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

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| WPX Energy Williston, LLC,<br><br>Plaintiff,<br>vs.<br><br>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,<br><br>Defendants. | ) | Civil No. 1:24-cv-00021 DLH/CRH<br><br>**WPX'S REPLY IN SUPPORT OF MOTION TO DISMISS FETTIGS' COUNTERCLAIM** |

Plaintiff WPX Energy Williston, LLC (WPX) submits this reply in support of its motion to dismiss the counterclaim of Defendants Gabriel Fettig, Howard Fettig, Charles Fettig, and Morgan Fettig (collectively, Fettigs).

## I. INTRODUCTION

WPX moved to dismiss Fettigs' counterclaim for fraud, accounting, breach of contract, and punitive damages for a lack of subject matter jurisdiction using a Rule 12(b)(1) facial attack and by arguing that the BIA has primary jurisdiction due to the ongoing BIA administrative proceeding initiated by Fettigs. WPX further argued that Fettigs failed to plead their fraud claim with the requisite particularity.

Fettigs oppose the motion to dismiss with arguments that are not germane to the assertions in WPX's motion. Fettigs contend: (1) the tribe has jurisdiction because Fettigs' claims are about breaches of "side agreements" to the BIA right-of-ways and not violations of the right-of-ways, and (2) exhaustion of BIA remedies is not required. Fettigs' first argument is not relevant to WPX's motion to dismiss their counterclaim or, if it is, Fettigs completely failed to explain how. WPX

addressed the issue of tribal jurisdiction in its Brief in Support of Motion for Preliminary Injunction (Doc. No. 18), and sees no need to do so in the context of its motion to dismiss. Fettigs' second argument, regarding exhaustion of remedies, deals with a doctrine that WPX is not invoking. Therefore, WPX's focus in this reply will be to reiterate: (1) Fettigs failed to establish federal subject matter jurisdiction, (2) the BIA has primary jurisdiction over Fettigs' claims, and (3) Fettigs failed to plead fraud with particularity.

## II. ARGUMENT

### A. Fettigs Fail to Establish a Basis for Federal Subject Matter Jurisdiction.

Federal courts are courts with limited jurisdiction. *Kessler v. Nat'l Enters., Inc.*, 347 F.3d 1076, 1080 (8th Cir. 2003). Rule 8(a) of the Federal Rules of Civil Procedure requires a complaint to include a short and plain statement of the grounds for a court's jurisdiction. "While Rule 8(a) requires very little, it does require fair notice of the claim and the grounds upon which the claim rest." *Eckert v. Titan Tire Corp*., 514 F.3d 801, 807 (8th Cir. 2008). Fettigs' counterclaim contains no averments specifying the Court's jurisdiction to hear their claims against WPX for breach of contract, accounting, fraud, and punitive damages. Indeed, not once in their entire response do the Fettigs attempt to articulate where and how their counterclaim alleges subject matter jurisdiction. Is their counterclaim based on federal question jurisdiction? *See* 28 U.S.C. § 1331. Or supplemental jurisdiction? *See* 28 U.S.C. § 1367. Or diversity jurisdiction? *See* 28 U.S.C. § 1332. Fettigs' response to WPX's motion does not shed any more light on the answer than does the language of their counterclaim, and WPX continues to be left without adequate notice of the claims against it. *See Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (defendant entitled to fair notice of what the claim is and the grounds upon which it rests).

Fettigs appear to make an attempt at manufacturing federal jurisdiction without asserting it outright by arguing that, under Rule 13 of the Federal Rules of Civil Procedure, their counterclaim is compulsory and so they are forced to raise it now. *See* Doc. No. 16 at p. 2. Rule 13 requires a party to state "any claim that—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction." Fed.R.Civ.P. 13(a)(1). Rule 13 also includes, *inter alia*, an exception that the pleader need not state the counterclaim if "when the action was commenced, the claim was the subject of another pending action." Fed. R. Civ. P. 13(a)(2)(A).

But Fettigs' counterclaim is clearly not a compulsory counterclaim under Rule 13 for several reasons. First, the exception in Rule 13(a)(2)(A) applies because Fettigs' counterclaim is the subject of not just one, but two other pending actions: (1) the Three Affiliated Tribes District Court case, Case No. CV-2020-0179, and (2) the BIA administrative proceeding the Fettigs initiated. *See U.S. v. Dico, Inc.*, 136 F.3d 572, 577 (8th Cir. 1998) (holding that "another pending action" includes actions before administrative agencies).

Second, Fettigs' counterclaim does not "arise[] out of the transaction or occurrence that is the subject matter of" WPX's claims here. WPX's claims narrowly relate to the scope of tribal court jurisdiction, implicating a completely different set of legal and factual issues than Fettigs' counterclaim. *See Cochrane v. Iowa Beef Processors, Inc.*, 596 F.2d 254, 264 (8th Cir. 1979) (affirming the district court's holding that counterclaims were not compulsory because they did not "arise out of the same transaction or occurrence" as the opposing party's claims).

Finally, Fettigs' counterclaim is not mature. As discussed in more detail below, the BIA has primary jurisdiction to resolve, in whole or in part, Fettigs' claims and until the BIA has done

so Fettigs' claims are not mature. *See id.* at 264 n.9 ("Even if it arose out of the same transaction or occurrence, a claim for relief that has not matured need not be asserted as a compulsory counterclaim.").

**B. The BIA has Primary Jurisdiction over Fettigs' Counterclaim.**

In its Motion to Dismiss, WPX argued that Fettigs' claims should be dismissed or stayed because the BIA has primary jurisdiction. WPX's BIA appeal is currently pending and Fettigs' claims' "sound determination requires resolution of issues that have been placed within the special competence of [the BIA]" due to the BIA's "extensive authority, protective role, and prior involvement in the controversy." *See Chase v. Andeavor Logistics, L.P.*, 12 F.4th 864, 870 (8th Cir. 2021).

In their response, Fettigs fail to address WPX's argument. Instead, Fettigs attempt to counter an argument that WPX did *not* make: that the Fettigs failed to exhaust administrative remedies. Fettigs failed to acknowledge that the doctrines of exhaustion of administrative remedies and primary jurisdiction are not the same. Exhaustion of administrative remedies applies "where a claim is cognizable in the first instance by an administrative agency alone." *Chase*, 12 F.4th at 870. Alternatively, primary jurisdiction "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body[.]" *Id.*

In *Chase*, allottee landowners filed a putative class action for trespass and injunctive relief regarding defendant Andeavor Logistics, L.P.'s oil pipeline. *Id.* at 866-67. The court distinguished the exhaustion of remedies doctrine from the primary jurisdiction doctrine. The court held that the exhaustion of remedies doctrine *did not* apply because the BIA did not have the statutory authority

to award the allottees' damages or injunctive relief for trespass, but further held that the primary jurisdiction doctrine *did* apply as the court clearly believed the BIA's processes should be employed:

- "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 . . . from grantees that violate their right-of-way." *Id.*
- "[A]ny action the BIA now takes will be of significance in resolving the judicial dispute." *Id.*
- The "BIA may take the position that it has the exclusive right to seek damages on behalf of the Allottees." *Id.* at 876-77.
- "The view of the BIA on [the pertinent] legal issues would obviously be important." *Id.* at 877.
- "Not only is [a right-of-way] controversy within the BIA's area of expertise, the agency may have or may be able to efficiently develop, facts that may be relevant to one or more legal issues." *Id.*

This all holds true for Fettigs' claims. Under the same statutes and regulations as in *Chase*, the BIA granted and administers the rights-of-ways on Fettigs' allotments, and thus is charged with protecting those lands from violations of the right-of-ways. As trustee, any action the BIA takes, such as to investigate the allegations, could be of significance for any later judicial review or action. For example, the BIA and the parties have not developed a factual record concerning this matter. The BIA should be given the first opportunity to develop a record because the BIA's functions include specialized fact-finding, interpretation of disputed technical subject matter, and resolving disputes concerning the meaning of the agency's regulations. *See Chase*, 12 F.4th at 876-77. Even if the dispute is not fully resolved by the BIA, the BIA's findings may produce a useful record for subsequent judicial consideration. *Id.* at 877.

Because Fettigs miss the mark on the legal doctrine applicable here, their reliance on the futility exception is both misplaced and incorrect. Fettigs' argument is misplaced because the futility exception, which may apply to the exhaustion of administrative remedies doctrine, does *not* apply to the primary jurisdiction doctrine. *See Elwell v. Fisher*, 716 F.3d 477, 484-85 (8th Cir. 2013) (refusing to recognize a futility exception to the primary jurisdiction doctrine). Regardless, even if the futility exception could apply, the pending BIA appeal is not a futile effort: the BIA is required to consider the appeal. WPX appealed the BIA's original decision as of right pursuant to 25 C.F.R. § 2.102(a). *See also* June 15, 2022 BIA Decision, filed at Doc. No. 1-6 (instructing that "This decision may be appealed to the Great Plains Regional Director in accordance with the regulations at 25 CFR Part 2"). Until the BIA completes its review, the BIA has primary jurisdiction and Fettigs' claims should be dismissed.

**C. Fettigs Fail to Defend Their Deficiently Pleaded Fraud Claim.**

In its Motion to Dismiss, WPX argued that Fettigs' fraud claim must be dismissed pursuant to Fed. R. Civ. P. 9(b) because Fettigs failed to plead fraud with the requisite particularity. *See H & Q Props., Inc. v. Doll*, 793 F.3d 852, 856 (8th Cir. 2015). In their response, Fettigs did not address WPX's argument at all. Not one sentence was devoted to defending the sufficiency of their fraud averments. Therefore, Fettigs' deficiently-pled fraud claim is indefensible: they failed to plead the "who, what, where, when, and how" necessary to meet Rule 9(b)'s heightened pleading standard. *See Freitas v. Wells Fargo Home Mortg., Inc.*, 703 F.3d 436, 439 (8th Cir. 2013). Putting aside WPX's arguments for dismissal of the counterclaim in its entirety, dismissal of the fraud portion of the counterclaim is a no-brainer.

## III. CONCLUSION

Fettigs' response to WPX's motion to dismiss was off-topic and irrelevant to the issues raised. Fettigs have not pleaded a basis for federal subject matter jurisdiction and, even if they had done so, the BIA has primary jurisdiction over Fettigs' grievances. Therefore, WPX asks the Court to grant its motion and dismiss Fettigs' entire counterclaim, or at the very least dismiss Fettigs' fraud claim for failure to plead fraud with the requisite particularity.

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By: */s/ Robin Wade Forward*

Robin Wade Forward (ID #05324)
**STINSON LLP**
424 South 3rd Street, Suite 206
Bismarck, ND 58504
E-mail: rob.forward@stinson.com
Telephone: 701.221.8600
Fax: 701.221.8601

**Attorneys for Plaintiff**
**WPX Energy Williston, LLC**