NO. 25-1083

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

WPX Energy Williston, LLC

Plaintiff-Appellee,

v.

Honorable B.J. Jones

Defendant-Appellant

On Appeal from the United States District Court for the District of North Dakota – Western Division

Case No. 1:24-cv-00021

BRIEF OF APPELLANT THE HONORABLE B.J. JONES

Peter J. Breuer(21-0130)
FREDERICKS LAW FIRM
601 S. Washington St. #332
Stillwater, OK 74074
(702) 883- 8580
pbreuer@jf3law.com

John Fredericks III(16-049)
FREDERICKS LAW FIRM
PO Box 519
Mandan, ND 58554
(701) 425-3125
jfredericks@jf3law.com

(*Counsel list continued on inside cover)*

Timothy Q. Purdon
ROBINS KAPLAN LLP
1207 W. Divide Avenue
Ste 200
Bismarck, ND 58501
(701) 255-3000
TPurdon@RobinsKaplan.com

Timothy W. Billion
ROBINS KAPLAN LLP
140 N. Phillips Avenue
Ste 307
Sioux Falls, SD 57104
(605) 335-1300
TBillion@RobinsKaplan.com

Attorneys for Defendant/Appellant Hon. B.J. Jones

SUMMARY OF THE CASE

Defendant-appellant the Honorable B.J. Jones ("Tribal Appellant") appeals the grant of a preliminary injunction to Plaintiff-appellee WPX Energy Williston, LLC, ("WPX") preventing litigation of an underlying action in Tribal Court.

WPX entered contractual no-smoking agreements on the Fort Berthold Reservation (the "Reservation") with enrolled Tribal members. Those Tribal members later sued WPX in Tribal Court for an alleged breach of those agreements. While that case was pending, WPX secured a preliminary injunction in federal District Court against tribal jurisdiction. This Court vacated for failure to exhaust tribal remedies. The Tribal Supreme Court later determined that tribal jurisdiction existed. WPX then secured another preliminary injunction prohibiting the exercise of tribal jurisdiction, from which the Tribal Appellant now appeals.

This case concerns fundamental issues regarding tribal jurisdiction. The Tribal Appellant requests 15 minutes to present oral argument to address these important federal Indian law questions.

CORPORATE DISCLOSURE STATEMENT

The Honorable B.J. Jones is an Associate Judge of the Three Affiliated Tribes District Court and is sued in his official capacity only.

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JURISDICTIONAL STATEMENT

WPX brought this action against the Tribal Appellant and Tribal members Gabriel Fettig, Howard Fettig, Charles Fettig, and Morgan Fettig (collectively, the Fettigs), invoking the District Court's original jurisdiction pursuant to 28 U.S.C. § 1331. *See Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 324 (2008) ("Whether a tribal court has adjudicative authority over nonmembers is a federal question."). In an order entered on December 18, 2024, the District Court granted WPX's motion for preliminary injunction. (App. 165, R. Doc. 30, at 1.) The Tribe timely filed this appeal on January 17, 2025. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1). *Novus Franchising Inc. v. Dawson*, 725 F.3d 885, 890 (8th Cir. 2013).

STATEMENT OF THE ISSUES

1. Tribes have civil jurisdiction over nonmembers who enter consensual relationships with the tribe or tribal members through contracts. WPX entered into no-smoking agreements with the Fettigs relating to the Fettigs' land within the reservation. Does the Tribal Court have jurisdiction over WPX?

   The District Court ruled that WPX was likely to prevail on the merits of its claim because the consensual relationship between WPX and the Fettigs did not implicate the Tribe's sovereign interests.

Apposite authorities

Montana v. United States
450 U.S. 544 (1981)

Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians
746 F.3d 167 (5th Cir. 2014) *aff'd by an equally divided court,*
136 S. Ct. 2159 (2016)

Lexington Ins. Co. v. Smith
117 F.4th 1106 (9th Cir. 2024)

2. A party seeking a preliminary injunction must prove that it will suffer irreparable harm without a preliminary injunction. Did the District Court err when it determined that WPX faced a threat of irreparable harm based on the expenditure of "time, effort, and money" litigating in Tribal Court?

    The District Court found that WPX had established a threat of irreparable harm.

Apposite Authorities

Dataphase Sys., Inc. v. C L Sys., Inc.
640 F2d 109, 113 (8th Cir. 1981)

Glenwood Bridge v. City of Minneapolis
940 F.2d 367, 371 (8th Cir. 1991)

3. Before issuing a preliminary injunction, a district court must consider the harm an injunction could inflict on the nonmoving parties. Did the District Court err when it failed to consider the injury to the Tribal Appellant's interest when it granted WPX's motion for a preliminary injunction?

   The District Court balanced the alleged harm to WPX against the harm to the Fettigs. The District Court did not balance the harm to the Tribal Appellant, although the District Court determined that the public interest factor was neutral.

Apposite Authorities

Dataphase Sys., Inc. v. C L Sys., Inc.
640 F2d 109, 113 (8th Cir. 1981)

STATEMENT OF THE CASE

The underlying Tribal court action involved alleged breaches of no-smoking clauses in side letter agreements between the Fettigs and WPX concerning use of the Fettigs' land within the Fort Berthold Indian Reservation ("Reservation"). WPX negotiated the no-smoking provisions directly with the Fettigs. (App. 3, R. Doc. 1, at 3.) The no-smoking clauses state that "[WPX] will not allow its employees, representatives, vendors or others to [smoke on the property].". (App. 25, 36, R.Doc. 101, at 17,25; App. 64, R. Doc. 1-2, at 25; App. 90, 98, R. Doc. 1-3, at 23,31; App. 110, R. Doc. 1-4, at 9.) Additionally, WPX was required to post "No Smoking" signs on the premises and violation of the smoking ban or failure to post signs would require WPX to pay a fine of $5,000 per incident. (*Id.*)

The no-smoking provision was one condition, among others, contained in side letter agreements that were part of the grants of rights-of-way[1] over the Fettigs' land. (App. 3, R. Doc. 1, at 3). After the direct negotiations and acceptance of these conditions by the Fettigs and WPX,

[1] WPX sought and received three separate but related rights-of-way over the Fettigs' land. (App. 3, R. Doc. 1, at 3.) The right-of-way documents are identical but for the legal descriptions. (*Id.*) The rights-of-way are all for trust land within the Reservation.

the Bureau of Indian Affairs ("BIA") issued the rights-of-way on February 16, 2018, February 27, 2018, and November 14, 2018. (App. 13, R. Doc. 1-1, at 5; App. 45, R. Doc. 1-2, at 6; App. 73, R. Doc. 1-3, at 6.) Each right-of-way "incorporates by reference the conditions or restrictions set out in the GRANTOR [sic], attached here." (*Id.*) Those conditions include the side letter agreements, which contain the smoking ban. (App. 21-28,32-39, R. Doc. 1-1, at 13-20, 24-31; App. 61-67, R. Doc. 1-2, at 22-28; App. 82-101, R. Doc. 1-3, 15-34.) The rights-of-way expressly reserve jurisdiction to the Tribe and explicitly require WPX to comply with Tribal law. (App. 11, 15, R. Doc. 1-1, at 3,7; App. 43,48,52-53, R. Doc 1-2, at 4,9, 13-14; App. 70-71,76, R. Doc. 1-3, at 3-4,9.) Further, the rights-of-way provide that a "tribe maintains its existing jurisdiction over the land, activities, and persons within the right-of-way and [the] grant does not diminish to any extent the [tribe's jurisdiction]." (*Id.*) Tribal jurisdiction is also consistent with federal regulations, which provide that the "tribe maintains its existing jurisdiction over the land, activities, and persons within the right-of-way." *See* 25 C.F.R. § 169.125.

In June 2020, the Fettigs filed suit in Tribal Court, alleging that WPX had violated the smoking ban. (App. 4; R. Doc. 1, at 4.) WPX moved

to dismiss, alleging that the Tribal Court lacked subject matter jurisdiction because WPX is not a member of the Tribe. (*Id.*) In June 2021, the Tribal Court, through the Tribal Appellant, ruled against WPX and determined that the Tribe had jurisdiction over WPX. (App. 4-5, R. Doc. 1, at 4-5.)

WPX appealed the June 2021 Tribal Court decision to the Tribe's Supreme Court. (App. 4, R. Doc. 1 at 4.) While that appeal was pending, WPX sued in federal District Court. The District Court enjoined the Tribal Court from further proceedings. (App. 5, R. Doc. 1 at 5.) This Court then vacated the District Court's injunction because WPX failed to exhaust tribal remedies. *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834, 839 (8th Cir. 2023).

On December 22, 2023, the Tribe's Supreme Court issued a decision affirming the Tribal Appellant's determination that the Tribal Court has jurisdiction over the dispute. (App. 7, R. Doc. 1, at 7; App. 124-136, R. Doc. 1-8, at 1-14.) On February 2, 2024, WPX again filed suit in federal District Court and sought to enjoin any further action by the Tribal Court for lack of jurisdiction. (App. 1-8, R. Doc. 1.) On December 18, 2024, the

District Court entered an order granting WPX's motion for preliminary injunction. (App. 165-183, R. Doc. 30, at 1-19.) This appeal followed.

SUMMARY OF ARGUMENT

This Court should vacate the preliminary injunction because the Tribal Court has jurisdiction over the underlying dispute. The District Court erred in three ways when it granted a preliminary injunction preventing the case from moving forward in Tribal Court.

First, the District Court erred in determining that WPX was likely to succeed on the merits of its claim that the Tribal Court lacked jurisdiction over WPX. In *Montana v. United States*, the Supreme Court held that tribes have civil jurisdiction to regulate "consensual relationships" between nonmembers and tribes or tribal members who enter contracts. 350 U.S. 544, 565 (1981). The side letter agreements between the Fettigs, who are Tribal members, and WPX, a nonmember, are precisely the type of consensual relationships that establish Tribal jurisdiction.

In overlooking the consensual relationship between WPX and the Fettigs, the District Court erroneously applied *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019), despite this Court's prior

ruling that *Kodiak* does not "directly control[]" this dispute. *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834, 838 (8th Cir. 2023). Additionally, the District Court incorrectly required that activities arising from a consensual relationship must separately implicate the Tribe's sovereign interests in order to support Tribal jurisdiction.

Second, the District Court erred in finding that WPX faced a threat of irreparable harm due to "time, effort, and money" WPX may need to spend on litigation in the Tribal court. Financial harm is not irreparable harm. Moreover, the District Court relied on inapposite authority to presume irreparable harm, improperly relieving WPX of one of the elements it was required to prove to obtain a preliminary injunction.

Third, the District Court erred when it failed to consider the injury to the Tribal Appellant's interests when it balanced the harms of issuing the preliminary injunction.

ARGUMENT

The underlying dispute over alleged violations of the smoking ban should be heard in Tribal Court because the Tribe has jurisdiction over WPX. The District Court has twice prevented the Tribal Court from exercising its jurisdiction by granting a preliminary injunction. Both injunctions were in error. The most recent injunction, the subject of this appeal, again strips the Tribal Court system of its authority to adjudicate a contract dispute involving tribal members.

"[A] preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008). The burden for establishing "the propriety of an injunction is on the movant." *Roudachevski v. All-Am. Care Ctrs., Inc.*, 648 F.3d 701, 705 (8th Cir. 2011). The burden of proof is even heavier when granting the preliminary injunction will in effect give the movant substantially the relief it would obtain after a trial on the merits. *Hotchkiss v. Cedar Rapids Cmty. Sch. Dist.*, 115 F.4th 889, 893 (8th Cir. 2024).

The grant of a preliminary injunction involves balancing four factors: (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the

injunction will inflict on other parties to the litigation; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F2d 109, 113 (8th Cir. 1981). "No single factor is determinative." *Allied World Specialty Ins. Co. v. Abat Lerew Constr., L.L.C.*, No. 8:16CV545, 2017 U.S. Dist. LEXIS 61794, at *6 (D. Neb. Apr. 24, 2017) (citing *Adam-Mellang v. Apt. Search, Inc.*, 96 F.3d 297, 299 (8th Cir. 1996)). Failing to show irreparable harm is, by itself, sufficient to deny a preliminary injunction. *Glenwood Bridge v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991) (citing *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 420 (8th Cir. 1987)).

I. Standard of Review

The appeal of a preliminary injunction involves three standards of review—one for factual findings, one for legal conclusions, and one for the grant of the injunction. *Sierra Club v. U.S. Army Corp. Of Eng'rs,* 645 F.3d 978, 989 (8th Cir. 2011). This Court will reverse factual findings only for clear error. *Id.* Legal conclusions are reviewed de novo. *Id.* The grant of an injunction is reviewed for abuse of discretion. *Id.*

This Court should review the District Court's determination of the legal test under *Montana* de novo because that is a question of law. This

Court should also review the District Court's presumption of irreparable harm de novo because that was a question of law and did not involve taking testimony or weighing evidence. Finally, this Court should review the District Court's balancing of harms for an abuse of discretion.

II. The Tribal Court has jurisdiction over WPX under *Montana*.

The District Court's decision takes an overly narrow reading of *Montana v. United States*, 450 U.S. 544 (1981), the seminal case concerning tribal civil jurisdiction over nonmembers. *Montana* established two exceptions to the general rule that tribes lack jurisdiction over nonmembers. Under the first exception, "[a] tribe may 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." *Id.* at 565. Under the second exception, "[a] tribe may also retain inherent power 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." *Id.* at 566.

A. The Tribal Court has jurisdiction over WPX because the contractual relationship between WPX and the Fettigs meets the first *Montana* exception.

The Tribal Court's jurisdiction over enforcement of the smoking ban in the side letter agreements falls squarely within the first *Montana* exception. Each side letter agreement is a consensual relationship between a tribal member and a nonmember—exactly the kind of relationship the Supreme Court contemplated that tribes regulate.

A tribe does not need to be a party to the consensual relationship to trigger the first *Montana* exception—a consensual relationship between a nonmember and a tribal member confers tribal jurisdiction over the nonmember. *Atty's Process & Investigation Servs. v. Sac & Fox Tribe*, 699 F.3d 927, 941 (8th Cir. 2010). To fit within the exception, a suit must "have a nexus to the consensual relationship itself." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). The consensual relationship must be of a "qualifying kind." *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997). A private agreement between tribal members and a nonmember corporation is a qualifying relationship. *See Dish Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 884 (8th Cir. 2013); *FMC v. Shoshone Bannock Tribes,* 905 F.2d 1311, 1315 (9th Cir. 1990).

WPX, a nonmember, entered the Reservation to develop oil and gas reserves. That development required rights-of-way over the Fettigs' land. To obtain those rights-of-way WPX entered *direct* negotiations with the Fettigs, who are tribal members. The Fettigs negotiated specific conditions that WPX consented to and later allegedly violated. Upon discovery of the violation, the Fettigs filed suit in Tribal Court. This dispute arose within the Reservation, concerned economic activity occurring within the Reservation, and involved an express written contract governing that on-Reservation activity and conduct between a nonmember and members. The Tribal Court has jurisdiction to adjudicate the dispute between WPX and the Fettigs.

B. *Kodiak* does not control this case.

When this Court vacated the previous preliminary injunction granted to WPX in 2023, it said this dispute was not "directly controlled" by *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019). *WPX Energy*, 72 F.4th at 838. Instead, this dispute "requires an application of *Montana* in a new context that differs from the scenario presented in *Kodiak*." *Id.*

In granting the preliminary injunction now on appeal, the District Court relied on *Kodiak* to reject tribal jurisdiction because it found that the contracts at the center of both cases were governed by extensive federal regulations. The District Court erred because the federal government plays no substantive role in regulating disputes over the alleged violations of the smoking ban negotiated in the side letter agreements.

In *Kodiak*, tribal members sued nonmember oil producers over excessive natural gas flaring from wells subject to leases on the members' allotted lands. *Kodiak*, 932 F.3d at 1130. This Court determined that the federal government's oversight of those leases was so pervasive that the consensual relationship created by the leases did not meet the first *Montana* exception. *Id.* at 1138. Though this Court conceded that entering into such a lease could be a consensual relationship, it concluded that "the entire relationship [between the nonmember and the tribal member] is mediated by the federal government." *Id.* This Court further stated that "Congress . . . left no room for tribal law to supplement [the] comprehensive regulatory scheme." *Id.* The tribal court, therefore, lacked jurisdiction over the matter because the "complete federal control of oil

and gas leases on allotted lands . . . undermines any notion that tribal regulation in this area is necessary." *Id.*

In contrast, the federal government does not provide oversight of or control the side letter agreements between WPX and the Fettigs. This Court already recognized this key difference from *Kodiak* when it vacated the previous preliminary injunction in this dispute. This Court stated, "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." *WPX Energy*, 72 F4th at 838 (emphasis added). This Court then said this dispute warrants a *Montana* analysis in a "new context" because it differed from *Kodiak*. *Id.*

Rather than conduct that new analysis, the District Court again relied on *Kodiak*, stating, "Although the side [letter] 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." (App. 176, R. Doc. 30, at 12.) That conclusion was incorrect.

The consensual relationship between WPX and the Fettigs is not created by the BIA's grant of a right-of-way. The relationship stems from the side letter agreements, which the United States does not control. While federal statutes and regulations govern some aspects of rights-of-way on allotted land, they do not extend to the negotiation and administration of these agreements. In fact, the regulation of the agreements defers to the tribe or its members. The federal government has a policy of "acknowledging and incorporating tribal law" and "defer[ring] to the maximum extent possible to Indian Landowner decisions." 25 C.F.R. § 169.1(a). Furthermore, the negotiation of remedies—such as the penalty for smoking violations—contained in the side letter agreements is authorized by 25 C.F.R. § 169.403. Under that provision, the BIA provides a great amount of latitude to landowners in negotiating remedies and defers to the negotiating parties. The BIA will approve the negotiated remedies unless they violate the federal government's trust responsibility. *Id.* § 169.1. While the United States plays a role in the *granting* of a right of way, it has no substantive role in the negotiation, execution, and administration of the side letter agreements.

Moreover, unlike *Kodiak*, the BIA's right-of-way process expressly contemplates ongoing Tribal jurisdiction. Federal regulations make clear that the "tribe maintains its existing jurisdiction over the land, activities, and persons within the right-of-way." *See* 25 C.F.R. § 169.125. That preservation of Tribal jurisdiction is also consistent with the rights-of-way issued in this case, which provide that a "tribe maintains its existing jurisdiction over the land, activities, and persons within the right-of-way and [the] grant does not diminish to any extent the [tribe's jurisdiction]." (App. 11,15, R. Doc. 1-1, at 3,7; App. 43, 48, 52-53, R. Doc. 1-2, at 4,9,13-14; App. 70-71,76, R. Doc. 1-3, at 3-4,9.)

Thus, the District Court erred when it described federal regulation of rights-of-way as "extensive" and "outside the control of tribes." (App. 175, R. Doc. 30, at 11.) The BIA does not dictate the entirety of the right-of-way process as it does with oil leasing.

The federal regulations at issue in *Kodiak*, by contrast, required that agreements conform to prescribed lease forms "which may only be changed with the [Interior] Secretary's approval." 932 F.3d at 1136. For leasing, the "[f]ederal regulations control[ed] nearly every aspect of the leasing process . . . ." *Id.* at 1136. The regulations were so pervasive as to

control the "leasing process, [] how leases are awarded, the size of land that may be included in a single lease, the duration of leases, the spacing of oil wells, the rates of royalties for oil and gas leases, the manner of payment," and more. *Id.* (citations omitted). In addition, the *Kodiak* Court wrote that "there was another entire set of statutory provisions which controlled the entire process of royalty payments." *Id.* The *Kodiak* Court said general common law did not apply to the leases, which were instead "governed by federal law." *Id.*

Unlike *Kodiak*, where the Interior Secretary approved a standard form with lease terms, the agreements here included specific conditions—not stock terms—negotiated by WPX and the Fettigs. The federal government empowers tribal landowners to negotiate their own remedies and limitations. Additionally, the right-of-way regulations at issue here expressly default to tribal jurisdiction, unlike the leasing regulations in *Kodiak*. For example, 25 C.F.R. § 169.403(e) states that 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 [or other court of competent jurisdiction]." The rights-of-way grants here provide for tribal jurisdiction where they incorporate the terms of the side letter

agreements. Each grant states that the "tribe maintains it 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 . . . (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,[] (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." (App. 11,15, R. Doc. 1-1, at 3,7; App. 43,48,52-53, R. Doc. 1-2, at 4,9,13-14; App. 70-71, 76, R. Doc. 1-3, at 3-4,9.) The multitude of express statements conferring jurisdiction to the Tribe speaks to the Tribe's authority over the relationship between WPX and the Fettigs. Federal law does not exclusively control here as it did in *Kodiak*.

C. The first *Montana* exception does not require a separate showing that a contract with a tribal member also implicates the tribe's sovereign interest.

The District Court interpreted the first *Montana* exception too narrowly when it concluded that tribal jurisdiction over WPX could only exist if the contract between WPX and the Fettigs also implicated the sovereign interest of the Tribe. Contrary to the District Court's analysis,

the first *Montana* exception only requires a nexus between the Tribe and the consensual relationship. Even if that were the case, the District Court erred when it found that WPX's relationship with the Fettigs did not implicate a sovereign interest of the Tribe.

Both WPX and the District Court misinterpreted the impact of *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). *Plains Commerce Bank* involved a non-Indian bank selling fee land within a reservation to non-Indians. *Id.* at 320. The discussion of tribal authority focused on two principles. First, the restriction on tribal authority is "particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians—what we have called 'non-Indian fee land.'" *Id.* at 328. Second, while tribes may regulate activity or conduct, they may not impose restraints on the alienation of non-Indian fee land. *Id.* at 331-32. In fact, the Supreme Court observed that "[t]he distinction between sale of the land and conduct on it is well established in our precedent[.]" *Id.* at 334. In that context, the Supreme Court stated:

> *Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land. *Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. *Montana* expressly limits its first exception to the 'activities of nonmembers,' allowing these to be regulated to the extent necessary 'to

> protect tribal self-government [and] to control internal relations[.]

Id. at 332 (internal citations omitted) (emphasis and alteration in original).

Plains Commerce Bank did not purport to change the first *Montana* exception. Multiple circuits have reached that conclusion in the years after *Plains Commerce Bank*. Most authoritatively, the Fifth Circuit extensively analyzed whether *Plains Commerce Bank* added a requirement to the first *Montana* exception and concluded that it did not. *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2016), *affirmed by an equally divided Court*, 579 U.S. 545, 546 (2016). That Court concluded:

> 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.
>
> . . .
>
> This statement [in *Plains Commerce Bank*] expresses nothing more than the uncontroversial proposition that a tribe cannot

> impose any conceivable regulation on a business simply because it is operating on a reservation and employing tribe members. However, such a limitation is already built into the first *Montana* exception. Under that exception, the tribe may only regulate activity having a logical nexus to some consensual relationship between a business and the tribe or its members.

Id. The Fifth Circuit further noted that if tribal regulation of a consensual relationship also required a showing that tribal jurisdiction was necessary to protect tribal self-government or control internal relations, the first *Montana* exception would cease to exist and would instead by swallowed by the second *Montana* exception. *Id.* at 175 n.6.

The Tenth and Ninth Circuits have both agreed with the Fifth Circuit.[2] In *Lexington Ins. Co. v. Smith*, the Ninth Circuit stated that "rather than imposing an additional requirement, the [*Plains Commerce Bank*] Court 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." 117 F.3d 1106, 1111 (9th Cir. 2024).

[2] The Seventh Circuit has also addressed *Dolgencorp*. *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014). *Jackson* did not analyze *Plains Commerce Bank*. *Id.* at 783. In a footnote, the Seventh Circuit quoted the Fifth Circuit's opinion in *Dolgencorp* and indicated that Dolgencorp "is not to the contrary" of *Jackson's* holding because there was no comparable sovereign interest at issue in *Jackson*. *Id.* at 783 n.43.

Logically, the *Montana* exceptions themselves are "'rooted' in the tribes' inherent power to regulate nonmember behavior that implicates these sovereign interests." *Id.* In other words, if a consensual relationship also has a sufficient connection, or nexus, to the exercise of tribal jurisdiction, the first *Montana* exception is satisfied.

Three years after *Plains Commerce Bank*, the Tenth Circuit engaged in a similar analysis where it evaluated the application of the first *Montana* exception by considering the nexus of the consensual relationship to the attempted tribal regulation. *Crowe v. Dunlevy*, 640 F.3d 1140, 1151-52 (10th Cir. 2011). *Crowe* involved an attorney who practiced before a tribal court and whether the tribe could order the attorney to return fees pending the outcome of tribal court litigation. While the attorney had a consensual relationship with the tribe as a member of the tribe's bar, the dispute over fees did not arise out of that consensual relationship. *Id.* at 1152. The tribe therefore would have been able to exercise jurisdiction over the attorney for a purpose that had a nexus to the attorney's admission to practice law in tribal court (such as a disciplinary proceeding or allegations of unprofessional conduct), but the tribe did not obtain universal jurisdiction over the attorney for all

purposes. While *Crowe* did not address *Plains Commerce Bank* as directly as the Fifth and Ninth Circuits did later, its analysis reveals that the core of the first *Montana* exception focuses on whether there is a sufficient nexus between a tribal interest and the consensual relationship at issue. If that nexus exists, then the consensual relationship itself concerns the tribe's ability to protect its self-government and control internal relations.

This Court's decision in *Kodiak* does not adopt a different view. As discussed above, *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. *Kodiak*, 932 F.3d at 1138. This Court already distinguished the smoking ban at issue in this case from the flaring regulations in *Kodiak*. *WPX*, 72 F.4th at 838-39. *Kodiak* does not suggest that *Plains Commerce Bank* added a new requirement to the first *Montana* exception—instead, *Kodiak* merely recognizes the overall context of the *Montana* decision itself. And *Kodiak* does not give any guidance on how courts should evaluate whether a consensual relationship between a tribal member and a nonmember must relate to self-government or internal relations. Given

the differences in this dispute and *Kodiak*, this panel should follow the more applicable analysis in *Dolgencorp*.

Even if *Plains Commerce Bank* imposed an additional hurdle for application of the first *Montana* exception, the exercise of Tribal jurisdiction over WPX is appropriate in this case. Unlike *Plains Commerce Bank*, the exercise of Tribal jurisdiction here does not act as a restraint on alienation of fee land. Instead, it regulates non-member conduct on land within the Reservation that is owned by Tribal members. Compliance with the smoking ban was a condition on WPX's entry onto the land. And the exercise of Tribal jurisdiction is directly related to WPX's consensual relationship with the Fettigs—indeed, the Fettigs are attempting to enforce the terms of the very contract that forms the consensual relationship. It is difficult to imagine a more straightforward exercise of jurisdiction to control internal relations on the Reservation. The enforcement of contracts, application of specific contract laws of the Tribe, and ability to provide a tribal forum for disputes arising from such a contract are important sovereign interests. The Tribe—like any sovereign—has an interest in ensuring that parties can enter into contracts and have those contracts enforced in accordance with the law

under which they were created. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985); *Williams v. Lee*, 358 U.S. 217, 223 (1959). Additionally, the Tribe has an interest in enforcing contracts that consent to its jurisdiction, enforcing contracts related to the economic development of Tribal minerals, and enforcing agreements such as the smoking ban that could minimize fires on the Reservation. The Tribe's ability to ensure the economic activities on allotted lands are conducted in accordance with agreed-to terms is sufficiently connected to the Tribe's exercise of self-government and control over internal relations.

Finally, the Tribal trial court and Supreme Court were limited to addressing a motion to dismiss. Those Tribal courts did not have the benefit of reviewing a developed record to determine whether the second *Montana* exception could apply. (App. 132-136, R. Doc. 1-8, at 10-14; App. 163, R. Doc. 23-1, at 21.) The District Court's preliminary injunction, though, will forever deprive the Tribal courts from addressing that aspect of tribal jurisdiction. Discovery in the Tribal trial court may reveal additional facts that would support Tribal jurisdiction under the second *Montana* exception. The 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.

In sum, the District Court erred when it determined that WPX is likely to succeed on the merits. The Tribal Court has jurisdiction over WPX under the first *Montana* exception. The consensual relationship between WPX and the Fettigs is the type of relationship between tribal members and a nonmember that this exception covers. This Court should vacate the preliminary injunction and remand with an instruction to deny the motion for a preliminary injunction because WPX is not likely to succeed on the merits.

III. WPX will not face irreparable harm from spending "time, effort, and money" to pursue its defense in Tribal Court.

WPX argued that it will have to expend "time, effort, and money" to pursue its defense in Tribal Court without a preliminary injunction. WPX did not offer any evidence of that purported harm. The District Court erroneously held that such an assertion amounts to a threat of irreparable harm.

The possibility that WPX may have to spend time, effort, and money on litigation does not constitute irreparable harm. If that were so, then

any moving party in every case brought in federal court would be able to establish irreparable harm for this same reason.

Instead, the District Court cited *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157-58 (10th Cir. 2011) for the proposition that a movant would suffer irreparable harm if forced to litigate in a tribal court that likely does not have jurisdiction. (App. 179, R. Doc. 30, at 15.) *Crowe* does not support that conclusion. The irreparable harm in *Crowe* stemmed from "unique circumstances" specific to that case, which involved a law firm that represented one faction of a tribe in a dispute over control of a tribal government. *Id.* at 1143-44, 1157. The Tenth Circuit stated:

> We agree with the district court that Crowe faces a significant risk of financial injury which, given the unique circumstances of this case, creates an irreparable harm sufficient to support a preliminary injunction. While economic loss is usually insufficient to constitute irreparable harm, the imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.
>
> Without an injunction, the Muscogee District Court will undoubtedly order Crowe to return its attorneys fees to the Thlopthlocco Treasury. Should the Anderson defendants prevail in the underlying tribal litigation, such that they are deemed the rightful governing body of the Thlopthlocco, Crowe will have no realistic way to recoup its fees. It is highly unlikely that a Thlopthlocco government, as reconstituted by the Anderson defendants, would voluntarily return funds to Crowe. And Crowe would have no legal recourse because the newly constituted Thlopthlocco would be immune from suit.

Id. at 1157-58 (internal citations and quotation omitted). The irreparable harm was not, as the District Court understood, the cost of litigating in a forum that may not have had jurisdiction. To the contrary, the Tenth Circuit focused on the monetary damages that would not be recoverable later. In fact, while the district court in *Crowe* mentioned the risk that Crowe would have to spend time and money litigating in a forum that lacked jurisdiction, the Tenth Circuit pointedly ignored that claim—strongly indicating that the cost of litigation is not irreparable harm in these circumstances. *See id.* at 1157.

Here, by contrast, there is no allegation that WPX may have to pay money to the Tribe that it would not be able to recover later. In fact, the Tribe is not a party to the underlying Tribal Court lawsuit. WPX will have to pay its own attorneys, but so does every litigant. This case does not present the unique circumstances that justified the irreparable harm in *Crowe*.

The District Court also erred when it presumed irreparable harm despite the absence of any evidence, relying on *Calvin Klein Cosms. Corp. v. Lenox Lab'ys, Inc.*, 815 F.2d 500 (8th Cir. 1987). Specifically, the District Court concluded that it "can presume irreparable harm if the

movant has a likelihood of success on the merits." (App. 178, R. Doc. 30, at 14.) *Calvin Klein* does not create such a sweeping rule.

Calvin Klein involved a trademark violation claim brought under the federal Lanham Act. 815 F.2d at 502. In that case, this Court said a district court "could presume irreparable injury from a finding of probable success *in proving likelihood of confusion*." *Id.* at 505 (emphasis added). Likelihood of confusion between a genuine product and an imitation product—and the resulting harm to a brand—may be a basis for irreparable harm in a trademark dispute, but that factor does not exist in this case. A blanket presumption of irreparable harm based solely off a likelihood of success on the merits would eliminate the irreparable harm element of the *Dataphase* test.

The District Court erred when it found WPX faced a threat of irreparable harm for the "time, effort, and money" it would face without a preliminary injunction. Paying a party's own lawyers is not irreparable harm. The District Court also erred when it concluded that it could presume irreparable harm. This Court should vacate on this basis alone with an instruction to deny the motion for a preliminary injunction

because failure to show irreparable harm is, by itself, sufficient to deny a preliminary injunction.

IV. The District Court erred when it failed to consider harm to the Tribal Appellant in balancing the harms to the parties.

The District Court did not consider harm to the Tribal Appellant in its analysis of the *Dataphase* factor requiring courts to balance the harms associated with a preliminary injunction among the parties.

As discussed above, WPX will not suffer any irreparable harm absent an injunction. Instead, the Fettigs can proceed in Tribal Court against WPX. If the Fettigs prevail and prove that WPX violated the smoking bans, then WPX will be liable to the extent proved under the contracts. If WPX prevails, it will not have any liability.

If the federal courts prevent the Tribal Court from exercising jurisdiction over this matter, the Tribal Court system will suffer serious consequences. The Tribe has an interest in preserving its judicial authority and enforcing contracts that consent to its jurisdiction, relate to the development of tribal minerals, and that could minimize fires on the Reservation. (App. 161-163, R. Doc. 23-1 at 19-21.) Further, an injunction diminishes tribal sovereignty, circumvents the authority of

the Tribal Court, and erodes the power of the Tribe and its members to enter contracts and be ruled by their own laws.

But the District Court did not consider the harm that an injunction would impose on the Tribal Appellant. It said that without a preliminary injunction, WPX would face harm having to defend against the underlying action in a court lacking jurisdiction. (App. 179, R. Doc. 30, at 15.) The Fettigs, on the other hand, would face harm from a preliminary injunction as they could no longer proceed in Tribal Court and must pursue their claims in federal court. (*Id.*) Without explaining its reasoning as to why WPX had the better argument, the District Court said this factor weighed in favor of a preliminary injunction. The District Court's opinion fails to even mention the Tribal Appellant in its analysis of this factor.

The District Court acknowledged the harm that an injunction would impose on the Tribal Appellant when it discussed the impact of an injunction on the public interest. (App. 180, R. Doc. 30, at 16.) In concluding that the public interest factor was neutral, the District Court implicitly concluded that an injunction would, in fact, harm the Tribal Appellant. Had the District Court correctly weighed the harm imposed

on the Tribal Appellant against the (nonexistent) irreparable harm to WPX, it should have concluded that the balance of harms weighed against issuing the injunction. The District Court abused its discretion when it minimized the harm an injunction will cause to the Tribal Appellant.

CONCLUSION

WPX did not meet its burden under the *Dataphase* factors. It is not likely to succeed on the merits because the Tribal Court has jurisdiction under the first *Montana* exception. WPX failed to show it faced a threat of irreparable harm without a preliminary injunction, given that the only harm it could cite was monetary. And the balance of harms does not favor WPX, given the Tribal Appellant's interest in asserting its jurisdiction over the underlying dispute. The District Court erred in reaching the opposite legal conclusion on these factors.

For the foregoing reasons, the Tribal Appellant asks this Court to vacate the preliminary injunction.

Dated this 12th day of March, 2025.

FREDERICKS LAW FIRM
Peter J. Breuer
(Bar No. 21-030)
601 N. Washington St. # 332
Stillwater, OK 74074
P: 720-883-8580
E: pbreuer@jf3law.com

/s Peter J. Breuer
Peter J. Breuer

John Fredericks III
(Bar No. 16-049)
3730 29th Ave
Mandan N.D. 58554
P: 701-421-3125
E: jfredericks@jf3law.com

Timothy Q. Purdon
ROBINS KAPLAN LLP
1207 W. Divide Avenue
Ste 200
Bismarck, ND 58501
P: (701) 255-3000
E: TPurdon@RobinsKaplan.com

Timothy W. Billion
ROBINS KAPLAN LLP
150 E. 4th Place
Ste 704
Sioux Falls, SD 57104
P: (605) 335-1300
E: TBillion@RobinsKaplan.com

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Dated this 12th day of March, 2025

FREDERICKS LAW FIRM
Peter J. Breuer
601 N. Washington St. # 332
Stillwater, OK 74074

/s Peter J. Breuer
Peter J. Breuer (Bar No. 21-030)

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Dated this 12th day of March, 2025

FREDERICKS LAW FIRM
Peter J. Breuer
601 N. Washington St. # 332
Stillwater, OK 74074

/s Peter J. Breuer
Peter J. Breuer (Bar No. 21-030)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellant's Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on March 12, 2025.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by this Court's CM/ECF system.

I also certify that upon notification that Appellant's Brief has been filed, I will file with the Clerk of Court ten (10) paper copies of the Appellants' Brief by sending them to the Court via Federal Express.

I further certify that upon notification that the foregoing has been filed, I will send one (1) paper copy of the foregoing to the counsel of record for the Appellee by U.S. Mail to the address listed on the Court's CM/ECF System.

Dated this 12th day of March, 2025.

FREDERICKS LAW FIRM
Peter J. Breuer
601 N. Washington St. # 332
Stillwater, OK 74074

/s Peter J. Breuer
Peter J. Breuer (Bar No. 21-030)