THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PARADIGM ENERGY PARTNERS, LLC, Plaintiff, Appellee, v. MARK FOX, in his official capacity as Chairman of the Tribal Business Council of the Mandan, Hidatsa & Arikara Nation; and CHIEF NELSON HEART, in his official capacity as Chief of Police for the Mandan, Hidatsa & Arikara Nation, Defendants, Appellants.	Eighth Circuit File No. 16-3655 Appeal from the United States District Court for the District of North Dakota, Western Division, Case No. 1:16-CV-00304-DLH-CSM **Appellants' Motion for an Expedited Appeal**

INTRODUCTION

Pursuant to 28 U.S.C. § 1657 and Rule 2 of the Federal Rules of Appellate Procedure, Appellants-Defendants Mark Fox and Chief Nelson Heart ("Appellants"), hereby respectfully request, with good cause, that this Court expedite their appeal because it raises issues of unusual magnitude and urgency. Appellants seek an expedited review of the district court's

grant of a preliminary injunction in favor of Appellee-Plaintiff Paradigm Energy Partners, LLC ("Appellee"), which permits Appellee to construct oil and natural gas pipelines through property held in trust for the Mandan, Hidatsa & Arikara Nation ("MHA Nation"). The district court's injunction contravened a cease-and-desist order issued by the MHA Nation which had halted construction pending further tribal proceedings.

Appellants are entitled to an expedited appeal. First, this appeal stems from an order granting a preliminary injunction and federal law requires expedited review of such matters. Second, this appeal implicates important questions of federal law, including issues of tribal property rights, jurisdiction and sovereign immunity. Finally, an expedited appeal is appropriate because the imminent construction of the pipeline through tribal trust land under Lake Sakakawea presents an urgent need for relief.

FACTUAL AND PROCEDURAL BACKGROUND

Appellee Paradigm Energy is currently constructing two oil and natural gas pipelines that will run under Lake Sakakawea in North Dakota. The location of these pipelines under Lake Sakakawea is within the exterior boundaries of the Fort Berthold Indian Reservation, which is home to the

MHA Nation. Defendant Fox is Chairman of the Tribal Business Council, and Defendant Chief Heart is the MHA Nation's Chief of Police.

The portion of Lake Sakakawea where these pipelines will travel under the lake is within the exterior boundaries of the Fort Berthold Indian Reservation. Although the lake and its subsurface were conveyed to the United States by the 1949 Takings Act, the Fort Berthold Mineral Restoration Act of 1984 expressly restored the minerals under the lake to tribal trust ownership. P.L. 98-602, 98 Stat. 3152, §202 ("[A]ll mineral interests in lands located within the exterior boundaries of the Fort Berthold Indian Reservation [] which were acquired by the United States for construction, operation, or maintenance of the Garrison Dam and Project . . . are hereby declared to be held in trust by the United States for the benefit and use of the Three Affiliated Tribes of the Fort Berthold Reservation.").

Appellee is constructing a pipeline through a combination of on and off Reservation lands. Nearly two miles of that pipeline system will pass through the MHA Nation's trust mineral estate under Lake Sakakawea. Appellee sought and received approval from the Corps of Engineers to construct the pipeline under the lake, but Appellee did not obtain the consent of the MHA Nation or the Bureau of Indian Affairs for the portion

of the pipeline that travels under the lake. Appellee sought and failed to obtain tribal approval on two separate occasions. Appellee commenced boring operations in spite of its failure to obtain tribal consent. As a result, on August 8, 2016, the Tribe served an "Order to Cease and Desist" signed by Chairman Fox on the Appellee. In response, on August 9, 2016, Appellee ceased construction of the pipelines.

On August 19, 2016, Appellee filed an "Emergency Motion for Temporary Restraining Order" in the United States District Court for the District of North Dakota, Case No. 1:16-cv-304-DLH-CSM. Appellee sought a temporary restraining order ("TRO") to prohibit Appellants from interfering with its construction of the pipelines. On August 22, 2016, Appellants filed a motion to dismiss for lack of jurisdiction by reason of the MHA Nation's sovereign immunity. On August 23, 2016, the district court issued an order granting the TRO. Appellants then filed a motion to dissolve the TRO. On September 1, 2016, the district court held a hearing in Bismarck, North Dakota, on Appellee's request for a preliminary injunction.

On September 13, 2016, the district court issued an order granting Appellee's motion for a preliminary injunction and enjoining Appellants' from unlawfully interfering in any way with Appellee's construction of the

contested pipeline. The district court's order also denied Appellants' motions to dissolve the TRO and to dismiss for lack of jurisdiction. On September 14, 2016, Appellants filed their Notice of Interlocutory Appeal with the district court. This motion for expedited appeal follows.

ARGUMENT

Federal law contemplates and routinely permits expedited appeals and, in certain circumstances, mandates expedited consideration of an appeal. Under 28 U.S.C. § 1657, federal courts "*shall* expedite the consideration of any action . . . for temporary or preliminary injunctive relief, or any other action if good cause therefor is shown." 28 U.S.C. § 1657(a) (emphasis added). Good cause is shown "if a right under the Constitution of the United States or a Federal Statute . . . would be maintained in a factual context that indicates that a request for expedited consideration has merit." *Id.* Additionally, Rule 2 of the Federal Rules of Appellate Procedure provides that, "[o]n its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs[.]"

The Eighth Circuit has previously permitted expedited appeals where the need for relief is urgent. *See Henderson v. Bodine Aluminum, Inc.* 70 F.3d

958, 960 (8th Cir. 1995) (per curiam) (appeal heard three days following filing of action). In *Henderson*, the Eighth Circuit permitted an expedited appeal where the plaintiff sought a preliminary injunction against her health plan after it had denied her physician's request for certain experimental breast cancer treatment. *Id.* at 959. The *Henderson* court acknowledged that "[u]rgent medical treatment is the kind of equitable relief that cannot abide trial." *Id.* at 960.

Similarly, other circuits have permitted expedited appeals. *See Gregorio T. by & Through Jose T. v. Wilson*, 54 F.3d 599, 600 (9th Cir. 1995) (granting expedited review in action challenging enforcement of certain voter initiatives in advance of election and noting that 28 U.S.C. § 1657 gives priority to preliminary injunction appeals); *Van Hollen v. FEC*, Nos. 12-5117, 12-5118, 2012 U.S. App. LEXIS 10333, at *2 (D.C. Cir. May 14, 2012) (ordering expedited appeal pursuant to 28 U.S.C. § 1657 following district court's order vacating a regulation promulgated by the Federal Election Commission).

Here, Appellants' grounds for an expedited appeal are clear. *First*, as illustrated above, 28 U.S.C. § 1657(a) requires courts to permit an expedited appeal in "any action . . . for temporary or preliminary injunctive relief" if good cause is shown. Thus, because Appellants' appeal the district court's

grant of a preliminary injunction and have shown good cause, they are entitled to have that appeal heard on an expedited basis.

Second, Appellants' have satisfied an additional basis under 28 U.S.C. § 1657(a), which requires an expedited appeal in any action where "a right under the Constitution of the United States or a Federal Statute . . . would be maintained in a factual context that indicates that a request for expedited consideration has merit." *Id.* Important federal rights are directly at stake in this litigation, including federally protected tribal property rights, the MHA Nation's federally recognized jurisdiction within its reservation, and sovereign immunity. The federal Nonintercourse Act expressly prohibits anyone from claiming an interest in Indian land unless authorized by Congress. 25 U.S.C § 177. Further, "[n]o grant of a right-of-way over and across any lands belonging to a tribe . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324. Federal law also vests in any tribe the power "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe[.]" 25 U.S.C. § 476(e).

The Nonintercourse Act "has been perhaps the most significant congressional enactment regarding Indian lands." *United States ex rel Santa*

Ana Indian Pueblo v. Univ. of N.M., 731 F.2d 703, 706 (10th Cir. 1984). The Act's "overriding purpose is the protection of Indian lands. It acknowledges and guarantees the Indian tribes' right of possession and imposes on the federal government a fiduciary duty to protect the lands covered by the Act." *Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 904 (9th Cir. 2014) (quotations omitted). *See also Tonkawa Tribe v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996) (recognizing the Nonintercourse Act "broadly protects Indian tribes' rights to and interests in land" and applies to "any title or claim to real property, including nonpossessory interest") (internal quotations omitted).

Here, the mineral estate under Lake Sakakawea is undoubtedly held in trust for the MHA Nation by the United States. *See* Fort Berthold Mineral Restoration Act of 1984, P.L. 98-602, 98 Stat. 3152, §202. Thus, Appellee needed tribal consent for any right-of-way or encumbrance upon the Tribe's trust land before Appellee could proceed with the pipeline construction. Because Appellee failed to obtain consent, the Tribe had the legal right to order Appellee to cease and desist construction of the pipelines. The district court's order granting a preliminary injunction – which allowed Appellee to proceed with construction without the Tribe's consent and effectively invalidated the Tribe's properly-issued cease-and-desist order – violates the

Tribe's rights under federal law and raises serious questions of sovereign immunity. Therefore, because a right under the Constitution or federal law is implicated and because Appellants' position undoubtedly has merit, this Court should permit an expedited appeal.

Finally, Appellants have demonstrated that the need for relief is urgent. *See Henderson*, 70 F.3d at 960. Here, the pipeline construction, in violation of federal and tribal law and with its impact on the MHA Nation's mineral interests and potential for environmental impact, is imminent and, indeed, ongoing.[1] Further, Phillips 66, one of the entities involved in the pipeline construction told its investors the pipeline is expected to be operational by September 30, 2016, so the invasion is imminent and, in fact, has commenced. Additionally, before the district court, Appellee represented that if the natural gas pipeline is not complete by November 1, 2016, the company will lose its anchor customer and the project will fail. Appellee also represented that a critical right of way agreement with a private land owner is set to expire on November 1, 2016. Thus, a swift resolution is necessary and would serve the interests of all parties.

[1] The Supreme Court has recognized, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987).

CONCLUSION

Appellants respectfully request that the Court grant this motion for an expedited appeal.

September 21, 2016

By: *s/ John Fredericks III*

Fredericks Peebles & Morgan, LLP
John Fredericks, III
3730 29th Avenue
Mandan, North Dakota 58554
T: 303-673-9600
jfredericks@ndnlaw.com

Robins Kaplan LLP
Timothy Q. Purdon
1207 West Divide Avenue
Suite 200
Bismarck, North Dakota 58503
T: 701 255 3000
tpurdon@robinskaplan.com

-and-

Katherine Barrett Wiik
Luke Hasskamp
800 LaSalle Avenue
Suite 2800
Minneapolis, Minnesota 55402
T: 612 349 8500
tpurdon@robinskaplan.com
kbarrettwiik@robinskaplan.com
lhasskamp@robinskaplan.com

Attorneys for Defendants, Appellants Mark Fox and Chief Nelson Heart

CERTIFICATES OF SERVICE
FOR DOCUMENTS FILED USING CM/ECF

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on the 21st day of September, 2016, I electronically filed the foregoing 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.

s/ John Fredericks III
John Fredericks III