United States Court of Appeals
For the Eighth Circuit

No. 25-1083

WPX Energy Williston, LLC, now known as Devon Energy Williston, L.L.C.

Plaintiff - Appellee

v.

Gabriel Fettig; Howard Fettig; Charles Fettig; Morgan Fettig

*Defendant*s

The Honorable B.J. Jones, in his capacity as Associate Judge of the Three Affiliated Tribes District Court

Defendant - Appellant

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

Submitted: October 23, 2025
Filed: September 4, 2026

Before L.R. SMITH, KELLY, and GRASZ, Circuit Judges.

KELLY, Circuit Judge.

The district court granted a preliminary injunction in favor of WPX Energy Williston, LLC, enjoining the tribal court from exercising jurisdiction over a suit filed against it by members of the Three Affiliated Tribes. The Honorable B.J. Jones, judge of the Three Affiliated Tribes District Court, appeals.

I.

In 2018,[1] the Bureau of Indian Affairs granted WPX Energy, a non-Indian company that drills and operates oil and gas wells, several rights-of-way over allotments located on the Fort Berthold Reservation and owned by Gabriel Fettig, Howard Fettig, Charles Fettig, and Morgan Fettig (the Fettigs), all members of the Three Affiliated Tribes. The Fettigs consented to the grants, which were filed with the Bureau.

Before the rights-of-way were granted, WPX Energy and the Fettigs entered into related side letter agreements concerning the use of the rights-of-way. In these agreements, WPX Energy agreed to numerous conditions governing its use of the land, including the following provision, whereby WPX Energy would

> not allow its employees, representatives, vendors, or others to hunt on the premises nor . . . allow smoking. Additionally, [WPX Energy] will post "No Hunting" and "No Trespassing" and "[N]o Smoking" signs. If [WPX Energy], its employees, representatives, vendors or others smoke on premises, [WPX Energy] will pay a fine of $5,000.00 per incident.

In 2020, the Fettigs sued WPX Energy in the Three Affiliated Tribes District Court, alleging that WPX Energy violated the no-smoking provision of the side letter agreements. WPX Energy moved to dismiss the suit, arguing that the tribal court lacked jurisdiction because WPX Energy is a non-Indian entity. The tribal district court, in an opinion issued by Judge Jones, denied WPX Energy's motion, holding it had jurisdiction over the dispute, which originated in the side letter agreements, under Montana's consensual relationship exception. See Montana v. United States,

[1]One right-of-way was granted in 2011 and later amended in 2019.

450 U.S. 544, 565 (1981). WPX Energy appealed the decision, but before the Three Affiliated Tribes Supreme Court ruled, WPX Energy sought a preliminary injunction in federal district court, reasserting its position that the tribal court lacked jurisdiction over the dispute.

WPX Energy's motion was pending in federal district court when the Fettigs submitted an administrative claim to the Bureau, arguing that WPX Energy had violated the no-smoking provision, and seeking damages, cancellation of the easements, and a cease-and-desist order. The Bureau denied the claim, finding that the "Side Agreements [were] not part of the [Bureau]'s casefiles for the herein described grants of easements." Because "the [Bureau] did not consider the terms of the Side Agreements nor incorporate any of said terms into the grants of easements which were approved by the [Bureau]," it found nothing in the grants that would allow it "to initiate a violation based on the Fettigs' allegations of smoking."[2]

Later, the federal district court granted WPX Energy a preliminary injunction, finding that the tribal court lacked jurisdiction. Judge Jones appealed to this court, arguing WPX Energy failed to exhaust its tribal court remedies. We agreed and vacated the preliminary injunction with directions to dismiss the complaint without prejudice. WPX Energy Williston, LLC v. Jones, 72 F.4th 834, 839 (8th Cir. 2023). The Three Affiliated Tribes Supreme Court then affirmed the tribal district court's decision, holding that it had jurisdiction over the dispute.

After the tribal supreme court's decision, WPX Energy again sought declaratory and injunctive relief in federal district court, repeating its argument that the tribal court did not have jurisdiction over the Fettigs' suit. The district court

[2]WPX Energy appealed the Bureau's determination. To date, the parties have provided no update on the status of the appeal.

granted WPX Energy's request for a preliminary injunction. Judge Jones appeals the grant.[3]

II.

We review the grant of a preliminary injunction "for abuse of discretion, though we review its underlying legal conclusions de novo." Ass'n for Accessible Meds. v. Ellison, 140 F.4th 957, 959 (8th Cir. 2025) (quotation omitted) (quoting Home Instead, Inc. v. Florance, 721 F.3d 494, 497 (8th Cir. 2013)). On appeal from the issuance of a preliminary injunction, "[w]e review the district court's factual findings for clear error, its legal conclusions *de novo*, and the ultimate decision to grant the injunction for abuse of discretion." Short v. Billings Cnty., 138 F.4th 1072, 1077 (8th Cir. 2025) (quotation omitted). The factors to consider are: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." Id. (quotation omitted) (citing Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). Although no one of these factors is dispositive, the likelihood of success on the merits has been regarded as the "most significant." Id. (quotation omitted).

A.

The district court found that WPX Energy was likely to succeed on the merits of its claim, which seeks a declaration that the tribal court lacks jurisdiction over its dispute with the Fettigs concerning alleged violations of the side letter agreements.

We start with the two sets of documents that link WPX Energy and the Fettigs: the rights-of-way and the side letter agreements. To obtain a right-of-way across the

[3]The Fettigs filed a "notice of joinder and statement of intent," purporting to join the appeal filed by Judge Jones. They did not file briefs in this court.

Fettigs' land, WPX Energy had to "submit a complete application to the BIA office with jurisdiction over the land covered by the right-of-way." 25 C.F.R. § 169.101. As part of that process, WPX Energy was also required to obtain consent from the landowners. See 25 U.S.C. §§ 323–28; 25 C.F.R. § 169.107. The Fettigs consented, and the Bureau granted rights-of-way to WPX Energy over the Fettigs' allotments. See WPX Energy, 72 F.4th at 836.

WPX Energy and the Fettigs separately negotiated additional restrictions and conditions, which are contained in the side letter agreements. See id. These agreements are signed by the parties and incorporated into the grant.[4] No representative of the federal government signed the side letter agreements. The question here is whether the tribal court, or only the federal court, has jurisdiction over a dispute concerning the side letter agreements.[5]

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[4]The parties agree that side letter agreements generally are incorporated into the rights-of-way. The record, however, indicates that these particular side letter agreements might not have been incorporated. The Fettigs filed an administrative claim with the Bureau, seeking "a determination from the [Bureau] as to whether cigarette smoking on specific existing rights-of-way encumbering the Fettigs' trust lands is a violation of the approved grants of easement for such rights-of-way." In response, the Bureau reported that it did not incorporate the side letter agreements into the rights-of-way. Indeed, it had no record of the side letter agreements in its casefiles at all. As a result, the Bureau found it had no authority to "initiate a violation," and it denied their request for monetary damages and other relief. As noted, this finding presumably remains pending on appeal.

[5]The parties agree that Kodiak does not answer the question this case raises, and we agree. See Kodiak Oil & Gas (USA) Inc. v. Burr, 932 F.3d 1125, 1136, 1138 (8th Cir. 2019) (concluding that the tribal court lacked jurisdiction over suit involving oil and gas leases, because "[f]ederal law . . . controls the entire process of royalty payments" under the federal statute and "the entire relationship [between the nonmember and the tribal members] is mediated by the federal government"); see also WPX Energy, 72 F.4th at 838 ("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

A tribe's jurisdiction stems from either a treaty, a federal statute, or its "retained or inherent sovereignty." Att'y's Process and Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa, 609 F.3d 927, 934 (8th Cir. 2010) (quotation omitted) (quoting Atkinson Trading Co. v. Shirley, 532 U.S. 645, 649–50 (2001)). "[A]bsent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." Hornell Brewing Co. v. Rosebud Sioux Tribal Ct., 133 F.3d 1087, 1091 (8th Cir. 1998) (quotation omitted) (quoting Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997)). "[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders: '[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'" Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 328 (2008) (second alteration in the original) (quoting Montana, 450 U.S. at 565).

The Supreme Court has recognized two exceptions to this general rule, known as the Montana exceptions. Montana, 450 U.S. at 565–66. The first is the consensual relationship 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. The second exception recognizes that a tribe may "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. The exceptions allow tribal jurisdiction over nonmembers "to the extent necessary to protect tribal self-government and to control internal relations." McGowan v. Tix, 161 F.4th 1118, 1124 (8th Cir. 2025) (quotation omitted) (quoting Plains Com. Bank, 554 U.S. at 332).

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application of Montana in a new context that differs from the scenario presented in Kodiak.").

We begin with the first Montana exception. No one disputes that the Fettigs and WPX Energy have entered a consensual relationship, and that the relationship is based on a commercial agreement. See McGowan, 161 F.4th at 1125 n.7; Nord v. Kelly, 520 F.3d 848, 856 (8th Cir. 2008) ("The first [Montana] exception 'covers activities of nonmembers who enter consensual [commercial] relationships with the tribe or its members.'" (second alteration in original) (quoting Strate, 520 U.S. at 456–57)). Nor does WPX Energy challenge the validity of the side letter agreements themselves. Nevertheless, we have said that a "'consensual relationship alone is not enough' to establish tribal jurisdiction over a nonmember." McGowan, 161 F.4th at 1124 (quoting Kodiak Oil & Gas (USA) Inc. v. Burr, 932 F.3d 1125, 1138 (8th Cir. 2019)). The conduct at the center of the dispute must also have a "sufficient nexus to the consensual relationship such that the nonmember could anticipate tribal jurisdiction." Id. (citation modified) (quoting Att'y's Process, 609 F.3d at 941); see also Atkinson Trading Co., 532 U.S. at 656 ("Montana's consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.").

WPX Energy contends that because its relationship with the Fettigs "exists only by virtue of federal statutes and regulations," only the federal courts may resolve any dispute over the side letter agreements. Indeed, federal law governs the process for obtaining a right-of-way over Indian land, 25 U.S.C. §§ 323–28, and that process includes an extensive regulatory scheme involving various federal agencies, 25 C.F.R. § 169.

But federal law does not govern the entirety of the relationship between the Fettigs and WPX Energy. Contra Kodiak, 932 F.3d at 1137–38 (concluding that the parties' dispute over an oil and gas lease "ar[ose] under federal law," and thus only the federal court had jurisdiction over that dispute). True, the Fettigs and WPX Energy would have had no reason to enter the side letter agreements without the rights-of-way. See WPX Energy, 72 F.4th at 838 (recognizing that "right-of-way grants are governed by federal law"). However, "the dispute here arises from the alleged violation of a condition that was independently negotiated by the [Fettigs and WPX Energy]." Id. Unlike the rights-of-way, the side letter agreements are not dependent on the Bureau's approval. And the restrictions and conditions the parties agree upon in the side letter agreements are not dictated by federal law.

Instead, the side letter agreements include terms and conditions that WPX Energy must abide by that are specific to the rights-of-way on the Fettigs' land. Thus, the dispute here—whether WPX Energy violated a term or condition of those agreements—arises out of the parties' "commercial relationship." Nord, 520 F.3d at 856. The Fettigs' suit alleges that WPX Energy violated the agreements' no-smoking provision. See McGowan, 161 F.4th at 1124; Atkinson Trading Co., 532 U.S. at 656; Att'y's Process, 609 F.3d at 941 ("[T]he operative question for jurisdictional purposes is whether the . . . claim has a sufficient nexus to the consensual relationship between" the nonmember entity and the tribe.). And WPX Energy and the Fettigs are both parties to the side letter agreements that contain this provision. Thus, the dispute has a sufficient nexus to the consensual relationship between the parties and the agreement the parties entered. See Atkinson Trading Co., 532 U.S. at 656 (characterizing Strate, 520 U.S. at 457, as concluding that the regulation imposed in that case did not have a sufficient nexus to the consensual relationship itself because the nonmember "was not a party to the subcontract, and the [T]ribes were strangers to the accident" (alteration in original)).

In assessing whether the first Montana exception applies, however, we must also determine whether "tribal adjudication of the parties' [dispute over the side letter agreements] was 'necessary to protect tribal self-government and to control internal relations.'" McGowan, 161 F.4th at 1125 (citing Plains Com. Bank, 554 U.S. at 332). The tribal court's ability to adjudicate commercial contracts between its members and non-Indian entities is central to the tribe's ability to self-govern. See Plains Com. Bank, 554 U.S. at 337 ("[T]he regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." (citing Montana, 450 U.S. at 564)). A tribe, like any other sovereign, has an interest in protecting the contractual rights of its members. Montana, 450 U.S. at 565 ("To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.").

Here, the side letter agreements seek a non-Indian's compliance with land use and preservation practices as well as prohibitions on smoking and hunting—activities that have "a discernible effect on the tribe or its members." Plains Com. Bank, 554 U.S. at 332. The restrictions and conditions contained in the agreements are directed at specified activities of WPX Energy—activities that impact the health of tribal members and the environmental condition of the reservation. Cf. id. at 335 ("The tribe's traditional and undisputed power to exclude persons from tribal land, for example, gives it the power to set conditions on entry to that land via licensing requirements and hunting regulations."). The potential effects of the violations alleged here, such as fire risk and public health consequences, do not contain themselves to the physical dimensions of the rights-of-way. These impacts implicate the tribe's sovereign interests, and the tribe's ability to enforce the type of agreement at issue here fits into the first Montana exception. We recognize that the "[Montana] exceptions are 'limited' ones, and cannot be construed in a manner that would 'swallow the rule,' or 'severely shrink it.'" Id. at 330 (citations omitted). But to not recognize tribal jurisdiction over the dispute at issue here risks severely shrinking the exception instead.

To obtain a right-of-way, WPX Energy was permitted, but not required, to enter side letter agreements with the Fettigs. The terms of the side letter agreements are not governed by federal law, and the federal government is not a signatory to the agreements. We conclude that WPX Energy has failed to establish that it is likely to prevail on the merits of its claim that the tribal court lacks jurisdiction over its dispute with the Fettigs concerning the side letter agreements.

B.

Because no one factor is dispositive at this procedural posture, we turn to WPX Energy's argument that it would face irreparable harm if forced to litigate in tribal court. According to WPX Energy, without an injunction, it will spend time and litigation costs in a court that lacks jurisdiction to hear the dispute. But we have held that "normal costs of litigation" are "not an irreparable injury so long as the losses can be recovered." DISH Network Serv. L.L.C. v. Laducer, 725 F.3d 877, 882 (8th Cir. 2013). WPX Energy cites Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140 (10th Cir. 2011), to support its assertion that simply litigating in a court that lacks jurisdiction amounts to irreparable harm. In Crowe, the Tenth Circuit held that Crowe, a non-Indian entity, would face irreparable harm due to the "unique circumstances of [the] case" because Crowe would be unable to recover its attorney's fees against a tribal council that would be "immune from suit." Id. at 1157–58. Unlike Crowe, WPX Energy has identified nothing that would prevent it from recovering litigation costs from a private party. See id. Nor has it otherwise shown how litigation in tribal court would amount to irreparable injury. See Denali Summit, LLC v. Union Elec. Co., 158 F.4th 896, 899 (8th Cir. 2025) ("Failure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction." (quotation omitted)).

We vacate the grant of a preliminary injunction and remand for further proceedings as appropriate.