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

KODIAK OIL & GAS (USA) INC., now known as Whiting Resources Corporation, Plaintiff, vs. JOLENE BURR, TED LONE FIGHT, GEORGIANNA DANKS, EDWARD S. DANKS and JUDGE MARY SEAWORTH, In Her Capacity as the Chief Judge of the Fort Berthold District Court, Defendants.	)	Case No. 4:14-cv-00085-DLH-CSM

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

Defendants and the Tribal Official[1] (collectively "All Defendants") barely acknowledge the controlling case of *Nevada v. Hicks*, 533 U.S. 353 (2001) and never acknowledge the Supreme Court's emphatic declaration that it is "**quite wrong**" to regard a tribal court as a court of general jurisdiction authorized to decide federal questions.[2] Docs. 46 & 48. Instead, All Defendants seek to obscure the compelling reasons to enjoin the Tribal Court Lawsuit, asserting a variety of arguments contrary to the claims made in the Tribal Court Lawsuit, the proceedings in Tribal Court, or controlling precedent.[3]

[1] Pursuant to Fed. R. Civ. P. 25(d), Chief Judge Mary Seaworth is automatically substituted for her predecessor, Chief Judge Diane Johnson, who was originally named as a defendant.

[2] Defendants cite *Nevada v. Hicks* in passing only once, on a different point. Doc. 46 at 7.

[3] The Tribal Official's legal arguments largely repeat the erroneous assertions in her renewed motion to dismiss, to which Kodiak is herewith filing a separate response.

I. Setting the Record Straight

Because so many contentions by Defendants and/or the Tribal Official rest on pretense contrary to law or fact, Kodiak will first refute the most blatant of these misstatements.

First, the Tribal Official wrongly asserts "the Tribal Court has not yet made a determination as to jurisdiction." Doc. 48 at 8-9. But the record before this Court includes decisions expressly finding jurisdiction over Kodiak by two tribal courts – including the MHA Nation Supreme Court. Doc. 29-2 at 8-16 of 18; Doc. 29-9 at 3-7 of 21. Tribal exhaustion is fully satisfied here because it only applies to the question of "whether petitioners were required to exhaust their *jurisdictional claims* in Tribal Court before bringing them in Federal District Court." *Nevada v. Hicks*, 533 U.S. at 369 (emphasis added). Thus, a defendant in tribal court is "not required to fully litigate the merits of the claims before seeking review of the Tribal Court's jurisdiction in federal court." *Belcourt Pub. Sch. Dist. v. Herman*, 786 F.3d 653, 656 n.2 (8th Cir. 2015).[4]

Second, Defendants misrepresent their own evidence when they cite their Exhibit 1 (Doc. 46-1) for the false contention that Kodiak has "simultaneously with this motion for preliminary injunction, filed a motion to dismiss in Tribal Court." Doc. 46 at 2; *see also id.* at 4, 22. Exhibit 1 is actually a motion filed by Rimrock Oil & Gas Williston, LLC in a tribal court action filed by Charles D. Wilkinson and other plaintiffs – none of whom are parties to this case. Doc. 46-1. Merely because Mr. Soderstrom represents different plaintiffs in some other tribal court case (Doc. 46-1 at 2) affords no basis for denying an injunction here.

[4] Tribal exhaustion is a prudential rule based on comity to allow a tribal court a procedural opportunity to determine its own jurisdiction; it "neither establishes tribal-court adjudicatory authority" in the cases to which it applies nor forecloses a federal court's own determination of the substantive federal question of tribal court jurisdiction. *Strate v. A-1 Contractors*, 520 U.S. 438, 448 (1997); *id.* at 449-53.

Third, Defendants incorrectly assert that the conduct giving rise to their "claims took place on *tribal lands*." Doc. 46 at 13 (emphasis added). And the Tribal Official erroneously equates allotted land with tribal trust land. *See* Doc. 48 at 10-11.[5] But this case does not involve tribal lands. *See Strate*, 520 U.S. at 454 & n.8 (equating "tribal land" with "land belonging to the Tribe or held by the United States in trust for the Tribe") (citing *Montana v. United States*, 450 U.S. 544, 557 (1981)). The federal lease form invoked by Defendants, by its very title, applies only to "ALLOTTED INDIAN LANDS." Doc. 17-1 at 8. Based on Supreme Court authority and the Tribe's own constitution, Kodiak has demonstrated that the Tribe has no ownership interest in any allotted land, which is held in trust by the federal government solely for the benefit of individual allottees. *See* Doc. 30 at 16-17. The allotment process eliminated whatever tribal ownership may once have existed over such lands. *Id.*

Fourth, tribal lands are not at issue because the Tribe is not a party to the Tribal Court Lawsuit, and Defendants assert no claim on behalf of the Tribe. Indeed, Defendants told the Tribal Court that "the Second Amended Complaint only alleges claims on behalf of enrolled member Plaintiffs and the class of those similarly situated and *does not allege any claims on behalf of . . . the Tribe as a whole*." Doc. 17-2 at 5 of 6 (emphasis added). And the Tribal Court found Defendants have "no authority to bring any action on behalf of the Tribe." Doc. 29-2 at 4 of 18.

Finally, land status does not create tribal jurisdiction here because "the general rule of *Montana* applies to both Indian and non-Indian land." *Nevada v. Hicks*, 533 U.S. at 360 (no

[5] There is no claim by Defendants or the Tribal Official that a federal statute grants tribal court jurisdiction over Kodiak. Therefore, the Tribal Official's passing reference to "Indian Country" (Doc. 48 at 10) is "misplaced" because that term, as defined in 18 U.S.C. § 1151, is immaterial to the question of "inherent or retained sovereignty over nonmembers." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 n.5 (2001); *Chiwewe v. BNSF Ry.*, 239 F. Supp. 2d 1213, 1218 (D.N.M. 2002) (section 1151 "addresses only claims of statutorily conferred tribal power").

tribal court jurisdiction even though nonmember conduct "occurred on land owned and controlled by the Tribe" (*id.* at 370)); *see also id.* at 387 (O'Connor, J., concurring in part) ("Today, the Court finally resolves that *Montana* . . . governs a tribe's civil jurisdiction over nonmembers regardless of land ownership."). "The ownership status of land . . . is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'" *Id.* at 360 (quoting *Montana*). But it may be "a dispositive factor"; indeed, under Supreme Court precedent and as relevant to this case, *"the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction*." *Id.* (emphasis added); *see also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (describing retained sovereignty as "limited" and focused on "land *held by*" or "activities that occur on land *owned* ***and*** *controlled by*" the tribe) (emphasis added).

II. Probability of Success on the Merits

A. No Tribal Court Jurisdiction Over Federal Questions

Like the MHA Nation Supreme Court (*see* Doc. 30 at 9), Defendants concede the "extensive federal regulation of oil operations on Indian lands and the supervisory responsibilities of the Secretary of the Interior and the Bureau of Land Management." Doc. 46 at 2. Defendants rely on a federal contract form that requires compliance with federal law and therefore presents federal questions for adjudication. Doc. 17-1 at 8-15 of 15. Nevertheless, Defendants offer two arguments in an effort to sidestep the jurisdictional consequences of the congressional decision to place mineral development on allotted Indian lands under the authority of the Secretary of Interior. *See* Doc. 30 at 6-7.

First, Defendants argue that federal "preemption" analysis does not apply (Doc. 46 at 4-11), but Kodiak never made any such argument. Preemption presupposes the existence of two

sovereigns, each with regulatory authority over the matter in question (typically federal and state governments). But preemption is a non sequitur here because the question is whether, in light of congressional policy and Supreme Court authority, Indian tribes have *any* authority to regulate "avoidable" and "unavoidable" waste by flaring or otherwise. *See, e.g.*, Doc. 17-4 at 8-13 of 25. Tribal authority has not been "preempted"; it simply does not exist. *Id.* at 14-21 of 25.

Second, Defendants concede that this case raises a federal question. *See* Doc. 46 at 9-10 (federal question jurisdiction applies to cases involving federal contracts and regulations). The Eighth Circuit has agreed with the Fifth Circuit that "the 'extensive regulatory scheme' governing tribal oil and gas leases confer[s] federal jurisdiction over a contract dispute between a tribe and two oil companies." *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 848 (8th Cir. 2003) (citing *Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes*, 261 F.3d 567, 574-75 (5th Cir. 2001)).[6] Yet Defendants attempt to circumvent federal law on oil and gas leasing by contending that federal jurisdiction is not "exclusive" vis-à-vis a tribal court. *See* Doc. 46 at 7-9. Defendants are incorrect.

By definition, federal question jurisdiction exists for a civil action "arising under the . . . laws . . . of the United States." 28 U.S.C. § 1331. Defendants sued for breach of a mineral lease form promulgated by federal authority, and they deplore what they contend is "lack of enforcement" of federal standards. Doc. 46 at 2-4. Thus, the Tribal Court Lawsuit centers on

[6] *Gaming World* involved a contract/arbitration dispute between a tribe and a corporation as well as "activities undertaken by tribal government"; the case included threshold questions of contract formation and validity. 317 F.3d at 849, 851. But in the Tribal Court Lawsuit, the Tribe is not a party and the issue is contract breach rather than formation or validity. Defendants' extended discussion of *Gaming World* (Doc. 46 at 7-9) is a diversionary argument that erroneously attempts to bootstrap a prudential rule of tribal court exhaustion into a grant of jurisdiction – contrary to Supreme Court precedent. *See* note 4, *supra*. The key point from *Gaming World* is this: "In terms of jurisdiction there is a significant distinction between ordinary contract disputes involving Indian tribes . . . and those raising issues in an area of extensive federal regulation." 317 F.3d at 847 (internal citation omitted).

substantial questions involving the interpretation of federal law as applied to oil and gas development on the allotted lands–*i.e.* a federal question is presented. *Comstock*, 261 F.3d at 574-75 (collecting cases). The United States Supreme Court has declared that tribal courts are not courts of general jurisdiction and therefore lack concurrent jurisdiction to entertain federal claims unless a federal statute specifically grants tribal court jurisdiction over a specified question of federal law. *Nevada v. Hicks*, 533 U.S. at 366-69 (holding that tribal court had no authority to entertain federal claims against nonmembers of the tribe under 42 U.S.C. § 1983). No federal statute grants tribal court jurisdiction over the Tribal Court Lawsuit, so this general rule applies: "Tribal courts, it should be clear, cannot be courts of general jurisdiction . . . for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction." *Id*. at 367. Thus, a tribal court has no concurrent jurisdiction over matters of Indian mineral development regulated under the law of the federal sovereign.[7]

Defendants can make their argument that federal jurisdiction is not "exclusive" only by misrepresenting Kodiak's authority, particularly *Rainbow Resources, Inc. v. Calf Looking*, 521 F. Supp. 682 (D. Mont. 1981), where the court *enjoined* a tribal court suit by an allottee alleging the lessee had breached a federal-form oil and gas lease. Plaintiffs misrepresent *Rainbow Resources* as merely holding that "'Congress has made clear its intention, that in the area of oil and gas leases on Indian land, [federal court jurisdiction] is permissible.'" Doc. 46 at 9 (bracketed phrase added by Defendants). In reality, *Rainbow Resources* states as follows:

> This court concludes that the plaintiff, Rainbow Resources, is correct in asserting that subject matter jurisdiction properly lies with this court *and not with the Blackfeet Tribal Court*. . . . [T]he critical inquiry is whether Congress has

[7] Defendants repeatedly cite *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968), which merely held that allottees had standing to bring suit for breach of a federal oil and gas lease *in state court*. Defendants concede the case says nothing about tribal court jurisdiction. Doc. 46 at 5-6.

> made clear its intention to permit the intrusion on tribal sovereignty that such action would entail. . . .
>
> [T]his court . . . conclude[s] that Congress has made clear its intention, that in the area of oil and gas leases on Indian land, such *intrusion* is permissible. In the exercise of its superior and plenary control, *Congress has chosen to grant exclusive authority* for the regulation, administration and supervision of oil and gas leases *on lands allotted* to individual Indians *to the Secretary of Interior*.

521 F. Supp. at 683-84 (emphasis added). Thus, *Rainbow Resources* squarely holds that federal jurisdiction is exclusive vis-à-vis a tribal court – a holding the court enforced by *enjoining tribal court jurisdiction*. *Rainbow Resources* is indistinguishable from the present dispute.

Lacking any legal support for tribal court jurisdiction over the federal questions raised in the Tribal Court Lawsuit, Defendants resort to a slippery-slope argument that Indian tribes would somehow be deprived of "any jurisdiction whatsoever." Doc. 46 at 11. But merely because Defendants have chosen to sue on a federal question does not entitle them to a tribal forum. "Opening the Tribal Court for [a plaintiff's] optional use is not necessary to protect tribal self-government . . . ." *Strate*, 520 U.S. at 459. Once again, *Nevada v. Hicks* is instructive: "[T]ribe members are of course able to invoke the authority of the Federal Government *and federal courts* (or the state government and state courts) to vindicate constitutional or other federal- and state-law rights." *Nevada v. Hicks*, 533 U.S. at 373 (emphasis added).[8]

B. No Tribal Authority over Nonmember Kodiak

Defendants argue the Tribal Court has jurisdiction under *Montana* while simultaneously suggesting that *Montana* does not apply. Doc. 46 at 12-18. Neither argument is correct.

[8] The Tribal Official's contention that tribal courts "can and do decide questions of federal law" (Doc. 48 at 10 (internal quotation and citation omitted)) is yet another distortion of the tribal exhaustion doctrine and three inapposite cases, all of which predate the 2001 decision in *Nevada v. Hicks*. The *El Paso Natural Gas* and *Middlemist* cases merely discussed tribal consideration of the federal question of tribal court jurisdiction as a matter of comity. *See* note 4, *supra*. In *Santa Clara Pueblo*, a tribal member sued her tribe in federal court asserting rights under a federal statute (the Indian Civil Rights Act), so the case presented no issue of tribal court jurisdiction over nonmembers based on inherent or retained sovereignty.

1. *Montana* Test Is Controlling

Defendants contend the *Montana* analysis can be disregarded because tribal courts have allegedly "Plenary" jurisdiction over any dispute with a nonmember that somehow involves "Tribal Lands." Doc. 46 at 12. But this case involves no "Tribal Lands," and Defendants' contention flies in the face of controlling authority: "*Montana* applies to both Indian and non-Indian land." *Nevada v. Hicks*, 533 U.S. at 360; *see also* Doc. 30 at 13, 16-18; Section I, *supra*.

Defendants' principal authority is the Ninth Circuit's decision in *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011). *Water Wheel* was an unlawful detainer and trespass action by a tribe against a tenant that overstayed the expiration of a lease of the tribe's land and refused to pay rent. *Water Wheel* bears no resemblance to this case, where the Tribe has no rights or role in allotted mineral leasing.[9]

Defendants cannot equate the tribal land in *Water Wheel* with mineral leasing of allotted land held by the federal government solely for the benefit of individual allottees. Defendants have ignored both precedent and the Tribe's own organic documents demonstrating that allotted lands are not under the Tribe's ownership and control. Doc. 30 at 16-17; *Montana*, 450 U.S. at 559 n.9 (equating allotment of Indian land "with the dissolution of tribal affairs and jurisdiction"). And unlike the lease in *Water Wheel*, the lease form invoked by Defendants does not reference or incorporate any tribal law, regulation or authority. *See* 642 F.3d at 808. Instead, the form repeatedly references the Secretary's authority and requires compliance with *federal* law. Doc. 17-1 at 8-10 (¶¶ 2-3, 5-8, 10-12). Moreover, unlike *Water Wheel* (where the plaintiff tribe sought to retake the premises and evict the holdover tenant), the Tribal Court Lawsuit

[9] Defendants' reliance on *Ford Motor Credit Co. v. Poitra*, 776 F. Supp. 2d 954 (D.N.D. 2011) is likewise misplaced, and the case had nothing to do with exclusion from land. The passages quoted and attributed to the *Poitra* district court (Doc. 46 at 13, 15) are actually internal quotations to yet another Ninth Circuit case, but none of this can trump Supreme Court authority.

involves no attempt to exclude anyone from any parcel. Instead, it seeks to have the Tribal Court regulate and award damages for nonmember conduct of oil and gas development and production under federal rules and regulations incorporated into a federal form lease. *Cf. Plains Commerce Bank*, 554 U.S. at 332 (suit for damages is a form of regulation).

The Ninth Circuit approach in *Water Wheel* defies Supreme Court precedent and the overwhelming weight of authority. *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 917-18 (9th Cir. 2017) (Ninth Circuit's interpretation of *Nevada v. Hicks* and *Montana* is "at odds with every other circuit that has addressed tribal jurisdiction over nonmembers after *Hicks*," including Seventh, Eighth and Tenth Circuits) (Christen, J., dissenting); *Rolling Frito-Lay Sales LP v. Stover*, 2012 WL 252938 at *3, No. CV11-1361-PHX-FJM (D. Ariz. Jan. 26, 2012) (district court holding that Supremacy Clause requires it follow *Montana*, not *Water Wheel*).

Indeed, *Water Wheel* includes a lengthy footnote attempting to distinguish the Supreme Court's controlling decision in *Plains Commerce Bank*. 642 F.3d at 811 n.6. Equally unavailing are the attempts by All Defendants to imply support from *Plains Commerce Bank*. Doc. 46 at 13-14; Doc. 48 at 9. *Plains Commerce Bank* actually confirmed and expanded the presumption of invalidity as to any tribal effort to regulate nonmembers. "[E]fforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" 554 U.S. at 330 (quoting *Atkinson*, 532 U.S. at 659). By this phrasing, the Supreme Court has explained that the presumption, although operating with particular force on non-Indian fee land, applies to *all* tribal efforts to regulate nonmembers. The Eighth Circuit agrees: "*Montana's* analytic framework now sets the outer limits of tribal civil jurisdiction – both regulatory and adjudicatory – over nonmember activities on *tribal and nonmember land*." *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe*, 609 F.3d 927, 936 (8th Cir. 2010) (emphasis added).

2. *Montana* Exceptions Do Not Apply

Attempts by Defendants and the Judicial Officer to assert tribal jurisdiction under the two *Montana* exceptions cannot withstand analysis. Doc. 46 at 16-18; Doc. 48 at 10-12.

Defendants first invoke the consensual relationship exception, attempting to liken this case to *Williams v. Lee*, 358 U.S. 217 (1959), a collection action by a non-Indian who operated a general store on a reservation. Plaintiffs' effort to equate such a routine transaction with a federal oil and gas lease – a contract that requires the Secretary's approval and the leasee's compliance with contract terms and regulations specified by the Secretary – is unpersuasive. "[T]his extensive regulatory scheme demonstrates that tribal oil and gas leases represent a *very specialized subset of contracts* and, therefore, compels the conclusion that they belie characterization as routine contracts." *Comstock*, 261 F.3d at 575 (emphasis added). Thus, "federal regulations and statutes governing tribal oil and gas leases are adequate to invoke federal question jurisdiction over" disputes about mineral leasing and development. *Id.* at 574.

Arguments by Defendants and the Tribal Official to invoke the first *Montana* exception are untenable. The consensual relationship exception does not apply because Congress long ago established that federal law and authority would govern oil and gas leasing and production on Indian lands; therefore, the making of a contract pursuant to that federal law cannot restore tribal jurisdiction. That is precisely the lesson of *Plains Commerce Bank*, which rejected the argument that the existence of a contract between a tribal member and nonmember was sufficient to create tribal jurisdiction over the transaction, regardless of its subject matter. "[W]hen it comes to tribal regulatory authority, it is not 'in for a penny, in for a Pound.'" *Plains Commerce Bank*, 554 U.S. at 338 (quoting *Atkinson*, 532 U.S. at 656). Just as the contract in *Plains Commerce Bank* gave the tribe no authority to control transfers of fee land, the making of a contract bestows no authority on the Tribe to regulate or adjudicate the terms or standards for oil and gas

production on allotted lands. No contract – particularly one prescribed and executed by federal authority – can be used as a pretext to create tribal jurisdiction.[10]

Defendants abandoned reliance on the second *Montana* exception on appeal to the MHA Supreme Court. Doc. 29-6 at 27 of 54 (reciting both *Montana* exceptions but then asserting the "instant action fits squarely within the first exception" without any further discussion of second exception). But now Defendants attempt to revive the second *Montana* exception merely by citing two old New York Times articles. Doc. 46 at 17-18. And even though Defendants deleted any reference to allegations of adverse health and environmental effects in their operative Tribal court pleading, All Defendants now argue that such hypothetical allegations somehow justify jurisdiction under the second *Montana* exception. *Compare* Doc. 1-1 ¶ 25 *with* Doc. 17-1 at 14-15. All Defendants utterly ignore controlling authority demonstrating the extremely narrow scope of this exception, as most recently articulated in *Plains Commerce Bank*. 554 U.S. at 340-42; Doc. 30 at 14 n.7. By way of comparison, there is no claim that any defendant has stormed the offices of Tribal government on Tribal trust land, attacked Tribal members, seized sensitive information or otherwise assisted in a coup d'état. *Cf. Attorney's Process*, 609 F.3d at 939-40 (on these facts, tribal court jurisdiction found under second *Montana* exception). Gas flaring does not implicate the political integrity of the Tribe or jeopardize its survival as a self-governing entity. The second *Montana* exception does not apply. *See also* Doc. 30 at 14 n.7.

[10] It is immaterial that Kodiak may have interactions with tribal authorities as to other aspects of its business operations, such as employment standards. *See* Doc. 46 at 22. Such collateral matters furnish no basis for tribal court jurisdiction when the subject of the dispute is gas flaring under a federal contract that falls outside tribal authority. *See Atkinson*, 532 U.S. at 655-56; *Plains Commerce Bank*, 554 U.S. at 338.

C. Exhaustion of Administrative Remedies No Impediment to Injunctive Relief

Upon Kodiak's appeal of the Tribal Court's jurisdictional finding, the MHA Nation Supreme Court held and declared the existence of tribal jurisdiction "over non-Indians who enter into oil and gas leases with allottees." Doc. 29-9 at 7 of 21. "Upon completion of the Tribal Court of Appeals' appellate review, all requisite tribal remedies were exhausted." *Belcourt Pub. Sch. Dist. v. Herman*, 786 F.3d 653, 656 n.2 (8th Cir. 2015).

In an effort to distract this Court from the tribal court jurisdictional issue now squarely presented, All Defendants instead point to a separate section of the opinion where the MHA Nation Supreme Court began to address the merits by deciding as an "issue of first impression" that "it is appropriate to require Respondents [*i.e.* Defendants] to exhaust their administrative remedies with the BLM." Doc. 29-9 at 19 of 21. The MHA Nation Supreme Court made no connection between its unconditional determination of tribal court jurisdiction and its separate ruling for exhaustion of administrative remedies (Doc. 29-9 at 18-20 of 21) and merely reiterated its jurisdictional decision in concluding its opinion (*id.* at 21 of 21). Thus, this Court should reject All Defendants' arguments that conflate tribal exhaustion of the jurisdictional issue with administrative exhaustion of Defendants' contract claims.

For example, Defendants again bemoan the alleged futility of administrative exhaustion, an argument rejected in the tribal appeal (*see* Doc. 17-5 at 35-36 of 47; Doc. 29-9 at 20 of 21; Doc. 46 at 18-20), but this is immaterial to the jurisdictional issue now before this Court. For her part, the Tribal Official erroneously seeks to postpone indefinitely a jurisdictional ruling by this Court with speculation that Kodiak might someday "prevail in the Tribal Court matter" (Doc. 48 at 6), but she never explains how the continued unlawful exercise of tribal jurisdiction over a nonmember is in any way a victory for Kodiak or the rule of law.

The Tribal Court Lawsuit is already four years old, and two tribal courts – including the MHA Nation Supreme Court – have erroneously decided there is jurisdiction over a federal-question contract claim against nonmember Kodiak. And Defendants have filed a motion in the Tribal Court Lawsuit to certify a plaintiff class with thousands of members. Doc. 29-11 at 6 of 10. These circumstances support dispatch, not delay, by this Court.[11]

III. Other Factors Supporting Preliminary Injunctive Relief

A. Irreparable Harm to Kodiak

Defendants cannot refute Kodiak's showing of ongoing irreparable injury to its constitutional and legal rights as well as the inevitable business disruption, risk and uncertainty of litigation – particularly in a federal-question case where Kodiak's removal rights under 28 U.S.C. § 1441 are being thwarted. Doc. 30 at 9 n.4, 18-19. Instead, Defendants attempt to deflect Kodiak's irreparable injury by merely rearguing the jurisdictional question, misportraying tribal exhaustion as requiring full adjudication on the merits, and reasserting those alleged merits. Doc. 46 at 22-23. Defendants speculate as to possible arguments in opposition to their tribal motion for class certification, but ignore the adverse consequences to Kodiak if a four-plaintiff case mushrooms into a class action alleged to include thousands of claimants.

The Tribal Official also belittles Kodiak's irreparable injury, but her own words prove the peril Kodiak faces in a forum where controlling precedent may not be followed:

- The Tribal Official declares it "simply absurd" "that a non-Indian should not be subjected to the judicial authority of a tribal court." Doc. 48 at 4. But this is precisely the *Montana* general rule. *Plains Commerce Bank*, 554 U.S. at 330. (exercise of tribal jurisdiction over a nonmember is "presumptively invalid").

[11] In any event, Kodiak adheres to its position that tribal exhaustion has never been required here, where "a tribal court plainly lacks adjudicatory jurisdiction over an action." *Fort Yates Pub. Sch. Dist.*, 786 F.3d at 672 (exhaustion by tribal appeal not required where tribal court lacked jurisdiction and appeal would serve no purpose other than delay). *See, e.g.*, Doc. 17, ¶ 11.

- The Tribal Official contends Kodiak "has wholly failed to show that tribal courts lack authority to adjudicate federal questions" (Doc. 48 at 9). But this assertion wholly ignores Kodiak's frequent citation to *Nevada v. Hicks* and the Court's emphatic declaration that it is "quite wrong" to regard a tribal court as a court of general jurisdiction. 533 U.S. at 367.

- The Tribal Official asserts Kodiak "has failed to show that neither of the *Montana* exceptions applies." Doc. 48 at 9. But Kodiak has no such burden – controlling law declares the burden rests with the proponent of tribal court jurisdiction. *Atkinson*, 532 U.S. at 654, 659; *Belcourt*, 786 F.3d at 658.

In sum, the Tribal Official opposes "divesture of the Tribal Court's proper jurisdiction in this matter, which would violate long-standing principles *of Indian law*." Doc. 48 at 5 (emphasis added).[12] But the question before this Article III Court is the *federal question* of whether a tribal court can exercise jurisdiction in a federal-question suit against a non-Indian. *Plains Commerce Bank*, 554 U.S. at 324 ("whether a tribal court has adjudicative authority over nonmembers is a federal question"). Every day that Kodiak must continue to endure unlawful tribal court jurisdiction is another day of irreparable injury: "Government with the consent of the governed is everything in America." *Rolling Frito-Lay Sales*, 2012 WL 252938 at *3. *See also Crowe & Dunlevy, P.C. v. Stidham*, 609 F. Supp. 2d 1211, 1222-23 (N.D. Okla. 2009) (collecting cases on irreparable injury in tribal context; *Ex Parte Young* suit enjoining tribal judge), *aff'd*, 640 F.3d 1140 (10th Cir. 2011); *McKesson Corp. v. Hembree*, 2018 U.S. Dist. Lexis 3700 *34-36, No. 17-CV-323 (N.D. Okla. 2018) (same; *Ex Parte Young* suit enjoining suit by tribal attorney general).

B. Balance of Equities and Public Interest

Efforts by Defendants and the Judicial Official to invoke the public interest or assert some equitable interest to be weighed by this Court must fail for two fundamental reasons.

First, an injunction against the Tribal Court Lawsuit will not impair the contract rights of anyone. Defendants may seek redress for their contract claims in an appropriate federal or state

[12] Perhaps this is why the MHA Nation Supreme Court described the *Montana* decision as "infamous." Doc. 29-9 at 4 of 21.

court subject to the requirements of federal law and administrative process. Defendants will suffer no deprivation of forum, only a denial of forum shopping. *Nevada v. Hicks*, 533 U.S. at 373 (tribal member may seek redress in federal or state courts). And an injunction would not harm the Tribal Official, who has no personal stake in the Tribal Court Lawsuit. *See Crowe & Dunlevy*, 609 F. Supp. 2d at 1224.

Second, a preliminary injunction may frustrate efforts by advocates (here including the Tribal Official) to expand Tribal Court jurisdiction over non-Indians. But under the controlling law of the land, the Tribal Court Lawsuit presents a federal question for decision only by a court of general jurisdiction – not a tribal court. *Plains Commerce Bank*, 554 U.S. at 324; *Nevada v. Hicks*, 533 U.S. at 367-68. Justice delayed is justice denied, and that result is precisely what All Defendants seek to promote with their arguments against entry of a preliminary injunction.

In sum, ample controlling precedent demonstrates the absence of tribal court jurisdiction in this federal-question case against a non-Indian, so the prompt entry of an injunction is appropriate. "The doctrine of *Ex parte Young* is based on the idea that the power of federal courts to enjoin continuing violations of federal law is necessary to vindicate the federal interest in assuring the supremacy of that law." *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 255 (8th Cir. 1995) (internal quotations and brackets omitted). Failure to enjoin continuation of the unlawful Tribal Court Lawsuit will be a de facto expansion of Tribal Court jurisdiction contrary to controlling precedent and the public interest. *Crowe & Dunlevy*, 640 F.3d at 1158 ("We simply are not persuaded the exertion of tribal authority over . . . a non-consenting, nonmember, is in the public's interest.").

IV. Conclusion

Accordingly, Kodiak requests that its motion for preliminary injunction be granted.

Dated this 22nd day of February, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2018, 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 addresses:

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