

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

Kodiak Oil & Gas (USA) Inc.,)	
)	
HRC,)	
vs.)	Case No. 4:14-cv-085
)	
Jolene Burr, Ted Lone Fight, Georgianna)	SPECIALLY APPEARING DEFENDANT JUDGE MARY SEAWORTH’S RESPONSE TO HRC OPERATING, LLC’S MOTION FOR PRELIMINARY INJUNCTION
Danks, Edward S. Danks, and Judge Mary)	
Seaworth, in her capacity as the Chief)	
Judge of the Fort Berthold District Court,)	
)	
Defendants.)	
)	
)	

Defendant Judge Mary Seaworth, by and through Fredericks Peebles & Morgan LLP, hereby submits this response in opposition to HRC Operating, LLC’s (“HRC”) Motion for Preliminary Injunction.

I. THIS COURT LACKS JURISDICTION OVER THE COMPLAINT FOR THE REASONS STATED IN JUDGE SEAWORTH’S SEPARATE MOTION TO DISMISS AND BRIEF IN SUPPORT.

As an initial matter, Judge Seaworth asserts that it is premature at this stage for the Court to rule on HRC’s motion. On February 22, 2018, Judge Seaworth filed a motion to dismiss. Doc. 52. In her memorandum in support of that motion to dismiss, she showed multiple independent reasons why this Court was required to dismiss HRC’s complaint. Doc. 53. This Court has not yet ruled on Judge Seaworth’s motion to dismiss HRC’s complaint.

The underlying basis for dismissal is the Court’s lack of subject matter jurisdiction over this action. Because subject matter jurisdiction is a prerequisite for the Court to take action in this case, the Court must make a determination on subject matter jurisdiction and rule on Judge Seaworth’s motion to dismiss prior to considering HRC’s motion for a preliminary injunction. Due to the lack of subject matter jurisdiction, this Court should grant Judge Seaworth’s motion

and dismiss the instant case. However, in the event that this Court denies Judge Seaworth's motion to dismiss or proceeds with considering HRC's motion for a preliminary injunction prior to ruling on Judge Seaworth's motion to dismiss, this Court must deny HRC's motion for the following reasons.

II. PRELIMINARY INJUNCTION STANDARD.

HRC's motion for a preliminary injunction must be denied because HRC has failed to allege or prove sufficient facts to warrant such relief for even one of the factors for issuance of a preliminary injunction, let alone show that the balance of the equities lies in HRC's favor. To avoid redundancy and conserve judicial resources, Judge Seaworth refers the Court to pages 2-3 of her Response to Plaintiff's Motion for Preliminary Injunction ("Response to Kodiak"), Doc. 48, regarding the four-factor test for issuance of a preliminary injunction. In this instance, HRC has failed to meet its burden with respect to all four factors and the balance of equities favors Judge Seaworth, not HRC.

III. HRC FAILED TO MEET ITS BURDEN FOR ISSUANCE OF A PRELIMINARY INJUNCTION.

Again, it is premature at this time for the Court to consider the merits of HRC's motion because this Court has not yet determined whether or not it has subject matter jurisdiction. The Court must rule on Judge Seaworth's Motion to Dismiss, Doc. 52, answering the Article III threshold question of subject matter jurisdiction, prior to addressing HRC's motion. As set forth in detail in Judge Seaworth's Motion to Dismiss, Doc. 52, and supporting memorandum, Doc. 53, jurisdiction here is plainly lacking because HRC has failed to exhaust tribal remedies, because Judge Seaworth is cloaked with the Three Affiliated Tribes' ("Tribe") sovereign immunity which has not been waived, and because the Tribe is a necessary and indispensable party that has not been and cannot be joined. However, should the Court find that it has jurisdiction over this matter, it must deny HRC's Motion for Preliminary Injunction because HRC has failed to meet its burden

for such extraordinary relief. In particular, HRC has failed to show that it is likely to succeed on the merits or that it will suffer irreparable harm if a preliminary injunction is not granted.

A. HRC FAILED TO DEMONSTRATE ANY THREAT OF IRREPARABLE HARM.

HRC's motion for a preliminary injunction fails to allege any concrete harm that would occur if its motion were denied. HRC's primary allegation of harm is an adoption of Kodiak Oil & Gas (USA) Inc.'s ("Kodiak") argument contained in Kodiak's Memorandum in Support of Motion for Preliminary Injunction, Doc. 30 at 19. To avoid redundancy and conserve judicial resources, Judge Seaworth refers the Court to pages 4-7 of her Response to Kodiak, Doc. 48, regarding HRC's failure to show a threat of imminent harm. HRC attempts to bolster its argument by asserting that "[b]eing required to litigate in a forum without jurisdiction may constitute irreparable harm." *HRC's Mem. in Support of Mot. for Prelim. Inj.*, Doc. 59 at 13 (emphasis added). Whether something may cause harm is not the proper test for issuance of a preliminary injunction, and the mere possibility of harm cannot justify the issuance of a preliminary injunction. HRC *claims* that failure of the Court to grant a preliminary injunction "would result in irreparable harm to HRC," *id.*, but it provides no explanation for its leap from "may" to "would." HRC has therefore failed to demonstrate a threat of harm, and its motion must be denied.

B. HRC IS HIGHLY UNLIKELY TO SUCCEED ON THE MERITS BECAUSE JURISDICTION PLAINLY LIES WITH THE FORT BERTHOLD TRIBAL COURT.

While it is unnecessary to consider the merits of the case due to this Court's lack of jurisdiction, and, independently, due to the lack of any irreparable injury, should this Court proceed with considering HRC's motion, it must deny the requested relief because the likelihood of HRC succeeding on the merits of its claim is minute.

1. Tribal Courts Have Authority to Adjudicate Federal Questions.

HRC's argument that tribal courts have no authority to adjudicate Federal Questions must fail because 1) no federal question yet exists, and 2) HRC's position is simply wrong and contrary to law. To avoid redundancy and conserve judicial resources, Judge Seaworth refers the Court to pages 8-10 of her Response to Kodiak, Doc. 48. With respect to federal preemption, Judge Seaworth refers the Court to pages 10-13 of Defendant Judge Diane Johnson's Reply to Plaintiff's Response to Motion to Dismiss by Defendant Judge Diane Johnson, Doc. 22.

HRC's argument that *Rainbow Resources* lends support to its position is easily disposed of. Unlike here, *Rainbow Resources* involved a challenge to tribal court jurisdiction over an action for injunctive relief based on violations of the Department of the Interior's tribal oil and gas regulations. The court in *Rainbow Resources, Inc. v. Calf Looking*, 521 F.Supp. 682 (D. Mont. 1981), held "that tribal officials may be sued when they violate regulations of the Secretary of the Interior." *United Nuclear Corporation v. Clark*, 584 F. Supp. 107, 111 n. 8 (D.D.C. 1984). Here, the Tribal Court cause of action is for breach of a contract between operators and tribal members. There is no allegation that tribal official violated regulations of the Secretary of the Interior. As in *United Nuclear Corporation*, the principle that "tribal officials may be sued when they violate regulations of the Secretary of the Interior ... has no application here: no Interior regulations have been violated." *Id.*

This Court need not consider HRC's claim that "federal regulations and statutes governing tribal oil and gas leases are adequate to invoke federal question jurisdiction," *Mem. in Support of Mot. for Prelim. Inj.*, Doc. 59 at 4 (quoting *Comstock v. Ala. And Coushatta Indian Tribes*, 226 F.3d 567 (5th Cir. 2001), or its assertion that 28 U.S.C. § 1331 confers jurisdiction over federal questions to federal courts, *id.* at 3. The issue in this case is not whether the tribal court plaintiffs

could have brought some claim against HRC in this Court.¹ The issue is whether there is at least a plausible basis for claiming tribal court jurisdiction over the specific contract dispute which is pending the Tribe's Court. An essential element of HRC's argument is its plainly incorrect assertion that 28 U.S.C. § 1331 provides *exclusive* jurisdiction to federal courts over the contract dispute. Nothing in that statute contains language of exclusivity or language prohibiting concurrent tribal court jurisdiction. HRC's argument that tribal courts lack authority to adjudicate federal questions is simply wrong, and lends no support to its likelihood of success on the merits.

2. Tribal Courts Have Jurisdiction Over Breach of Contract Actions Brought by Tribal Members Against a Non-Indian Arising in Indian Country.

In addition, HRC cannot succeed on the merits of its claim because, as a matter of well-settled law, tribal courts plainly have jurisdiction over a breach of contract action brought by a tribal member against a non-Indian when the breach of contract occurs on the reservation. To avoid redundancy and conserve judicial resources, Judge Seaworth refers the Court to pages 10-12 of her Response to Kodiak, Doc. 48.

3. Tribal Court Plaintiffs Had No Obligation to Exhaust Federal Administrative Remedies or Include the United States in the Tribal Court Action.

HRC alleges that it is somehow more likely to succeed on the merits because Defendants purportedly failed to exhaust federal administrative remedies and failed to include the federal government in the Tribal Court action. *Mem. in Support of Mot. for Prelim. Inj.*, Doc 59 at 9. Although HRC claims "the government's presence is vital to any adjudication of this case," it fails to address the standards for a necessary and indispensable party because it simply cannot show

¹ While immaterial to the current matter, it does seem likely that tribal court plaintiffs could have brought some sort of federal claim against HRC or its successor in interest related to those entities' on-Reservation conduct. But it seems even more clearly that, because of the well-pled complaint rule, the tribal court plaintiffs could not have brought the contract claim that is pending in the Tribal Court.

that the United States is necessary and indispensable to the Tribal Court's adjudication of the underlying breach of contract dispute. *Id.* Furthermore, HRC cites no source of law that would deprive the Tribal Court of jurisdiction in the absence of a party that "is vital to any adjudication of this case." *Id.* Because the United States is neither necessary nor indispensable to the underlying claim, its absence from the Tribal Court litigation has no bearing on HRC's likelihood of success on the merits.

HRC's allegation regarding exhaustion of federal administrative remedies likewise fails to support its argument that it is likely to succeed on the merits. The underlying cause of action is a private contract dispute. It is not an action "seeking review of federal agency decisions," as HRC implies. *Id.* at 10. Tribal Court Plaintiffs have not asked the Tribal Court to "address the appropriateness of the BIA's actions or BLM's actions..." *Id.* The Tribe's trial and appellate courts have both already rejected HRC's expansive interpretation of the Tribal Court complaint. It is Tribal Court plaintiff, and then the Tribal Court itself, and not HRC, which defines Plaintiffs' claims. HRC's argument fails because there is no applicable requirement for Tribal Court Plaintiffs to exhaust federal administrative remedies.

C. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR DENIAL OF HRC'S MOTION.

Finally, as HRC has failed to allege any actual harm, the balance of equities and public interest clearly favor denial of HRC's motion. HRC's argument regarding this factor is an adoption of Kodiak's argument in its Memorandum in Support of Motion for Preliminary Injunction, Doc. 30 at 20. To avoid redundancy and conserve judicial resources, Judge Seaworth refers the Court to page 12 of her Response to Kodiak, Doc. 48. Furthermore, HRC's memorandum is devoid of any claim regarding the balance of equities, one of the four elements it must prove to justify issuance of a preliminary injunction. HRC does incorporate Kodiak's analysis concerning

irreparable harm, *Mem. in Support of Mot. for Prelim. Inj.*, Doc. 59 at 13, but, in addition to HRC's failure to demonstrate any harm as discussed above, the "balance of harms" is not the proper factor for the Court to consider. Because HRC's motion fails to address the balance of equities, HRC has failed to meet its burden and its motion must be denied.

With respect to the public interest, HRC claims that denial of its motion "could negatively affect oil and gas operations and economic opportunities enjoyed by many individuals across the Fort Berthold Indian Reservation," *Mem. in Support of Mot. for Prelim. Inj.*, Doc. 59 at 14 (emphasis added). However, as explained in Judge Seaworth's Kodiak Response, "[t]he Tribal Court's enforcement of tribal contract law will, in fact, provide stability for businesses through the uniform enforcement of applicable tribal law." Doc. 48 at 5.

CONCLUSION

This Court must abstain from ruling on HRC's motion for the simple fact that it lacks subject matter jurisdiction. Tribal remedies must be exhausted before the Court can even consider its own jurisdiction. However, should the Court proceed with considering HRC's motion, it must deny the motion because HRC has failed to meet its burden for issuance of a preliminary injunction.

Respectfully submitted this 12th day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 2018, I electronically filed the foregoing **SPECIALLY APPEARING DEFENDANT JUDGE MARY SEAWORTH'S RESPONSE TO HRC OPERATING, LLC'S MOTION FOR PRELIMINARY INJUNCTION**, with the Clerk of the Court via the ECF filing system, which will send notification of such filing to all parties of record.

/s/ Sarah M. Harrington
Sarah M. Harrington, Legal Assistant