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.

ENERPLUS RESOURCES (USA) CORPORATION'S RESPONSE TO DEFENDANTS' MOTION FOR RECONSIDERATION

Enerplus Resources (USA) Corporation ("Enerplus") submits the following Response to Wilbur D. Wilkinson's ("Wilkinson") and Reed A. Soderstrom's ("Soderstrom") (collectively, "Defendants") Motion for Reconsideration of the Court's November 2, 2017 Order[1] granting Enerplus's Motion for Summary Judgment ("Order"). For the following reasons, the Motion for Reconsideration should be denied.

In the Order, the Court granted Enerplus's second Motion for Summary Judgment. The Court determined that Enerplus was entitled to a declaration that "the forum selection clauses in the Settlement Agreement, the ORRI Assignment, and/or the Wilkinson and Lee Division orders are valid and enforceable terms of the contracts between Enerplus and Wilkinson, which operate to preclude and prohibit the Tribal Court from exercising jurisdiction over any dispute arising in connection with these documents and/or activities and transactions associated therewith." The

[1] In the Memorandum in Support of the Motion for Reconsideration, the Defendants refer to "[t]his Court's November 3, 2017, Order" granting Enerplus's motion for summary judgment. The undersigned assumes the date in this reference is a typographical error, as the Order granting Enerplus's motion was issued on November 2, 2017.

Court also determined that Enerplus is entitled to recover its attorney fees and costs pursuant to the Settlement Agreement and/or Division Orders.

In their Motion, Defendants do not take issue with the Court's conclusion that the forum selection clauses in the pertinent agreements are binding on the parties. Instead, they argue that the Court issued the Order "without even taking into consideration Plaintiff's standing to enforce the terms of the Settlement Agreement, Overriding Royalty Interest ("ORRI"), and Division Orders," and specifically, that Enerplus has failed to prove its assignment from Peak North. As discussed in more detail below, Defendants are making this argument for the ***fifth*** time, even though it has been soundly rejected by this Court and the Eighth Circuit every previous time.

Rule 60(b) provides that a court may relieve a party from a final judgement, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Defendants have failed to assert any justifiable reason to grant them relief from the Order pursuant to Rule 60(b). Defendants simply continue to assert that Enerplus does not have standing to enforce the Settlement Agreement, ORRI Assignment, and/or Division Orders notwithstanding their past failures. Specifically, this Court rejected the argument in both the August 30, 2016 Order granting Enerplus's motion for preliminary injunction, *see* Document No. 48, p. 8, and in the February 23, 2017 Order granting Enerplus's first motion for summary judgment. *See* Document

No. 75, p. 8. In rejecting Defendants' "standing" argument, the Court explained that Defendants "confuse[] the principles of merger and standing." *See* Document No. 75, p. 8. It further explained that because Enerplus and Peak North merged, *there was no assignment that the Secretary needed to approve*, assuming approval would otherwise be required. *Id.* (emphasis added).

On appeal, the Eighth Circuit Court of Appeals agreed with this Court's conclusion. *See* Eighth Circuit Opinion, Document 86-1, p. 6-7. The Court of Appeals observed that "Wilkinson seems to equate the Peak North-Enerplus merger with an assignment. But Wilkinson provides no authority for this contention. And even if such an assignment had occurred, Wilkinson has not shown that it would void the underlying lease or invalidate the Settlement Agreement." *Id.*

This Court implicitly rejected this argument again by declining to address it for a *fourth* time in the Order.[2] Yet, in their Motion for Reconsideration, Defendants insist on making it again. Given the fate of this argument in the past, Defendants' stubborn refusal to accept the rulings of both Courts is groundless, frivolous, and needlessly further burdens the Court and increases the cost of this litigation. The motion can only be understood as being presented for the purpose of harassment and delay, for which sanctions under Fed. R. Civ. P. 11 may be warranted.

Finally, Defendants summarily assert that "Wilkinson never unreasonably withheld the overpayment, but only wanted to ensure that the overpayment was a true accounting error. To date Enerplus has only asserted its accounting error and has not provided an accounting to show its accounting error." Presumably, Defendants take issue with this Court's determination that the overpayment was the result of a simple clerical error — a determination that was made months ago in the February 23, 2017 Order granting Enerplus's first Motion for Summary Judgment. *See*

[2] Defendants raised the argument in their response to Enerplus's second motion for summary judgment. *See* Document No. 84.

Document No. 75. If Defendants wanted to challenge that determination, they could have done so by filing an appeal within 30 days of the order. *See* Fed. R. App. P. 4(a)(1)(A). Further, Defendants had adequate opportunity to conduct discovery to obtain the information they needed to challenge Enerplus on this issue. Defendants failed to conduct discovery, and they cannot now complain that they do not have the evidence that would allegedly disprove Enerplus's right to the overpayment.

In sum, Defendants have failed to make any showing that could possibly justify granting them relief from the November 2, 2017 Order pursuant to Rule 60(b). Instead, they continue to make the same arguments that the Court has already rejected. For the forgoing reasons, Enerplus respectfully requests that the Wilkinson's and Soderstrom's Motion for Reconsideration be denied.

Dated this 20 day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2017, 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 email addresses:

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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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/s/ Tabitha Addison