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

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| Slawson Exploration Company, Inc.,<br><br>Plaintiff,<br><br>vs.<br><br>United States Department of the Interior; Ryan Zinke, in his official capacity as Secretary of the United States Department Of the Interior; Interior Board of Land Appeals; and James K. Jackson, Administrative Judge,<br><br>Defendants. | ) | **ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER**<br><br>Case No.: 1:17-cv-166 |

Before the Court is the Plaintiff's "Motion for Temporary Restraining Order and Preliminary Injunction" filed on August 12, 2017. See Docket No. 3. The Plaintiff seeks a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure, specifically requesting the Court set aside an Order the Interior Board of Land Appeals ("the Board") issued on August 9, 2017, that stayed eight previously approved Applications for Permit to Drill. For the reasons set forth below, the Court grants the Plaintiff's motion for a temporary restraining order.

## I. BACKGROUND

This case arises from an appeal of the permitting process for a project seeking to develop oil and gas leases underneath Lake Sakakawea. The Plaintiff, Slawson Exploration Company, Inc. ("Slawson"), is a privately held corporation engaged in oil and gas production and exploration. See Docket No. 1. The property at issue in this case, the Torpedo Federal wells, are located in

Mountrail County, North Dakota. The Torpedo Federal wells are part of Slawson's Torpedo Federal Project, a project involving Slawson's plan to drill multiple horizontal wells from a single well pad to develop oil and gas leases beneath the bed of Lake Sakakawea. Since the outset of the project, Slawson has invested over $3.8 million in construction, equipment, and labor for the project. The Project seeks to access and develop existing federal, state, and fee oil and gas leases beneath Lake Sakakawea. See Docket No. 3-3, p. 4. Slawson asserts the project's wells would not penetrate or develop any tribally owned minerals, allotted minerals, or minerals that are held in trust by the United States for the benefit of one or more tribes or tribal members. Further, Slawson asserts the project's well pad is located on private lands, non-Indian lands overlaying private minerals.

Beginning in 2011 and through 2015, Slawson filed Applications for Permit to Drill for the Torpedo Federal Project. See Docket No. 3-3, p. 2. During the six-year review process, the Bureau of Land Management (BLM) attempted to solicit the Mandan, Hidatsa, and Arikara Nation's ("MHA Nation") input on the project. In early 2013, tribal representatives met with the BLM at a proposed well pad location and voiced no objections—even though the proposed location was 345 feet closer to Lake Sakakawea than the final well pad location. See Docket No. 3-3, p. 7. Throughout 2016, the BLM repeatedly communicated with the MHA Nation about the proposed well pad location and had four in-person meetings. Slawson contends the MHA Nation did not raise any serious issues with the well pad's location until August 2016.

In March of 2017, the BLM approved Slawson's permits to drill. Prior to its approval of Slawson's permits, an environment assessment was conducted as required by the National Environmental Policy Act, and the BLM determined its approval of Slawson's permits conformed to its resource management plan. See Docket No. 3-3, pp. 26-167. On March 10, 2017, the BLM's

North Dakota Field Manager signed the Decision Record approving the Environmental Assessment and the eight associated Applications for Permit to Drill. See Docket No. 3-3, p. 6. Slawson contends the BLM contacted the MHA Nation by telephone that same day to notify it of the Decision Record.

After the BLM issued its decision approving Slawson's permits, the MHA Nation attempted to seek administrative review of the decision. Slawson asserts the MHA Nation filed an untimely request[1] for review with the Director of the BLM's Montana State Office, in which the MHA Nation principally objected to the well pad's location. The MHA Nation argued the well pad's location, sited 600 feet from the shore of Lake Sakakawea, conflicted with a recent tribal resolution imposing a 1,000-foot setback from the lake, and the well pad's location conflicted with the BLM's resource management plan and management decisions of the Bureau of Indian Affairs and Army Corps of Engineers. The BLM's Montana State Office entertained the MHA Nation's request for review, but affirmed the North Dakota Field Office's decision to issue the permits on April 24, 2017.

The MHA Nation filed a Notice of Appeal and Petition for Stay with the Montana State Office and Board on May 24, 2017. See Docket No. 3-7. Slawson argues the notice of appeal was untimely filed as it was filed the day the 30-day period for such filing expired. Slawson intervened in the appeal and responded to the MHA Nation's Petition for Stay.

[1] BLM regulations require requests for review by state offices be filed within 20 business days after a party receives notice of a decision. 43 C.F.R. § 3165.3(c). The BLM published its Decision Record on its website on March 10, 2017, and issued a Press Release. Slawson contends the agency contacted the MHA Nation by telephone to notify it of the Decision Record that same day. Slawson argues the MHA Nation had notice of the Decision Record on March 10, 2017, and agency regulations required that it request review by April 7, 2017. The MHA Nation did not request State Director Review until April 11, 2017.

Thirty days after filing its Notice of Appeal, the Board's regulations required the MHA Nation it file its merits brief, known as a Statement of Reasons. The MHA Nation did not file its Statement of Reasons on that date, but instead requested an extension.[2] The Board allowed the MHA Nation to file a late Statement of Reasons.

More than a month after the Board's 45-day period to rule on the Petition for Stay expired,[3] the Board issued its Order on August 9, 2017, granting the MHA Nation's Petition to Stay. See Docket No. 1-1. The Order dated August 9, 2017, revoked the approved Applications for Permit to Drill. On August 10, 2017, the Department of the Interior informed Slawson it could continue its operations until a 7-inch casing is cemented in the well, but that "shutdown operations shall commence" at that time. See Docket No. 3-3, p. 8.

On August 11, 2017, Slawson filed a complaint in federal district court, asserting claims of declaratory and injunctive relief. See Docket No. 1. The next day, on August 12, 2017, Slawson filed a motion for a temporary restraining order and preliminary injunction, specifically requesting that the Court find that the Board's Order issued on August 9, 2017, is unlawful and that it be vacated. See Docket Nos. 3 and 4.

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[2] Slawson asserts the MHA Nation's extension request was also untimely filed. The Board's regulations require parties to file requests for extension of time "no later than" the day before a document's due date "absent compelling circumstances." 43 C.F.R. § 4.405(b). The Board acknowledged the MHA Nation lacked compelling circumstances justifying its late request for an extension, but allowed the procedural deficiency. See Docket No. 3-5.

[3] The Board's regulations state it "shall grant or deny" petitions for stay within 45 calendar days of the expiration of the time for filing a notice of appeal. 43 C.F.R. § 4.21(b)(4). Slawson asserts the period for a notice of appeal to be filed expired on May 23, 2017, and the Board's regulations required it to issue a decision by July 10, 2017. The Board did not issue its decision on the MHA Nation's Petition to Stay until August 9, 2017.

In following Rule 65(b)(1)(B), Slawson notes its counsel spoke with Kent Rockstad, Chief of the Civil Division of the United States Attorney's Office for the District of North Dakota, by telephone on the afternoon of August 11, 2017, explained the claim and provided a copy of the complaint via email, and also emailed a copy of the complaint to Curt Sholar of the Office of Solicitor of the Department of the Interior. See Docket No. 3, p. 3. Slawson also noted it will provide courtesy copies of its motion and supporting papers immediately after filing to Rockstad, Sholar, anyone they designate, and counsel for the MHA Nation. See Docket No. 3, p. 3.

## II. STANDARD OF REVIEW

Slawson 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:
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> **(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 Slawson has a likelihood of success on the merits. Slawson 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).

Slawson seeks to vacate the alleged untimely and unlawful stay pending review of eight approved Applications for Permit to Drill that the Board issued on August 9, 2017. Slawson asserts it relied on the approvals of the Applications and the lack of a timely ruling on the MHA Nation's Petition for Stay to begin drilling. Slawson requests a TRO so it can continue drilling without incurring significant non-reimbursable expenses from ceasing operation and decommissioning the active drilling rig on site. Slawson asserts it is likely to prevail on its claims against the Defendants.

The Court finds Slawson has a strong likelihood of success on its claims against the Defendants. Slawson's brief in support of its motion for a TRO maintained three independent reasons which give rise to its substantial likelihood of success:

(1) The Order directly contradicted the governing regulation which states that the "Appeals Board shall grant or deny a petition for a stay pending appeal . . . within 45 calendar days," and because the stay was not denied within 45 days, Slawson relied on that timing to begin work on the well;

(2) The MHA Nation filed its Statement of Reasons in support of its appeal late, without meeting the required standard. Thereby, it was subject to dismissal, and the entire appeal should have been denied; and

(3) On the underlying merits, the Order is not in accordance with the law and is in excess of statutory authority because it imposes tribal regulation on non-Indians contrary to *Montana v. United States*, 450 U.S. 544 (1981).

See Docket No. 3-1, p. 17.

The first two arguments Slawson sets forth are alleged procedural deficiencies; however, its third argument addresses the underlying merits of the Order. Slawson argues the Board's Order was substantively flawed because it ignored the well-settled principles that tribes may not regulate federal agencies and have very limited civil jurisdiction over non-tribal members on non-tribal lands. To the extent that the MHA Nation attempts to regulate authorizations by the BLM to develop federal minerals, Slawson argues the law is clear that the MHA Nation lacks the authority to do so.[4] See Docket No. 3-1, p. 21. To the extent that this case concerns the activity of non-tribal members on non-tribal land, Slawson argues an application of *Montana v. United States*, 450 U.S. 544 (1981), is warranted.

In *Montana*, the United States Supreme Court set forth a general presumption that tribes may not exercise civil jurisdiction over non-tribal members "without express . . . delegation" by

[4] Slawson maintains Congress has vested the Secretary of the Interior with exclusive authority to lease and manage the minerals under Lake Sakakawea. Flood Control Act of 1944, ch. 655, 58 Stat. 877; Fort Berthold Garrison Act, Pub. L. No. 81-437, 63 Stat. 1026 (1949); Mineral Leasing Act for Acquired Lands of 1947, Pub. L. 80-382, 61 Stat. 913; South Dakota v. Bourland, 508 U. S. 679, 691-92 (1993).

Congress. 450 U.S. at 564. The MHA Nation's Petition for Stay did not demonstrate any evidence of an express delegation from Congress giving it the authority to apply the 1,000-foot setback at issue in this case.[5] The MHA Nation's Petition for Stay cited one of two exceptions to the general rule outlined in *Montana* which allows tribes to regulate non-tribal conduct on fee lands within a reservation when it "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." See Montana, 533 U.S. at 566. However, this exception only applies when the conduct "imperil[s] the subsistence" of the tribe or will result in "catastrophic" consequences for the tribe. See Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S Ct. 2709, 2726 (2008). Slawson argues that neither the MHA Nation's Petition for Stay nor the Board cited evidence of any such "catastrophic consequence." Therefore, Slawson argues the MHA Nation does not have civil jurisdiction over Slawson or the BLM with regard to non-tribal land. The Court agrees.

Slawson also argues the Board's Order was flawed because it was based on a mistaken belief that the case concerned "trust resources for the MHA Nation" – that is, "mineral interests . . . held in trust for the benefit of the MHA Nation." See Docket No. 1-1, p. 3. The drilling permit which BLM initially approved for Slawson does not allow Slawson to access any resources held in trust for the MHA Nation. Slawson argues the BLM has no obligation to enforce or recognize tribal law when making federal decisions affecting non-Indian lands. The Court agrees.

[5] The MHA Nation's Petition for Stay cited its constitution which purports to apply to non-tribal members on fee lands. The MHA Nation contends its constitution was authorized by Congress and approved by the Secretary of the Interior. See Docket No. 3-7, p. 9. Slawson argues that the congressional authorization the MHA Nation cited, namely the Indian Reorganization Act of 1934, only authorized the MHA Nation to develop a constitution, and did not specifically approve the constitution at issue. See Docket No. 3-1, p. 21, n. 5; see also 25 U.S.C. § 5123(a).

As the Court has found a strong likelihood of success on Slawson'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 Slawson has shown the "success on the merits" *Dataphase* factor weighs strongly in favor of the issuance of a temporary restraining order.

**B. IRREPARABLE HARM**

Slawson 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.

Slawson contends it will suffer irreparable injury if a temporary restraining order or injunction are not ordered. Specifically, Slawson alleges that stopping the drilling of the Torpedo well will cause substantial financial costs that, due to the Defendants' claimed sovereign immunity, cannot be recovered.

The threat of unrecoverable economic loss qualifies as irreparable harm. See Iowa Utilities Bd. v. F.C.C., 109 F.3d 418, 426 (8th Cir. 1996); Baker Elec. Coop. Inc. v. Chaske, 28 F.3d 1466, 1473 (8th Cir. 1994) (finding irreparable harm and issuing a preliminary injunction where absence of said injunction would result in unrecoverable economic injury); North Dakota v. U.S. E.P.A., 127 F.Supp.3d 1047, 1059 (D.N.D. 2015). The Court finds that Slawson has adequately

demonstrated the economic loss it would sustain if it was to shut down drilling operations at the Torpedo Federal well pad and remove the drilling rig. See Docket No. 3-4. Further, Slawson has established the significant losses, including a significant number of leases and lease extension bonuses, it would likely incur if forced to wait on the Board's issuance of a ruling on the appeal. See Docket No. 3-4, p. 4 (noting Slawson's Vice President of Operations', Matt Houston, understanding that the Board often takes up to two years to issue such a ruling and outlining the effects of such a delay).

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 Slawson 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, Slawson 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, Slawson 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 Slawson seeks will harm the Defendants in any significant way, or even at all. The issuance of a temporary restraining order would simply vacate the Order dated August 9, 2017; however, normal Board procedures would continue to apply. To the contrary, if the temporary restraining order is not granted, Slawson asserts it will likely move the drilling rig off of the well pad to a different sit, in order to mitigate injury, and still incur substantial costs in doing so. See Docket No. 3-4.

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).

To the extent that claims of injury by the MHA Nation, a third party, are relevant at this stage of the analysis, Slawson argues they are speculative at best. In its Petition for Stay, the MHA Nation argued that the construction of the project only 600 feet from Lake Sakakawea "threatens the reservation lands, waters and resources," but provided no specific injury caused by the development of the well pad. See Docket No. 3-7, p. 6. This is in contrast to the findings of the BLM when it analyzed the wells' potential impacts in an environmental assessment and found the wells would have no significant environment impact. See Docket Nos. 3-3, pp. 6 and 26-167. The MHA Nation also argued the permits' approval would violate its "sovereign governmental ability to regulate activities within the Fort Berthold Indian Reservation;" however, Slawson argues this claimed injury assumes that the MHA Nation is successful on the merits.

The balance of harm factor clearly favors Slawson. Given the relatively short time period and the potential for Slawson 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 development and production of oil and gas is in the public interest. Granting a temporary restraining order comports with this public interest. Public policy favors the development of oil and gas resources. At this preliminary stage, the Court finds this *Dataphase* factor weighs 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 Slawson has met its burden under Rule 65(b) of establishing the necessity of an *ex parte* temporary restraining order.

## III. 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 a temporary restraining order at this early stage of the litigation. The Court **GRANTS** the motion for a temporary restraining order (Docket No. 3). 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 enforcing the Interior Board of Land Appeal's Order, dated August 9,

2017, staying the eight Applications for Permit to Drill for the Torpedo Federal Project submitted by Slawson Exploration Company, Inc.

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 **Tuesday, August 29, 2017, at 9:00 a.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 August 29, 2017, 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 1:45 p.m., this 15th day of August, 2017.

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