Appeal No. 25-1083

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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WPX Energy Williston, LLC,

*Plaintiff – Appellee,*

v.

Honorable B.J. Jones,

*Defendant – Appellant.*

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On Appeal from the United States District Court
for the District of North Dakota
Daniel L. Hovland, District Court Case No. 1:24-cv-00021

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# RESPONSE BRIEF OF APPELLEE

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## SUMMARY OF THE CASE

This case involves a question of tribal jurisdiction over a non-Indian company where the relationship between the non-Indian company and Tribal members exists only by virtue of federal statutes and regulations and is controlled by an extensive federal regulatory scheme. Plaintiff-appellee WPX Energy Willison, LLC ("WPX") is a non-Indian company that drills and operates oil and gas wells and owns mineral interests within Fort Berthold Indian Reservation. Pursuant to 25 U.S.C. §§ 323-328, the Bureau of Indian Affairs ("BIA") granted WPX rights-of-way on Gabriel Fettig, Howard Fettig, Charles Fettig, and Morgan Fettig's (collectively, "Fettigs") allotments. Under 25 U.S.C. § 324, WPX was required to obtain Fettigs' consent to the rights-of-way, and, as allowed by BIA regulations, Fettigs' consent incorporated into the rights-of-way, *inter alia*, a smoking ban.

Fettigs sued WPX in Tribal Court alleging violations of the smoking ban. WPX moved to dismiss for lack of jurisdiction but the Honorable B.J. Jones, acting on behalf of the Tribal Court ("Tribal Appellant"), determined the Tribal Court had jurisdiction. WPX commenced an action in federal District Court. The District Court granted WPX a preliminary injunction, but this Court vacated for failure to exhaust Tribal Court remedies. After the Tribal Supreme Court affirmed the Tribal Court's jurisdiction finding, WPX again commenced an action in federal District Court. Once again, the District Court granted WPX a preliminary injunction finding the Tribal Court lacked jurisdiction. WPX requests 15 minutes to present oral argument.

## CORPORATE DISCLOSURE STATEMENT

Appellee WPX Energy Williston, LLC, which is now known as Devon Energy Williston, L.L.C., is a wholly-owned indirect subsidiary of Devon Energy Corporation, a publicly-held corporation.

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## STATEMENT OF THE ISSUES PRESENTED FOR APPEAL

1. Whether the District Court properly held that, under *Montana*, the Tribal Court lacks jurisdiction over WPX because WPX's relationship with the Tribal members exists only by virtue of federal statutes and regulations and WPX's disputed activity is wholly regulated, determined, and enforced by the federal government.

**Apposite Authority:** *Montana v. U.S.*, 450 U.S. 544 (1981); *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316 (2008); *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019).

2. Whether the District Court properly held that WPX would suffer irreparable harm if forced to litigate in a Tribal Court that lacks jurisdiction over WPX.

**Apposite Authority:** *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011); *Roman Cath. Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 589 U.S. 57 (2020).

3. Whether the District Court properly disregarded harm to the Tribal Court in balancing the harms while weighing a preliminary injunction after the District Court held the Tribal Court lacked jurisdiction.

**Apposite Authority:** *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981).

## STATEMENT OF THE CASE

Fettigs are enrolled members of the Three Affiliated Tribes of the Mandan, Hidatsa, and Arikara Nation ("MHA Nation") and own surface lands and mineral interests within the exterior boundaries of Fort Berthold Indian Reservation. Add. 2; App. 166; R. Doc. 30, at 2.

Fettigs own four trust allotments that were assigned allotment numbers by the Bureau of Indian Affairs ("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.
>
> *Id.*

WPX is a non-Indian company that drills and operates oil and gas wells and owns mineral interests within Fort Berthold Indian Reservation. *Id.* Pursuant to 25 U.S.C. §§ 323-328, the BIA granted WPX rights-of-way on Fettigs' allotments for oil well pads, well bores, access roads, pipelines, and other appurtenances. *Id.*

Under 25 U.S.C. § 324, WPX was required to obtain Fettigs' consent to the rights-of-way, and, as allowed by BIA regulations, Fettigs' consent included additional restrictions, conditions, and remedies negotiated by Fettigs and WPX. *See* 25 C.F.R. § 169.107; 25 C.F.R. § 169.403.

Included in the conditions, restrictions, and remedies that Fettigs and WPX negotiated is a smoking restriction on the rights-of-way property and a fine for smoking. Add. 2; App. 166; R. Doc. 30, at 2. Here is the pertinent language, which is materially the same for all the rights-of-way:

> 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.
>
> Add. 10; App. 174; R. Doc. 30, at 10.

All conditions, restrictions, and remedies listed in Fettigs' consent documents, including those set out in the previous paragraph, are incorporated into the rights-of-way issued by the BIA to WPX. *See* 25 C.F.R. § 169.125; 25 C.F.R. § 169.403; Add. 2; App. 166; R. Doc. 30, at 2. The BIA regulation that allowed Fettigs and WPX to negotiate remedies for rights-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).

In June 2020, Fettigs sued WPX in Tribal Court on the Fort Berthold Indian Reservation, alleging violations of rights-of-way that were granted to WPX by the BIA for oil and gas operations on allotted trust land. Add. 3; App. 167; R. Doc. 30, at 3. The case is *Gabriel Fettig, et al. v. WPX Energy*, Case No. CV-2020-0179.

WPX moved to dismiss the lawsuit for lack of jurisdiction but the Honorable B.J. Jones, acting on behalf of the Tribal Court ("Tribal Appellant"), determined the Tribal Court had jurisdiction to hear the dispute and denied WPX's motion. Add. 3; App. 167; R. Doc. 30, at 3. Thereafter, WPX filed a notice of appeal with the MHA Nation Supreme Court. *Id.*

Prior to the Tribal appeal being decided, WPX also commenced an action in the United States District Court for the District of North Dakota, Case No. 1:21-cv-00145, seeking injunctive and declaratory relief from the Tribal Court's exercise of jurisdiction over WPX. *Id.* On April 22, 2021, The District Court granted WPX's motion for a preliminary injunction. *Id.*

The Tribal Court appealed the preliminary injunction to this Court. On July 3, 2023, this Court vacated the preliminary injunction and remanded with directions to dismiss WPX's complaint without prejudice for failure to exhaust Tribal Court remedies. *Id* at 4; *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834, 839 (8th Cir. 2023). In its decision, this Court 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, the District 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. Add. 4; App. 168; R. Doc. 30, at 4.

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 rights-of-way, issue a cease and desist order, and award monetary damages for violations of the smoking restriction. *Id.* 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 rights-of-way because the side agreements did not appear to be in the BIA's casefiles. *Id.* 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 rights-of-way, and asking the BIA to address Fettigs' complaint on the merits by using the appropriate administrative tools. Add. 4-5; App. 168-69; R. Doc. 30, at 4-5. WPX's appeal is still pending. Add. 5; App. 169; R. Doc. 30, at 5.

On February 2, 2024, WPX again filed suit in the United States District Court for the District of North Dakota seeking injunctive and declaratory relief from the Tribal Court's exercise of jurisdiction over WPX. Add. 5; App. 169; R. Doc. 30, at 5. On December 18, 2024 the District Court entered an order granting WPX's motion for preliminary injunction. *Id.* Tribal Appellant appealed. Fettigs did not.

## SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's grant of a preliminary injunction because the Tribal Court lacks jurisdiction over WPX and the *Dataphase* factors weigh in favor of a preliminary injunction. Tribal Appellant contends the District Court erred in three ways: First, by determining that the Tribal Court lacks jurisdiction and that, therefore, WPX is likely to succeed on the merits; Second, by determining that WPX faced irreparable harm if forced to litigate in a Tribal Court after finding the Tribal Court lacked jurisdiction; and Third, by failing to consider harm to Tribal Appellant when balancing the harms after finding the Tribal Court lacked jurisdiction. Tribal Appellant is incorrect on all three issues.

First, the District Court properly held that the Tribal Court lacked jurisdiction, and therefore properly held that WPX is likely to succeed on the merits. WPX's relationship with Fettigs is founded on right-of-way grants and administered by the United States for oil and gas development on allotted land. The smoking ban on WPX's rights-of-way is not an independent agreement: it is incorporated into and a part of the federally-administered right-of-way grant. Thus, the District Court properly held that WPX's relationship with Fettigs does not implicate the Tribe's sovereign authority and therefore does not satisfy the first *Montana* exception.

Tribal Appellant argues that the District Court erroneously relied on *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019), but review of the District Court's Order demonstrates that the District Court did no such thing. The

District Court applied the *Montana* standard to the facts of this case. The District Court did not even mention *Kodiak* until the very end of its analysis, and even then merely noted the difference between *Kodiak* and this case. The District Court did not blindly defer to *Kodiak* as Tribal Appellant suggests.

Second, the District Court properly held that WPX faced irreparable harm if forced to litigate in Tribal Court because the District Court already held that the Tribal Court lacked jurisdiction over WPX. If WPX is forced to litigate in a Tribal Court that lacks jurisdiction any decision that comes out of the Tribal Court, whether favorable to WPX or not, would be void. In this case, the presence or absence of irreparable harm rises and falls with the jurisdictional question. And because the Tribal Court lacks jurisdiction over WPX, WPX would face irreparable harm if forced to litigate in the Tribal Court.

Third, the District Court properly weighed the balance of harms between WPX and Fettigs and determined that the balance of harms weighs in favor of a preliminary injunction. The District Court did not weigh harm to the Tribal Appellant for a good reason: the District Court held that the Tribal Court lacked jurisdiction, therefore a preliminary injunction cannot possibly harm Tribal Appellant.

## ARGUMENT

### I. Standard of Review.

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 Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 324 (2008).

WPX sought 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 Sys., Inc. v. C L Sys., 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. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994) (quoting *Calvin Klein Cosms. Corp. v. Lenox Lab'ys, 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).

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 Systems, Inc.*, 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 rights-of-way 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.

## II. The District Court Properly Held that the Tribal Court Lacks Jurisdiction.

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 "swallow[s] the rule" or "severely shrink[s] it." *Id.*

Congress has not expressly given Tribes the authority to regulate non-members in the context of federal rights-of-way 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 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.

The District Court properly applied *Montana* and its progeny and determined that neither of the two *Montana* exceptions apply, thus the Tribal Appellant lacks jurisdiction. On appeal, the Tribal Appellant contends the District Court erred in two respects while applying *Montana*: First, the Tribal Appellant argues that the District Court improperly deferred to *Kodiak Oil & Gas (USA) Inc. v. Burr* instead of conducting its own *Montana* analysis; Second, the Tribal Appellant argues that the District Court erred by finding that, even if WPX had a consensual relationship with the Tribal members, the parties' smoking ban side agreement and rights-of-way do not implicate the Tribe's sovereign interests.

Tribal Appellant's arguments are contradictory. In the first instance, Tribal Appellant argues that the District Court erred by improperly deferring to *Kodiak*

rather than conducting its own *Montana* analysis. In the second instance, Tribal Appellant implicitly concedes that the District Court *did* conduct its own *Montana* analysis, but argues the District Court did so incorrectly. Regardless, Tribal Appellant is wrong on both issues. First, the District Court did not rely on *Kodiak*; instead, the District Court did exactly what this Court advised in *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834, 839 (8th Cir. 2023): it applied *Montana* to the facts of the present case. Second, the District Court properly applied the standard set forth in *Plains Commerce Bank* and concluded that, even presuming a consensual relationship between WPX and Fettigs, the parties' agreements do not implicate the Tribe's sovereign interests and therefore the first *Montana* exception does not apply. Finally, although the Tribal Appellant fails to properly preserve any issue on appeal as to the second *Montana* exception, the District Court properly held that the second *Montana* exception does not apply.

### A. The District Court Correctly Determined that 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. Thus, the first *Montana* exception applies when (1) a nonmember has a consensual relationship with the Tribe or its members and (2) such activities arising from the consensual relationship implicate the Tribe's sovereign interests.

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 rights-of-way granted and administered by the United States for WPX's oil and gas development activities 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 rights-of-way 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), *report and recommendation adopted*, No. 1:19-CV-00096, 2020 WL 9848706 (D.N.D. Dec. 3, 2020). And the regulation of these rights-of-way, 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 rights-of-way 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 rights-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 rights-of-way 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 District Court properly concluded the first *Montana* exception does not apply to the Tribal Court case against WPX.

### 1. The District Court did not improperly rely on *Kodiak*.

A large portion of Tribal Appellant's brief (approximately 6 pages) is dedicated to arguing that *Kodiak* does not control this case. *See* Appellant Brief at pp. 14-20. This is curious, because the District Court never held that *Kodiak* controls this case. Instead, the District Court applied *Montana* directly to the facts of this case and, at the very end of its analysis, noted the difference this Court recognized between *Kodiak* and this case:

> In *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834 (8th Cir. 2023), the Eight Circuit Court of Appeals distinguished the dispute stemming from the underlying tribal action in this case from *Kodiak v. Burr*, 303 F.Supp.3d 964. The Eight Circuit noted that in *Kodiak*, the disputed conduct of nonmembers – the failure to pay adequate royalties – occurred between a non-Indian company and the federal government, whereas the disputed conduct in *WPX Energy Williston* occurred between a non-Indian company and tribal members.

Add. 12; App. 176; R. Doc. 30, at 12. Despite that distinction, the District Court concluded that "[a]lthough the side agreements in this case were independently negotiated between WPX and tribal members, the relationship between the parties exists only by virtue of federal statutes and regulations." *Id.*

The District Court is correct. As detailed above, Fettigs and WPX's relationship is founded on rights-of-way 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 only entity with authority to grant the rights-of-way, and the United States defers to the landowner in the application of conditions to the consent pursuant to the last sentence of 25 C.F.R. § 169.1(a), but it is nevertheless the United States that makes the grant. If the United States decides not to grant the right-of-way, then any consent provided by Fettigs is a nullity. *See* 25 C.F.R. § 169.4(a) ("You need an approved right-of-way under this part before crossing Indian land . . . if you are (1) a person or legal entity . . . who is not an owner of the Indian land . . . then you must obtain a right-of-way under this part . . . from us [the BIA], with the consent of the owners of the majority interest in the land . . . before crossing the land or any portion thereof.").

The Tribal Appellant seeks to minimize the extensive federal regulatory scheme that controls WPX's relationship with Fettigs by arguing that the "BIA does not dictate the entirety of the right-of-way process"—but Tribal Appellant is simply

incorrect. 25 C.F.R. § 169.101-169.124 enumerates the extensive and detailed requirements a party must satisfy to apply for a right-of-way. Even if all of those extensive requirements are satisfied, the BIA can still decline to grant the right-of-way if it finds a "compelling reason" to do so. 25 C.F.R. § 169.124(a)(2). The District Court's conclusion is well reasoned and based on the application of *Montana* to the facts of this case; the District Court did not blindly apply *Kodiak* as Tribal Appellant contends.

### 2. The District Court correctly held that the disputed activity in this case does not implicate the Tribe's sovereign interests.

Tribal Appellant further argues the District Court erred because "the first *Montana* exception only requires a nexus between the Tribe and the consensual relationship." Appellant Brief at p. 21. Tribal Appellant states its position in the first sentence of its first issue on appeal, asserting "Tribes have civil jurisdiction over nonmembers who enter consensual relationships with the tribe or tribal members through contracts." Appellant Brief at p. 2. Tribal Appellant's position is directly contrary to both Supreme Court and Eighth Circuit precedent. *See Plains Commerce Bank*, 554 U.S. at 337 ("[laws and regulations that govern Tribal territory] may be fairly imposed on nonmembers ***only*** if the nonmember has consented, either expressly or by his actions. ***Even then***, the regulation ***must*** stem from the Tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.") (emphasis added); *Kodiak Oil & Gas (USA)*

*Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019) ("A consensual relationship alone ***is not enough***. Even where there is a consensual relationship with the tribe or its members, the 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.'") (quoting *Plains Commerce Bank*, 554 U.S. at 336) (emphasis added).[1]

The District Court carefully analyzed the standard required under the first *Montana* exception, and its analysis matches the analysis done by the Supreme Court in *Plains Commerce*. As both the District Court and Supreme Court in *Plains Commerce* recognized, in *Montana* the Supreme Court cited four cases explaining the first *Montana* exception. Add. 8; App. 172; R. Doc. 30, at 8; *Plains Commerce*, 554 U.S. at 332. Each of those cases "involved the regulation of non-Indian activities on the reservation that has a discernable effect on the tribe or its members." Add. 9; App. 173; R. Doc. 30, at 9; *Plains Commerce*, 554 U.S. at 332. Both the District Court and Supreme Court recognized that 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." Add. 9; App. 173; R. Doc. 30, at 9; *Plains Commerce*, 554 U.S. at 335. Thus, even when a non-member consents to

[1] Tellingly, Tribal Appellant chooses to discuss Fifth Circuit, Tenth Circuit, and Ninth Circuit law before even mentioning this Court's own precedent on the point. *See* Appellant Br. at 20-26.

tribal authority, "the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." Add. 9; App. 173; R. Doc. 30, at 9; *Plains Commerce*, 554 U.S. at 335.

In *Plains Commerce*, the Supreme Court concluded that "whatever 'consensual relationship' may have been established through the Bank's dealing with the Longs, the jurisdictional consequences of that relationship cannot extend to the Bank's subsequent sale of its fee land." 554 U.S. at 338. Here, the District Court concluded that "[g]iven the federal nature of the contractual relationship between WPX and Fettigs, the disputed activity in this case does not implicate the tribe's sovereign interests." Add. 12; App. 176, R. Doc. 30, at 12.

Lest there be any doubt, the District Court's reading of *Plains Commerce* accords with this Court's reading as articulated in *Kodiak Oil & Gas (USA) Inc. v. Burr*. In *Kodiak*, this Court held that the first *Montana* exception did not apply because, despite a consensual relationship between the parties, "the entire relationship is mediated by the federal government." 932 F.3d at 1138. This Court explained that under the first *Montana* exception, "[a] consensual relationship alone is not enough." *Id.* "Even where there is a consensual relationship with the tribe or its members, the 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.* (quoting *Plains Commerce*, 554 U.S. at 336).

Tribal Appellant attempts to write off this Court's language in *Kodiak* by arguing that *Kodiak* "addressed a fundamentally different situation where the relationship between the oil producer and the tribe was governed so entirely by federal law that it displaced all other authority." Appellant Brief at p. 25. But different facts do not alter the applicable legal standard, which is that a consensual relationship alone is not enough. The disputed conduct must also implicate the Tribe's inherent sovereign authority. In *Kodiak* this Court held that the conduct at issue did not implicate the Tribe's inherent sovereign authority because of the complete federal control of oil and gas leases on allotted lands. 932 F.3d at 1138. In this case, the District Court held, for a similar but different reason, that the conduct at issue does not implicate the Tribe's inherent sovereign authority because "the relationship between the parties exists only by virtue of federal statutes and regulations" and "the specific activity from which the Fettigs seek relief in the underlying tribal court action is wholly regulated, determined, and enforced by the federal government." Add. 12; App. 176; R. Doc. 30, at 12.

**3. Tribal Appellant's cited authority do not support the conclusion Tribal Appellant asks this Court to reach.**

Tribal Appellant also relies on non-controlling law from other circuits to argue that the mere existence of a consensual relationship between WPX and Fettigs is

sufficient to satisfy the first *Montana* exception. Tribal Appellant argues that other circuits have held that no "additional showing" that a relationship implicates the Tribe's inherent sovereign authority is required. Tribal Appellant fundamentally misunderstands the issue in this case and the standard under *Plains Commerce*. The question here has nothing to do with whether the Tribal Appellant or Fettigs made a sufficient "showing" that WPX's relationship with Fettigs implicates the Tribe's sovereign authority. The question is simply whether WPX's relationship with Fettigs does or does not implicate the Tribe's sovereign authority, and that question is a question of law. The District Court properly determined that the nature of WPX's relationship with Fettigs does not implicate the Tribe's sovereign authority because it is regulated, determined, and enforced by the federal government.

First, and most extensively, Tribal Appellant relies on *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2016). *Dolgencorp* does not support Tribal Appellant's position, and instead reinforces the fact that the relationship between a Tribal member and a nonmember must implicate the Tribe's sovereign authority for Tribal jurisdiction to exist. The issue in *Dolgencorp* was whether a showing that one specific employment relationship between a Tribe member and a nonmember business implicated the Tribe's sovereign interests was required. The Fifth Circuit found that no specific showing is required, and that it instead can look at the nature of the relationship generally:

> We do not interpret *Plains Commerce* to require an additional showing that ***one specific relationship, in itself***, "intrude[s] on the internal relations of the tribe or threaten[s] self-rule." It is hard to imagine how a single employment relationship between a tribe member and a business could ever have such an impact. ***On the other hand, at a higher level of generality***, 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.

*Id.* at 175 (emphasis added).

Necessarily, the baseline presumption in the Fifth Circuit's analysis is that the relationship at issue must implicate the Tribe's sovereign authority. Here, even at a general level, the relationship between WPX and Fettigs does not implicate the Tribe's sovereign authority because it exists solely because of federal law and is regulated by federal law. Thus, *Dolgencorp* does not support Tribal Appellant's argument—it rebuffs it.

The next case Tribal Appellant relies on, *Lexington Insurance Company v. Smith*, 117 F.4th 1106 (9th Cir. 2024), is similar. There, the Ninth Circuit stated that in *Plains Commerce*, the Supreme Court did not "impos[e] an additional requirement" and instead "was merely clarifying that a nonmember's consent to tribal law is not enough for tribal jurisdiction and cannot circumvent the limitations on tribal authority." *Id.* at 1111. Thus, the Ninth Circuit held that no "separate inquiry" but

nevertheless reaffirmed that "tribal sovereignty" must be implicated for Tribal jurisdiction to exist. *Id.* at 1112.

Finally, Tribal Appellant relies on *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011). *Crowe* similarly does not support Tribal Appellant's position. In *Crowe*, the Tenth Circuit recognized that "[g]enerally . . . the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 1150. Considering the first *Montana* exception, the Tenth Circuit stated "[i]t is true that membership in a tribe's bar association and appearances before its courts can constitute a 'consensual relationship' with the tribe." *Id.* at 1151. "But that is not the end of the *Montana* inquiry." *Id.* The Tenth Circuit continued, "[s]uch a 'consensual relationship' may establish tribal court jurisdiction under *Montana* only if there is a sufficient 'nexus' between that relationship and the attendant 'exertion of tribal authority." *Id.* Notably, the Tenth Circuit does not analyze *Plains Commerce*. The "nexus" language the Tenth Circuit includes, and that Tribal Appellant latches onto and repeats throughout its brief (*see* Appellant Br. at 21, 24-25), originates from *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001). *Atkinson* predates the Supreme Court's clarification of the first *Montana* exception in *Plains Commerce*, where the Court stated that, even if a consensual relationship exists, the regulation "must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve self-government, or control internal relations." 554 U.S. at 337.

At bottom, the presumption under *Montana* is that the sovereign authority of the Tribe does not extend to nonmembers. Under the first *Montana* exception, Tribal jurisdiction can exist over a nonmember so long as there is a consensual relationship *and* the Tribe's regulation of that relationship implicates the Tribe's sovereign authority. Tribal Appellant asks this Court to turn the standard on its head and create a presumption that the relationship between WPX and Fettigs implicates the Tribe's sovereign authority simply because the relationship exists. That is not the standard under any of the non-controlling cases Tribal Appellant relies on, and it certainly is not the standard under Supreme Court and Eight Circuit Precedent.

### B. Tribal Appellant Waived Any Issue Regarding the Second *Montana* Exception, But Regardless the District Court Correctly Held that the Second *Montana* Exception Does Not Apply.

As an initial matter, Tribal Appellant has waived any issue regarding the second *Montana* exception. None of the three issues Tribal Appellant presents in its Statement of Issues concern the second *Montana* exception: the first concerns the first *Montana* exception and the other two concern the standard for obtaining a preliminary injunction. Tribal Appellant only mentions the second *Montana* exception in one paragraph near the very end of Tribal Appellant's argument on the first *Montana* exception and argues that "[d]iscovery in the Tribal trial court may reveal additional facts that would support Tribal jurisdiction under the second *Montana* exception." Appellant Br. at 27. Thus, Tribal Appellant argues, "[t]he District Court

did not meaningfully consider this issue, and it erred when it deprived the Tribal court system of addressing its jurisdiction under that exception via a preliminary injunction." *Id.* at 27-28.

This Court has held that a party waives an issue when the issue is not included in the statement of issues and is mentioned only briefly. *Mahler v. First Dakota Title Ltd. P'ship*, 931 F.3d 799, 807 (8th Cir. 2019) ("Because Mahler's brief does not include this claim in the statement of issues and mentioned it only briefly, she has waived this issue."). *See also* Fed. R. App. P. 28(a)(5) ("The appellant's brief must contain . . . a statement of the issues presented for review"); *United States v. O'Neal*, 17 F.3d 239, 243 n.8 (8th Cir. 1994) ("Rule 28 of the Federal Rules of Appellate Procedure requires the inclusion of a statement of issues in the appellate brief, and issues not raised are considered waived."). Tribal Appellant's argument as to the second *Montana* exception should be disregarded.

Even if Tribal Appellant's argument as to the second *Montana* exception is considered on the merits, it is incorrect. First, there is no discovery or new information that could render the second *Montana* exception applicable. The second *Montana* exception only applies "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 Nevada*, 533 U.S. at 359–61; *Strate*, 520 U.S. 457-58. The District Court correctly held that the fundamental issues in this case do not fall within the scope of the second *Montana* exception: "When a federal agency has the sole discretion to decide the pivotal issue of a matter, neither tribal regulatory nor adjudicative authority over such is needed to preserve the 'right of reservation Indians to make their own laws and be ruled by them.'" Add. 14; App. 178; R. Doc. 30, at 14 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

The District Court's reasoning is salient considering the extensive scheme under 25 C.F.R. Part 169, which demonstrates the regulation of rights-of-way 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, regardless of discovery, "'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). Moreover, the party that would actually be conducting the discovery Tribal Appellant alludes to—Fettigs—did not even bother appealing the District Court's Order.

## III. The District Court Correctly Held that WPX Faced a Threat of Irreparable Harm Absent a Preliminary Injunction.

Tribal Appellant repeatedly asserts that the District Court erred by determining that WPX faced irreparable harm solely because of the "time, effort, and money" expended litigating in a different forum. Tribal Appellant misses the point: the District Court held, properly, that "WPX would suffer irreparable harm if forced to expend time, effort, and money ***in a forum that lacks jurisdiction***." Add. 15; App.179; R. Doc. 30, at 15 (emphasis added). The distinction is vital.

The issue is not simply that WPX will have to spend time, effort, and money just like "every litigant." Appellant Br. at 30. The issue is that, absent a preliminary injunction, WPX would be forced to expend time, effort, and money on litigation in a Tribal Court that the District Court held lacks jurisdiction. That is not the type of burden that "every litigant" is expected to incur: it is inherently harmful because any proceedings and judgments that arise from the Tribal Court, whether favorable to WPX or not, would be void. *Cf. Roman Cath. Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 589 U.S. 57, 63-64 (2020) (noting that "without jurisdiction . . . subsequent proceedings and judgments are not . . . simply erroneous, but absolutely void."). That is exactly the type of irreparable harm preliminary injunctions should preclude, and it makes sense for the irreparable harm element for a preliminary injunction to rise or fall with the Tribal Court's jurisdiction.

Tribal Appellant attacks the District Court's cited authority, particularly *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157-58 (10th Cir. 2011), but *Crowe* supports the District Court's reasoning. In *Crowe*, the district court granted Crowe's request for a preliminary injunction, in part finding Crowe would be irreparably harmed if "forced to expend unnecessary time, money, and effort litigating the issue of their fees in the Muscogee Nation District Court—a court which likely does not have jurisdiction over it." 640 F.3d at 1157. The Tenth Circuit recited and did not reverse that reasoning on appeal. The Tenth Circuit affirmed the grant of a preliminary injunction, noting that it need not consider the district court's finding as to Crowe's expenditure of time, money, and effort in a tribal court that likely lacked jurisdiction because the Tenth Circuit affirmed the finding of irreparable harm based on Crowe's significant risk of financial injury arising from irrecoverable attorneys' fees. *Id.* at 1158 n.10.

This case is even more stark than *Crowe*. In *Crowe*, the district court did not hold outright that the tribal court lacked jurisdiction. Instead, the district court merely held that "Crowe has demonstrated a sufficient likelihood of demonstrating that neither *Montana* exception applies in the instant case." *Crowe & Dunlevy, P.C. v. Stidham*, 609 F. Supp. 2d 1211, 1226 (N.D. Okla. 2009), *aff'd*, 640 F.3d 1140 (10th Cir. 2011). The district court found it "doubtful that Crowe's mere appearance" in tribal court conferred jurisdiction under the first *Montana* exception. *Id.* Additionally, the

district court stated it "is at this time unable to see how Crowe's conduct has in any way threatened or had an effect on the political integrity, economic security, health, or welfare" of the Tribe. *Id.* Thus, the district court found that "Crowe has sufficiently demonstrated that the issue of Defendant's jurisdiction over it is so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Id.* (internal quotation omitted).

Here, the District Court's holding is not tentative: the District Court held that the Tribal Court lacks jurisdiction. It follows that WPX would be irreparably harmed by being forced to litigate in a forum the District Court has simultaneously held lacks jurisdiction. Otherwise, WPX would be forced to litigate in a forum that, based on the District Court's finding of a lack of jurisdiction, WPX is unable to get any valid form of relief in. *See c.f., Roman Catholic Archdiocese of San Juan, Puerto Rico*, 589 U.S. at 63–64 (decisions rendered without jurisdiction are void).

## IV. The District Court Correctly Held that the Balance of the Harms Weighed in Favor of Granting a Preliminary Injunction.

Tribal Appellant argues the District Court erred by failing to consider harm to Tribal Appellant in balancing the harms to the parties. There is a good reason the District Court did not weigh harm to Tribal Appellant: the District Court held the Tribal Court lacked jurisdiction, thus there is no harm whatsoever to the Tribal Appellant for the District Court to weigh. If the Tribal Court lacks jurisdiction, Tribal Appellant no longer has any interest in the dispute between Fettigs and WPX. Thus,

the District Court properly weighed the balance of the harms *vis-à-vis* Fettigs and WPX. The District Court considered that WPX would suffer harm if forced to litigate in a court that lacks jurisdiction. Add. 15; App. 179; R. Doc. 30, at 15. The District Court further considered that Fettigs may no longer proceed with their Tribal Court action, but would still have a valid forum to pursue their claims. *Id.* Thus, all in all, the District Court properly concluded this *Dataphase* factor weighs in favor of granting a preliminary injunction. There is no reason for the District Court to weigh the "harm" to Tribal Appellant when the District Court already concluded the Tribal Court lacked jurisdiction.

## CONCLUSION

WPX respectfully requests that the Court affirm the District Court's grant of a preliminary injunction in favor of WPX.

Dated: April 11,2025

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type-style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief has been prepared in a proportionally-spaced typeface in 14-point font Times New Roman type style. This brief contains 7850 words, excluding parts of the document exempted by Fed. R. App. P. 32(f). Pursuant to 8th Circuit Rule 28A(h), I certify that the electronic version of this brief and the addendum are searchable PDFs and have been scanned for viruses and are virus-free.

Dated: April 11, 2025

*/s/ Robin Wade Forward*
Attorney for Appellee

**CERTIFICATE OF SERVICE**

I hereby certify that on April 11, 2025, I electronically filed the foregoing Brief of Appellant with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 11, 2025

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