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, and the Honorable B.J. Jones, in his capacity as Associate Judge of the Three Affiliated Tribes District Court, Defendants.	Case No. 1:24-cv-00021-DLH-CRH **WPX'S BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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

I. INTRODUCTION

WPX moves the Court for a preliminary injunction to stop a tribal court lawsuit that was commenced by Fettigs against WPX for alleged violations of federal right-of-ways on allotments located on the Fort Berthold Indian Reservation. The tribal court and tribal appeals court determined the tribal court has jurisdiction to hear the dispute, but their determination is erroneous under *Montana v. United States* and its progeny because WPX is a non-Indian entity and no exceptions apply.

II. PROCEDURAL HISTORY

In June 2020, 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. The case is *Gabriel Fettig, et al. v. WPX Energy*, Case No. CV-2020-0179; a copy of Fettigs' amended tribal complaint accompanies this brief as Exhibit A. WPX moved to dismiss the lawsuit for lack of jurisdiction but the Honorable B.J. Jones, acting on behalf of the tribal court, determined the tribal court had jurisdiction to hear the dispute and denied WPX's motion. Thereafter, WPX filed a notice of appeal with the MHA Nation Supreme Court.

Prior to the tribal appeal being decided, WPX also commenced an action in this Court, Case No. 1:21-cv-00145, seeking injunctive and declaratory relief from the tribal court's exercise of jurisdiction over WPX. The tribal court moved to dismiss the federal case on the grounds that WPX failed to exhaust its tribal court remedies, that tribal sovereign immunity applied, and that the tribal court properly exercised jurisdiction. Fettigs joined the motion. This Court denied the motion to dismiss, and granted WPX's motion for a preliminary injunction.

The tribal court appealed the preliminary injunction to the Court of Appeals for the Eighth Circuit. On July 3, 2023, the Eighth Circuit vacated the preliminary injunction and remanded with directions to dismiss WPX's complaint without prejudice for failure to exhaust tribal court remedies. *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834, 839 (8th Cir. 2023). In its decision, the Eighth Circuit did not opine on the jurisdictional question, concluding:

> Without venturing a decision on the ultimate jurisdictional issue here, we conclude that the question is not frivolous or directly controlled by *Kodiak*. While right-of-way grants are governed by federal law, *see* 25 U.S.C. §§ 323-328; 25 C.F.R. §§ 169.101, 169.102, 169.107, the dispute here arises from the alleged violation of a condition that was independently negotiated by the parties. The condition in the side letter agreements requires an application of *Montana* in a new context that differs from the scenario presented in *Kodiak*. We therefore apply the ordinary rule that a tribal appellate court should decide jurisdictional issues in the first instance, and either decline to exercise jurisdiction or provide federal courts with the precise basis for any assertion of jurisdiction. We do not signal a view on the better answer, but conclude

> only that WPX Energy must exhaust its tribal court remedies before proceeding with an action in federal court.

Id. at 838-39. Subsequently, this Court dismissed WPX's complaint without prejudice.

On December 22, 2023, the MHA Nation Supreme Court issued a decision that affirmed the Honorable B.J. Jones' determination that the tribal court has jurisdiction over the dispute between WPX and Fettigs, and remanded the case so that tribal litigation could resume. Doc. No. 1-8.

In addition to the federal and tribal court actions, Fettigs filed an administrative complaint against WPX by letter to the BIA dated May 6, 2022, in which Fettigs ask the BIA to cancel the oil and gas leases that correspond to the right-of-ways, issue a cease and desist order, and award monetary damages for violations of the smoking restriction. *See* Doc. No. 1-5. In a decision dated June 15, 2022, the BIA declined to review the Fettigs' administrative complaint on its merits, reasoning that the side agreements, which contain the smoking restriction, are not part of WPX's right-of-ways because the side agreements are not in the BIA's casefiles. *See* Doc. No. 1-6. WPX appealed the BIA's decision, asking the BIA to acknowledge that the conditions and restrictions set out in the side agreements are incorporated into the right-of-ways, and asking the BIA to address Fettigs' complaint on the merits by using the appropriate administrative tools. *See* Doc. No. 1-7. WPX's appeal is still pending. Forward Decl. ¶ 2.

III. MATERIAL FACTS

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.

Fettigs own four trust allotments that were assigned allotment numbers by the BIA and are identified by the names given to the drilling pads located on them, 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.

Under 25 U.S.C. § 324, WPX was required to obtain Fettigs' consent to the right-of-ways, and, as allowed by BIA regulations, Fettigs' consent included additional restrictions, conditions, and remedies negotiated by the Fettigs and WPX. *See* 25 C.F.R. § 169.107; 25 C.F.R. § 169.403; *compare* Compl. ¶ 15, *with* Fettigs' Answer ¶ 4.

Included in the conditions, restrictions, and remedies that Fettigs and WPX negotiated is a smoking restriction on the right-of-way property and a fine for smoking. Here is the pertinent language, which is materially the same for all the right-of-ways:

> 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 ¶ 4.

All conditions, restrictions, and remedies listed in Fettigs' consent documents, including those set out in the previous paragraph, are incorporated into the right-of-ways issued by the BIA to WPX. *See* 25 C.F.R. § 169.125; 25 C.F.R. § 169.403.

The BIA regulation that allowed Fettigs and WPX to negotiate remedies for right-of-way violations provides that those remedies may only be created "so long as the consent also specifies the manner in which those remedies may be exercised by or on behalf of the Indian landowners." 25 C.F.R. § 169.403(b). Fettigs' consent documents do not specify the manner in which any remedies they and WPX negotiated—including the $5,000 smoking fine—may be exercised by Fettigs or on their behalf, nor do any other right-of-way documents in question. *See* Doc. Nos. 1-1, 1-2, 1-3, 1-4.

IV. ARGUMENT

WPX's substantive claims rest upon a determination of whether the tribal court has jurisdiction over WPX and Fettigs' underlying claims. It is well recognized that the question of "[w]hether 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 (2009). Consequently, pursuant to 28 U.S.C. 1331, the Court has original jurisdiction.

In the motion at hand, WPX seeks a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure. 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 terms of right-of-ways granted under federal law, by the federal government, to a non-Indian entity for oil and gas operations on allotted land held in trust by the federal government.

1. Under *Montana,* WPX is not subject to the tribal court's jurisdiction because WPX is a non-Indian entity.

In *Montana v. U.S.,* 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." 450 U.S. 544, 565 (1981). Given their diminished status as sovereigns, "the Indian tribes have lost any 'right of governing every person within their limits except themselves.'" *Id.* (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978). And, "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).

Even so, the Supreme Court recognized that in certain circumstances, regardless of congressional authorization, 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." *Montana,* 450 U.S. at 565-66. These exceptions concern regulation of the activities or conduct. *Plains Commerce Bank*, 554 U.S. at 330. Notably, the exceptions are limited and are not to be construed in a manner that "swallows the rule" or "severely shrink it." *Id.*

Congress has not expressly given tribes the authority to regulate non-members in the context of federal right-of-ways on allotted land held in trust by the United States. *See* 25 U.S.C. §§ 323-28. In addition, tribal courts are not courts of general jurisdiction. *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1134 (8th Cir. 2019). Therefore, absent the applicability of one of the *Montana* exceptions, the jurisdiction of the tribal court here does not extend to WPX. The burden

rests on Fettigs and the tribal court to establish that one of the Montana exceptions applies. *See Plains Commerce Bank*, 554 U.S. at 330.

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

The first *Montana* exception recognizes tribal 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." 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*. A tribe may regulate non-member activities only where the regulation "stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id.* at 336.

Here, WPX arguably has a consensual relationship with Fettigs—albeit one that exists only by virtue of federal statutes and regulations—and so the question is whether WPX's activities arising from the relationship implicate the tribe's sovereign interests. In answering that question, the predominant factor to consider is the federal nature of the relationship—it is founded on right-of-ways granted and administered by the United States for oil and gas development on allotted land the United States holds in trust for Fettigs. The United States is the fee owner of the allotments and Fettigs are the beneficial owners. *See Chase v. Andeavor Logistics, L.P.*, 12 F.4th 864, 876 (8th Cir. 2021). Therefore, the United States' principal and governing role must take center stage

in this analysis. Indeed, federal law governs the acquisition and use of the right-of-ways over the allotments under 25 U.S.C. §§ 323-28. Neither a tribe nor an individual allottee can grant a right-of-way over trust land. *See* 25 U.S.C. § 324; *see also Fettig v. Fox*, 1:19-cv-00096, 2020 WL 9848691, *14 (D.N.D. Nov. 16, 2020) (adopted 2020 WL 9848706). And the regulation of these right-of-ways, which is extensive, is exclusively performed by the United States through the BIA. *See* 25 C.F.R. Part 169. "The BIA's role as trustee is the core of the many protections Congress has provided for these Indian lands." *Chase*, 12 F.4th at 876. "The BIA grants and administers rights-of-way over lands held in trust, and it protects those lands both from those invading without a right-of-way, and from grantees that violate their right-of-way, including holdovers." *Id*. (emphasis added).

Even the consent authority that Congress gave to individual allottees and tribes is not without federal oversight. *See* 25 C.F.R. §§ 169.106-109. Under the BIA's rules, allottees and right-of-way applicants are allowed to negotiate restrictions and remedies for violations and add them to the allottees' written consent documents. 25 C.F.R. § 169.403(b). The smoking ban on WPX's right-of-ways is one such restriction and the $5,000 fine for violations is one such remedy. This restriction and the negotiated remedy 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. §§ 169.107, 169.403. They do not exist by virtue of any tribal law.

Furthermore, the restrictions and remedies Fettigs and WPX negotiated were, by operation of law, incorporated into and became terms of the right-of-way grants. *See* 25 C.F.R. § 169.125(a); 25 C.F.R. § 169.403; *see also WPX Energy Williston, LLC v. Jones*, 72 F.4th 834, 836 (8th Cir. 2023) (stating "the parties may agree to additional 'restrictions or conditions' and 'negotiated remedies' that are incorporated into the grant"). Therefore, the smoking restriction that WPX

allegedly violated and the $5,000 remedy are terms of the federal right-of-way grant, not independent terms of "side agreements" to be analyzed in a context apart from the grant. More to the point, a violation of the terms of a side agreement is, by law, a violation of a right-of-way grant. And **any** violations of a right-of-way grant fall within the purview of the BIA. *See* 25 C.F.R. § 169.401 ("Any . . . violation of the right-of-way grant or right-of-way document, including but not limited to encroachments beyond the defined boundaries, accidental, willful, and/or incidental trespass, unauthorized new construction, changes in use not permitted in the grant, and late or insufficient payment may result in enforcement actions including, but not limited to, cancellation of the grant.").

Under this paradigm, there is no question the legislative and regulatory authority over the right-of-ways lies with the federal government and is outside the control of the tribes. Therefore, tribal regulation of the terms of federal right-of-way grants cannot logically be viewed as necessary for tribal self-government or controlling internal relations. And because a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction, *Strate*, 520 U.S. at 458, the first *Montana* exception does not apply to the tribal court case against WPX.

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 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). *Strate* 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 terms of oil and gas right-of-ways—that 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, which demonstrates the regulation of right-of-ways over allotted trust land is not in the control of the tribes. Under such circumstances, neither tribal regulatory nor adjudicative authority is in need of preserving because it does not exist. WPX's alleged failure to follow the terms of the federal right-of-way grants does not "'imperil the subsistence' of the tribal community," as is required to meet the second exception. *See Plains Commerce Bank*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566). 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 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*, 12 F.4th at 876-77 (invoking primary jurisdiction of BIA); *see also* 25 C.F.R. § 169.401 ("Any . . . violation of the right-of-way grant or right-of-way document, including but not limited to encroachments beyond the defined boundaries, accidental, willful, and/or incidental trespass, unauthorized new construction, changes in use not permitted in the grant, and late or insufficient payment may result in enforcement actions including, but not limited to, cancellation of the grant."). The BIA has the authority and the obligation to investigate alleged right-of-way violations, and is amply equipped to facilitate resolution and make binding determinations. *See* 25 C.F.R. §§ 169.401-405. Further, 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 and conflict with BIA policy and decision-making. Therefore, this final *Dataphase* factor weighs in favor of a preliminary injunction.

V. CONCLUSION

All *Dataphase* factors support a preliminary injunction, with the most important factor being the substantial likelihood WPX will succeed on the merits. Accordingly, with its tribal court remedies now exhausted, WPX again seeks an order that enjoins the tribal court from exercising jurisdiction over WPX and enjoins Fettigs from further prosecuting their lawsuit in tribal court.

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