UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

Kodiak Oil & Gas (USA) Inc., now known as Whiting Resources Corporation, and HRC Operating, LLC Plaintiffs, vs. Jolene Burr, Ted Lone Fight, Georgianna Danks, Edward S. Danks, and Judge Mary Seaworth in her capacity as the Acting Chief Judge of the Fort Berthold District Court, Defendants.	)	Civil No. 4:14-cv-00085-DLH-CSM

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

HRC Operating, LLC ("HRC") joins Kodiak Oil & Gas (USA), Inc., now known as Whiting Resources Corporation ("Kodiak"), in its Motion for Preliminary Injunction, and provides further arguments and authority in support of the Motion as follows.

INTRODUCTION

This request for a preliminary injunction is necessary to stop Ted Lone Fight, Georgiana Danks, and Edward S. Danks (collectively the "Defendants") and the Fort Berthold District Court ("Tribal Court") from circumventing the Bureau of Land Management ("BLM"), the Bureau of Indian Affairs ("BIA"), and their exclusive oversight over flaring issues on federal Indian lands. It is well-established by the United States Supreme Court that tribal courts lack authority to address issues arising under federal law. The proper forum for Defendants to raise their grievances is with the applicable federal agencies. For these reasons, and those set forth in Kodiak's brief, this Court

should enjoin Defendants' lawsuit and the Tribal Court's efforts to unlawfully exercise jurisdiction.

FACTUAL BACKGROUND

The procedural history contained in Kodiak's *Memorandum in Support of Kodiak's Motion for Preliminary Injunction* and supporting papers, Doc. 29-30, and HRC's *Brief in Support of Motion to Intervene*, Doc. 37, provide an accounting of the facts and procedural history relevant to this motion. HRC incorporates those summaries here.

LEGAL STANDARD

A party seeking a preliminary injunction must establish: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 893 (8th Cir. 2013) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)); *Gould v. Williams Cty.*, 2015 WL 94672, at *4 (D.N.D. 2015). This Court has broad discretion in ruling upon a request for preliminary injunction. *Novus Franchising*, 725 F.3d at 893.

ARGUMENT

A preliminary injunction is appropriate whenever the necessary standards are met. As the Eighth Circuit has recognized, however, the "most significant" preliminary injunction standard is "likelihood of success on the merits." *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 881-82 (8th Cir. 2013). In this case, HRC and Kodiak will likely succeed in challenging tribal jurisdiction because there is clear federal law recognizing that federal questions can only be addressed in federal forums or courts of general jurisdiction, and tribal courts are not courts of general jurisdiction. HRC faces the irreparable harm of being forced to litigate in a tribal forum

that clearly has no authority. The balance of harm and injury favors an injunction against the Defendants and the Tribal Court as they are unfairly subjecting HRC to tribal control, in violation of federal law. Lastly, it is in the public's interest to ensure that tribal courts act within their jurisdiction. For these reasons, the Court should enjoin the Defendants and the Tribal Court.

I. HRC IS LIKELY TO SUCCEED ON THE MERITS.

HRC references and incorporates Kodiak's analysis and authority concerning the likelihood of success factor as if set forth herein. *See Memorandum in Support of Kodiak's Motion for Preliminary Injunction*, Doc. 30, pp. 6-18. In addition to the above-referenced analysis from Kodiak, HRC provides the following authority and analysis for this Court's consideration:

A. The Federal Government has Exclusive Jurisdiction over Federally-Approved Oil and Gas Operations and Flaring Issues on Federal Indian Land.

Defendants' efforts to bypass federal jurisdiction and the regulatory authority of the BIA and BLM should be enjoined by this Court. Federal jurisdiction, not tribal jurisdiction, exists under 28 U.S.C. § 1331 when an action requires resolution of an issue of federal law. *Nevada v. Hicks*, 533 U.S. 353, 354, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (holding that tribal court lacked jurisdiction over federal civil rights claim). Under *Hicks*, "[t]he historical and constitutional assumption of state-court jurisdiction over federal law cases is completely missing with respect to tribal courts." *Hicks* illustrates that concurrent tribal court jurisdiction over federal questions would create "serious anomalies" because the "general federal question removal statute refers only to removal from state court, see 28 U.S.C. § 1441." *Id.* at 368. If federal issues were cognizable in tribal court, defendants would inexplicably lack the right to seek a federal forum. *Id.* Indeed, the only time tribal courts may exercise jurisdiction over federal questions is when "statutes proclaim tribal-court jurisdiction over certain questions of federal law." *Id.* at 367 (citing 25 U.S.C. § 1911(a) (authority to adjudicate child custody disputes under the Indian Child Welfare

Act of 1978); 12 U.S.C. § 1715z-13(g)(5) (jurisdiction over mortgage foreclosure actions brought by the Secretary of the Housing and Urban Development against reservation homeowners). Here, there is no federal statute proclaiming tribal jurisdiction, and the Defendants have no right to circumvent the federal agencies with exclusive jurisdiction over these issues.

With regard to trust or allotted lands, the BIA has promulgated specific regulations which address the leasing, sale, and surrender of oil, gas, and other minerals. *See* 25 U.S.C. § 396a-g; 25 C.F.R. § 211.1, *et seq*. Thus, in the context of oil and gas leasing, "federal regulations and statutes governing tribal oil and gas leases are adequate to invoke federal question jurisdiction." *Comstock v. Alabama and Coushatta Indian Tribes*, 226 F.3d 567 (5th Cir. 2001); *see also Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572, 575-76 (10th Cir. 1984) (holding that federal jurisdiction arises by the express terms of the Indian lease which states the lease is subject to the regulations of the Secretary of Interior); *Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director*, BIA, 24 IBIA 169, 177, 1993 WL 373801, at *5–6 (finding that leases "approved on behalf of an Indian or Indian tribe by the Secretary of Interior in his fiduciary capacity," invoke questions of federal law). In light of the holding in *Hicks*, the import of these decisions is that disputes relating to oil and gas production on federal Indian lands, since they involve federal questions, are subject to the exclusive jurisdiction of the federal agencies, whose decisions are reviewable only by the federal courts.

Indeed, anticipating the reasoning set forth in *Hicks*, at least one federal court has held that the Secretary of the Interior and the United States District Courts have exclusive jurisdiction over oil and gas operations involving allotted Indian trust lands. *Rainbow Res., Inc. v. Calf Looking*, 521 F. Supp. 682, 683 (D. Mont. 1981). In *Rainbow Resources*, the non-Indian oil and gas lessee was sued in a tribal forum for its operations on federal trust lands and filed a subsequent action in

federal court to enjoin the tribal proceedings. *Id*. The lessee argued that the federal government possessed jurisdiction over the subject oil and gas operations stemming from a BIA lease and that the tribal court had no authority to hear the case. The United States District Court agreed. *Id*. Although the tribal court had already issued a preliminary ruling on the issues, the United States District Court enjoined the tribal proceedings. *Id.* It held that the federal courts, rather than the tribal court, had jurisdiction over the dispute, because Congress has granted exclusive authority for the regulation, administration and supervision of oil and gas leases on lands allotted to individual Indians to the Secretary of the Interior. *Id.* at 684.

The federal statutory scheme for tribal oil and gas leasing likewise illustrates that any issues presented in the Defendants' Second Amended Complaint to the Tribal Court (Doc. 1-1) are governed by federal law and subject to resolution through federal administrative processes. Full federal oversight was intended by Congress when it passed the relevant mineral leasing acts. *Comstock*, 261 F.3d at 573 (citing the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108, The Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, and stating that federal jurisdiction is "beyond question" based on the extensive regulatory scheme involved in the administration of oil and gas leases on tribal lands). In fact, the central purpose of the Mineral Leasing Act of 1938 and the Indian Mineral Development Act of 1982 was to establish national uniformity in the oil and gas leasing procedures relating to federal Indian lands. *See* S. Rep. No. 985, 75th Cong., 1st Sess., 2 (1937); *Superior Oil Co. v. United States*, 798 F.2d 1324, 1328 (10th Cir. 1986). Because the federal government holds legal title, and acts as guardian to trust and allotted Indian lands, federal law, not tribal law, governs the disbursement and use of these property interests. *See e.g., United States v. Creek Nation*, 295 U.S. 103, 109, 55 S. Ct. 681, 684, 79 L. Ed. 1331 (1935) (finding that the "tribe was a dependent Indian community under the

guardianship of the United States"); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415, 100 S. Ct. 2716, 2740–41, 65 L. Ed. 2d 844 (1980) (stating the courts must "recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs"). Based on these statutes, the Department of the Interior has promulgated an extensive and comprehensive scheme regulating all aspects of federal oil and gas operations on Indian land. *See, e.g.*, 25 C.F.R. Parts 211, 212, 214; 43 C.F.R. Part 3160, §§ 3161.4, 3161.2. This federal regulatory scheme specifically addresses the issues upon which Defendants appear to base their claims – namely, flaring and the obligation to pay federal royalties. *See Defendants' Second Amended Complaint*, Doc. 1-1, ¶¶ 17-25

Based on the authority granted under the Mineral Leasing Act of 1938 and the Indian Mineral Development Act of 1982, the Department of the Interior promulgated an extensive and comprehensive scheme, including regulations, Onshore Oil and Gas Orders, and NTLs governing all aspects of oil and gas operations on federal Indian lands. *See* 25 C.F.R. Parts 211, 212, 214; 43 C.F.R. Part 3160, §§ 3161.4, 3161.2; 25 U.S.C. §§ 396a through 396g; *see also Comstock*, 261 F.3d at 573.

At the time Defendants filed their lawsuit with the Tribal Court, this scheme included the following flaring standards set forth in NTL-4A:

> Gas Production (both gas well gas and oil well gas) subject to royalty shall include that which is produced and sold on a lease basis or for the benefit of a lease under the terms of an approved communitization or unitization agreement. No royalty obligation shall accrue on any produced gas which (1) is used on the same lease, same communitized tract, or same unitized participating area for beneficial purposes, (2) is vented or flared with the Supervisor's prior authorization or approval during drilling, completing, or producing operations, (3) is vented or flared pursuant to the rules, regulations, or orders of the appropriate State regulatory agency when said rules, regulations, or orders have been ratified or accepted by the Supervisor, or (4) the Supervisor determines to have been otherwise unavoidably lost . . . Where produced gas (both gas well gas and oil well gas) is (1) vented or

> flared during drilling, completing, or producing operations without the prior authorization, approval, ratification, or acceptance of the Supervisor or (2) otherwise avoidably lost, as determined by the Supervisor, the compensation due the United States or the Indian lessor will be computed on the basis of the full value of the gas so wasted, or the allocated portion thereof, attributable to the lease.

NTL-4A, Doc. 1-3.

Under NTL-4A, the federal government, not the tribal court, was to determine when compensation is due, and flaring was subject to the discretion of the Department of the Interior based on circumstances surrounding each individual well. Protecting the federal government's exclusive control over these regulations reduces the risk of inconsistent standards and conflicting decisions from multiple government entities. It also protects oil and gas operators from double liability.

Since the filing of Defendants' Second Amended Complaint with the Tribal Court, NTL-4A has been replaced with other federal regulations. *See* 43 C.F.R. § 3179.1 *et seq.* (effective January 17, 2017). Like the old standard under NTL-4A, however, these federal regulations fully govern the issues raised in Defendants' Second Amended Complaint. *See* 43 C.F.R. § 3179.1 *et seq.* (effective January 17, 2017). The new federal regulations govern all aspects of flaring on federal Indian lands, including when flaring is allowed, 43 C.F.R. §§ 3179.7 through 3179.9, when flaring may be considered "unavoidable loss", 43 C.F.R. § 3179.4, specific reporting requirements for operators, 43 C.F.R. § 3179.9, and the time frames when oil and gas operators may flare under specific exemptions. *See, e.g.*, 43 C.F.R. § 3179.8; 81 FR 83008-01. These federal regulations, and their underlying statutes, demonstrate that the federal government, through its agencies, holds full authority and exclusive jurisdiction to govern every aspect of Defendants' claims, which are asserted under leases subject to these regulations and which seek payment royalties on flared gas.

Indeed, it is well settled that issues involving payment of Indian royalties fall under the exclusive jurisdiction of the federal government:

> Given all the Federal statutes dealing with mineral governance, leasing, exploration, operations, and production on Federal and Indian lands, **Congress clearly intended to occupy the field of royalty management and payment of royalty obligations to the United States**. Indeed, with respect to the management and collection of royalties, when Congress enacted FOGRMA, this statute included a wholesale restructuring of Federal oil and gas royalty management.

w&t Offshore, Inc., Appellant, MMS-10-0020-OCS (July 20, 2012) (followed by a direct quote of 30 U.S.C. § 1702(b)); *Bhp Billiton Petroleum (Americas) Inc., Appellant*, ONRR-11-0015-OCS (Oct. 26, 2012) (same); *Merit Energy Co., Appellant*, MMS-10-0061-OCS (Sept. 10, 2013) (same). While the controlling regulations in the cited decisions involved the BIA and ONRR, and the dispositive regulations for this case involve the BIA and BLM, all the referenced regulations and standards are all part of the same regulatory scheme under the Mineral Leasing Act of 1938, and they accomplish same the goal of national uniformity specified in the federal statutes. 25 U.S.C. §§ 396a-396g. The federal government has clearly occupied all areas of oil and gas operations on Federal and Indian lands, no matter which federal agency oversees the operations.

Moreover, all royalties on allotted Indian lands must be paid to ONRR, and thus Plaintiffs' claims seeking direct payments attributable to flared gas contradict federal law on the method of royalty payment. ONRR is the only entity authorized under federal law to collect royalty payments from oil and gas companies. 30 C.F.R. § 1218.100. Upon collection, ONRR deposits royalty funds into the U.S. Treasury, *id*., § 1219.103, and then provides the BIA with distribution reports covering the interests of all Indian allottees. *Id*., § 1219.104. *See also Roles and Responsibilities of the U.S. Department of Interior*, Indian Mineral Royalty Management, ONRR, https://www.onrr.gov/indianservices/pdfdocs/Roles-and-Responsibilities-Booklet.pdf, at pp. 1-6

(last visited on February 23, 2018). Based on these reports, the Office of the Special Trustee for American Indians ("OST") pays Indian mineral owners in accordance with their percentage of mineral ownership. *Id*. If royalties are incorrect or otherwise lacking, it is ONRR that investigates, penalizes, fines, and recovers any outstanding payments. *See* 30 C.F.R. Parts 1241 and 1243.

Noticeably absent from any of these federal regulations and decisions, however, is any procedure that allows the Defendants to circumvent the federal government and bring a private action in Tribal Court for payment of royalties or other damages arising from alleged breaches of their leases. Thus the Tribal Court lacks jurisdiction over Plaintiffs' Second Amended Complaint (Doc. 1-1).

B. Defendants have Failed to Exhaust Federal Administrative Remedies and Failed to Include the Federal Government in their Tribal Court Action.

Defendants have failed to include the federal government in their Tribal Court action, even though the government's presence is vital to any adjudication of this case. *See Amended Complaint*, Doc. 1-1. As stated above, these federal agencies hold exclusive authority over the issues and allegations raised by Defendants. Not only has the BIA been charged with exclusive authority over federal Indian lease issues, but the Department of the Interior's Area Oil and Gas Supervisor oversees flaring on Indian land, and the United States holds legal title to the land covered by these oil and gas leases.

In fact, the MHA Nation Supreme Court has already ruled that these very Defendants must exhaust federal remedies prior to seeking tribal remedies. *Jolene Burr et al. v. XTO Energy Inc., et al.*, (Order AP: 2016-002). In its ruling, the MHA Supreme Court stated. . .

> . . . [W]e believe it is appropriate to require Respondents to exhaust their administrative remedies with the [federal agency]. The reasons listed by the U.S. Supreme Court are logical . . . the Department of the Interior [is] charged with the responsibility of administering and supervising mineral development on all Indian lands including matters concerning royalties. 25 C.F.R. Part 200; 43 C.F.R. Part 4. Decisions

> regarding waste resulting from flaring activities under oil and gas leases and any damages resulting from waste in the form of unpaid royalties would come within such supervisory authority. Hence, all of the claims made by the Respondents fall within the regulatory authority of the U.S. Department of Interior . . . The Respondents in this case should seek a determination from the [federal agency] prior to seeking judicial review. Whether looking to the regulations applied by the BLM to flaring activities or to applicable tribal or state regulations, it is clear that the goal of governmental regulation in this area is to prevent waste, protect the rights of property owners and establish administrative procedures for enforcement. . . Because the Tribe doesn't manage the leases of individual allottees, it appears tribal administrative remedies are not availiable . . .

Id. It should go without saying that Defendants should be enjoined from circumventing clear federal law and exercising jurisdiction over these issues.

Federal courts have consistently ruled that oil and gas lease issues on federal Indian lands fall under the exclusive jurisdiction of the federal government, *see, e.g., Rainbow Res.,* 521 F. Supp. 682, and the Tribal Court cannot address the appropriateness of the BIA's actions or BLM's actions without those agencies being present.

Lawsuits seeking review of federal agency decisions cannot be raised except in accordance with the Administrative Procedures Act. 5 U.S.C. § 704; 5 U.S.C. § 551, *et seq*. Simply stated, Defendants cannot sue the BLM or BIA, as would be required to bring their lawsuit in Tribal Court, without first exhausting their administrative remedies. Exhaustion of federal administrative remedies is necessary before any private party can raise federal administrative issues in any court. 5 U.S.C. § 551, *et seq*; *Coosewoon v. Meridian Oil Co.,* 25 F.3d 920, 925 (10th Cir. 1994). Once the administrative appeal period has run, federal agency decisions are final and binding. *See, e.g.,* 25 C.F.R § 2.6. To even address these issues, however, private parties must satisfy mandatory federal administrative requirements. 5 U.S.C. § 551 *et seq*.

Applicable laws do not allow Defendants to circumvent these federal agencies and shop for conflicting decisions in Tribal Court. Clearly, any continued exercise of tribal authority over

this case would fall outside the proper administrative channels and would amount to a trespass against the federal government. *See Tenneco Oil Co.*, 725 F.2d at 575-76.

C. Non-Tribal Members are Protected from Tribal Jurisdiction.

Another, completely independent, reason HRC is likely to prevail in its case against the Defendants and the Tribal Court is that federal case law limits tribal jurisdiction over nonmembers. Whether a tribal court has adjudicative jurisdiction over non-Indian activities is a federal question. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987). The burden of proving tribal court jurisdiction is on the proponent of tribal jurisdiction. *See, e.g., Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 772 (9th Cir. 2003). Generally, tribal courts do not have jurisdiction over the activities of non-Indians within their borders. *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981); *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 328, 128 S. Ct. 2709, 2718, 171 L. Ed. 2d 457 (2008). Tribal efforts to regulate non-tribal members and their interests are presumptively invalid. *Plains Commerce Bank*, 544 U.S. at 330. By their incorporation into this country, tribes lost "the right of governing . . . person[s] within their limits except themselves." *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978). And the general rule restricting authority over nonmembers is particularly strong when a tribe seeks to regulate non-Indian property rights. *Plains Commerce Bank*, 554 U.S. at 328; *see also Strate v. A-1 Contractors*, 520 U.S. 438, 446, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).

There are only two limited exceptions whereby a tribe may exercise civil jurisdiction over non-Indian conduct. The first exception is that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or

its members, through commercial dealings, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. The second exception is that "[a] tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (citing *Fisher v. District Court*, 424 U.S. 382, 386 96 S. Ct. 943, 946, 47 L. Ed. 2d 106).

These two exceptions, however, are very limited and cannot be construed in a manner that would "swallow the rule," or "severely shrink it." *Plains Commerce Bank*, 554 U.S. at 330. One limitation on the first exception is that the activity must actually arise from the consensual relationship being invoked for jurisdictional purposes, otherwise it has no bearing on the tribe's authority. *See, e.g., Strate*, 520 U.S. at 457-58. Agreements or relationships which do not affect the outcome of the case should be ignored when analyzing jurisdiction. *Id.* The second exception is also limited in that it applies only when necessary "to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* at 459. "But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or control internal relations." *Montana*, 450 U.S., at 564; *see also Strate*, 520 U.S. at 459. Stated another way, the second exception applies only if the exercise of state or federal court jurisdiction would "menace" the tribe's ability to govern itself. *Strate*, 520 U.S. at 457-58.

Here, neither *Montana* exception applies. 450 U.S. 544. The Defendants' Amended Complaint (Doc. 1-1) does not identify specific facts that would amount to a consensual relationship with HRC, nor does it allege facts affecting the health, safety or welfare of the Tribes. Defendants cannot merely rely on the language "others similarly situated" within their caption to assert that a consensual lease exists with all of the oil and gas companies identified in their Second Amended Complaint. Moreover, allowing the applicable federal agencies to exercise sole

authority over these issues would not "menace" the tribe's ability to self-govern in any way. Thus, neither *Montana* exception applies, and proper application of the general rule would lead HRC to prevail on its jurisdictional arguments.

II. HRC FACES IRREPARABLE HARM.

HRC references and incorporates Kodiak's analysis concerning irreparable harm as if set forth herein. *See Memorandum in Support of Kodiak's Motion for Preliminary Injunction*, Doc. 30, pp. 18-19. In addition, HRC asserts that because the Tribal Court plainly lacks jurisdiction, subjecting HRC to the Tribal Court's authority would result in irreparable harm to HRC. Being required to litigate in a forum without jurisdiction may constitute irreparable harm. *See, e.g. Chiwewe v. Burlington N. & Santa Fe Ry. Co.*, 2002 WL 31924768, at *2 (D.N.M., 2002) (finding that parties would suffer irreparable harm if forced to litigate in a tribal forum without jurisdiction and face the possibility of inconsistent judgments). Notably, the Eighth Circuit has explained that irreparable harm can be presumed when the party seeking the injunction demonstrates "probable success" on the merits. *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 505 (8th Cir. 1987).

III. THE BALANCE OF THE HARMS FAVORS A PRELIMINARY INJUCTION.

HRC references and incorporates Kodiak's analysis concerning irreparable harm as if set forth herein. *See Memorandum in Support of Kodiak's Motion for Preliminary Injunction*, Doc. 30, p. 19.

IV. A PRELIMINARY INJUNCTION IS IN THE PUBLIC'S INTEREST.

HRC references and incorporates Kodiak's analysis concerning irreparable harm as if set forth herein. *See Memorandum in Support of Kodiak's Motion for Preliminary Injunction*, Doc. 30, p. 20. Additionally, it is well understood that public policy demands courts to exercise

jurisdiction when appropriate and refrain from exercising jurisdiction when it is not. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1158 (10th Cir. 2011) (stating that it is not in the public's interest to allow the exertion of tribal authority over a non-consenting, nonmember). As tribal jurisdiction is an issue of federal law, public policy favors a determination from this Court regarding the limitations of the Tribal Court's authority. A determination against injunctive relief in this case could negatively affect oil and gas operations and economic opportunities enjoyed by many individuals across the Fort Berthold Indian Reservation. Continued litigation in Tribal Court would expose all affected parties to legal confusion, uncertainty, and likely conflicts with federal law.

CONCLUSION

For the above reasons, HRC requests that this Court issue a preliminary injunction preventing the Defendants and Tribal Court from proceeding any further with the underlying Tribal Court lawsuit, including the motion for class certification recently filed by the plaintiffs with the Tribal Court, pending a final determination by this Court that the Tribal Court has no jurisdiction over the case.

Dated this 26th day of February, 2018.

/s/ Paul J. Forster

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February, 2018, the **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

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