

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

Paradigm Energy Partners, LLC,)	
)	
Plaintiff,)	
)	
vs.)	ORDER GRANTING PLAINTIFF’S
)	MOTION FOR TEMPORARY
)	RESTRAINING ORDER
Mark Fox, in his official capacity as)	
Chairman of the Tribal Business Council)	
of the Mandan, Hidatsa & Arikara Nation,)	
Chief Nelson Heart, in his official capacity)	
as Chief of Police for the Mandan, Hidatsa)	Case No.: 1:16-cv-304
& Arikara Nation,)	
)	
Defendants.)	

Before the Court is the Plaintiff’s “Emergency Motion for Temporary Restraining Order” filed on August 19, 2016. See Docket No. 4. The Plaintiff seeks a temporary restraining order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, specifically requesting an order prohibiting the Defendants from interfering with the Plaintiff’s construction of two pipelines in McKenzie and Mountrail Counties, North Dakota. On August 22, 2016, the Defendants filed a Motion to Dismiss for Lack of Jurisdiction. See Docket No. 8. The Plaintiff filed a response in opposition to the Defendant’s motion on August 23, 2016. See Docket No. 9. For the reasons set forth below, the Court grants the Plaintiff’s motion.

I. BACKGROUND

The Plaintiff, Paradigm Energy Partners, LLC (“Paradigm Energy”), is a Delaware limited liability company with its principal place of business in Irving, Texas. See Docket No. 1. No person or entity having an ownership interest in Paradigm Energy is a resident or citizen of North

Dakota. Paradigm Energy is engaged in the business of constructing two pipelines that run underneath Lake Sakakawea in McKenzie and Mountrail Counties, North Dakota (collectively, the “Sacagawea Pipelines”). One pipeline will transport natural gas (the “Natural Gas Pipeline”) and one will transport crude oil (the “Oil Pipeline”). When completed, the Sacagawea Pipelines will cross underneath Lake Sakakawea by boring 100 feet beneath the lakebed and will run 70 miles to transport natural gas and oil to a collection point in Mountrail County for delivery to interstate carriers. See Docket No. 5-4, p. 4. Defendant Mark Fox is the Chairman of the Tribal Business Council of the Manda, Hidatsa & Arikara Nation (“Nation”) and is a citizen of North Dakota. Defendant Chief Nelson Heart is the Chief of Police for the Nation and is a citizen of North Dakota.

Lake Sakakawea is located within the Fort Berthold Indian Reservation; however, both Lake Sakakawea and its subsurface are owned by the United States. In 1949, the Nation conveyed all of its “right, title and interest” in the land under Lake Sakakawea to the United States in order to build the Garrison Dam. The Army Corps of Engineers (the “Corps of Engineers”) operates Lake Sakakawea for the federal government pursuant to its authority under the 1944 Flood Control Act and the 1949 Takings Act.

Paradigm Energy began obtaining approval from the necessary federal agencies to construct the Sacagawea Pipelines in 2015. In accordance with the National Environmental Policy Act (“NEPA”), the Bureau of Indian Affairs (“BIA”) completed an environmental review of the Sacagawea Pipelines. On August 28, 2015, the BIA, along with the Fish and Wildlife Service, issued a “Finding of No Significant Impact.” See Docket No. 5-9. The Corps of Engineers completed its own NEPA review and issued a “Mitigated Finding of No Significant Impact” on April 15, 2016. See Docket No. 5-10. Paradigm Energy obtained the necessary right-of-way

agreements from the Corps of Engineers, the BIA, allottees, private landowners, and the Nation. Specifically, Paradigm Energy obtained an “Easement for Fuel Carrying Pipeline Right-of-Way” from the Corps of Engineers. See Docket No. 5-6. The Easement, issued on June 1, 2016, granted Paradigm Energy a right-of-way for the Sacagawea Pipelines under Lake Sakakawea, and was issued under the federal government’s exclusive statutory authority under the Mineral Leasing Act (30 U.S.C. § 185) to grant rights-of-way for pipelines crossing federal lands. Paradigm Energy also obtained permits from private landowners to access their lands to install the Sacagawea Pipelines. Paradigm Energy’s permit with one private landowner prohibits the use of his land after November 1, 2016. The November 1, 2016, deadline cannot be extended without the landowner’s consent, and the landowner has refused to extend that deadline.

The Nation’s Business Council requested that Paradigm Energy obtain over 600 tribal members’ signatures on a petition supporting the Sacagawea Pipelines. Paradigm Energy asserts it obtained the requested signatures on a petition prepared by the Nation’s attorneys. See Docket No. 5-7. On April 16, 2015, Defendant Fox signed Tribal Resolution No. 15-065, through which the Nation approved all segments of the Pipeline that crossed lands held in trust for the benefit of the Nation. See Docket No. 1-2, pp. 2-3. The Nation reaffirmed this Resolution in June of 2016. See Docket No. 1-2, pp. 4-5.

Paradigm Energy began constructing the Sacagawea Pipelines in March of 2016, and the Lake Sakakawea Segment of the Sacagawea Pipelines in early June of 2016, in accordance with the permits and approvals it had obtained for the project. See Docket No. 1, p. 6. On August 8, 2016, Paradigm Energy and its workers and contractors were served with a “Cease and Desist Order” signed by Defendant Fox. See Docket No. 1-1. The “Cease and Desist Order” asserts that “[c]onsent of the governing body of the MHA Nation is required before an oil and gas pipeline

can be constructed under Lake Sakakawea within Reservation boundaries.” See Docket No. 1-1. After the “Cease and Desist Order” was issued, the Defendants and their agents showed up at the Lake Sakakawea Segment construction site and informed Paradigm Energy’s construction contractors that they would be arrested if they continued to work on the Lake Sakakawea Segment. See Docket No. 1, p. 7. On August 9, 2016, Paradigm Energy instructed its contractors to stop work. The record reveals the construction of the Oil Pipeline is largely complete; essentially the only remaining work to be completed is the addition of a block valve, while construction for the Natural Gas Pipeline had just begun.

On August 19, 2016, Paradigm Energy filed a complaint, asserting claims of declaratory and injunctive relief. See Docket No. 1. That same day, Paradigm Energy filed a motion for a temporary restraining order, seeking to restrain and enjoin the Defendants from obstructing or interfering in any way with its construction of the Sacagawea Pipelines. See Docket No. 4. Paradigm Energy notes it will provide copies of its motion for a temporary restraining order and accompanying pleadings to the attorneys for the Nation who Paradigm Energy reasonably believes represent or may represent the Defendants. See Docket No. 4, p. 4. On August 19, 2016, notices of appearance of counsel were filed on behalf of the Defendants. See Docket Nos. 6 and 7.

On August 22, 2016, the Defendants filed a Motion to Dismiss. The Defendants argue the Court lacks jurisdiction because Plaintiff has not pled a waiver of sovereign immunity, neither the Nation nor the United States has waived the Nation’s sovereign immunity, the Plaintiff failed to exhaust tribal court remedies, the Plaintiff failed to join and is unable to join an indispensable party, and the Plaintiff has not properly served either defendant and therefore lacks personal jurisdiction over the Defendants. See Docket No. 8. The Plaintiff filed a response in opposition to the Defendant’s motion on August 23, 2016. See Docket No. 9.

II. STANDARD OF REVIEW

Paradigm Energy seeks a temporary restraining order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, which provides in relevant part as follows:

(b) Temporary Restraining Order.

(1) *Issuing Without Notice.* The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

The United States Supreme Court has recognized that in some limited situations, a court may properly issue *ex parte* orders of brief duration and limited scope to preserve the status quo pending a hearing. Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 438-39 (1974); Carroll v. Princess Anne, 393 U.S. 175, 180 (1968). The limited nature of *ex parte* remedies:

reflect[s] the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute. *Ex parte* temporary restraining orders are no doubt necessary in certain circumstances, cf. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 180 . . . (1968), but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.

Granny Goose Foods, 415 U.S. at 438-39 (emphasis in original).

Rule 65(b) directs the court to look to the specific facts shown by an affidavit to determine whether immediate and irreparable injury, loss, or damage will result to the applicant. In addition, it is well-established the court is required to consider the factors set forth in Dataphase Systems, Inc., v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981), in determining whether a temporary

restraining order should be granted. The *Dataphase* factors include “(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.

III. LEGAL DISCUSSION

It is well-established that the movant has the burden of establishing the necessity of a temporary restraining order. Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994). “No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction.” Id. at 1472.

A. PROBABILITY OF SUCCESS ON THE MERITS

When evaluating a movant’s likelihood of success on the merits, the 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. v. Lenox Labs., Inc., 815 F.2d 500, 503 (8th Cir. 1987). At this preliminary stage, the Court need not decide whether the party seeking the temporary restraining order will ultimately prevail. PCTV Gold, Inc. v. SpeedNet, LLC, 508 F.3d 1137, 1143 (8th Cir. 2007). Although a temporary restraining order cannot be issued if the movant has no chance on the merits, “the Eighth Circuit has rejected a requirement as to a ‘party seeking preliminary relief prove a greater than fifty per cent likelihood that he will prevail on the merits.’” Id. The Eighth Circuit has also held that of the four factors to be considered by the district court

in considering preliminary injunctive relief, the likelihood of success on the merits is “most significant.” S & M Constructors, Inc. v. Foley Co., 959 F.2d 97, 98 (8th Cir. 1992).

The Court must consider the substantive claims in determining whether Paradigm Energy has a likelihood of success on the merits. Paradigm Energy is asserting claims of declaratory and injunctive relief. See Docket No. 1. A likelihood of success on the merits of even one claim can be sufficient to satisfy the “likelihood of success” *Dataphase* factor. See Nokota Horse Conservancy, Inc. v. Bernhardt, 666 F. Supp. 2d 1073, 1078-80 (D.N.D. 2009).

Paradigm Energy seeks to ensure the timely construction of its pipelines and the operation of its business by restraining Defendants from continuing to interfere with its right to lawfully construct the Sacagawea Pipelines. Paradigm Energy asserts it is likely to prevail on all of its claims against the Defendants.

The Court finds Paradigm Energy has a strong likelihood of success on its claims against the Defendants. Based on the limited record before the Court, it appears that Paradigm Energy has the legal right to construct the Sacagawea Pipelines. Paradigm Energy asserts it has obtained the necessary easements and rights of way to construct the Sacagawea Pipelines in North Dakota and the necessary approvals from the federal government, allottees, private landowners, and the Nation. In addition, Defendant Fox of the Nation expressly approved the construction of the pipelines months ago. It does not appear from the record before the Court that the Defendants have a valid legal basis for interfering with Paradigm Energy’s construction of the Sacagawea’s Pipelines.

The Defendants have argued the Court lacks jurisdiction and that sovereign immunity warrants a dismissal of this action. However, the *Ex parte Young* doctrine allows suits for declaratory and injunctive relief against government officials in their official capacities—

notwithstanding the sovereign immunity possessed by the governmental entity itself. It is clear the *Ex parte Young* doctrine applies to Indian tribes as well. Vann v. U.S. Dept. of Interior, 701 F.3d 927, 929 (D.C.Cir. 2012) (citing cases and authorities); Ex parte Young, 209 U.S. 123 (1908); accord Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty., 991 F.2d 458, 460 (8th Cir. 1993) (discussing the *Ex parte Young* “exception” and affirming that “sovereign immunity did not protect the tribal officers because they had acted beyond the scope of the authority the tribe was capable of bestowing upon them”).

At this early stage of the litigation, the allegations contained in Paradigm Energy’s complaint and other pleadings are sufficient to invoke the *Ex parte Young* doctrine. As the Eighth Circuit Court of Appeals has explained, “When the complaint *alleges* that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked.” Northern States, 991 F.2d at 460 (quoting Tenneco Oil Co. v. Sac and Fox Tribe of Indians, 725 F.2d 572, 574 (10th Cir. 1984)) (emphasis added); see also Verizon Maryland, Inc. v. Public Service Com’n of Md., 535 U.S. 635, 646 (2002). Here, Paradigm Energy’s complaint alleges in paragraphs 9, 57, and 58 that the Defendants have acted outside such authority. See Docket No. 1, pp. 2, 10.

As the Court has found a strong likelihood of success on Paradigm Energy’s claims, no further analysis is necessary at this point. See Nokota Horse Conservancy, 666 F. Supp. 2d at 1078-80 (finding sufficient likelihood of success on the merits of one claim, without a need to undertake extensive review of other claims). The Court finds Paradigm Energy has shown the “success on the merits” *Dataphase* factor weighs strongly in favor of the issuance of a temporary restraining order.

B. IRREPARABLE HARM

Paradigm Energy must establish there is a threat of irreparable harm if injunctive relief is not granted, and that such harm is not compensable by an award of money damages. Doe v. LaDue, 514 F. Supp. 2d 1131, 1135 (D. Minn. 2007). “The ‘mere possibility’ that harm may occur before a trial on the merits is not enough.” MKB Mgmt. Corp. v. Burdick, 954 F. Supp. 2d 900, 912 (D.N.D. 2013). The party that seeks a temporary restraining order must show that a significant risk of harm exists. Id. The absence of such a showing is sufficient grounds to deny injunctive relief. Id.

Paradigm Energy contends it will suffer irreparable injury if the Defendants continue to interfere with its construction of the Sacagawea Pipelines. The Defendants seek to prevent Paradigm Energy from exercising its lawful right to construct the Sacagawea Pipelines and have no apparent legal basis for doing so. If the Defendants are allowed to continue to obstruct Paradigm Energy from continuing the construction of the Pipeline, even temporarily, the Defendants will wrongfully strip Paradigm Energy of its right to engage in the lawful construction of the Sacagawea Pipelines. Despite knowing for months that Paradigm Energy was constructing the Sacagawea Pipelines across Lake Sakakawea, the Defendants waited until the construction of the Oil Pipeline was nearly complete to serve their “Cease and Desist Order.” Paradigm Energy asserts it only has until November 1, 2016, to complete the Sacagawea Pipelines based on a deadline imposed by a private landowner’s permit. If the Oil Pipeline is not operational by that date, Paradigm Energy asserts it will not be able to meet its transportation commitments to shippers, the shippers will have the right to terminate their existing contracts, and a projected revenue loss from those contracts exceeds \$277 million. This loss is in addition to the estimated loss of \$253 million in capital expenditures associated with the construction of the pipelines. In

addition, if the Natural Gas Pipeline is not completed by November 1, 2016, Paradigm Energy asserts it will lose its anchor natural gas customer, and the cost of building the Natural Gas Pipeline would become unjustifiable. Paradigm Energy further asserts it would likely be unable to survive such losses. Paradigm Energy argues that the time sensitive nature of the matter supports the issuance of a temporary restraining order.

The Court finds the threat of the Defendants' continued interference with Paradigm Energy's construction of the Sacagawea Pipelines is real and poses a significant threat of irreparable harm. Further, the Eighth Circuit has explained that a district court can presume irreparable harm if the movant is likely to succeed on the merits. See Calvin Klein Cosmetics Corp., 815 F.2d at 505 (citing Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc., 633 F.2d 746, 753 (8th Cir. 1980)). As Paradigm Energy has sufficiently demonstrated the threat of irreparable harm, the Court finds this *Dataphase* factor weighs strongly in favor of the issuance of a temporary restraining order.

C. BALANCE OF HARMS

As outlined above, Paradigm Energy has demonstrated the threat of irreparable harm. The balance of harm factor requires consideration of the balance between the harm to the movant and the injury the injunction's issuance would inflict on other interested parties. See Pottgen v. Mo. State High Sch. Activities Ass'n, 40 F.3d 926, 929 (8th Cir. 1994). While the irreparable harm factor focuses on the harm or potential harm to the plaintiff, the balance of harm factor analysis examines the harm to all parties to the dispute and other interested parties, including the public. See Dataphase, 640 F.2d at 114; Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367, 372 (8th Cir. 1991).

At this early stage, Paradigm Energy has clearly demonstrated a strong likelihood of success on the merits and a real threat of irreparable harm. Based on the limited record before the Court, it does not appear that the temporary restraining order Paradigm Energy seeks will harm the Defendants in any significant way. The issuance of a temporary restraining order will merely prevent the Defendants from attempting to deter lawful construction of the Sacagawea Pipelines which was initially approved and supported by the Nation. Even if the Defendants are able to demonstrate that they will suffer harm, such harm will likely be short-lived. Pursuant to Rule 65 of the Federal Rules of Civil Procedure, when a court issues a temporary restraining order without notice, “the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matter” Fed. R. Crim. P. 65(b)(3). Additionally, typically the maximum amount of time that a temporary restraining order is in effect is 14 days. See Fed. R. Crim. P. 65(b)(2). If the *ex parte* temporary restraining order is not granted, Paradigm Energy will be forced to either abandon its planned construction of the Sacagawea Pipelines or continue its activities under threat of the Nation “tak[ing] such enforcement action as is necessary to protect its rights and resources.” See Docket No. 1-1, p. 3. Under either of these scenarios, Paradigm Energy will be irreparably harmed.

The balance of harm factor clearly favors Paradigm Energy. Given the relatively short time period and the potential for Paradigm Energy to suffer lengthy and costly delays resulting in significant harm, the Court finds the “balance of harm” *Dataphase* factor strongly weighs in favor of issuance of an *ex parte* temporary restraining order.

D. PUBLIC INTEREST

The final *Dataphase* factor, which involves consideration of public policy, also favors the issuance of a temporary restraining order. The Legislative Assembly of North Dakota has specifically declared that the development and production of oil and gas is in the public interest. N.D.C.C. § 38-08-01 (stating it is "in the public interest to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state"). Granting a temporary restraining order comports with this public interest. Public policy, as clearly stated in North Dakota law, favors the development of oil and gas resources. In addition, it is certainly in the public interest to protect companies who are engaging in lawful business activities. Therefore, at this preliminary stage, the Court finds this *Dataphase* factor weighs strongly in favor of the issuance of a temporary restraining order.

After a careful review of the entire record and the *Dataphase* factors, the Court finds Paradigm Energy has met its burden under Rule 65(b) of establishing the necessity of an *ex parte* temporary restraining order.

IV. CONCLUSION

The Court has carefully reviewed the entire record and the *Dataphase* factors and finds the Plaintiff has met its burden under Rule 65(b) of establishing the necessity of an *ex parte* temporary restraining order at this early stage of the litigation. The Court **GRANTS** the motion for a temporary restraining order (Docket No. 4). As a result, the Defendants and any person or entities acting in concert with or on behalf of the Defendants, are **TEMPORARILY RESTRAINED**

AND ENJOINED from unlawfully interfering in any way with the Plaintiff and its representatives' access and construction of the Sacagawea Pipelines.

In addition, the Court **ORDERS** the following:

- 1) A hearing shall be held in Courtroom One of the U.S. District Court for the District of North Dakota, in Bismarck, North Dakota, on **Thursday, September 1, 2016, at 2:30 p.m.** to determine whether a preliminary injunction should be issued.
- 2) At the hearing, the Plaintiff shall be prepared to show cause why a preliminary injunction should be issued. If the Plaintiff fails to do so, "the court must dissolve the [restraining] order." Fed.R.Civ.P. 65(b)(3).
- 3) At the hearing, the Defendants shall be prepared to show cause why they should not be preliminarily enjoined during the pendency of this action.
- 4) At any time, the Defendants may file a motion to dissolve or modify this temporary restraining order in accordance with Rule 65(b)(4) of the Federal Rules of Civil Procedure. The Defendants may also contact the U.S. District Court to modify the time or date of the scheduled hearing.
- 5) The temporary restraining order will not become effective until the Plaintiff serves the order on the Defendants. The Plaintiff shall arrange for the immediate service of this order together with the Plaintiff's motion for a temporary restraining order and the supporting pleadings and affidavits, and shall promptly file proof of service with the Court.
- 6) In accordance with Rule 65(c) of the Federal Rules of Civil Procedure, a \$10,000 bond shall be required to be posted by the Plaintiff before the temporary restraining order is effective.
- 7) In accordance with Rule 65(b)(2) of the Federal Rules of Civil Procedure, this order expires in 14 days or on or before September 5, 2016, at the same hour of this order, unless the Court, for good cause, extends the order "for a like period or the adverse party consents to a longer extension."

IT IS SO ORDERED.

Dated at 4:30 p.m., this 23rd day of August, 2016.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court