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 BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff WPX Energy Williston LLC (WPX) submits this brief in support of its motion for a preliminary injunction against Defendants Gabriel Fettig, Howard Fettig, Charles Fettig, and Morgan Fettig (Fettigs), and Defendants Honorable B.J. Jones, in his capacity as Associate Judge of the Three Affiliated Tribes District Court, and the Three Affiliated Tribes District Court (collectively, Tribal Court).

I. INTRODUCTION

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 does not have jurisdiction for two independent reasons: (1) the Tribal Court has no congressional authority to adjudicate disputes over right-of-ways that are created and controlled by federal law, and (2) WPX is not subject to the Tribal Court's jurisdiction

because WPX is a non-Indian entity. Accordingly, WPX is moving the Court for a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure.

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, 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 that 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 case against Fettigs and the other defendants in this federal case, seeking to halt the tribal lawsuit. *See* Compl.

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

III. ARGUMENT

WPX seeks a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure in order to halt the Fettigs' lawsuit in Tribal Court. The primary purpose of a preliminary injunction is to preserve the status quo until a court can grant full, effective relief upon a final hearing. *Ferry-Morse Seed Co. v. Food Corn, Inc*., 729 F.2d 589, 593 (8th Cir. 1984). A preliminary injunction is an extraordinary remedy, with the burden of establishing the necessity of a preliminary injunction placed on the movant. *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003).

A court determines whether the movant has met its burden of proof by weighing the factors set forth in *Dataphase Systems, Inc., v. C L Systems, Inc*., 640 F.2d 109, 114 (8th Cir. 1981). The *Dataphase* factors are: (1) the probability that movant will succeed on the merits; (2) the threat of irreparable harm to the movant; (3) the state of balance between this harm and the injury that granting the injunction will inflict on the other litigating parties; (4) the public interest. *Id.* All of the factors must be considered to determine whether on balance they weigh

towards granting the injunction. *Baker Elec. Coop., Inc*., 28 F.3d at 1472 (quoting *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987). The most significant factor is the probability that movant will succeed on the merits. *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013).

A. There is a substantial probability that WPX will succeed on the merits.

When considering a party's probability of success on the merits, a court should "flexibly weigh the case's particular circumstances to determine 'whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.'" *Calvin Klein Cosmetics Corp*., 815 F.2d at 503 (quoting *Dataphase*, 640 F.2d at 113). A court need not decide whether the party seeking injunctive relief will ultimately prevail. *PCTV Gold, Inc. v. SpeedNet*, LLC, 508 F.3d 1137, 1143 (8th Cir. 2007). Although a preliminary injunction cannot be issued if the movant has no chance on the merits, a movant is not required to prove a greater than fifty per cent likelihood that he will prevail on the merits. *Id.* Here, the merits of WPX's case are centered on the legal question of the Tribal Court's jurisdiction to hear disputes arising from written terms of right-of-ways granted under federal law to a non-Indian entity for oil and gas operations on allotted land.

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-way grants by regulation. 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 does not have jurisdiction to hear Fettigs' lawsuit, and the tribal lawsuit should stop.

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 the tribes power to hear matters regarding right-of-ways over allotted land that is held in trust by the United States. Therefore, absent the applicability of one of the *Montana* exceptions, the jurisdiction of the Tribal Court does not extend to the activities of 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 to be included 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 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 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 as 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 the tribes. *See Kodiak*, 922 F.3d at 1136. Under such circumstances, neither tribal regulatory nor adjudicative authority is in need of preserving because it does not exist. *See id*. Therefore, the *Montana* rule, not its exceptions, applies here and the Tribal Court does not have jurisdiction over WPX.

B. WPX will suffer irreparable harm absent a preliminary injunction.

The basis for injunctive relief in the federal courts is irreparable harm and inadequacy of legal remedies. *Bandag, Inc. v. Jack's Tire & Oil, Inc.*, 190 F.3d 924, 926 (8th Cir. 1999). It is well established that when there is an adequate remedy at law, a preliminary injunction is not appropriate. *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc*., 871 F.2d 734, 738 (8th Cir. 1989). The Eighth Circuit Court of Appeals has explained that a district court can presume irreparable harm if the movant is likely to succeed on the merits. *Calvin Klein Cosmetics Corp.*, 815 F.2d at 505. Other courts have concluded a movant would suffer irreparable harm if forced to

litigate in a tribal court that likely does not have jurisdiction. *See Crowe & Dunleavy, P.C. v. Stidham*, 640 F.3d 1140, 1157-58 (10th Cir. 2011) (finding the movant had demonstrated irreparable harm because the tribal court likely lacked jurisdiction and there would be no realistic way to recoup fees expended in tribal court).

As explained in this brief, the Tribal Court does not have jurisdiction to hear the Fettigs' lawsuit. Therefore, WPX would suffer irreparable harm if forced to expend further time, effort, and money in Tribal Court with no realistic way to recoup the expenditure of time, effort, and money of such litigation. This *Dataphase* factor weighs in favor of granting a preliminary injunction.

C. A balancing of the harms weighs in favor of a preliminary injunction.

The balance of harm factor requires consideration of the harm to the movant and the injury the injunction's issuance would inflict on other interested parties. *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 929 (8th Cir. 1994). While the irreparable harm factor focuses on the harm or potential harm to the plaintiff, the balance of harm factor analysis examines the harm to all parties to the dispute and other interested parties, including the public. *Dataphase*, 640 F.2d at 114.

If the Court does not issue a preliminary injunction preventing the lawsuit from proceeding in Tribal Court, WPX would continue to defend against the lawsuit in a court which lacks jurisdiction and WPX would have to expend the effort, time, and money necessary to do so. WPX has no realistic chance of ever recouping those resources. On the other hand, even though Fettigs would no longer be able to proceed in Tribal Court if a preliminary injunction is ordered, their proper forum is a BIA administrative proceeding. *See Chase v. Andeavor Logistics, L.P.*, 2020 WL 6231891 (D.N.D. Apr. 6, 2020) (requiring parties of BIA right-of-ways to exhaust their

administrative remedies available in Part 169 and 25 C.F.R. Part 2). The BIA is equipped with the ability to investigate right-of-way violations, facilitate resolution, and make determinations that could ultimately result in termination of a right-of-way. *See* 25 C.F.R. §§ 169.401-405. And the BIA's decisions may be appealed under a process set out in 25 C.F.R. Part 2. Therefore, Fettigs' have an avenue of redress besides the Tribal Court.

When the possible harms to the parties are weighed, the scale tips decidedly in favor of granting a preliminary injunction.

D. A preliminary injunction would serve the public interest.

Preliminary injunctive relief is only proper if the moving party establishes that entry of an injunction would serve the public interest. *Dataphase*, 640 F.2d at 113. Here, public interest is not served by permitting Fettigs to circumvent federal law by suing WPX in Tribal Court and allowing the continued exertion of jurisdiction by the Tribal Court's when it has none. *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). Furthermore, the continuation of the Fettigs' lawsuit in Tribal Court may result in decisions that conflict with federal law. Therefore, this final *Dataphase* factor weighs in favor of a preliminary injunction.

IV. CONCLUSION

All *Dataphase* factors support a preliminary injunction, with the most important factor being the substantial likelihood WPX will succeed on the merits of this federal case. Indeed, the Tribal Court does not have jurisdiction for two independent reasons: (1) the Tribal Court has no congressional authority to adjudicate disputes over right-of-ways that are created and controlled

by federal law, and (2) WPX is not subject to the Tribal Court's jurisdiction because WPX is a non-Indian entity.

Therefore, WPX requests an order that enjoins Fettigs from further prosecuting their lawsuit in the Tribal Court, and that also enjoins the Tribal Court from exercising jurisdiction over Fettigs' lawsuit and over WPX.

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By: */s/ Robin Wade Forward*

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