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

WPX ENERGY WILLISTON LLC, Plaintiff, vs. GABRIEL FETTIG, et. al, Defendants.	**BRIEF IN SUPPORT OF MOTION TO DISMISS** Case No. 1:21-cv-00145-CRH

INTRODUCTION

The Three Affiliated Tribes District Court and the Honorable B.J. Jones (the "Tribal Defendants") seek dismissal of this action because WPX has failed to exhaust its tribal remedies and because the Tribal Defendants are immune from suit. Relying on *Kodiak Oil & Gas Inc. v. Burr, 93*2 F.3d 1125, 1133 (8th Cir. 2019), WPX alleges that the Tribe lacks jurisdiction and therefore immunity does not apply nor is exhaustion required. The argument be rejected because it ignores the plain requirements of tribal jurisdiction required by the rights-of-way and applicable regulations. Furthermore, this case is substantially different from *Kodiak*. In this matter there is no "federal mediation" of the relationship between WPX and tribal members nor is there a federal scheme so pervasive that it preempts tribal jurisdiction. Instead, the underlying rights-of-way and the regulations governing the right-of-way specifically provide for tribal jurisdiction. Even if the

regulations and rights-of-way did not provide tribal jurisdiction, WPX has a consensual relationship with tribal members and is subject to tribal jurisdiction.

FACTS

The Three Affiliated Tribes (Tribe) is a federally recognized Indian Tribe whose government is organized under the Indian Reorganization Act (IRA), 25 U.S.C § 5123, with a Constitution approved by the Secretary of the Interior in accordance with the Act. Under Article I of its Constitution, the Tribe has jurisdiction over all lands and all persons within the Fort Berthold Reservation. The exercise of jurisdiction is "subject to any limitations imposed by the statutes of the United States" Id, Art VI §2.

WPX entered the Fort Berthold Reservation and negotiated directly with Gabriel Fettig, Howard Fettig, Charles Fettig, and Morgen Fettig (the "Fettigs") for the use of their trust land. After a dispute arose under the right of way agreement the Fettigs filed suit in tribal court. The Fettigs are all members of the Three Affiliated Tribes. Dkt. 1, ¶¶ 2-5. WPX operates a number of oil and gas wells within the Fort Berthold Reservation. *Id.* at ¶¶ 13-14. As part of its operations, WPX negotiated with the Fettigs to obtain a number of rights-of-way for the placement of well pads, well bores, pipelines, or other appurtenances necessary for oil and gas development. *Id.* As part of that negotiation the parties agreed to certain restrictions regarding the use of the rights-of-way including a smoking ban on the property. *Id.* at ¶¶ 15-17. After the Fettigs consented the BIA issued the rights-of-way on November 14th, 2018. Dkt. 1-1, 6,11; Dkt 1-2, 16

Due to alleged violations of those restrictions, the Fettigs filed suit against WPX in tribal court. *Id.* at 20. WPX moved to dismiss on the grounds that the tribal court lacked subject matter jurisdiction and personal jurisdiction. *Id.* at ¶ 22. The tribal court found it held both subject

matter and tribal jurisdiction. *Id.* at ¶ 22. WPX then filed an appeal of the decision to the Tribe's Supreme Court. *Id.* at ¶ 23. The appeal is still pending before the Tribe's Supreme Court. *Id.*

The Tribe's district court, the Fort Berthold District Court, is a court of general jurisdiction. Three Affiliated Tribes Law and Order Code, Tit. I, Chap. 1, § 3.1.[1] The statutes of the Tribe empower the district court to hear disputes over "all persons who reside, enter or transact business within the territorial boundaries of the reservation". *Id* at § 3.3. The general jurisdiction extends to "any and all lands within the reservation boundaries including all easements, fee patented land, [and] *rights-of-ways*". *Id.* at § 3.2 (emphasis added).

The tribal judicial system includes the MHA Nation Supreme Court. *Id.* at Chap. 2, § 6. All parties have the right to appeal a decision of the Fort Berthold District Court to the MHA Nation Supreme Court. *Id.* The judges for the Fort Berthold District Court and the MHA Nation Supreme Court must meet exacting standards before appointment to the bench. *Id.* at § Chap. 1, §§ 4.1; Resolution No. 13-096-VJB. A judge must be a licensed attorney and have experience in the field of federal Indian law. *Id.* An appellate judge must be a licensed attorney and have *extensive* experience in the field of federal Indian law.

STANDARD

A motion to dismiss under Fed. R. Civ. P. 12(b)(1) challenges the jurisdiction of a court to hear a case. Here, this Court lacks subject matter jurisdiction for multiple reasons. If the Court

[1] Excerpts of the Tribe's Law and Order Code are provided in Exhibit 1. Also included with Exhibit 1 is Resolution No. 13-096-VJB which creates the MHA Nation Supreme Court and names the experience necessary to be an appellate judge. The MHA Nation Supreme Court replaced the North Plains Intertribal Court of Appeals as the appellate court of the Tribe.

decides in favor of the Tribal Defendants on any of the grounds asserted under 12(b)(1) then it must dismiss.

Federal courts "are courts of limited jurisdiction , possessing only that power authorized by Constitution and statute". *Eckerberg v. Inter-State Studio & Publ'g Co., 86*0 F.3d 1079, 1084 (8th Cir. 2017). The "plaintiff bears the burden of proving subject matter jurisdiction". *Aly v. Hanzada for Imp. & Exp. Co., LTD, 86*4 F.3d 844, 847 (8th Cir. 2017) (internal quotation marks and citations omitted). To determine its jurisdiction a court may review documents and evidence beyond the pleadings. *Osborn v. United States,* 918 F.2d 724, 729 (8th Cir. 1990).

Under 12(b)(1) a party "attack[s] either the facial or factual basis for jurisdiction". *Middlebrooks v. United States*, 8 F. Supp. 3d 1169, 1173 (D.S.D. 2014) (citing *Osborn*, 918 F.2d at 729 n.6. On a factual challenge, matters outside the pleadings may be considered by the reviewing court and the nonmoving party is afforded no Rule 12(b)(6)-type protection. *Id.* Unlike summary judgment, the existence of disputed material facts will not preclude the trial court from evaluation for itself the merits of jurisdictional claims. *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986)). However, the Court is not required to attach any assumption of truthfulness to the complaint's allegations. *Id.*

ARGUMENT

WPX wishes to drastically reduce tribal jurisdiction through single minded application of the *Kodiak* case without an eye for nuance or prior jurisprudence. Reliance on *Kodiak* is misplaced as both the procedural posture and underlying subject matter in this suit are sufficiently different to require a different outcome than that of *Kodiak*. Most importantly this is a matter deals with remedies negotiated directly between the Fettigs, as tribal members, and WPX. All without the interference or direct oversight of the federal government.

It is important to provide an overview and summary of *Kodiak* before moving to the reasons why this matter must be dismissed. In *Kodiak*, the Three Affiliated Tribes regulated the flaring of natural gas by oil producers. 932 F.3d at 1138. A group of tribal members sued oil and gas producers for wasteful flaring under that tribal law. *Id.* The MHA Nation Supreme Court upheld that decision. *Id.* After an exhaustion of tribal remedies, the oil and gas producers sued the tribal court and presiding judge in federal court. *Id.* at 1137. The oil and gas producers argued (1) that federal law on oil and gas leasing controlled and preempted any claims of tribal jurisdiction, and (2) that no personal jurisdiction existed because the "consensual relationship" created by the oil and gas leases was entirely mediated by the federal government and such mediation by the federal government moved the relationship beyond the *Montana* relationship exception. *Id.* The *Kodiak* Court agreed with the oil producers. *Id.* Their analysis depended heavily upon the substantial statutory and regulatory scheme that guides oil and gas leasing. *Id.* According to the court, this large scheme supplanted tribal law and moved any relationship beyond consensual because of the "federal mediation" of the relationship between tribal members and producers. *Id.*

I. WPX, BY ITS OWN ADMISSION, HAS FAILED TO EXHAUST TRIBAL REMEDIES.

The Supreme Court has recognized "that Congress is 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). Congress itself has expressly found that "the appropriate forums for the adjudication of disputes affecting personal and property rights" 25 U.S.C. § 3601. Consistent with this policy, the Supreme Court has held: "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively

limited by a specific treaty provision or federal statute." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (citations omitted). This deference to tribal jurisdiction requires that, "absent exceptional circumstances, federal courts typically should abstain from hearing cases that challenge tribal court jurisdiction until tribal court remedies, including tribal appellate review, are exhausted." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1149 (10th Cir. 2011) (quotation marks omitted).

The Supreme Court has acknowledged that exhaustion is not required in the following instances: (1) "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith"; (2) "where the action is patently violative of express jurisdictional prohibitions"; or (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Nat'l Farmers*, 471 U.S. at 856 n.21. The Supreme Court has also held that exhaustion may be excused "where it is clear that the tribal court lacks jurisdiction and that judicial proceedings would serve 'no purpose other than delay.'" *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1238 (10th Cir. 2014) (quoting *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001)). A party invoking any of these exceptions to "make a substantial showing of eligibility." *Romero v. Wounded Knee*, LLC, 2018 U.S. Dist. LEXIS 148785, *11, quoting *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1243 (10th Cir. 2017) cert. denied 138 S. Ct. 1001 (2018). "Exceptions typically will not apply so long as tribal courts can 'make a colorable claim that they have jurisdiction.'" *Id*. (quoting *Thlopthlocco*, 762 F.3d 1226, 1240 (10th Cir. 2014)).

The tribal court exhaustion doctrine establishes that “federal court jurisdiction does not properly arise until available remedies in the tribal court system have been exhausted”. *Auto-Owners Ins. Co. v. Tribal court of Spirit Lake Indian Reservation*, 495 F.3d 1017, 1021 (8th Cir.

2007). Exhaustion is *mandatory*. *Gaming World Int'l v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8th Cir. 2003).

One important purpose of exhaustion is to allow a tribal court to develop the factual record from which legal conclusions concerning jurisdiction can flow. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987). Once a tribal court has created a factual record and issued a ruling based upon it, a party can seek federal review of the tribal court's decision related to jurisdiction. *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Rsrv.*, 27 F.3d 1294, 1300 (8th Cir. 1994).

None of the exceptions to the tribal exhaustion rule apply here. WPX's reliance on *Kodiak* to excuse exhaustion is misplaced for a number of reasons.

First, *Kodiak* does not provide substantial support for the conclusion that exhaustion in this case is "patently violative of express jurisdictional prohibitions". In fact, *Kodiak* reveals that the parties had fully exhausted tribal remedies. Here, however, WPX admits that it has only filed an appeal to the MHA Nation Supreme Court, but it has not yet received a decision. Dkt. 1, ¶ 23. The rule of exhaustion requires that a party exhaust all remedies including any rights of appeal. *Belcourt Pub. Sch. Dist. v. Herman*, 786 F.3d 653, 656 n.2 (8th Cir. 2015). A federal court "should stay its hand until after the Tribal Court has had a full opportunity to determine its jurisdiction". *Strate v. A-1 Contrs.*, 520 U.S. 438 (1997). A full opportunity to determine must include the Tribe's Supreme Court rendering a decision. Both the federal district court and the 8th Circuit in *Kodiak* required such full exhaustion. *Kodiak Oil & Gas (USA) Inc. v. Burr,* 303 F. Supp. 3d 964, 969 (D.N.D. 2018); *Kodiak Oil & Gas (USA) Inc.*, 932 F.3d at n.2.

Second, as shown in more detail below, the facts of this case are different than those presented in *Kodiak,* which involved enforcement of a tribal regulation that had been preempted

by federal law. No such federal preemption exists here, in a run of the mill contract dispute involving tribal members and arising from WPX's conduct on reservation trust land that allegedly violated the agreement terms. This is especially so since the right of way agreement itself, as well as the regulations under which the right of way was granted, acknowledged tribal jurisdiction.

Finally, even if the parties had not completed exhaustion in *Kodiak*, WPX's argument would still be incorrect. Tribal jurisdiction, as explored in the following section, is explicitly acknowledged by both the rights-of-way granting documents and the regulations which control the granting of rights-of-way. Additionally, WPX entered into a consensual relationship with the Fettigs through negotiation of rights-of-way violation remedies and is therefore subject to tribal jurisdiction.

This Court should dismiss and direct the parties to complete the tribal appeal process. Such a return will allow the Tribe's judicial system to provide a full record to this Court and lend its years of knowledge regarding tribal jurisdiction. Returning this matter to the MHA Nation Supreme Court supports both the policy of tribal sovereignty and the long-standing deference federal courts provide to tribal courts.

II. The Tribal Defendants Are Immune From Suit

The Tribal Defendants are immune from suit as they are cloaked in the sovereign immunity of the Tribe. WPX does not allege that the Tribal Defendants have waived their immunity but instead allege that the exercise of jurisdiction is unlawful, and that immunity does not extend to suits for declaratory or injunctive relief. [2]Both of WPX's arguments are wholly dependent on their

[2] If WPX were to allege that the Tribe has waived its immunity WPX cannot meet their burden. WPX must show that there was clear "unequivocally expressed" waiver. *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.,* 991 F.2d 458, 462 (8th Cir. 1993). Such a waiver can never be implied. *Id.* The burden of proving a waiver is placed upon the party asserting a waiver exists. *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 686 (8th Cir. 2011)

contention that the Tribe lacks jurisdiction over the matter. However, the Tribe holds jurisdiction over this matter as it involves a consensual relationship between non-members and tribal members. Furthermore, there is no preemptory federal law as this concerns negotiated remedies on a right-of-way and not the actual grant of the right-of-way. The rights-of-way and the remedies by regulation are subject to tribal law.

Tribal sovereign immunity challenges subject matter jurisdiction. *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000). It is not a discretionary doctrine that may be applied as a remedy depending upon equities. *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla., 53*2 U.S. 411, 418 (2001). Instead, it is a *purely* jurisdictional question. *Id.*

Tribes enjoy the same immunity from suit enjoyed by sovereign powers and are "subject to suit only where Congress has expressly authorized the suit or the tribe has clearly waived its immunity". *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754 (1998); *C & L Enters., 53*2 U.S. at 418.

A lawsuit against officials acting within their official capacity is nothing more than a claim against the entity. *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985); *Epps v. Duke Univ.*, 447 S.E.2d 444, 447 (N.C. Ct. App. 1994). Immunity from suit for a tribe also applies to tribal officials. *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir.), *cert. denied*, 235 U.S. 939 (2002).

In this matter the point of contention is not whether the Tribe waived its immunity but instead whether the Tribe has jurisdiction. Once again WPX depends heavily on *Kodiak* to defeat this motion to dismiss. *Kodiak* disposed of tribal jurisdiction through two veins: first that the tribal court lacked personal jurisdiction over non-Indians and second that the tribal court lacked jurisdiction over the subject matter. However, the facts in this situation are sufficiently different

from that of *Kodiak* to require a finding that the Tribe holds jurisdiction over both the personal and subject matter jurisdiction.

a. *Jurisdiction Over WPX*

It is well-settled law that civil jurisdiction over tribal-related activities on tribal land presumptively lies in the tribal courts. *Duncan Energy Co.*, 27 F.3d at 1299. In *Montana v. United States*, 450 U.S. 544, 565-66 (1981) the Supreme Court stated 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 dealing, contracts, leases or other arrangements." *Id* (emphasis added). Here, WPX entered into a consensual relationship with the Fettigs by soliciting and obtaining rights-of-way from the Fettigs and directly negotiating with the Fettigs regarding remedies for violations of the conditions of the rights-of-way. Much like a contract or other commercial dealing there were significant negotiations as to conditions, payments, and restrictions on use. Dkt. 1, ¶¶ 15-19.

In *Kodiak*, the analysis finding against personal jurisdiction was entirely dependent on the substantial body of federal statutes and regulations regarding the leasing of oil and gas owned by tribal members. 932 F.3d at 1138. The 8th Circuit conceded that entering into an oil and gas lease with a tribal member could be a consensual relationship. *Id.* However, since those leases were subject to an entire body of federal law and "the entire relationship [between the producers and the tribal member] is mediated by the federal government" no consensual relationship existed. *Id.* The lack of a consensual relationship is based upon the "complete federal control of oil and gas leases". *Id.*

Here, we have conditions negotiated by the Fettigs and WPX concerning the use of a right-of-way. Unlike *Kodiak,* the federal government does not mediate the entire relationship. Instead,

the federal government empowers individual landowners to negotiate their own remedies and limitations. The only power of the federal government is to approve or deny those remedies. 25 C.F.R. § 169.403(b). For leasing the entire process is controlled under 30 U.S.C. §§ 1701-1759. *Kodiak*, 932 F.3d at 1135. Here, the entirety of negotiating remedies is controlled by 25 C.F.R. § 169.403. Under that provision the BIA provides a great amount of latitude in negotiating remedies. The BIA sets almost no limits to what can be negotiated. Instead, the BIA will approve almost any negotiated remedies unless they would violate the federal government's trust responsibility. *Id.* § 169.1. Comparatively, the leasing of oil and gas resources must be completed "on forms, prescribed by the Secretary of Interior" and those forms "may only be changed with the Secretary's approval". *Kodiak*,932 F.3d at 1136 (citing 25 C.F.R. § 211.57).

This Court must distinguish between right-of-way remedies negotiated and the Tribe's attempts to regulate in a space where substantial federal law exists. The *Kodiak* Court ruled against there being a consensual relationship because of the amount of oversight and mediation that the federal government imposed. That decision essentially concluded that no consensual relationship existed because of the significant number of regulations and requirements imposed by federal law. Here, however, there is no such oversight. The application of *Kodiak* in this situation is improper because we have direct negotiation, with minimal federal oversight, between tribal members and non-members companies. The only intercession by the BIA is its almost pro-forma approval of the remedies.

b. *Subject Matter Jurisdiction*

In *Kodiak,* the 8th Circuit concluded that the tribal court lacked jurisdiction over a federal cause of action. It determined that federal law, not tribal law, controlled the process of royalty payments and the flaring of natural gas. However, here, there is no such controlling law and the

enforcement of negotiated right must be brought before a tribal court in accordance with the right-of-way grant and the regulations thereto. Unlike *Kodiak* there is *direct* language in the regulations and the underlying right-of-way which require and apply tribal jurisdiction.

The requirement of tribal jurisdiction is found throughout the regulations controlling the granting of a right-of-way, the regulations controlling the negotiation of remedies for violations of the right-of-way, and in the right-of-way itself. 25 C.F.R. § 169.403(e) provides that a "right-of-way grant may provide that violations will be addressed by a tribe, and that disputes will be resolved by a tribal court [or other court of competent jurisdiction]". WPX points out that the right-of-way does not specifically name the tribal court as the proper court for hearing disputes. Dkt. 1, ¶ 19.[3] But the Supreme court itself has said that jurisdiction "presumptively lies" in tribal court. *Iowa Mutual*, 480 U.S. at 18. Moreover, WPX's assertion ignores the rest of the right-of-way document. First, the right-of-way "incorporates by reference the conditions or restrictions [negotiated] by grantor". Dkt. 1-1, 5,9; Dkt. 1-2, 6,11,16. Each of these federal rights-of-way grants provide that the "Tribe maintains its existing jurisdiction over the land, activities, and person within the right-of-way and this grant does not diminish to any extent: (a) the Tribe's power to tax the land, any improvements on the land, or any person or activity within the right-of-way, (b) the Tribe's authority to enforce Tribal law of general or particular application on the land subject to and withing the right-of-way, [] (c) the Tribe's inherent sovereign power to exercise civil jurisdiction over non-members on Indian Land; or (d) the character of the land subject to the right-of-way as Indian Country". Dkt. 1-1, 5-6. The foregoing language is found in the right-of-way regulations as well at 25 C.F.R. §169.10. The inclusion of the foregoing language is required by

[3] WPX further implies that failure to incorporate the correct court for hearing a dispute on the negotiated remedies somehow invalidates that negotiated remedy entirely. Such a position is preposterous.

25 C.F.R. § 169.125 which provides that a right-of-way grant must state that "the [T]ribe maintains its existing jurisdiction over the land, activities, and persons within the right-of-way". There is no more plain a statement of tribal jurisdiction that can be provided. The foregoing language does not provide a hint of federal jurisdiction but instead provides a full-throated backing of tribal jurisdiction.

WPX contends that federal law is at issue in this matter. However, the issue at hand is the enforcement of the remedy negotiated by the parties concerning the smoking ban. A federal law was used to *negotiate* the ban on smoking and the remedies thereto. A federal law does not apply to the smoking ban itself or the analysis of the smoking ban. To put it plainly no federal law has an impact on the outcome of whether WPX violated that ban. A tribal court would hear evidence on whether the ban was violated and determine what monetary remedy can be awarded to the prevailing party. Even if some federal law could touch on this matter, the Supreme Court has stated that the mere "presence of federal law issues…does not compel the conclusion that tribal court jurisdiction [is removed]".*Nevada v. Hicks*, 944 F. Supp. 1455, 1467 (D. Nev. 1996) (rev'd and remanded by *Nevada v. Hicks,* 533 U.S. 353 (2001). In *Williams v. Lee*, the Supreme Court stated that jurisdiction could not be removed due to the presence of federal law as tribal courts are just a competent to interpret federal law as any other court system. 358 U.S. 217, 223 (1959).

WPX contends the land status also removes jurisdiction from the Tribe. However, the fact that the right-of-way is on allotted lands provides "an adequate fulcrum for tribal affairs and there is "exclusive tribal *and* federal jurisdiction" over those lands. *DeCoteau v. Dist. Cnty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 446 (1975). The simple designation as land as allotted does not remove tribal jurisdiction over those lands or the activity on that land. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1017-18 (8th Cir. 1999).

Finally, this Court should view *Kodiak* in light of the recent decision in *United States v. Cooley*, 141 S. Ct. 1638, 1639 (2021). In *Cooley*, the Supreme Court reaffirmed the applicability of both *Montana* exceptions. Though that case dealt with the second *Montana* exception regarding conduct that threatens the political integrity, economic security or the health or welfare of a tribe, it is instructive here. *Id.* 1643. The Supreme Court unanimously decided against applying an overly restrictive reading of the exception. *Id.* at 1643-44. Instead, the Supreme Court reminded the litigants that the *Montana* case and its progeny acted to reserve the tribe's inherent sovereign authority over those who enter the territories of tribes. *Id.* A similar conclusion should be reached in this matter. One cannot extend *Kodiak* as far as to strip tribal jurisdiction when nonmembers directly negotiate with tribal members. It certainly cannot extend as far as to remove tribal jurisdiction when no federal law is at issue and the underlying grant of right-of-way requires tribal jurisdiction.

CONCLUSION

This matter must be dismissed. The proper course of action is to allow the exhaustion of tribal court remedies. Once the tribal remedies are concluded WPX may file suit anew challenging the jurisdiction of the Tribe. Such a process will provide this Court the wisdom and experience of the tribal courts regarding tribal jurisdiction. It is premature for WPX to flee from the tribal judicial system while an appeal is still pending.

However, this Court could also dismiss because the tribal defendants are immune from suit The tribal defendants possess the authority to determine whether the tribal court has jurisdiction over this matter. The determination remains subject to review in the tribal Supreme Court. The tribal defendants have not acted outside the scope of their authority, nor have they violated federal law by exercising jurisdiction over a case in which federal law expressly forbids tribal jurisdiction.

On the contrary, this is a dispute revolving around a consensual relationship between tribal members and a non-Indian who was given tribal permission to use the Indian lands in question. WPX decided to directly negotiate with tribal members and is now attempting to avoid tribal jurisdiction by misreading and misapplying the law on tribal jurisdiction. This Court should not be lead astray in misapplying the law as well and dismissal must occur.

Respectfully submitted this 26th day of August 2021.

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