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

WPX Energy Williston, LLC, Plaintiff, vs. Gabriel Fettig, Howard Fettig, Charles Fettig, Morgan Fettig, the Honorable B.J. Jones, in his capacity as Associate Judge of the Three Affiliated Tribes District Court, and the Three Affiliated Tribes District Court, Defendants.	Civil No. 1:21-cv-00145 DLH/CRH **WPX'S RESPONSE TO THREE AFFILIATED TRIBES DISTRICT COURT AND HONORABLE B.J. JONES' MOTION TO DISMISS**

Plaintiff WPX Energy Williston, LLC (WPX), submits this response in opposition to the motion to dismiss filed by the Three Affiliated Tribes District Court and the Honorable B.J. Jones (collectively, Tribal Court or Tribal Court Defendants).

I. INTRODUCTION

Plaintiffs (Fettigs) sued WPX in Tribal Court on the Fort Berthold Indian Reservation, alleging violations of right-of-ways that were granted to WPX by the Bureau of Indian Affairs (BIA) for oil and gas operations on allotted trust land. WPX moved to dismiss the lawsuit for lack of jurisdiction but the Tribal Court denied the motion, erroneously determining it had jurisdiction to hear the dispute. Therefore, WPX commenced this federal case to halt the tribal lawsuit.

The Tribal Court Defendants have moved to dismiss WPX's federal lawsuit, arguing they have sovereign immunity and arguing WPX has failed to exhaust tribal court remedies. But the Tribal Court Defendants are not immune from suit because WPX is seeking injunctive and declaratory relief to stop the Tribal Court Defendants from unlawfully exceeding their authority.

More to the point, because the Tribal Court lacks jurisdiction over Fettigs' lawsuit and over WPX, the shield of sovereign immunity has been lowered. In addition, exhaustion of tribal court remedies is not required in the Eighth Circuit when a tribal court lacks jurisdiction over an action; forcing WPX to continue litigating in the tribal court system would serve no purpose other than delay.

The Tribal Court Defendants' motion to dismiss should be denied.

II. FACTUAL BACKGROUND

Fettigs are enrolled members of the Three Affiliated Tribes and own surface lands and mineral interests within the exterior boundaries of Fort Berthold Indian Reservation. *Compare* Compl. ¶¶ 2-5, *with* Fettigs' Answer ¶ 2.

Specific to this lawsuit, Fettigs own four trust allotments that were numbered and named for oil and gas production through the BIA as follows:

> Allotment 1109A—Lead Woman;
> Allotment 1836-A—Nancy Dancing Bull;
> Allotment 921 Sweet Grass Woman;
> Allotment 853—Skunk Creek.

Compare Compl. ¶¶ 12, *with* Fettigs' Answer ¶ 2.

WPX is a non-Indian company that drills and operates oil and gas wells and owns mineral interests within Fort Berthold Indian Reservation. *Compare* Compl. ¶ 13, *with* Fettigs' Answer ¶ 2. Pursuant to 25 USC §§ 323-328, the BIA granted WPX right-of-ways on Fettigs' allotments for oil well pads, well bores, access roads, pipelines, and other appurtenances; copies of the right-of-way documents for each allotment are in the record at Doc. Nos. 1-1, 1-2, 1-3, 1-4, 23-1.

Under 25 U.S.C. § 324, WPX was required to obtain Fettigs' consent to the right-of-ways, and under 25 C.F.R. § 169.125(a), Fettigs' consent contained additional restrictions and conditions negotiated by Fettigs and WPX. *Compare* Compl. ¶ 15, *with* Fettigs' Answer ¶ 2. Included in the

conditions and restrictions that Fettigs and WPX negotiated is a smoking ban. Here is the pertinent language, which is materially the same in all the consents:

> GRANTEE will not allow its employees, representatives, vendors, or others to hunt on the premises nor will GRANTEE allow smoking. Additionally, GRANTEE will post "No Hunting", "No Trespassing" and "No Smoking" signs. If GRANTEE, its employees, representatives, vendors or others smoke on premises, GRANTEE will pay a fine of $5,000 per incident.

Compare Compl. ¶ 16, *with* Fettigs' Answer ¶ 2.

Under 25 C.F.R. § 169.125(a), all conditions and restrictions listed in Fettigs' consent documents, including the smoking ban, are incorporated into the right-of-ways issued by the BIA to WPX. In addition to 25 C.F.R. § 169.125(a), here is a pertinent clause found in all but one of the grants:

> **ADDITIONAL CONDITIONS OR RESTRICTIONS.** This grant incorporates by reference the conditions or restrictions set out in the GRANTOR, attached here.

See Doc. Nos. 1-1, 1-2, and 1-3.

In addition, under 25 C.F.R. § 169.403(b), Fettigs and WPX were allowed to negotiate pre-ordained remedies for right-of-way violations, such as the remedy of $5,000 per incident for violations of the smoking ban. *Compare* Compl. ¶ 18, *with* Fettigs' Answer ¶ 2. However, 25 C.F.R. § 169.403(b) provides that those remedies are only allowed in a right-of-way grant if the Indian landowners' "consent also specifies the manner in which those remedies may be exercised by or on behalf of the Indian landowners." Fettigs' consent documents do not contain any such specification, nor do any other right-of-way documents. *See* Doc. Nos. 1-1, 1-2, 1-3, 1-4, 23-1.

In 2020, Fettigs sued WPX in Tribal Court, alleging violations of the smoking ban. Doc. No. 24-6. The case is *Gabriel Fettig, et al. v. WPX Energy*, Case No. CV-2020-0179. WPX moved to dismiss Fettigs' lawsuit because the Tribal Court lacks jurisdiction to hear the dispute.

Doc. Nos. 24-1, 24-2. In June 2021, the Tribal Court determined it has jurisdiction to hear the dispute and WPX's motion to dismiss was denied. Doc. No. 24-12.

To preserve all opportunities to challenge the jurisdiction of the Tribal Court, WPX has filed a notice of appeal with the Mandan, Hidatsa and Arikara Nation Supreme Court regarding the Tribal Court's denial of WPX's motion to dismiss. Doc. No. 24-5.

In July 2021, WPX initiated this federal case against Fettigs and the Tribal Court Defendants, seeking injunctive and declaratory relief to halt the tribal lawsuit, s*ee* Compl., and the Tribal Court Defendants filed a motion to dismiss. Doc. No. 19.

Fettigs have not pursued administrative remedies with the BIA for WPX's alleged right-of-way violations. *See* Doc. No. 23, ¶ 3.

III. ARGUMENT

The merits of WPX's case is centered on the legal question of the Tribal Court Defendants' jurisdiction to hear disputes arising from terms of right-of-ways granted under federal law to a non-Indian entity for oil and gas operations on allotted land. The question of whether a tribal court has adjudicative authority over nonmembers is a federal question. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008). Therefore, this Court has original jurisdiction. *See* 28 U.S.C. § 1331. However, the Tribal Court Defendants assert this Court lacks jurisdiction because they are immune from suit and because WPX failed to exhaust tribal court remedies.

A. The Tribal Court Defendants are not shielded from this lawsuit by sovereign immunity.

A defense of sovereign immunity presents a jurisdictional question. *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 4043 (8th Cir. 2000). Indian tribes possess "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*,

436 U.S. 49, 59 (1978). Indian tribes may not be sued absent an express and unequivocal waiver of immunity by the tribe or an abrogation of tribal immunity by Congress. *Baker Elec. Coop. v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994). This immunity extends to tribal officials who act within the scope of the tribe's lawful authority. *Id*.

In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court recognized sovereign immunity does not bar certain suits seeking declaratory and injunctive relief against state officers in their individual capacities based on ongoing violations of federal law. The *Ex parte Young* doctrine rests on the premise "that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). The Supreme Court has extended the *Ex parte Young* doctrine to tribal officials, holding "tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct." *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 788 (2014).

Here, WPX is seeking only injunctive and declaratory relief, not damages, and the Tribal Court Defendants exceeded the scope of their authority by exercising jurisdiction over the dispute between WPX and Fettigs. First, the Tribal Court has no congressional authority to adjudicate disputes over right-of-ways that are created and controlled by federal law. Second, regardless of congressional authority, WPX is not subject to the Tribal Court's jurisdiction because WPX is a non-Indian entity.

1. The Tribal Court has no congressional authority to adjudicate disputes over right-of-ways that are created and controlled by federal law.

The right-of-ways granted to WPX are on allotted land that is held in trust by the United States for Fettigs. The United States is the fee owner of the allotments and Fettigs are the beneficial

owners. *See, e.g., Tooahnippah v. Hickel*, 397 U.S. 598, 609 (1970). Federal law governs the acquisition and use of the right-of-ways over the allotments under 25 U.S.C. §§ 323-28. Where nonmembers are concerned, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana v. United States*, 450 U.S. 544, 564 (1981).

Congress has not expressly delegated authority to the tribes to hear matters regarding right-of-ways over allotted land held in trust by the United States. *See* 25 U.S.C. §§ 323-28. Neither a tribe nor an individual allotee can grant a right-of-way over trust land. *Fettig v. Fox*, 1:19-cv-00096, 2020 WL 9848691, *14 (D.N.D. Nov. 16, 2020) (adopted 2020 WL 9848706, Dec 3, 2020). And while Congress has given tribes and allottees the power to consent to right-of-ways in 25 U.S.C. § 324, Congress has never extended this consent authority to include any independent ability to grant, administer, or adjudicate right-of-ways on trust land. *See* 25 U.S.C. §§ 323-28.

Instead, only the Secretary of the Interior is authorized by Congress to grant, administer and enforce right-of-ways over trust land, and the BIA has enacted broad and comprehensive regulations. *See* 25 U.S.C. § 323; 25 C.F.R. Part 169. The extensive nature of the scheme under Part 169 demonstrates that the regulation of such right-of-ways lies entirely with the federal government and is outside the control of tribes. *See Kodiak Oil & Gas (USA) Inc. v. Burr*, 922 F.3d 1125, 1136 (8th Cir. 2019) (discussing the extensive federal regulation of oil and gas leasing of trust land and determining tribal court lacked jurisdiction).

Notably, even the consent authority that Congress gave to allottees is not without regulation. *See* 25 C.F.R. §§ 169.107-109. Under the BIA's rules, allottees and right-of-way applicants are allowed to negotiate conditions and restrictions and remedies for violations, and add

them to the allottees' written consent documents, all of which are subsequently incorporated into the right-of-ways by rule (and by a clause in the grants). 25 C.F.R. § 169.125(a). The smoking ban on WPX's right-of-ways is one such condition or restriction and the $5,000 fine for violations of the ban is one such remedy. These conditions and restrictions and the negotiated remedies owe their existence solely to federal law and are unique to the BIA's regulatory scheme. *See* 25 U.S.C. § 324; 25 C.F.R. § 169.403(b).

Because Fettigs' lawsuit is based on right-of-way restrictions, conditions, and negotiated remedies that arise exclusively in the context of comprehensive federal control, it follows that Fettigs' claims are federal in nature and do not stem from tribal law. Furthermore, tribal courts are not courts of general jurisdiction and, where nonmembers are concerned, "tribal courts' adjudicative authority is limited (absent congressional authorization) to cases arising under tribal law." *Kodiak,* 922 F.3d at 1134-35. "[T]ribal courts lack jurisdiction to adjudicate federal causes of action absent congressional authorization." *Id.* at 1135 (citing *Nevada v. Hicks*, 533 U.S. 353 (2001)). Fettigs' are asserting a federal cause of action in a tribal court that is acting without congressional authorization. Therefore, the Tribal Court Defendants are acting outside their lawful authority and are not shielded by sovereign immunity. *See id.* at 1132-33.

2. WPX is not subject to the Tribal Court's jurisdiction because WPX is a non-Indian entity.

It is well-established that "absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). In *Montana,* the United States Supreme Court articulated the now well-accepted rule that "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* 450 U.S. at 565. However, the Supreme Court added that in certain circumstances, even when Congress has not expressly authorized such regulation, tribes

retain inherent sovereign authority over non-members (1) to 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" and (2) "to 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 565-66. These exceptions are limited and are not to be construed in a manner that "swallows the rule." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008).

As explained earlier, Congress has not expressly given tribes the power to hear matters regarding right-of-ways over allotted land that is held in trust by the United States, nor to regulate the related activities of nonmembers like WPX. Therefore, absent the applicability of one of the *Montana* exceptions, the jurisdiction of the Tribal Court does not extend to WPX.

a. The first *Montana* exception does not apply.

The first *Montana* exception recognizes the tribes' jurisdiction to regulate, through taxation, licensing, or other means, the "activities of nonmembers who enter consensual relationships with the tribe of its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. This exception does not grant tribes unlimited regulatory or adjudicative authority over nonmembers, but instead permits the regulation of activities. *Plains Commerce Bank*, 554 U.S. at 330. As explained in *Plains Commerce Bank*, the rationale for the *Montana* exceptions was to ensure tribal regulation of certain activities that "may intrude on the internal relations of the tribe or threaten tribal self-rule." *Id.* at 335.

The first exception applies when a nonmember has a consensual relationship with the tribe or its members and such activities arising from the consensual relationship implicate the tribe's sovereign interests. *Id*. Here, WPX has a consensual relationship, via the BIA, with tribal

members and so the question is whether WPX's activities arising from the relationship implicate the tribe's sovereign interests. *See id*. They do not.

As stated earlier, the extensive scheme under 25 C.F.R. Part 169 demonstrates the regulation of such right-of-ways lies entirely with the federal government and is outside the control of tribes. *See Kodiak*, 922 F.3d at 1136 (pointing to the extensive federal regulation of oil and gas leasing of trust land and determining the tribal court lacked jurisdiction). The conditions and restrictions the BIA allows in the right-of-way grants—like the Fettigs' smoking ban—and the existence of "negotiated remedies" for violations of the right of ways are only made possible by federal law. *See* 25 C.F.R. § 169.403(b). Because Fettigs' lawsuit is based on the restrictions and conditions and negotiated remedies that arise solely from federal law, it follows that the lawsuit is federal in nature and does not stem from tribal law. Therefore, in the face of such regulation and an absence of an impactful tribal role, it is axiomatic that the activity in question does not implicate tribal governance or internal relations.

b. The second *Montana* exception does not apply.

A tribe retains inherent power to exercise authority over the conduct of nonmembers "when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. The United States Supreme Court's decisions in *Strate*, 520 U.S. 438 and *Nevada v. Hicks*, 533 U.S. 353 (2001) dictate a narrow interpretation of the second exception. Both decisions caution that the second exception cannot be interpreted to severely shrink *Montana*'s general rule. *See Hicks*, 533 U.S. at 359-61; *Strate*, 520 U.S. 457-58. For example, in considering whether tribal courts may adjudicate claims against nonmembers stemming from accidents on state highways within a reservation, the *Strate* opinion acknowledged that careless driving on a public highway running through a reservation certainly jeopardizes the safety of the tribal members, but concluded the second exception cannot be

interpreted so broadly to bring such claims within the adjudicative authority of the tribal court. *Strate*, 520 U.S. at 457-58.

Indeed, if read in isolation, the second exception "can be misperceived." *Id.* at 459. Instead, much like the first exception, the second *Montana* exception must be read in the context of those cases cited to support the exception. *See id.* at 458-59 (discussing cases cited in *Montana* regarding the second exception). The *Strate* court concluded the second exception was not applicable because "[n]either regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.' " *Id*. at 459 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

As to Fettigs' case, adjudicative authority over oil and gas right-of-ways—which only exist due to federal law—is not essential to preserving a tribe's right to make its own laws and be governed by them. This is especially true considering the extensive scheme under 25 C.F.R. Part 169 that demonstrates the regulation of right-of-ways over allotted trust land lies entirely with the federal government and is outside the control of tribes. *See Kodiak*, 922 F.3d at 1136. Under such circumstances, neither legislative nor adjudicative tribal authority is jeopardized because it does not exist. *See id*. Therefore, the *Montana* rule, not its exceptions, applies here and the Tribal Court Defendants do not have jurisdiction over WPX, and thus they are not protected by sovereign immunity.

B. In the Eighth Circuit, WPX is not required to exhaust tribal court remedies because it is clear the Tribal Court lacks jurisdiction.

Before challenging an exercise of tribal court jurisdiction in federal court, parties must generally exhaust their tribal court remedies. *Kodiak*, 922 F.3d at 1133 (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-19 (1987), and *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-57 (1985)). This rule is prudential and based on comity for which the Supreme

Court has recognized a number of exceptions. *Nat'l Farmers Union Ins. Cos.,* 471 U.S. at 856 n. 21; *see Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006) (listing the recognized exceptions).

Exhaustion of tribal court remedies is not required when the tribal court's action "is patently violative of express jurisdictional prohibitions." *See Hicks*, 533 U.S. at 369 (quoting *National Farmers Union*, 471 U.S. at 856 n. 21). When a tribal court plainly lacks adjudicatory jurisdiction over an action, "the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay." *Strate*, 520 U.S. at 459 n. 14 (citation omitted).

Here, WPX has challenged the Tribal Court's jurisdiction in Tribal Court and filed an appeal of the adverse decision. WPX is not required to finish the appeal or try the case in Tribal Court before pursuing federal relief because, as explained in detail above, the Tribal Court lacks jurisdiction. Indeed, the Eighth Circuit Court of Appeals has held that when it is plain a tribal court lacks jurisdiction, the question of whether a tribal court appeal has been undertaken is of no import. *Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 672 (8th Cir. 2015). In *Murphy*, a non-Indian school district was sued in tribal court and sought injunctive relief in federal court, arguing the tribal court lacked jurisdiction. *Id*. The tribal court officials asserted the federal suit was barred because the school district did not appeal the tribal court's jurisdictional decision to the tribal appellate court. The Eighth Circuit disagreed with the tribal officials and stated:

> In light of our holding that the Tribal Court lacks jurisdiction, "it would serve no purpose other than delay" to require the School District to appeal the Tribal Court's jurisdictional determination to the Tribe's Supreme Court. The School District was therefore not required to exhaust its administrative remedies before commencing this suit.

Id. (quoting *Strate*, 520 U.S. at 459 n. 14).

Therefore, under the law of the Eighth Circuit, WPX is not required to initiate or finish a tribal appeal of the Tribal Court's decision because it would serve no purpose other than delay. WPX's case should not be dismissed for failure to exhaust tribal remedies.

IV. CONCLUSION

When considering the motion to dismiss, the determinative questions are: (1) whether the Tribal Court has congressional authority to adjudicate disputes over right-of-ways that are created and controlled by federal law and (2) whether WPX, a non-Indian entity, is subject to the Tribal Court's jurisdiction. The answer to both is in the negative and so, under the established law in the Eighth Circuit, the Tribal Court Defendants are not protected by sovereign immunity nor must WPX exhaust tribal court remedies. Therefore, WPX asks the Court to deny the Tribal Court Defendants' motion to dismiss.

Dated: September 15, 2021

By: */s/ Robin Wade Forward*

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