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 REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff WPX Energy Williston, LLC (WPX), submits this reply in support of its motion for preliminary injunction (Doc. No. 26) against Defendants Gabriel Fettig, Howard Fettig, Charles Fettig, and Morgan Fettig (Fettigs), and Defendants Honorable B.J. Jones and the Three Affiliated Tribes District Court (collectively, Tribal Defendants).

I. INTRODUCTION

WPX is asking the Court for a preliminary injunction that halts a lawsuit brought by Fettigs against WPX in tribal court. The tribal court erroneously determined it has jurisdiction to hear the lawsuit, which concerns right-of-ways granted to WPX by the Bureau of Indian Affairs (BIA) for oil and gas operations on Fettigs' allotted land. The Tribal Defendants oppose WPX's motion, arguing that (1) WPX failed to exhaust tribal remedies, and (2) sovereign immunity shields the Tribal Defendants. Fettigs also oppose the motion, joining the Tribal Defendants' arguments and adding a third: the tribal court has jurisdiction because Fettigs' lawsuit is about breaches of "side agreements" to the right-of-ways and not violations of the right-of-ways.

When considering the merits of these arguments and WPX's motion, the determinative question is whether the tribal court has jurisdiction. The answer is 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) under *Montana*, WPX is not subject to the tribal court's jurisdiction. Therefore, the Tribal Defendants and Fettigs' arguments are invalid and WPX's motion should be granted.

II. ARGUMENT

A. The tribal court does not have jurisdiction to hear the right-of-way dispute, and does not have jurisdiction over WPX.

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). 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 Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1134-35 (8th Cir. 2019). Congress has not expressly delegated authority to the tribes to hear matters regarding right-of-ways over allotted land held in trust by the federal government. *See* 25 U.S.C. §§ 323-28. Because Fettigs' lawsuit is based on right-of-way restrictions, conditions, and negotiated remedies that arise exclusively in the context of federal law, Fettigs' claims are federal in nature and do not stem from tribal law.

Furthermore, in *Montana,* the Supreme Court articulated the rule that "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. There are two exceptions to the rule, and Defendants are only arguing for the application of one of them. Doc. No. 38, pg 10. That exception is described as those situations

where tribes 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." *Montana*, 450 U.S. at 565-66. The 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. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 335 (2008).

The Defendants believe the second element of the exception—implication of the tribe's sovereign interests—is met because "ensuring activities on allotted trust lands are conducted in accordance with agreed-to-terms under a right-of-way grant is central to the Tribe's exercise of self-government." Doc. No. 38, pg. 10. However, 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, Congress has never expanded this limited authority to include the ability to grant, regulate, or adjudicate the right-of-ways. *See* 25 U.S.C. §§ 323-28. The regulation of such right-of-ways lies entirely with the federal government. *See* 25 C.F.R. Part 169. Because neither the tribe's legislative nor adjudicative authority over the right-of-ways exists, it is axiomatic that the tribe's internal relations and self-rule are not threatened. Therefore, the *Montana* rule, not its exceptions, applies here and the tribal court does not have jurisdiction over WPX.

1. The BIA regulations and right-of-way terms do not give the tribal court jurisdiction.

The Defendants argue the tribal court derives jurisdiction from BIA regulations and point specifically to 25 C.F.R. § 169.403. Doc. No. 38, pgs. 6, 7; Doc No. 43, pg. 4. Here is the pertinent part of that regulation:

> (e) 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, any other court of competent jurisdiction, or by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing actions or proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

25 C.F.R. § 169.403(e) (emphasis added).

The Defendants misapprehend this regulation. It does not expressly grant tribes the authority to adjudicate right-of-way disputes; instead, the regulation indicates the BIA, as a part of a right-of-way grant, may allow violations to be resolved by a tribal court. Put another way, § 169.403(e) does not give jurisdiction directly to tribes, but rather it creates the option for the BIA to allow a tribe to hear a dispute. No part of the right-of-ways that were granted to WPX by the BIA give jurisdiction to the tribe or otherwise set out that disputes are to be heard by the tribal court. *See* Doc. Nos. 1-1, 1-2, 1-3, 1 4, 23-1. Nor do any BIA regulations. *See 25 C.F.R. Part 169*. And even if they did, the unilateral expansion of tribal jurisdiction by the BIA would be of doubtful validity because its origin would not be Congress. *See Montana*, 450 U.S. at 564 (1981) (referring to *congressional* delegation of power when defining limits of tribes' jurisdiction).

In furtherance of their argument, Defendants correctly point out the right-of-ways have a clause that reserves the tribe's jurisdiction, but they insinuate the clause combines with BIA regulations to become something more than a reservation, and result in tribal jurisdiction over this lawsuit. *See* Doc. No. 38, pgs. 7, 8. Here is the clause:

> **RESERVATION OF JURISDICTION.** (25 CFR 169.10, 169.125) The Tribe maintains its existing jurisdiction over the land, activities, and persons 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 within the right-of-way, as if there were no grant of 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 under 18 U.S.C. 1151.

See, e.g., Doc. No. 24-2, pg. 18 (emphasis added).

This clause does not endow the tribal court with the ability to hear the dispute between WPX and Fettigs. Instead, the language of the clause merely indicates a right-of-way grant is not to be construed as limiting or shrinking the tribe's *existing* jurisdiction. And, as WPX explained earlier, the tribe's existing jurisdiction does not encompass this case.

2. The right-of-ways encompass the side agreements and the smoking ban.

Separate from the Tribal Defendants, Fettigs argue each of the right-of-ways granted to WPX is segmented into three parts that are legally separate—right-of-ways, consents, and side agreements—and that the side agreements containing the smoking prohibition at issue are subject to tribal jurisdiction. Doc. Nos. 42, 43, 24-9. Their argument conveniently ignores the indisputable fact that some of the side agreements and consents are physically combined into one document titled "SIDE LETTER AGREEMENT CONSENT OF OWNERS FOR GRANT OF RIGHT-OF-WAY." *See, e.g.*, Doc. No. 24-2, pg. 29. Moreover, for each right-of-way, the terms of the grant are encompassed by cross-referenced, and sometimes combined, documents that may have been executed separately but represent one transaction. Indeed, the grants contain language that illustrates the side agreements are not stand-alone instruments:

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

See, e.g., Doc No. 24-2, pg. 20. Fettigs do not dispute this clause pertains to the side agreements and consents, nor do Fettigs assert the clause is invalid or is otherwise not binding. *See* Doc. Nos.

42, 43, 24-9. They would be hard pressed to do so because the clause is directly linked to the side agreements, as shown by the following language in the side agreements:

> **Purpose of Side Letter Agreement:** To outline and define the additional terms and conditions for which Owner grants his permission for WPX Energy to construct [well pads, pipelines, fiber optics water lines, et cetera for each allotment were inserted here].

See, e.g., Doc No. 24-2, pg. 29 (emphasis added). This conforms with BIA regulations. *See* 25 C.F.R. § 169.403 (Indian landowners and grantees may negotiate remedies).

The side agreements are incorporated as additional terms of the right-of-ways and all the documents are considered together as one instrument. "When a writing refers to another document, that other document, or the portion to which reference is made, becomes constructively a part of the writing, and in that respect the two form a single instrument. The incorporated matter is to be interpreted as part of the writing." 11 *Williston on Contracts* § 30:25 (4th ed.); *see also Halbach v. Great-West Life & Annuity Ins. Co.*, 561 F.3d 872, 876 (8th Cir. 2009) (reciting the rule and citing Williston). Courts have long recognized that a contract may consist of more than one instrument. *See Dakota Gasification Co. v. Natural Gas Pipeline Co*., 964 F.2d 732, 734 (8th Cir. 1992). Where multiple agreements "represent successive steps which were taken to accomplish a single purpose," they should be read together.[1] *Id*.

Here, not only do the BIA's grants incorporate the terms of the side agreements, but they represent successive steps correlated with the BIA's regulations. *See, e.g.*, 25 C.F.R. § 169.107 ("The consent document may impose restrictions or conditions; any restrictions or conditions

[1] Fettigs point out the side agreements were signed before the right-of-way grants were issued, but this fact only reinforces that the side agreements were part of the succession of steps necessary for WPX to obtain the grants. The BIA will not grant a right-of-way unless the allotment owner has first given consent, and "negotiated remedies" in side agreements are established simultaneous with the consent. Therefore, the logical progression of events will result in consents and side agreements that predate grants. *See* 25 U.S.C. § 324 (requiring consent) and 25 C.F.R. §§ 169.106-169.109 (consent process).

automatically become conditions and restrictions in the grant"). Therefore, each respective group of documents form one instrument—a BIA right-of-way—and because the right-of-ways in this case are exclusively the domain of the federal government, the tribal court does not have jurisdiction.

B. WPX is not required to exhaust tribal remedies.

Exhaustion of tribal remedies before challenging tribal court jurisdiction in federal court is required, subject to exceptions. *Kodiak*, 932 F.3d at 1133. Recognizing a link between exhaustion of tribal remedies and tribal jurisdiction, the Supreme Court created an exception to the exhaustion requirement, stating: "When . . . it is plain that no federal grant provides for tribal governance of nonmembers conduct on land covered by *Montana*'s main rule . . . the otherwise applicable exhaustion requirement, must give way, for it would serve no purpose other than delay." *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n. 14 (1997).

The Defendants assert that WPX is not excepted from the exhaustion requirement because "WPX's argument that tribal court exhaustion serves no purpose but delay is unfounded." Doc. No. 38 at pg. 3. The fundamental flaw in this argument is that exhaustion is pointless in the clear absence of tribal jurisdiction. *See id*. As explained earlier, the tribe's jurisdiction does not encompass this case. Therefore, WPX is not required to finish its tribal appeal or try the case in tribal court before pursuing federal injunctive relief.

C. Tribal immunity does not apply.

Indian tribes may not be sued without 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). But tribal immunity does not bar a suit for injunctive relief against individuals, including tribal officers, who are responsible for unlawful conduct. *Michigan v. Bay*

Mills Indian Cmty., 572 U.S. 782, 796 (2014). Because the Tribal Defendants exceeded the scope of lawful authority regarding jurisdiction, they do not have immunity from federal injunctive relief.

In opposing WPX's motion, the Tribal Defendants contend that "WPX uses an incorrect standard to suggest that tribal judges are not immune from suit." Doc. No. 38, pg. 5. For support, the Tribal Defendants cite a money damages case, *Stump v. Sparkman*, 435 U.S. 349 (1978), and hang their hat on this statement: "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*.' " *Stump*, 435 U.S. at 356-57 (emphasis added) (quoting *Bradley v. Fisher*, 80 U.S. 335 (1871)). The Tribal Defendants assert that because the tribe's statutes grant general jurisdiction to the tribal court, there is no "clear absence of all jurisdiction" and thus immunity survives. Doc. No. 38, pg. 6. The Tribal Defendants failed to explain how this argument squares with *Ex parte Young*, 209 U.S. 123 (1908) and *Bay Mills*, and they omitted the following clarification that the Supreme Court gave in *Stump*:

> [T]he Court [previously] illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.

Stump, 435 U.S. at 357 n. 7. The Tribal Defendants are analogous to the probate judge who only has jurisdiction over wills and estates in that the Tribal Defendants only have jurisdiction as delineated by Congress. By exercising jurisdiction over Fettigs' lawsuit, the Tribal Defendants

have gone beyond the bounds of what Congress has granted, and therefore acted "in the clear absence of jurisdiction" and do not have immunity in this case.

III. CONCLUSION

All factors set forth in *Dataphase Systems, Inc., v. C L Systems, Inc*., 640 F.2d 109, 114 (8th Cir. 1981) support a preliminary injunction that prevents Fettigs from further prosecuting their lawsuit in the tribal court, and that also prevents the Tribal Defendants from further exercising jurisdiction.

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By: */Robin Wade Forward*

Robin Wade Forward (ID #05324)
STINSON LLP
424 South Third Street, Suite 206
Bismarck, ND 58504
rob.forward@stinson.com
Telephone: 701.221.8603
Facsimile: 701.221.8601

ATTORNEYS FOR PLAINTIFF
WPX ENERGY WILLISTON, LLC