

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

Enerplus Resources (USA) Corporation,)	Civil No. 1:16-cv-00103
Plaintiff,)	
vs.)	DEFENDANT WILKINSON'S
Wilbur D. Wilkinson, an individual; The Three)	RESPONSE TO PLAINTIFF'S
Affiliated Tribes, Fort Berthold District Court,)	SECOND MOTION FOR
Reed A. Soderstrom, agent for Wilbur D.)	SUMMARY JUDGMENT
Wilkinson; and Ervin J. Lee, an individual.)	
Defendants.)	

In response to Plaintiff's Second Motion for Summary Judgment, Defendant Wilbur D. Wilkinson, states as follows:

PROCEDURAL HISTORY

Plaintiff filed its Federal Court Complaint on May 4, 2016. The numbered claims in its Complaint requested:

1. Injunctive Relief;
2. Declaratory Relief as to:
 - (i) Forum Selection Clause that precluded Tribal Court;
 - (ii) A royalty percentage of 0.45% of 8/8ths;
 - (iii) Attorney's Fees;
 - (iv) Ervin Lee receives pursuant to the Settlement Agreement;
3. Equitable restitution for any monies that may have been spent; and
4. An accounting. (Doc. # 1)

Thereafter, Plaintiff filed a Summary Judgment that monies held with the Court be paid directly to Plaintiff. (Doc. # 62). Plaintiff's Summary Judgment was filed on January 13, 2017, and granted by this Court on February 23, 2017. (Doc. # 62). Plaintiff filed a Motion to Dismiss its Accounting Claim on April 13, 2017. (Doc. # 79). Wilkinson did not oppose Plaintiff's Motion to Dismiss its Claim for an Accounting. Wilkinson

continues to dispute that this Court has jurisdiction over this matter and matters between Wilkinson and Lee.

Wilkinson continues to assert his Special Appearance and reasserts his Motion to Dismiss (Doc. # 9,10). Wilkinson reasserts his claim that Plaintiff lacks standing to assert a Forum Selection Clause regarding minerals that were obtained and conveyed on the Fort Berthold Indian Reservation without any proof of its merger agreement and acquisition of Peak North Dakota, LLC and without proof of its ownership through a Bureau of Indian Affairs ("BIA") Mineral Lease. As previously set forth, any conveyance of Mineral Leases must be approved by the BIA. (Doc. # 10 (M)). Wilkinson entered into a Settlement and Lease Agreement only with Peak North Dakota, LLC in October 2010. All oil and gas leases are located within the exterior boundary of the Fort Berthold Indian Reservation. This action originated in the Fort Berthold Tribal District Court thirty days before Plaintiff filed with this Court.

Plaintiff has failed to provide the requisite proof to show it has standing to assert the Forum Selection Clause. Assumptions have been made that Plaintiff steps into the shoes of Peak North through Forum Selection provisions. However, leasehold requirements mandated by the BIA have been summarily disregarded. Over the years Wilkinson has repeatedly asked Plaintiff for documents. (Doc # 10 (H-L)). Plaintiff's failure to show the Court the Merger Agreement between it and Peak North demonstrates a lack of subject matter and personal jurisdiction to proceed in Federal Court. Proof of compliance with the BIA Mineral Lease must be determined. Plaintiff also lacks standing because it is not a party to any agreement entered into with

Wilkinson. Plaintiff must exhaust Tribal remedies before pursuing this matter in Federal District Court.

Although Plaintiff postures this case as a simple “overpayment” issue, Plaintiff should not be afforded the right to Forum Selection of federal jurisdiction through a Settlement Agreement between Defendant and Peak without evidence that establishes its actual Mineral Leasehold rights through proper BIA conveyance procedures has been completed.

ARGUMENT

A. Plaintiff Lacks Standing to Assert the Settlement Agreement and its Forum Selection Clause.

Wilkinson does not dispute that he entered into a Settlement Agreement with Peak North. However, Plaintiff has provided no witnesses, no testimony, no exhibits, and no Peak/Enerplus Merger Agreements showing it has standing to assert a Forum Selection Clause. Assurances were made at the request of this Court that Wilkinson’s repeated requests for such documents would be honored and produced. Plaintiff’s refusal to provide promised documentation establishes Plaintiff lacks subject matter and personal jurisdiction to move forward.

The Assignment of allotted Indian lands and minerals is prohibited absent approval from the Secretary of the Interior. (Doc. #10(m); see 25 U.S.C. § 415). Plaintiff has termed its ownership of the subject minerals a “merger.” The designation of the term is self-serving until the Merger Agreement is produced and the BIA Mineral Lease has been approved by the BIA.

Oil and Gas Leases of Allotted Indian Lands prohibit assignment of leases, interests, and prohibit the subletting of any portion of leased premises without approval of the Secretary of the Interior. (*Id.*). The Peak North lease expressly states:

Not to assign this lease or any interest therein by an operating agreement or otherwise nor to sublet any portion of the leased premises before restrictions are removed, except with the approval of the Secretary of the Interior. If this lease is divided by the assignment of an entire interest in any part of it, each part shall be considered as a separate lease under all the terms and conditions of the original lease. The provisions of this section will not operate to abridge or modify any of the rights of the land or royalty owners under section 9 of this lease. (*Id.*).

To date, Plaintiff has not provided to this Court any proof of approval from the Secretary of the Interior. Absent such proof, Plaintiff lacks standing to enforce the provisions of the Settlement Agreement between Wilkinson and Peak North. Despite Wilkinson's requests for information, Plaintiff has not provided proof of approval or a waiver from the Secretary of the Interior.

Exhaustion of Tribal Remedies must first be pursued. See *Wilkinson v. U.S.*, 440 F.3d 978 (8th Cir. 2006) ("If a Plaintiff lacks standing, the District Court has no subject matter jurisdiction:") (citing *Young Am. Corp. v. Affiliated Computer Services, Inc.*, 424 F.3d 840, 843 (8th Cir. 2005). See also *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Iowa Mutual Inc. Co. v. LaPlante*, 480 U.S. 9 (1987); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294 (8th Cir. 1994); *Reservation Telephone Coop. v. Three Affiliated Tribes*, 76 F.3d. 181 (8th Cir. 1996); *Bruce H. Lien v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996); *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, 579 U.S. ____ (2016).

To have standing, there must be (1) an injury in fact; (2) a causal connection between that injury and the challenged conduct; and (3) a likelihood that a favorable decision by the Court will address the alleged injury. The party invoking federal jurisdiction bears the burden of establishing these elements. *Wilkinson, citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiff has yet to show an injury because Plaintiff has yet to show it is a party to the Settlement Agreement to assert an injury.

B. The Fort Berthold Tribal District Court Retains Jurisdiction Over Matters Concerning Wilkinson and Lee.

Matters pending between Wilkinson and Lee are set forth in Tribal Court and jurisdictional issues have been addressed by retired State Court Judge Joel Medd. (Doc. # 24 (AA)). Jurisdictional issues were also addressed by the Tribal Appellate Court wherein law trained Judges have reviewed the facts and established Tribal Court jurisdiction. (Doc. # 24 (FF) (HH)). Federal Courts generally grant comity to Tribal judges' rulings. *See, e.g., Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 555 (9th Cir. 1991). On three separate occasions, the Tribal Court has determined that it was the appropriate venue to adjudicate disputes between Wilkinson and Lee. As a matter of comity, this Court should allow the Tribal Court to proceed with the matter between Wilkinson and Lee before making any determination regarding their dispute.

C. Attorney's Fees Should Not Be Awarded To Plaintiff.

Wilkinson opposes Plaintiff's request for attorney's fees. Plaintiff admits it "mistakenly paid" Defendant. (See Plaintiff's Motion to Dismiss Claim for an Accounting, ¶1). Plaintiff "owns" its mistake. It was Wilkinson who preserved the money for Enerplus and Wilkinson who has not taken any distribution from royalty

monies. Said monies were properly held in the Pringle and Herigstad Trust Account. Enerplus has been provided every penny that it claims it overpaid, because of Wilkinson. Enerplus has now dismissed its claim for an accounting. (*Id.*).

It was Enerplus, who over the years, refused Wilkinson any proof that it has standing to assert the rights of the Settlement Agreement through a Forum Selection Clause. (Doc. # 10). It is the undersigned's recollection that the Court asked Plaintiff at the Oral Argument hearing in Bismarck to give Wilkinson the Merger Agreement. Assurances were made the document would be provided. Wilkinson has acted within the realm of reason to demand proof of the document that affects his minerals and the legacy he leaves his children. Wilkinson should not be punished by Plaintiff being awarded attorney's fees when Plaintiff has been less than forthcoming, unresponsive to previous requests and gave Wilkinson assurances they would provide the Merger Agreement (which still has not been done).

As a matter of equity and law, Enerplus cannot now assert its attorney's fees under a Settlement Agreement that it did not enter into with Wilkinson.

For the above stated reasons, Wilkinson opposes Plaintiff's Second Motion for Summary Judgment.

Dated this 4th day of May, 2017.

PRINGLE & HERIGSTAD, P.C.

BY: /s/ Reed A. Soderstrom
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CERTIFICATE OF SERVICE

I certify that on the 4th day of May, 2017, the following documents:

Defendant Wilkinson's Response to Plaintiff's Second Motion for Summary Judgment.

was filed electronically with the Clerk of Court through ECF and the ECF will send a Notice of Filing (NEF) to the following:

Neal S. Cohen
Attorney at Law
1225 17th Street, Ste. 2200
Denver, CO 80202
ncohen@foxrothschild.com

I further certify that a copy of the foregoing was send on May 4, 2017, to the following address and deposited in the U.S. Mail, postage prepaid as follows:

Ervin J. Lee
Attorney at Law
915 North 1st Street
Bismarck ND 58501

Dated this 4th day of May, 2017.

/s/ Reed A. Soderstrom

Reed A. Soderstrom #04579