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

WPX ENERGY WILLISTON LLC, Plaintiff, vs. GABRIEL FETTIG, et. al, Defendants.	TRIBAL DEFENDANTS OMNIBUS BRIEF: REPLY IN SUPPORT OF THEIR MOTION TO DISMISS AND RESPONSE IN OPPOSITION TO WPX MOTION FOR PRELIMINARY INJUNCTION Case No. 1:21-cv-00145-CRH

The Three Affiliated Tribes District Court and the Honorable B.J. Jones (the "Tribal Defendants") file this omnibus brief[1] as their Reply in support of their Motion to Dismiss and as a Response in opposition to the WPX Energy Williston, LLC ("WPX") Motion for Preliminary Injunction.

STANDARD

The standards applying to the Tribal Defendants' Rule 12(b)(1) Motion to Dismiss are well-established and the parties do not dispute them. WPX holds the burden to show that subject matter jurisdiction exists. *Aly v. Hanzada for Imp. & Exp. Co., LTD*, 864 F.3d 844, 847 (8th Cir.

[1] Combination of the briefs is appropriate as the issues argued in the motion to dismiss are dispositive and directly impact the preliminary injunction matter. If this Court finds in favor of the Tribal Defendants on any of the dismissal arguments, the Motion for Preliminary Injunction is moot.

2017). Documents and evidence beyond the pleadings are available to this Court to render a decision. *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990).

As to WPX's Motion for Preliminary Injunction, "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008). The burden for establishing "the propriety of an injunction is on the movant." *Roudachevski v. All-Am. Care Ctrs., Inc.*, 648 F.3d 701, 705 (8th Cir. 2011). The burden of proof is even heavier when granting the preliminary injunction will in effect give the movant substantially the relief it would obtain after a trial on the merits. *Calvin Klein Cosmetics Corp. v. Lenox Lab'ys, Inc.*, 815 F.2d 500, 503 (8th Cir. 1987).

The Tribal Defendants agree with WPX that the four *Dataphase* factors apply to the Court's decision on whether or not to grant this extraordinary relief; however, "[n]o single factor is determinative." *Allied World Specialty Ins. Co. v. Abat Lerew Constr., L.L.C.*, No. 8:16CV545, 2017 U.S. Dist. LEXIS 61794, at *6 (D. Neb. Apr. 24, 2017) (citing *Adam-Mellang v. Apt. Search, Inc.*, 96 F.3d 297, 299 (8th Cir. 1996)). Furthermore, failing to show irreparable harm is, by itself, sufficient to deny a preliminary injunction. *Id.*

ARGUMENT

WPX's Reply Brief in opposition to the Motion to Dismiss (Dkt. 25) and Brief in Support of Motion for Preliminary Injunction (Dkt. 27) fall short on their burden to show that this Court holds subject matter jurisdiction. The filings fail to overcome the hurdles of exhaustion of tribal remedies, sovereign immunity, and this Court's general lack of jurisdiction. Instead, WPX unpersuasively attempts to analogize *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019) and its starkly different regulatory and factual situation to this matter. The regulations,

statutory schemes, and facts at issue in *Kodiak* differ greatly from those at hand here. Unlike *Kodiak* the regulations, statutes, and facts here all support the exercise of tribal court jurisdiction, the exhaustion of tribal remedies, and the immunity of the Tribal Defendants.

I. The Tribal Defendants Succeed On Each Ground Presented In Its Motion To Dismiss

a. WPX Failed To Exhaust Tribal Remedies

WPX's arguments surrounding exhaustion of tribal remedies lean heavily on the erroneous assertion that the tribal court lacks jurisdiction over this dispute. For the reasons discussed below, the tribal court clearly holds jurisdiction in this case. Moreover, WPX's argument that the tribal court lacks jurisdiction must be presented to and resolved by the tribal court system in the first instance before a federal court may entertain such argument. As such, exhaustion of tribal remedies is required before WPX can proceed to federal court.

Courts require exhaustion of tribal court remedies, subject to certain exceptions. *See* Brief in Support of Motion to Dismiss, at 6-7 (Dkt. 20); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985) (exhaustion is not required "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction") (internal quotations and citations omitted). None of these exceptions applies here.

WPX's argument that tribal court exhaustion serves no purpose but delay is unfounded. Rather, completion of the pending tribal court proceedings will provide the valuable input that tribal exhaustion requirements are intended to create. Tribal court exhaustion here is necessary to develop the factual record and allow the "tribal court to explain to the parties the precise basis for

accepting jurisdiction, and will provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Rsrv.*, 27 F.3d 1294, 1300 (8th Cir. 1994) (quoting *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856-57). As such, WPX must exhaust tribal remedies before proceeding in federal court.

Even if this court has some doubt as to whether the tribal court holds jurisdiction, absent a treaty provision or express statement from Congress, it should presume jurisdiction lies with the tribal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). This court must "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction . . . ." *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856. The question of jurisdiction is still pending before the Tribe's Supreme Court. *See* Brief in Support of Motion to Dismiss, at 2-3. This Court should refrain from weighing in on the question of jurisdiction until WPX has exhausted its tribal court remedies.

b. The Tribal Defendants Are Immune From Suit.

WPX does not directly address the issue of immunity but instead asserts that a lack of jurisdiction abrogates the Tribe's sovereign immunity. As shown below, in this case the Tribal Defendants in fact properly exercised jurisdiction pursuant to tribal law and *Montana v. United States*, 450 U.S. 544, 565 (1981). The proper exercise of tribal court jurisdiction here supports the Court granting the Tribal Defendants' Motion to Dismiss on both sovereign immunity and tribal exhaustion grounds. Unless the Tribal Defendants acted in the clear absence of jurisdictional authority, their sovereign immunity should stand. *Stump v. Sparkman*, 435 U.S. 349, 356-57

(1978).[2] As set forth below, WPX has failed to show the Tribal Defendants acted in the clear absence of jurisdiction in this case.

Further, WPX uses an incorrect standard to suggest that tribal judges are not immune from suit. WPX relies on *Ex parte Young*, 209 U.S. 123 (1908) and *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014) to support its position that tribal officials are not immune from suits seeking injunctive or declaratory relief where the officials are "responsible for unlawful conduct." *See* WPX Response to Motion to Dismiss, at 5. But that argument is contrary to the law. These cases relate to immunity of government officials broadly, rather than the specific question of judicial immunity. In *Stump*, the Supreme Court applied a "clear absence of all jurisdiction" standard in determining whether a state judge was immune from suit. The Supreme Court reasoned "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction." *Id.* (internal quotations omitted). Moreover, "[a] judge does not lose immunity for all judicial acts taken in excess of jurisdiction." *Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003). Tribal court judges are "entitled to the same absolute judicial immunity that shields state and federal court judges." *Id.* at 790.

The broad grant of jurisdictional authority under Three Affiliated Tribes Law and Order Code, Tit. I, Ch. 1, § 3 clearly empowers the tribal court to hear disputes regarding agreements involving a non-Indian corporation's use of tribal member trust land located within the boundaries

[2] Even if this court does not affirmatively hold the tribal court had jurisdiction over the right-of-way dispute, it should still grant the Tribal Defendants' Motion to Dismiss. This court is not required to find that the tribal court properly exercise jurisdiction in order to determine that the Tribal Defendants are immune from suit. *Penn v. United States*, 335 F.3d 786, 790 (8th Cir. 2003).

of the reservation. This statutory authority cannot be reconciled with WPX's position that the Tribal Defendants acted in the clear absence of all jurisdiction. Instead, it proves the exact opposite. *See generally Stump*, 435 U.S. at 357-58. Even absent this express statutory authority, the consensual relationships exception articulated under *Montana* clearly provides the tribal court with a well-established and clear basis for asserting jurisdiction over this dispute arising out of a right-of-way agreement for WPX's use of tribal member trust land.

c. The Tribal Courts Hold Jurisdiction Over This Matter

WPX asks this Court to ignore the straightforward language in the governing regulations and the Right of Way ("ROW") agreement between WPX and the Fettigs which provide for tribal jurisdiction. Instead of applying that plain language, WPX invites this Court to adopt a tortured reading of the *Kodiak* case. The Tribal Defendants spent significant time in their initial briefing exploring the stark difference between *Kodiak* and this matter. (Dkt. 20.) Simply put, this Court need not look beyond the language in and the regulations and the ROW to determine that Tribal Court holds jurisdiction here.

i. The Relevant Federal Regulations And The Right Of Way Provide For Tribal Jurisdiction

WPX asserts that the Tribal Court lacks jurisdiction over disputes involving rights-of-way on tribal land because 25 U.S.C. § 323 and the regulations at 25 C.F.R. Part 169 only provide the federal government with that authority. But nothing in 25 U.S.C. § 323 relates to enforcement or adjudication of rights-of-way and merely empowers the Secretary of the Interior to grant a right-of-way over tribal land. Moreover, the regulations at 25 C.F.R. Part 169 suggest that tribes do have jurisdiction over right-of-way disputes. The present matter involves the specific issue of enforcing a negotiated term in a right-of-way agreement, and therefore, 25 C.F.R. § 169.403 guides the

Court's analysis of jurisdiction. Under the express terms of 25 C.F.R. § 169.403(e), right-of-way grants "may provide that violations will be addressed by a tribe, and that disputes will be resolved by a tribal court [and] any other court of competent jurisdiction . . . ." WPX does nothing to refute this express reference to tribal jurisdiction in 25 C.F.R. § 169.403(e) and instead confusingly argues that the scheme under 25 C.F.R. Part 169 requires federal jurisdiction over cases involving enforcement of right-of-way grants. A plain reading of the language contained in 25 C.F.R. § 169.403(e) makes WPX's assertion of federal jurisdiction untenable.

Even if this court were to overlook the express grant of jurisdiction in 25 C.F.R. § 169.403(e), the regulatory scheme created under 25 C.F.R. Part 169 expressly preserves tribal jurisdiction over activities carried out on Indian lands within a right-of-way. Under 25 C.F.R. § 169.10 "[t]he Secretary's grant of a grant of a right-of-way . . . does not diminish to any extent" the tribe's "jurisdiction over the land subject to, and any person or activity within the right of way." The Secretary's grant also does not diminish the tribe's "inherent sovereign power to exercise civil jurisdiction over non-members on Indian land . . . ." *Id.*

WPX also erroneously asserts that the negotiated remedies in the right-of-way at issue failed to provide "the manner in which those remedies may be exercised" pursuant to 25 C.F.R. § 169.403(b) and that the "consent documents do not contain any such specification, nor do any other right-of-way documents." WPX Response to Motion to Dismiss, at 3. But section 4 of the right-of-way grant incorporates the provisions of 25 C.F.R. § 169.10 expressly reserving tribal jurisdiction. Doc. No. 1-1.

Additionally, pursuant to 25 C.F..R § 169.125 all right-of-way grants contain language stating that "[t]he tribe maintains its existing jurisdiction over the land, activities, and

persons within the right-of-way . . . .” WPX adopts an interpretation of 25 C.F.R. Part 169 that ignores these plain statements preserving tribal jurisdiction over activities carried out in connection with rights-of-way on tribal land. WPX’s interpretation also ignores the underlying intent of 25 C.F.R. Part 169’s regulatory scheme, which reflects a policy of “defer[ring] to the maximum extent possible” to Indian landowners regarding use of their land. *See* 25 C.F.R. § 169.1.

Despite WPX’s assertions to the contrary, the regulations in *Kodiak* are clearly distinguishable from those contained in 25 C.F.R. Part 169. The regulations in *Kodiak* required that agreements conform to prescribed lease forms “which may only be changed with the Secretary’s approval.” 932 F.3d at 1136. Here, Indian landowners are free to negotiate provisions for inclusion in the right-of-way grant pursuant to 25 C.F.R. 169.403. In *Kodiak*, the “[f]ederal regulations control[led] nearly every aspect of the leasing process . . . .” 932 F.3d at 1136. Here, the government merely approves a right-of-way grant that the parties negotiate and “defer[s] to the maximum extent possible to Indian landowner decisions regarding their land.” 25 C.F.R. §169.1.

ii. Unlike *Kodiak*, No Federal Law Preempts Tribal Jurisdiction

At issue in the present matter is jurisdiction over breach of a smoking ban included as a negotiated term in a ROW agreement between Tribal members and a non-Indian corporation. While federal law guides the negotiation process, it does not have any bearing on how the smoking ban is analyzed or enforced. *See* Brief in Support of Motion to Dismiss, at 13. (Dkt 20.) That this case involves an agreement guided by federal regulations does not negate Tribal Court jurisdiction. Indeed, “unconditional access to the federal forum would place it in direct competition with tribal courts, thereby impairing the latter’s authority over reservation affairs.” *Iowa Mut. Ins. Co.*, 480 U.S. at 16.

In *Kodiak*, part of the court's analysis supporting its holding for federal jurisdiction turned on the court's finding that the federal oil and gas leasing scheme was so extensive that any tribal contract law relied on to confer tribal jurisdiction "would be preempted." 932 F.3d at 1137. The court found that the federal government "exhaustively" controlled the oil and gas leasing and royalty process such that "Congress . . . left no room for tribal law to supplement [the] comprehensive regulatory scheme." *Id.* The same cannot be said of the regulatory scheme at issue here. To the contrary, the regulations at 25 C.F.R. Part 169 are designed to defer to individual Indian landowners, 25 C.F.R. §169.1, and provide for tribal jurisdiction in resolving violations of negotiated terms. *See* 25 C.F.R. 169.403(e). Ironically, if this Court applied *Kodiak* rather than the clear language of 25 C.F.R. Part 169, this Court would effectively rewrite the federal regulations—which is wholly inconsistent with *Kodiak's* determination that federal law preempted other law. The regulations at 25 C.F.R. Part 169 are clearly distinguishable from those at issue in *Kodiak*.

For the reasons articulated above and in the Tribal Defendants' brief in support of their motion to dismiss, WPX's reliance on *Kodiak* is misplaced. This court should not apply *Kodiak* to the facts of this case.

iii. WPX Entered Into A Consensual Relationship With The Tribe And Consented To Its Jurisdiction

That the right-of-way agreement between WPX and the Indian landowners clearly falls under the first of *Montana*'s exceptions further supports Tribal Court jurisdiction over this dispute. Under *Montana*'s first exception tribes have jurisdiction to regulate "nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. The right-of-way agreement at issue here between tribal members and WPX clearly falls within the meaning of a "commercial

dealing, contract[] . . . or other arrangement" between "nonmembers" and "the tribe or its members." *Id.* That the BIA signed off on the right-of-way grant does not alter the fact that tribal members bargained with WPX in formulating the terms of the right-of-way agreement and formed a consensual relationship to satisfy *Montana*'s first exception.

WPX argues that the law requires showing not only that a consensual relationship was formed, but also that the consensual relationship "implicate[s] the tribe's sovereign interests." *See* WPX Response to Three Affiliated Tribes District Court and Honorable B.J. Jones' Motion to Dismiss, at 8-9, [hereinafter WPX Response to Motion to Dismiss]. (Dkt. 25.) But this same argument was rejected in *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), *aff'd sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016). In *Dolgencorp*, the Fifth Circuit declined to interpret *Plains Commerce* as requiring "an additional showing that one specific relationship, in itself, 'intrude[s] on the internal relations of the tribe or threaten[s] [tribal] self-rule.'" *Dolgencorp, Inc.*, 746 F.3d at 175 (quoting *Plains Commerce Bank*, 554 U.S. at 334). Instead, Plains Commerce only requires a more general finding. *See Dolgencorp, Inc.*, 746 F.3d at 175 ("the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government. Nothing in *Plains Commerce* requires a focus on the highly specific rather than the general.") Here, the Tribe's ability to ensure activities on allotted trust lands are conducted in accordance with agreed-to-terms under a right-of-way grant is also central to the Tribe's exercise of self-government. That the term at the center of the dispute is one prohibiting smoking on the property with implications for the health and welfare of tribal members further supports tribal jurisdiction.

II. The Preliminary Injunction Is Moot And All The Factors Weigh In Favor Of The Tribal Defendants

This Court should determine that WPX's Motion for Preliminary Injunction is moot. The requirement that WPX exhaust its Tribal Court remedies and the sovereign immunity of the Tribal Defendants require the Court to grant the Tribal Defendants' Rule 12(b)(1) Motion to Dismiss, which would moot the Preliminary Injunction Motion. However, even if this Court did reach the preliminary injunction the four *Dataphase* factors still require that the preliminary injunction be denied.

a. WPX's Motion For Preliminary Injunction Is Moot As This Court Lacks Jurisdiction

A decision upon the Tribal Defendants' Motion to Dismiss must occur before a decision on the Motion for Preliminary Injunction. Of course, before a court can pass judgment on any matter it must first be assured that it has jurisdiction over the matter. A court's "subject matter jurisdiction defines its power to hear cases." *Lightfoot v. Cendant Mortg. Corp.,* 137 S. Ct. 553, 560 (2017). It further "represents the extent to which a court can rule on [the matters before it]." *Carlsbad Tech Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009). A "judgment is void if the rendering court lacked jurisdiction." *Baldwin v. Credit Based Asset Servicing & Securitization*, 516 F.3d 734, 737 (8th Cir. 2008). Accordingly, "[b]efore [a] Court may grant a preliminary injunction, the Court must be satisfied it has jurisdiction over the matter. *Halcón Operating Co. v. Rez Rock N Water, L.L.C.*, No. 1:17-cv-202, 2018 U.S. Dist. LEXIS 218645, at *9 (D.N.D. July 9, 2018). If a court lacks jurisdiction, as it does here, dismissal is necessary and a Motion for Preliminary Injunction is moot.

b. WPX Will Not Suffer Irreparable Harm

Requiring WPX to complete the litigation currently pending in Tribal Court does not constitute irreparable harm. To the contrary, that process strengthens Tribal sovereignty and Tribal self-rule. Denying the preliminary injunction and requiring Tribal Court litigation will help this Court and will further the federal policies of tribal self-determination and self-government. This Court should deny the preliminary injunction and allow the tribal litigation to continue.

The Eighth Circuit has found that adhering to tribal exhaustion and respecting tribal sovereignty by allowing tribal litigation to continue does not constitute irreparable harm. In *Dish Network Serv. L.L.C. v. Laducer*, the appellate court found it "doubtful" that the plaintiff would "suffer irreparable injury." 725 F.3d 877, 882 (8th Cir. 2013) (citing *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996)). The *Dish Network* court also rejected the application of *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011), another case upon which WPX depends. The Eighth Circuit rejected application of *Crowe* because "that precedent arose in very different circumstances" and "sovereign immunity would have prevented the plaintiffs from recovering fees paid in the course of litigation." *Id.* Such is not the case here. If WPX continues to litigate against the Fettigs in tribal court it can recover fees from them. The Fettigs are not protected by sovereign immunity as the plaintiffs were in *Crowe*.

The continuation and ultimate resolution of the Tribal Court litigation will benefit the parties and this Court. The exhaustion of tribal remedies allows for the building of a factual record and the generation of a decision regarding jurisdiction which this Court can rely upon. Tribal exhaustion allows a tribal court to lend its expertise to this Court. The use of factual records and the lending of experience is of benefit to all parties. *Nguyen v. Gustafson*, No. 18-522 (SRN/KMM), 2018 U.S. Dist. LEXIS 46079, at *17 (D. Minn. Mar. 21, 2018).

c. The Balance of Harms And Public Interest Weigh In Favor Of The Tribal Defendants

The final two factors can be discussed at the same time as they are intertwined for this specific matter. A preliminary injunction would inflict significant harm upon the Tribe – who is not a party. Granting the injunction would diminish Tribal sovereignty, the power of the Tribe and its members to be ruled by their own laws, and the federal policy of supporting Tribal independence. Abrogating Tribal exhaustion runs contrary to the "policy of supporting tribal self-government and self-determination". *Dish Network*, 725 F.3d at 882.

The public interest is better served by requiring Tribal Court exhaustion. Depriving the Tribal Court of jurisdiction would only create confusion for the public on when and where Tribal Court exhaustion must occur. As argued in the Motion to Dismiss briefing, the necessity of exhaustion of Tribal Court remedies in this matter is quite clear. A decision abrogating tribal exhaustion is both unnecessary and confusing to the public. As such, this Court should require the exhaustion of remedies.

Respectfully submitted this 29th day of October, 2021.

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