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

Halcón Operating Co., Inc., Plaintiff, vs. Rez Rock N Water, LLC, Frank White Calfe, Hon. Mary Seaworth, in her official capacity as Associate Judge of the Fort Berthold District Court, and Fort Berthold District Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, Defendants.	)	**ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND DENYING DEFENDANTS' MOTION TO DISMISS** Case No. 1:17-cv-202

Before the Court is Halcón Operating Co., Inc.'s "Motion for Preliminary Injunction" filed on September 27, 2017. See Docket No. 4. The motion has been fully briefed by the parties and a hearing on the motion was held on June 21, 2018, in Bismarck, North Dakota.[1] See Docket No. 4. Also before the Court is a motion to dismiss the complaint filed on November 8, 2017, by Defendants Honorable Mary Seaworth, in her official capacity as Associate Judge of the Fort Berthold District Court, and the Fort Berthold District Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation. See Docket No. 19. For the reasons set forth below, the Plaintiff's motion for a preliminary injunction is granted and the Defendants' motion to dismiss the Plaintiff's complaint is denied.

[1] Although Defendants Rez Rock N Water, LLC, and Frank White Calfe were properly served with a copy of the summons, complaint, and motion for preliminary injunction (Docket Nos. 10 & 11), these Defendants have not filed an answer to the complaint, responded to the motion for preliminary injunction, responded to the motion to dismiss the complaint, or appeared at the hearing held on June 21, 2018. See Docket No. 28.

I. BACKGROUND

On April 2, 2013, Halcón Operating, Co., Inc. ("Halcón") and Rez Rock N Water, LLC ("Rez Rock N Water") entered into a Master Service Contract ("MSC") in which Rez Rock N Water agreed to provide oilfield services, including the rental of equipment to Halcón. The scope of the MSC included "services in connection with the exploration, development, production, transportation and marketing of oil, gas or other minerals" provided by Rez Rock N Water and the purchase or rental of "goods, supplies, equipment, materials, or facilities" by Halcón from Rez Rock N Water. See Docket No. 6-2, p. 1. The MSC contained an arbitration provision, which provided:

> The parties agree to cooperate with each other in an attempt to resolve any dispute, controversy, or claim (a "Dispute") arising out of or in connection with this Contract. If the parties are not able to resolve the Dispute, they agree to submit the Dispute to mediation to be conducted in accordance with the American Arbitration Association ("AAA") mediation rules for commercial disputes. If the parties are not able to resolve the dispute by means of mediation, the parties hereby agree the Dispute shall be referred to and determined by binding arbitration, as the sole and exclusive remedy of the parties as to the Dispute, conducted in accordance with the AAA arbitration rules for commercial disputes. The arbitrator (the "Arbitrator") shall use the substantive laws of Texas, excluding conflicts laws and choice of law principles, in construing and interpreting this Contract. The Arbitrator shall be selected by agreement of the parties. In the event the parties cannot agree each party shall select one arbitrator, and the two arbitrators so selected shall select a third arbitrator who shall act as Arbitrator. The arbitration shall be in Houston, Texas, and the proceedings shall be conducted and concluded as soon as reasonably practicable, based upon the schedule established by the Arbitrator. The Arbitrator shall issue a written award, signed by the Arbitrator and setting forth the findings of fact and conclusions of law. No award shall be made for punitive, special, exemplary, or consequential damages, including loss of profits or loss of business opportunity. The decision of the Arbitrator pursuant hereto shall be final and binding upon parties. Judgment upon the award rendered by the Arbitrator pursuant hereto may be entered in, and enforced by, any court within the jurisdiction where the party against whom enforcement is sought has property. Each party shall share the expense of the Arbitrator and other expenses incurred by the Arbitrator, unless the Arbitrator shall determine that fairness requires that such fees and expenses be allocated among the parties in a different manner, including without limitation, requiring the losing party to pay all such expenses. Each party shall bear its own expenses, including expenses of its counsel. It is the desire of the parties that any

> Dispute is resolved quickly and at the lowest possible cost, and the Arbitrator shall act in a manner consistent with these intensions, including limiting discovery to only that which is absolutely necessary to enable the Arbitrator to render a fair decision which reflects the parties' intent set forth in this Contract. The parties hereby agree that this Paragraph 21 shall not preclude, limit or otherwise restrict a party from seeking immediate equitable relief against the other party in connection with this Contract, including without limitation, a restraining order or injunction, when the facts, circumstances and/or possible damages warrant such action.

See Docket No. 6-2, p. 10. The MSC also contained a "Choice of Law" provision, which provided:

> This Contract shall be governed, construed and enforced in accordance with the General Maritime Law of the United States ("Maritime Law") whenever any performance is contemplated in or above navigable waters, whether onshore or offshore. In the event that Maritime Law is held inapplicable, the internal laws of the State of Texas which shall apply without regard to principles of conflicts of law except to the extent otherwise expressly provided herein. Subject to the terms of Paragraph 21 below [i.e., the arbitration clause], the parties agree that any cause of action brought to enforce the terms of this Contract shall be brought in either a federal or state court located in Harris County, Texas. The parties consent to the jurisdiction and venue of any such federal or state court located in Harris County, Texas.

Id. at p. 9.

According to Halcón's complaint, when a dispute arose between the parties "regarding payments owed on equipment rentals," Halcón initiated proceedings to resolve the dispute through mediation or arbitration." See Docket No. 1, p. 5. Specifically, on May 13, 2016, Halcón filed an Original Statement of Claim and Demand for Mediation and Arbitration with the American Arbitration Association ("AAA"), in which Halcón indicated the parties had previously submitted the matter to mediation, which did not resolve the parties' dispute. See Docket No. 6-1. Eventually, through the AAA, arbitration proceedings commenced, but were later halted while Halcón proceeded through Chapter 11 bankruptcy. See Docket No. 1.

Meanwhile, on March 13, 2017, Rez Rock N Water and White Calfe, as chief executive officer of Rez Rock N Water, initiated an action in the Fort Berthold District Court ("Tribal Court") against Halcón Operating Co., Inc., Halcón Resources Corporation, Halcón Holdings, Inc., and

Energy Properties, Inc.,[2] alleging these Defendants refused to pay for damages to and excess use of equipment Rez Rock N Water rented from RDO Equipment Co., Inc. ("RDO") to perform scoria mining for Halcón. See Docket No. 7. White Calfe and Rez Rock N Water brought six claims against the Halcón Defendants in Tribal Court, including false representations, fraud, breach of contract (implied), quantum valebant, unjust enrichment, and tortious interference. See Docket No. 7, pp. 10-15.

When it emerged from the bankruptcy, and after White Calfe and Rez Rock N Water initiated the Tribal Court action, Halcón advised the AAA of the completion of its bankruptcy. See Docket No. 6-5. However, counsel for Rez Rock N Water informed Halcón it opposed proceeding with the AAA arbitration until completion of the Tribal Court action. See Docket No. 6-6. Nonetheless, the AAA proceeded with the arbitration and directed the parties to designate their party-appointed arbitrators. See Docket No. 6-9.

On May 3, 2017, Rez Rock N Water filed a motion in Tribal Court to stay the AAA arbitration. See Docket No. 8-1. Then, on May 24, 2017, the Halcón Defendants filed a motion in Tribal Court to dismiss White Calfe and Rez Rock N Water's complaint for lack of subject matter jurisdiction and improper venue. See Docket No. 8-3.[3] On September 11, 2017, the Tribal Court granted White Calfe and Rez Rock N Water's motion to stay the AAA arbitration proceeding and ordered "the Stay of American Arbitration Association Case NO. 02-16-0001-7844 shall remain in place until all Tribal Court remedies, including appellate review, have been exhausted." See Docket No. 8-13. On October 9, 2017, the Halcón Defendants filed a notice of appeal

[2] The Court will collectively refer to Halcon Operating Co., Inc., Halcon Resources Corporation, Halcon Holdings, Inc., and Energy Properties, Inc. as "Halcon Defendants."

[3] From the Court's review of the record, it appears the Tribal Court has not yet issued any order addressing the Halcon Defendants' motion to dismiss the Tribal Court complaint.

regarding the Tribal Court's order staying the arbitration proceeding. See Docket Nos. 27 and 27-1. The appeal is pending before the MHA Nation Supreme Court.

After the Tribal Court stayed the AAA arbitration proceeding, Halcón filed a complaint in this Court against Rez Rock N Water, Frank White Calfe, the Honorable Mary Seaworth, in her official capacity as Associate Judge of the Fort Berthold District Court, and the Fort Berthold District Court on September 27, 2017.[4] See Docket No. 1. Along with its complaint, Halcón contemporaneously filed a "Motion for Preliminary Injunction," requesting the Court enjoin the Tribal Court from asserting jurisdiction over and enjoin White Calfe and Rez Rock N Water from prosecuting the underlying action filed by Frank White Calfe and Rez Rock N Water against the Halcón Defendants in Tribal Court. Halcón further requests this Court enjoin the Tribal Court from "interfering with the arbitration proceedings pending before the American Arbitration Association ("AAA") as Case No. 02-16-0001-7844." In response to Halcón's motion for preliminary injunction, the Tribal Court Defendants filed a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b). See Docket No. 19. Halcón filed a response in opposition to the motion to dismiss on December 13, 2017. See Docket No. 22. The Tribal Court Defendants then filed a reply brief on December 27, 2017. See Docket No. 23.

II. LEGAL DISCUSSION

Before the Court may grant a preliminary injunction, the Court must be satisfied it has jurisdiction over the matter. Consequently, the Court first addresses the jurisdictional concerns

[4] The Court will collectively refer to Defendants Mary Seaworth, in her official capacity as Associate Judge of the Fort Berthold District Court, and the Fort Berthold District Court as "Tribal Court Defendants."

raised by the Tribal Court Defendants in their motion to dismiss. The Tribal Court Defendants assert dismissal of this matter is appropriate because:

1. This Court lacks subject matter jurisdiction because the complaint does not state a federal question.
2. This Court lacks jurisdiction because Plaintiff has failed to exhaust tribal court remedies.
3. This Court lacks jurisdiction as to Defendants Mary Seaworth, Associate Judge, and Fort Berthold District Court because Plaintiff has not pled a waiver of sovereign immunity.
4. This Court lacks jurisdiction because the Fort Berthold District Court, as an arm of the Three Affiliated Tribes of the Fort Berthold Indian Reservation ("Tribe"), and Mary Seaworth, as an officer of the Tribe, have not waived their sovereign immunity applicable to this matter.

See Docket No. 19, p. 1.

A. FEDERAL COURT JURISDICTION

It is inherently apparent the substantive claims of the Plaintiff rest upon the determination of whether the Tribal Court has jurisdiction over the underlying Tribal Court action. It is well recognized that the question of "[w]hether a tribal court has adjudicative authority over nonmembers is a federal question." Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 324 (2008). Consequently, pursuant to 28 U.S.C. § 1331, this Court has original jurisdiction. See 28 U.S.C. § 1331. The Court therefore turns to consider the Tribal Court Defendant's contentions this Court lacks jurisdiction because (1) Halcón has not pled a waiver of sovereign immunity and/or Judge Seaworth and the Tribal Court have not waived their sovereign immunity and (2) Halcón failed to exhaust tribal remedies before bringing this federal action.

1. SOVEREIGN IMMUNITY OF JUDGE SEAWORTH AND FORT BERTHOLD DISTRICT COURT

In the Eighth Circuit, sovereign immunity is jurisdictional in nature. Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d 1040, 4043 (8th Cir. 2000). See also Oglala Sioux Tribe v. C & W Enterprises, Inc., 487 F.3d 1129, 1131 n.4 (8th Cir. 2007). It has been long been recognized that Indian Tribes possess "common-law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978). Indian tribes may not be sued absent an express and unequivocal waiver of immunity by the tribe or "abrogation of tribal immunity by Congress." Baker Elec. Coop. v. Chaske, 58 F.3d 1466, 1471 (8th Cir. 1994).

A tribe's sovereign immunity certainly extends to tribal officers and agencies. Hagen, 205 F.3d at 1043 (citing Dillon v. Yankton Sioux Tribe Housing Auth., 144 F.3d 581, 583 (8th Cir. 1998)). However, the United States Supreme Court has held tribal officers are not protected by the tribe's immunity from suits for declaratory or injunctive relief. Santa Clara Pueblo, 436 U.S. at 59. Moreover, the Eighth Circuit has recognized a tribe's sovereign immunity is subject to the well-established exception expressed in *Ex Parte Young*, 209 U.S. 123 (1908) that "a suit challenging the constitutionality of a state official's action is not one against the State." Baker Elec. Coop., 28 F.3d at 1471. Consequently, tribal officers and agencies may be liable to suit when the complaint alleges

> 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. . . . If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it . . . .

N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty, 991 F.2d 458, 460 (8th Cir. 1993) (quoting Tenneco Oil Co. v. Sac & Fox Tribe of Indians, 725 F.2d 572, 574 (10th Cir. 1984)).

The Tribal Court Defendants contend they are cloaked in sovereign immunity and the Court must dismiss this action because (1) Halcón has not pled a waiver of sovereign immunity by the Tribal Court Defendants and (2) there has been no express and unequivocal waiver of immunity by the Tribal Court Defendants. See Docket No. 19. In its complaint, Halcón seeks only injunctive and declaratory relief against the Tribal Court Defendants. See Docket No. 1, pp. 7-9. Halcón does not plead the Tribal Court Defendants waived their sovereign immunity.

The law in the Eighth Circuit does not require Halcón to affirmatively plead a waiver of the Tribal Court Defendant's sovereign immunity. Halcón specifically alleges the Tribal Court Defendants, in their official capacities, acted unlawfully by permitting the underlying Tribal Court action to proceed, specifically the Tribal Court's action in staying the AAA arbitration proceeding. Consequently, Halcón sufficiently plead the inapplicability of the sovereign immunity doctrine to the Tribal Court Defendants. See N. States Power Co., 991 F.2d at 460. Pursuant to the holding of Santa Clara Pueblo, 436 U.S. at 59, tribal officials and agencies are not protected by the tribe's immunity in such a suit for declaratory and injunctive relief. This Court's exercise of jurisdiction over Judge Seaworth, in her capacity as Associate Judge of the Fort Berthold District Court, and the Tribal Court is therefore warranted as they are not immune from suit. See Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2035 (2014) (concluding "tribal immunity does not bar such a claim for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct").

2. FAILURE TO EXHAUST TRIBAL REMEDIES

The Tribal Court Defendants also contend this Court lacks jurisdiction over this matter because the Halcón Defendants are required to exhaust tribal remedies before filing a federal suit,

citing *National Farmers Union Ins. Cos. V. Crow Tribe of Indians*, 471 U.S. 845 (1985) ("*National Farmers*"). In *Strate v. A-1 Contractors*, the United States Supreme Court concluded *National Farmers* cannot be read to require exhaustion of tribal remedies: "we do not extract from *National Farmers* anything more than a prudential exhaustion rule . . . ." 520 U.S. 438, 450 (1997). Since the United States Supreme Court's decision in *Strate*, the Eighth Circuit has not required litigants to adjudicate the full merits of a case in tribal court before a federal court can exercise jurisdiction. Instead, "[a] federal court should stay its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction," but exhaustion of tribal remedies is not required, when it would serve no purpose other than delay. Belcourt Pub. Sch. Dist. v. Herman, 786 F.3d 653, 656 n. 2 (8th Cir. 2015). See also Nevada v. Hicks, 533 U.S. 353, 369 (2001). Moreover, both this Court and the Eighth Circuit have concluded exhaustion of tribal remedies is not required when a forum selection clause provides for litigation of a dispute elsewhere. See Enerplus Res. (USA) Corp. v. Wilkinson, 865 F.3d 1094, 1097 (8th Cir. 2017); Enerplus Res. (USA) Corp. v. Wilkinson, Case No. 1:16-cv-103 (D.N.D. August 30, 2016).

Here, the MSC provides for mediation and arbitration of any dispute, claim, or controversy arising out of or in connection with the MSC and provides for any enforcement action be litigated in state or federal court in Harris County, Texas, and not Tribal Court. See Docket No. 6-2, pp. 9-10. Halcón contends, in light of *Enerplus*, it is not required to exhaust tribal remedies before filing a federal action due to the arbitration provision and forum selection[5] clause of the MSC. The Tribal Court Defendants disagree and contend exhaustion is required.

[5] Although clause 15 of the MSC is entitled "Choice of Law," the clause provides for the forum of "any cause of action brought to enforce the terms of this Contract" to be brought in the forum of Harris County, Texas. See Docket No. 6-2, p. 9. Consequently, the Court refers to clause 15 of the MSC as a "forum selection clause."

Although White Calfe and Rez Rock N Water's action in Tribal Court sounds in tort, the factual allegations in the complaint clearly demonstrate the claims, despite nomenclature, are well within the scope of the MSC. In their complaint, White Calfe and Rez Rock N Water allege the tort claims arise from an agreement under which the Halcón Defendants "would use Rez Rock's leased loaders." See Docket No. 7, p. 7. The scope of the MSC included "services in connection with the exploration, development, production, transportation and marketing of oil, gas or other minerals" provided by Rez Rock N Water and the purchase or rental of "goods, supplies, equipment, materials, or facilities" by Halcón from Rez Rock N Water. See Docket No. 6-2, p. 1. White Calfe and Rez Rock N Water's claims for damages to and excess use of Rez Rock N Water's "leased loaders" encompasses Halcón's rental of such "equipment" from Rez Rock N Water. Consequently, the Court concludes the tribal court action "aris[es] out of or in connection with" the MSC. See Docket No. 6-2, p. 10.

Pursuant to the plain language of the MSC, the parties are to submit any claim to mediation and subsequently to arbitration, if needed. Further, the MSC requires any enforcement action to be brought in state or federal court in Harris County, Texas. See Docket No. 6-2, p. 9. The MSC does not provide for an action to be filed in Tribal Court. Therefore, the Court concludes Halcón is not required to exhaust tribal remedies before filing suit in this Court. See FGS Constructors, Inc. v. Carlow, 64 F.3d 1230, 1233 (8th Cir. 1995). See also Enerplus Res. (USA) Corp. v. Wilkinson, 865 F.3d 1094, 1097 (8th Cir. 2017). Exhaustion of tribal remedies would serve no purpose other than delay when the arbitration provision and forum selection clause of the MSC dictate the dispute be resolved or litigated elsewhere. See Docket No. 6-2, p. 9 ("Subject to the terms of Paragraph 21 below [i.e., the arbitration clause], the parties agree that any cause of action

brought to enforce the terms of this Contract shall be brought in either a federal or state court located in Harris County, Texas").

Based upon the foregoing, the Court is satisfied it has jurisdiction to address whether the Tribal Court has jurisdiction over Frank White Calfe and Rez Rock N Water's Tribal Court action against the Halcón Defendants (Civil Case No. 2017-0148). The Court then turns to this inquiry.

B. TRIBAL COURT JURISDICTION

In its complaint, Halcón seeks both declaratory and injunctive relief. Specifically, Halcón seeks a judgment declaring the Tribal Court lacks jurisdiction over the underlying Tribal Court action and lacks jurisdiction to stay the AAA arbitration proceedings. See Docket No. 1, p. 8. Halcón further seeks injunctive relief preventing the Tribal Court from exercising jurisdiction over the underlying Tribal Court action and preventing Frank White Calfe and Rez Rock N Water from proceeding with the underlying Tribal Court action. See Docket No 1, p. 9. Consequently, in its motion for preliminary injunctive relief, Halcón requests a preliminary injunction because the Tribal Court lacks jurisdiction over it.

As a preliminary matter, although the Tribal Court Defendants filed a motion to dismiss, neither they nor White Calfe and Rez Rock N Water filed a response to Halcón's motion for preliminary injunctive relief. Consequently, the Court may deem such a failure to file a response "an admission that the motion is well taken." D.N.D. Civ. L. R. 7.1(F). The Court certainly deems the Defendants' failure to respond to the motion for a preliminary injunction as an admission the motion is well taken. However, the Court also concludes, based upon the merits of the motion, the issuance of preliminary injunctive relief is appropriate.

The Plaintiff seeks a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure. The primary purpose of a preliminary injunction is to preserve the status quo until a court can grant full, effective relief upon a final hearing. Ferry-Morse Seed Co. v. Food Corn, Inc., 729 F.2d 589, 593 (8th Cir. 1984). A preliminary injunction is an extraordinary remedy, with the burden of establishing the necessity of a preliminary injunction placed on the movant. Watkins Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir. 2003); Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994); Modern Computer Sys., Inc. v. Modern Banking Sys., Inc., 871 F.2d 734, 737 (8th Cir. 1989). The court determines whether the movant has met its burden of proof by weighing the factors set forth in Dataphase Systems, Inc., v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981). 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. "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." Baker Elec. Coop., Inc., 28 F.3d at 1472 (quoting Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc., 815 F.2d 500, 503 (8th Cir. 1987)); see CDI Energy Servs., Inc. v. W. River Pumps, Inc., 567 F.3d 398, 401-03 (8th Cir. 2009).

1. 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., 815 F.2d at 503 (quoting Dataphase, 640

F.2d at 113). At this preliminary stage, the Court need not decide whether the party seeking injunctive relief will ultimately prevail. PCTV Gold, Inc. v. SpeedNet, LLC, 508 F.3d 1137, 1143 (8th Cir. 2007). Although a preliminary injunction 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. (quoting Dataphase, 640 F.2d at 113). 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 Halcón has a likelihood of success on the merits. Halcón alleges two causes of action, including injunctive relief and declaratory judgment. 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).

Given both the forum selection clause and the arbitration provision of the MSC, it appears likely Halcón will prevail on its claim the Tribal Court lacks jurisdiction over the underlying Tribal Court action. As discussed above, both this Court and the Eighth Circuit Court of Appeals have recently affirmed that a valid forum selection clause will divest a tribal court of jurisdiction over a dispute when a forum selection clause provides for litigation of such dispute elsewhere. See Enerplus Res. (USA) Corp. v. Wilkinson, 865 F.3d 1094, 1097 (8th Cir. 2017); Enerplus Res. (USA) Corp. v. Wilkinson, Case No. 1:16-cv-103 (D.N.D. August 30, 2016). Here, the MSC contains both a forum selection clause and an arbitration provision. The forum selection clause provides, subject to the arbitration provision, that "any cause of action brought to enforce the terms

of [the MSC] shall be brought in either federal or state court located in Harris County, Texas." See Docket No. 6-2, p. 9. Moreover, the arbitration provision provides that Rez Rock N Water and Halcón agreed to first submit any dispute, controversy, or claim "arising out of or in connection with" the MSC to mediation. If the parties are unable to resolve the dispute, they then agreed to submit the dispute, controversy, or claim to binding arbitration as "the sole and exclusive remedy of the parties" as to the dispute. See Docket No. 6-2, p. 10.

Looking to either the arbitration provision or forum selection clause, the Court finds the MSC specifically precludes litigation of the underlying action in Tribal Court. The arbitration provision directs that the parties are to submit any dispute, controversy, or claim "arising out of or in connection with" the MSC first to meditation and second to arbitration through the AAA as the sole and exclusive remedy available. The forum selection clause directs the parties to bring any action to enforce the terms of the MSC in Harris County, Texas. Moreover, reading these provisions concomitantly, it is without question the parties never contemplated an action related to the parties' relationship be venued in Tribal Court.

In their motion to dismiss, the Tribal Court Defendants posit the Tribal Court has jurisdiction over the Tribal Court action because White Calfe and Rez Rock N Water's claims are outside the scope of the MSC, and even assuming, *arguendo*, the MSC applies to those claims, the Tribal Court has jurisdiction to determine the arbitrability of the MSC. As discussed above, although White Calfe and Rez Rock N Water's action in Tribal Court sounds in tort, it is clear to the Court the underlying Tribal Court action is an attempt by Rez Rock N Water to usurp the dictates of the MSC, requiring the parties submit to mediation and arbitration. Moreover, the Court rejects the Tribal Court Defendants' contention the Tribal Court has jurisdiction to determine the

arbitrability of the MSC because the parties agreed to submit any dispute, claim, or controversy ("Dispute"):

> to mediation to be conducted in accordance with the American Arbitration Association ("AAA") mediation rules for commercial disputes. If the parties are not able to resolve the dispute by means of mediation, the parties hereby agree the Dispute shall be referred to and determined by dining arbitration, as the sole and exclusive remedy of the parties as to the Dispute, conducted in accordance with the AAA arbitration rules for commercial disputes.

Docket No. 6-2, p. 10. The Eighth Circuit Court of Appeals has concluded such an incorporation of AAA rules, constitutes "a clear and unmistakable expression of the parties' intent to leave the question or arbitrability to an arbitrator." Fallo v. High Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009). Therefore, the Tribal Court lacks jurisdiction to determine the arbitrability of the MSC. Consequently, the Court finds this *Dataphase* factor weighs strongly in favor of the issuance of a preliminary injunction.[6]

2. IRREPARABLE HARM

"The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." Bandag, Inc. v. Jack's Tire & Oil, Inc., 190 F.3d 924, 926 (8th Cir. 1999). It is well-established that when there is an adequate remedy at law, a preliminary injunction is not appropriate. Modern Computer Sys., Inc., 871 F.2d at 738. To demonstrate irreparable harm, a plaintiff must show the harm is not compensable through an award of monetary damages. Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367, 371 (8th Cir. 1991); Doe v. LaDue, 514 F. Supp. 2d 1131, 1135 (D. Minn. 2007) (citing Northland Ins. Co. v. Blaylock, 115 F. Supp.

[6] The Court notes, and the record reveals, that Rez Rock N Water and White Calfe have executed an "Assignment of Claims" with RDO, wherein Rez Rock N Water agreed to assign to RDO its claims related to the rental equipment at issue in the Tribal Court action. See Docket No. 27-5. Given the apparent execution of the "Assignment of Claims" by Rez Rock N Water, there is a serious question as to whether the named plaintiffs in Tribal Court have standing to even pursue a claim against the Halcon Defendants.

2d 1108, 1116 (D. Minn. 2000)). The Eighth Circuit has explained that a district court can presume irreparable harm if the movant is likely to succeed on the merits. 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)).

In this case, the irreparable harm the Plaintiff will suffer is being forced to engage in expensive and time-consuming litigation in a forum for which it did not bargain. This harm is real and ongoing and, given the Court's finding of a strong likelihood of success on the merits, the Court finds Halcón has clearly demonstrated it will suffer irreparable harm if a preliminary injunction is not granted. In addition, Halcón will be harmed if forced to defend itself from Tribal Court actions which White Calfe and Rez Rock N Water filed against it despite the clear forum selection clause which requires an enforcement action be brought in state or federal court in Harris County, Texas – not in Tribal Court. This *Dataphase* factor weighs in favor of the issuance of a preliminary injunction.

3. BALANCE OF HARMS

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. 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. Dataphase, 640 F.2d at 114; Glenwood Bridge, 940 F.2d at 372.

Rez Rock N Water, through White Calfe, clearly bargained for and agreed any disputes arising out of the MSC to be adjudicated through mediation or arbitration, with enforcement

actions to be heard in state or federal court in Harris County, Texas. Thus, White Calfe and Rez Rock N Water suffer no harm by prohibiting the continuation of the Tribal Court matter. The harms incurred by Halcón are explained above. The Court has carefully considered the balance of harms *Dataphase* factor and finds the harm to Halcón if a preliminary injunction is not granted far outweighs any harm the Defendants will suffer if a preliminary injunction is granted. The Court finds this *Dataphase* factor weighs in favor of the issuance of a preliminary injunction.

4. PUBLIC INTEREST

Granting preliminary injunctive relief is only proper if the moving party establishes that entry of an injunction would serve the public interest. Dataphase, 640 F.2d at 113. The Court recognizes the public has an interest in protecting the freedom to contract by enforcing contractual rights and obligations. See PCTV Gold, 508 F.3d at 1145. The Court finds this *Dataphase* factor weighs in favor of the issuance of a preliminary injunction.

III. CONCLUSION

After a careful review of the entire record, and a careful consideration of all of the *Dataphase* factors, the Court finds the *Dataphase* factors, when viewed in their totality, weigh in favor of the issuance of a preliminary injunction, and the Plaintiff has met its burden of establishing the necessity of a preliminary injunction. Accordingly, the Plaintiff's motion for a preliminary injunction (Docket No. 4) is **GRANTED**. Having determined the Plaintiff is likely to succeed on the merits and a preliminary injunction is warranted, there is clearly no basis for dismissal under Rule 12. Accordingly, the Defendants' motion to dismiss (Docket No. 19) is **DENIED**. The Court orders as follows:

Until further order of the Court, the Defendants are enjoined as follows:

(1) Frank White Calfe and Rez Rock N Water are enjoined from prosecuting any lawsuits against the Halcón Defendants in the Fort Berthold District Court; and

(2) The Fort Berthold District Court is prohibited from exercising jurisdiction over the Halcón Defendants in the Tribal Court case entitled Frank White Calfe and Rez Rock N Water, LLC v. Halcón Operating Co., Inc., Halcón Resources Corporation, Halcón Holdings, Inc., and Energy Properties, Inc., Civil Case No. 2017-0148.

IT IS SO ORDERED.

Dated this 9th day of July, 2018.

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