ARGUMENT

This is an appeal from a Preliminary Injunction issued in a case growing out of an accounting and Quiet Title action in Tribal Court concerning an Overriding Royalty Interest on Indian Reservation Trust Lands. The District Court enjoined Defendants from further litigating this matter in Tribal Court.

Between August 2014 and October 2015, Plaintiff-Appellee Enerplus alleges it overpaid Wilkinson in the sum of $2,961,511.15. Enerplus demanded the sum be paid back immediately. Subsequently, Wilkinson filed an accounting and Quiet Title action in Fort Berthold Tribal Court to determine the amount owed, if any, to Enerplus. Enerplus then brought suit in District Court, seeking and attaining a Preliminary Injunction against Wilkinson from adjudicating this matter in tribal court due to a Forum Selection Clause, despite the involvement of Tribal Lands. This case presents important issues addressing the public interests of Tribal Self-Determination and Sovereignty over a Forum Selection Clause. The United States Supreme Court has stated that Forum Selection Clauses will be enforced in "all but the most exceptional cases." *Atlantic Marine Construction Co. v. U.S. District Court*, 134 S.Ct. 568, 581 (2013). Assuming the clause even applies, this is an exceptional case that calls for Tribal Sovereignty to take precedence.

Wilkinson requests 15 minutes per side of oral argument if this Court believes oral argument would be helpful in the resolution of these issues

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JURISDICTIONAL STATEMENT

This appeal is from the United States District Court's Order Granting Plaintiff's Motion for Preliminary Injunction entered on August 31, 2016. Defendant Wilbur D. Wilkinson ("Wilkinson") filed his timely Notice of Appeal on September 19, 2016. This Court has appellate jurisdiction under 28 U.S.C. §1292(a)(1).

Wilkinson alleges that the United States District Court erred in not considering the public interest of Tribal self-determination and tribal sovereignty of Tribal Courts in matters relating to Tribal Lands, instead giving greater weight to the Forum Selection Clauses.

STATEMENT OF THE ISSUE

Whether the United States District Court erred in prohibiting Wilbur D. Wilkinson from prosecuting any lawsuits in Fort Berthold Tribal Court in New Town, North Dakota regarding the Settlement Agreement, the ORRI Assignment, and/or the Wilkinson and Lee Division Orders, and in prohibiting the Fort Berthold Tribal Court from exercising jurisdiction over Enerplus Resources (USA) Corporation ("Enerplus") in a pending case in Tribal Court regarding reservation Trust Lands when the United States District Court failed to consider Tribal Self-Determination as a public interest over contractual clauses.

- *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981).
- *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294 (8th Cir. 1994).
- *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, 134 S.Ct. 568 (2013).

STATEMENT OF THE CASE

After litigation in numerous courts with other parties, Wilbur D. Wilkinson ("Wilkinson") and Peak North Dakota, LLC ("Peak North") entered a "Settlement Agreement, Full Mutual Release, Waiver of Claims and Covenant Not to Sue" (the Settlement Agreement) on October 4, 2010. In the Settlement Agreement, Peak North assigned to Wilkinson a 0.5% of 8/8ths overriding royalty interest in certain oil and gas leases in North Dakota located within the jurisdictional boundaries of the Fort Berthold Indian Reservation Tribal Court, with 10% of Wilkinson's overriding royalty interest assigned to Ervin Lee ("Lee"), Wilkinson's attorney at the time. (App. p. 42 (b)(i)(2)).

Pursuant to the Settlement Agreement, Peak North assigned to Wilkinson a 0.45% of 8/8ths overriding royalty interest and Lee 0.05% of 8/8ths overriding royalty interest in an Assignment of Overriding Royalty Interest ("ORRI Assignment"), also dated October 4, 2010, on lands located within the exterior boundaries of the Fort Berthold Indian Reservation. (App. p. 134).

Lee and Wilkinson executed "Division Orders," also dated October 4, 2010, in conjunction with the Settlement Agreement and the ORRI Assignment. (App. pp. 150, 160).

The Settlement Agreement, ORRI Assignment, and Division Orders all had Forum Selection Clauses stating that all disputes related to the documents would

be resolved in either State Court or Federal Court in North Dakota. (App. pp. 48, 135, 152, 167.).

In December of 2010, Peak North and Enerplus had *merged* together into one entity. In the same month, Wilkinson filed suit against Lee for attorney misconduct and breach of the Settlement Agreement in the Fort Berthold Tribal Court. (App. p. 386). The Tribal Court denied Lee's Motion to Dismiss for lack of jurisdiction and Ordered that all future payments due from Peak North to Wilkinson and Lee be deposited into the trust account of Wilkinson's attorney at that time, Reed Soderstrom (the "IOLTA Payment Order"). (App. pp. 163-4). The MHA Nation Supreme Appeals Court affirmed the Tribal Court's jurisdiction ruling on August 31, 2015, and reaffirmed its ruling on November 30, 2015. (App. pp. 395, 403).

Between August 2014 and October 2015, Enerplus alleges it overpaid excess monies to the overriding royalty interest amount due to Wilkinson and Lee from the leases on Trust Lands by $2,961,511.15. This money has since been deposited from the IOLTA account into the United States District Court's Registry Investment System.

Enerplus demanded the return of the money. In response, Wilkinson requested an accounting and a copy of the Merger Agreement which was never received. Wilkinson subsequently filed suit against Enerplus in Fort Berthold Tribal Court on February 29, 2016, seeking an accounting and Quiet Title of the Overriding

Royalty Interest to substantiate the alleged overpayment. (App. pp. 176-79). Wilkinson also requested a copy of the Bureau of Indian Affairs ("BIA") Lease Merger and Assignment approval form from Enerplus. To date, despite requests and subpoenas, Enerplus has not provided this document.

Instead, Enerplus brought action against Wilkinson in the United States District Court on May 4, 2016, seeking, pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, 1) a Preliminary Injunction prohibiting Wilkinson from prosecuting any lawsuits in Tribal Court arising from or related to the Settlement Agreement, the ORRI Assignment, and/or the Wilkinson Division order in Tribal Court; 2) prohibiting the Tribal Court from exercising jurisdiction over Enerplus in Wilkinson's Tribal Court case; and 3) an Order requiring the excess money be deposited into the Court. As mentioned previously, the money has already been deposited into the District Court's registry.

In its Order dated August 31, 2016, the United States District Court enjoined Wilkinson from prosecuting any lawsuits in Fort Berthold Tribal Court arising from or related to the Settlement Agreement, the ORRI Assignment, and/or the Wilkinson and Lee Division Orders, as well as prohibiting the Fort Berthold Tribal Court (which never filed any response to this case) from exercising jurisdiction over Enerplus in Wilkinson's present case against it, and ordering Soderstrom to transfer the excess money into the Court, which has already been completed.

Wilkinson filed a Notice of Appeal on September 16, 2016, and moved for a stay pending appeal in regards to depositing the excess monies. On October 6, 2016, the United States District Court denied Wilkinson's request for a stay, and the excess monies were immediately deposited into the Court. While the Three Affiliated Tribes and the Fort Berthold Tribal Court have not made any response in this case, Wilkinson has moved forward with an appeal to this Court challenging the United States District Court's Order to enjoin Wilkinson from pursuing his action in Tribal Court.

SUMMARY OF ARGUMENT

In granting a Preliminary Injunction enjoining Wilkinson and the Fort Berthold Tribal Court from adjudicating claims related to reservation lands in Tribal Court, the United States District Court did not consider Tribal Self-Determination or Tribal Sovereignty when weighing the *Dataphase* factors for preliminary injunction.

Following the *Dataphase* factors, the United States District Court determined that Enerplus would succeed on the merits based upon the Forum Selection Clause without considering Tribal Self-Determination and Tribal Sovereignty as a public interest that would outweigh the Forum Selection Clause, and the irreparable harm and precedent it would create by infringing on Tribal Sovereignty in a case that involved Tribal Lands.

Moreover, the United States District Court's Order did not consider the absence of BIA approval over the transfer of Tribal Trust Land Leases from Peak North to Enerplus following their merger. Absent BIA approval, Enerplus has no standing to litigate these matters in court.

The United States District Court Order should be vacated and the case remanded with instructions to stay proceedings pending a determination from the Fort Berthold Tribal Court.

ARGUMENT

I. Standard of Review.

When evaluating the grant of a Preliminary Injunction, this Court "review[s] the United States District Court's factual findings for clear error, its legal conclusions *de novo*, and its exercise of equitable judgment for abuse of discretion." *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 316 (8th Cir. 2009). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996); *accord Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n*, 564 F.3d 900, 904 (8th Cir. 2009).

II. The District Court Erred In Granting A Preliminary Injunction When It Failed To Consider Tribal Sovereignty As A Public Interest.

The United States District Court awarded an injunction under Rule 65 and considered the *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 114

(8th Cir. 1981) factors in ordering its Preliminary Injunction against Wilkinson. However, the United States District Court erred in its balancing of the equities.

The United States District Court Order granted Enerplus' preliminary motions after considering Enerplus' likelihood of success on it claims against Wilkinson based on the Forum Selection Clauses in the Settlement Agreement, ORRI Assignment, and Division Orders (App. p. 16); that Wilkinson will suffer no harm from any disputes (App. p. 19) ; and finding that the "public has an interest in protecting the freedom to contract by enforcing contractual rights and obligations." (App. p. 19).

The United States District Court failed to consider the public interest in Tribal Sovereignty and self-determination over lands within its exterior boundaries. The United States District Court instead gave greater weight to the forum selection clauses alone.

A. The Forum Selection Clause Should Not Be Enforced because of the Exceptional Case Presented Here.

Uniformly, Forum Selection Clauses have been upheld as presumptively valid and generally enforceable. *See, KaeRen Accommodations, Inc. v. Country Hospitality Corp.*, 243 F.Supp.2d 993, 995 (D.N.D. 2002). Forum Selection Clauses will be enforced in "all but the most exceptional cases." *Atlantic Marine*

Construction Co. v. U.S. District Court for the Western District of Texas, 134 S.Ct. 568, 581 (2013). This is an exceptional case.

Here, the United States District Court found that the public interest in protecting freedom of contract by enforcing contractual rights and obligations without considering any Tribal rights. (App. p. 19). The United States District Court did not consider the public interest in Tribal Sovereignty over reservation lands.

In *Atlantic Marine Construction Co. v. U.S. District Court*, the Supreme Court dealt with the enforcement of a Forum Selection Clause between a Contractor and Subcontractor for work on a federal project on federal lands in Texas. *Atl. Marine. Constr.* at 576 (2013). The Subcontract with a Texas subcontractor mandated that any litigation resulting from the contract would be brought in state or federal court in Virginia. When a dispute arose, the Texas subcontractor filed suit in the United States District Court for the Western District of Texas. *Id.* at 577. The General Contractor's motion to dismiss the suit on the grounds that venue was "wrong" and "improper" was denied by the District Court and the Fifth Circuit. *Id.*

The Supreme Court, in a unanimous decision, held that,

> "When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation. A court accordingly must deem the private interest factors to weigh entirely in favor of the preselected forum. … As a consequence, a district court may consider arguments about public-interest factors only. Because those factors

> will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases." *Id.* at 582 (internal citations omitted).

The case at issue is an unusual case. While not dealing directly with motions to transfer, Enerplus is asking the court to exercise jurisdiction and judgment on an action that concerns a Tribal Member and Tribal Trust Lands, thus whittling away the already limited Tribal Self-determination and Sovereignty rights. Congress has been committed to a policy of supporting Tribal self-government and self-determination. *Nat'l Farmers Union Ins. Cos. V. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). As this Court noted in *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994):

> "The Supreme Court has repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. Tribal courts play a vital role in tribal self-government, and the federal Government has consistently encouraged their development. The deference that federal courts afford tribal courts concerning [tribal-related] activities occurring on reservation land is deeply rooted in Supreme Court precedent. Because a federal court's exercise of jurisdiction over matters relating to reservation affairs can impair the authority of tribal courts, the Supreme Court has concluded that, as a matter of comity, the examination of tribal sovereignty and jurisdiction should be conducted in the first instance by the tribal court itself." (internal citations omitted); *See also Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1419-1420 (1996).

The Tribal Court must be afforded opportunities to determine its own jurisdiction, especially when the situation concerns reservation lands. The public interest in maintaining Tribal Sovereignty is an important one, and one that is only being eroded away.

B. Even if the Forum Selection Clause Should Be Enforced, Enerplus has no Standing to Impose the Forum Selection Clause Absent a Showing of BIA Approval.

The Assignment of allotted Indian lands and minerals is prohibited absent approval from the Secretary of the Interior. (App. p. 286(h)). Oil and Gas Lessees of Allotted Indian Lands agree that they shall not assign leases, interests, nor sublet any portion of leased premises without approval of the Secretary of the Interior. (App. p. 286 (h)).

When Peak North merged with Enerplus, the assignment of the Indian lands and minerals needed to be approved by the Secretary of the Interior. Any assignment from Peak to Enerplus has not followed the terms and mandate of the BIA "Oil and Gas Mining Lease – Allotted Indian Lands." The lease states that Peak North is

> (h) Not to assign this lease or any interest therein by an operating agreement or otherwise nor to sublet any portion of the leased premises before restrictions are removed, except with the approval of the Secretary of the Interior. If this lease is divided by the assignment of an entire interest in any part of it, each part shall be considered as a separate lease under all the terms and conditions of the original lease. The provisions of this section will not operate to abridge or modify any of the

> rights of the land or royalty owners under section 9 of this lease. (App. p. 286).

To date, Enerplus has not provided proof of approval from the Secretary of the Interior. Absent such proof, such assignment between Peak North and Enerplus is voidable and the transaction, at the very least, must be considered suspect at this time. The United States District Court failed to even consider this in its Order.

Enerplus has claimed that the BIA has waived such requirements for its shut-in wells but has failed to produce any evidence of a waiver. (App. pp. 278, 279). Further, the Mineral Lease does not allow producing wells to be shut-in. (App. p. 285). This is yet another breach of the BIA Mineral Lease Agreement that binds every producing well on the Fort Berthold Indian Reservation and has merit for all actions occurring on and in regards to the Fort Berthold Indian Reservation.

Despite repeated requests, Enerplus has not provided proof of either approval from the Secretary of the Interior or a waiver regarding its lease assignments, something the United States District Court did not take into consideration.

CONCLUSION

For the reasons stated above, this Court should vacate the United States District Court's Order granting Plaintiff's Motion for Preliminary Injunction and remand with instructions to stay the action until the Fort Berthold Tribal Court has determined whether it has jurisdiction over this matter.

Dated this 18th day of November, 2016.

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BY: */s/ Reed A. Soderstrom*

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(7)(B) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced type face using Microsoft Word 2016 in 14 point font, Times New Roman. The brief contains 2,551 words, excluding the parts of the brief exempt by Fed. R. App. 32(a)(7)(B)(iii).

The undersigned further certifies that this brief and addendum complies with Eighth Cir. R. 28A(h) and has been scanned for viruses and are virus free.

Dated this 18h day of November, 2016.

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