Nos. 22-2020, 22-2025

In the

United States Court of Appeals for the Eighth Circuit

WPX Energy Williston, LLC,

Plaintiff-Appellee,

v.

Gabriel L. Fettig, Howard Fettig, Charles Fettig and Morgan Fettig,

Defendants-Appellants,

Hon. B.J. Jones, in his capacity as Associate Judge of the Three Affiliated Tribes District Court and Three Affiliated Tribes District Court,

Defendants-Appellants.

On Appeal from the United States District Court for the District of North Dakota, Western Division

Case No. 1:21-cv-00145

BRIEF OF PLAINTIFF-APPELLEE WPX ENERGY WILLISTON, LLC

Robin Wade Forward, (#05324)
STINSON LLP
424 South Third Street, Suite 206
Bismarck, ND 58504
Telephone: 701.221.8603
rob.forward@stinson.com

Attorneys for Plaintiff-Appellee

SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

Fettigs sued WPX in tribal court on the Fort Berthold Indian Reservation, alleging violations of right-of-ways that were granted by the Bureau of Indian Affairs ("BIA") to WPX for oil and gas operations on allotted land held in trust by the federal government. WPX, a non-Indian entity, moved to dismiss the lawsuit for lack of jurisdiction, but the tribal court erroneously determined it had jurisdiction and denied the motion. Thereafter, WPX appealed to the tribal appeals court, and WPX also commenced this federal case to enjoin the tribal lawsuit. In the federal case, Fettigs filed a counterclaim against WPX, which mirrors their tribal claims.

The tribal appeals court has not decided WPX's appeal. Meanwhile, the federal district court granted WPX a preliminary injunction that halted the tribal lawsuit and, in a separate order, the district court stayed Fettigs' counterclaim to allow for an administrative review by the BIA. On appeal here, the Honorable B.J. Jones, Associate Judge of the Three Affiliated Tribes District Court, and the Three Affiliated Tribes District Court (collectively, "Tribal Court"), are challenging the district court's order that granted the preliminary injunction, and Fettigs are appealing the order that stayed their counterclaim.

Appellee requests that this Court grant 20 minutes of oral argument to address these important federal Indian law questions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

RULES AND REGULATIONS

STATEMENT OF THE ISSUES

(1) Whether the Tribal Court has jurisdiction over a dispute arising from terms of right-of-ways granted by the BIA to WPX, a non-Indian party, for oil and gas operations on trust allotments.

Montana v. United States, 450 U.S. 544 (1981);

Nevada v. Hicks, 533 U.S. 353 (2001);

Kodiak Oil & Gas (USA) Inc. v. Burr, 922 F.3d 1125 (8th Cir. 2019);

25 U.S.C. §§ 323-28.

(2) Whether WPX is required to exhaust tribal remedies prior to seeking a federal injunction against the Tribal Court, which lacks jurisdiction.

Nevada v. Hicks, 533 U.S. 353 (2001);

Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B., 786 F.3d 662 (8th Cir. 2015).

(3) Whether Fettigs' separate appeal of a different order is viable, given that Fettigs failed to file an opening brief in support of the appeal.

Anderson Mktg., Inc. v. Design House, Inc., 70 F.3d 1018 (8th Cir. 1995);

STATEMENT OF THE CASE

A. Trust Allotments and Federal Right-of-Ways.

Fettigs are allottees of trust land located on the Fort Berthold Indian Reservation. App. 3; R. Doc. 1, at 3. The four allotments relevant to this case have been developed for oil and gas production by WPX, a non-Indian company that drills and operates oil and gas wells and owns mineral interests within the reservation. *Id*. The BIA granted WPX right-of-ways on the allotments for oil well pads, well bores, access roads, pipelines, and other appurtenances. *Id.*; App. 8-106, R. Docs. 1-1, 1-2, 1-3, 1-4; R. Doc. 23-1, at 2-4.

Under 25 U.S.C. § 324, WPX was required to obtain Fettigs' consent to the right-of-ways, and under 25 C.F.R. § 169.125(a), Fettigs' consent documents contained additional restrictions and conditions negotiated by Fettigs and WPX. App. 3; R. Doc. 1, at 3; App. 19-25, 30-36; R. Doc. 1-1, at 13-19, 24-30; App. 57-64; R. Doc. 1-2, at 20-27; App. 80, 84-98; R. Doc. 1-3, at 15, 19-33; App. 103-106; R. Doc. 1-4, at 4-7. Included in the conditions and restrictions negotiated by the parties is a smoking ban. App. 23; R. Doc. 1-1, at 17; App. 34; R. Doc. 1-1, at 28; App. 62; R. Doc. 1-2, at 25; App. 88; R. Doc. 1-3, at 23; App. 96; R. Doc. 1-3, at 31; App. 105; R. Doc. 1-4, at 6. In addition, under 25 C.F.R. § 169.403(b), Fettigs and WPX were allowed to negotiate pre-ordained remedies for right-of-way violations, such as the remedy of $5,000 per incident for violations of the

smoking ban. *Id.* Here is the pertinent language, which is materially the same in all the consent documents:

> GRANTEE will not allow its employees, representatives, vendors, or others to hunt on the premises nor will GRANTEE allow smoking. Additionally, GRANTEE will post "No Hunting", "No Trespassing" and "No Smoking" signs. If GRANTEE, its employees, representatives, vendors or others smoke on premises, GRANTEE will pay a fine of $5,000 per incident.

Id.

B. The Tribal Lawsuit.

In 2020, Fettigs sued WPX in Tribal Court, alleging violations of the smoking ban. R. Doc. 24-6, at 2-6. WPX moved to dismiss Fettigs' lawsuit, asserting the Tribal Court lacks jurisdiction. R. Doc. 24-1, at 2. The Tribal Court determined it has jurisdiction and denied WPX's motion. App. 121-142; R. Doc. 24-12, at 2-23. In June 2021, WPX appealed the denial of its motion to dismiss to the MHA Nation Supreme Court. R. Doc. 24-5, at 2. The MHA Nation Supreme court has stayed the appeal. R. Doc. 61-1, at 2-3.

C. The Federal Case.

In July 2021, WPX commenced this federal case against Fettigs and the Tribal Court, seeking injunctive and declaratory relief to halt the tribal lawsuit. App. 1-6; R. Doc. 1, at 1-6. Fettigs filed a counterclaim that mirrors their claims in the tribal lawsuit. App. 107-110; R. Doc. 16, at 1-5. The Tribal Court moved to dismiss WPX's lawsuit on the grounds that WPX failed to exhaust tribal remedies, and that

the Tribal Court is immune from suit because it has jurisdiction. R. Doc. 19, at 1; R. Doc. 20, at 1-16. WPX moved to dismiss Fettigs' counterclaim, arguing that Fettigs failed to exhaust their administrative remedies with the BIA. R. Doc. 21, at 1; R. Doc. 22, at 1-13. WPX also moved for a preliminary injunction to bar Fettigs and the Tribal Court from prosecuting the tribal lawsuit. R. Doc. 26, at 1; R. Doc. 27, at 1-13. In one order, the district court denied the Tribal Court's motion to dismiss and granted WPX's motion for preliminary injunction. R. Doc. 50, at 1-31. In a separate order, the district court acted on WPX's motion to dismiss Fettigs' counterclaim by staying the counterclaim "to allow the BIA to conduct an administrative review of the Fettigs' claims." App. 112-119; R. Doc. 51, at 1-8.

D. Eighth Circuit Appeal.

The Tribal Court appealed the district court's order that denied its motion to dismiss and granted WPX's motion for preliminary injunction. R. Doc. 53, at 1-2. Fettigs only appealed the order that stayed their counterclaim. R. Doc. 55, at 1. Thereafter, instead of filing a brief in support of their appeal of the stay, Fettigs filed a "Motion to Concur" in which they ask for leave to "simply support and concur with [the Tribal Court's] briefing." However, nothing in the Tribal Court's initial brief in this appeal addresses the district court's order staying Fettigs' counterclaim, and the Fettigs' notice of appeal did not include the order or issues that were appealed by the Tribal Court. Fettigs' opportunity to appeal the district court's order

that granted WPX a preliminary injunction has passed. *See* Fed.R.App.P. 4(a)(1)(A) (notice of appeal is to be filed within 30 days after entry of judgment or order).

SUMMARY OF THE ARGUMENT

The district court's grant of a preliminary injunction that halted Fettigs' tribal lawsuit was legally sound. The Tribal Court lacks jurisdiction because (1) the Tribal Court's jurisdiction is limited to tribal law and Fettigs' suit against WPX is a federal cause of action, and (2) under *Montana*, WPX is not subject to the Tribal Court's jurisdiction because WPX is a non-Indian entity. Furthermore, the Tribal Court's argument that WPX should be required to exhaust tribal remedies prior to pursuing federal relief should be rejected because such a requirement would serve no other purpose than delay.

As for Fettigs' appeal of the order staying their counterclaims, Fettigs failed to file an opening brief and therefore, their appeal should be dismissed.

ARGUMENT

I. The Tribal Court lacks jurisdiction.

A. The Tribal Court's jurisdiction is limited to tribal law and Fettigs' suit against WPX is a federal cause of action.

The right-of-ways granted to WPX are on allotted land that is held in trust by the United States for Fettigs. The United States is the fee owner of the allotments and Fettigs are the beneficial owners. *See, e.g., Tooahnippah v. Hickel*, 397 U.S. 598, 609 (1970). Federal law governs the acquisition and use of the right-of-ways

over the allotments under 25 U.S.C. §§ 323-28. Where nonmembers are concerned, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana v. United States*, 450 U.S. 544, 564 (1981).

Congress has not expressly delegated authority to the tribes to hear matters regarding right-of-ways over allotted land held in trust by the United States. *See* 25 U.S.C. §§ 323-28. Neither a tribe nor an individual allotee can grant a right-of-way over trust land. *See id*. And while Congress has given tribes and allottees the power to consent to right-of-ways in 25 U.S.C. § 324, Congress has never extended this consent authority to include any independent ability to grant, administer, or regulate right-of-ways. *See id*.

Instead, only the Secretary of the Interior is authorized by Congress to grant, administer, and regulate right-of-ways on trust land, and the BIA has enacted broad and comprehensive regulations. *See* 25 U.S.C. § 323; 25 C.F.R. Part 169. The extensive nature of the scheme under Part 169 demonstrates that the regulation of such right-of-ways lies entirely with the federal government and is outside the control of tribes. *See Kodiak Oil & Gas (USA) Inc. v. Burr*, 922 F.3d 1125, 1136 (8th Cir. 2019) (discussing the extensive federal regulation of oil and gas leasing of trust land and determining tribal court lacked jurisdiction).

Notably, even the consent authority that Congress gave to tribes and allottees is not without federal regulation. *See, e.g.,* 25 C.F.R. §§ 169.107-109. As part of the consent process, the BIA allows allottees and right-of-way applicants to negotiate conditions and restrictions, and remedies for violations, all of which are subsequently incorporated into the right-of-way grants by regulation. 25 C.F.R. § 169.125(a). The smoking ban on WPX's right-of-ways is one such condition or restriction and the $5,000 fine for violations of the ban is one such remedy. These conditions and restrictions and the negotiated remedies owe their existence solely to federal law and are unique to the BIA's regulatory scheme. *See* 25 U.S.C. § 324; 25 C.F.R. § 169.403(b).

Because Fettigs' lawsuit arises from right-of-way terms that exist exclusively in the context of federal oversight and regulation, it follows that Fettigs' claims are federal in nature and do not stem from tribal law. Furthermore, tribal courts are not courts of general jurisdiction and where nonmembers are concerned, "tribal courts' adjudicative authority is limited (absent congressional authorization) to cases arising under tribal law." *Kodiak,* 922 F.3d at 1134-35. "[T]ribal courts lack jurisdiction to adjudicate federal causes of action absent congressional authorization." *Id.* at 1135 (citing *Nevada v. Hicks*, 533 U.S. 353 (2001)). Fettigs are asserting a federal cause of action in a tribal forum that lacks congressional authorization to adjudicate the action. Therefore, the Tribal Court does not have jurisdiction to hear Fettigs' lawsuit.

B. WPX is not subject to the Tribal Court's jurisdiction because WPX is a non-Indian entity.

It is well-established that "absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). In *Montana,* the United States Supreme Court articulated the now well-accepted rule that "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* 450 U.S. at 565. However, the Supreme Court added that in certain circumstances, even when Congress has not expressly authorized such regulation, tribes retain inherent sovereign authority over non-members to (1) regulate, "through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" and (2) "to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66. These exceptions are limited and are not to be construed in a manner that "swallows the rule." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008).

As explained earlier, Congress has not expressly given the tribes power to hear matters regarding right-of-ways over allotted land that is held in trust by the

United States. Therefore, absent the applicability of one of the *Montana* exceptions, the jurisdiction of the Tribal Court does not extend to the activities of WPX.

1. The first *Montana* exception does not apply.

The first *Montana* exception only applies when a nonmember has a consensual relationship with the tribe or its members and such activities arising from the consensual relationship implicate the tribe's sovereign interests. *Plains Commerce Bank*, 554 U.S. at 335. The exception does not give tribes unlimited regulatory or adjudicative authority over nonmembers, but instead permits the regulation of nonmembers' activities. *Id.* at 330. As explained in *Plains Commerce Bank*, the rationale for the *Montana* exceptions was to ensure tribal regulation of certain activities that "may intrude on the internal relations of the tribe or threaten tribal self-rule." *Id.* at 335. Here, WPX has a consensual relationship, via the BIA, with tribal members and so the question is whether WPX's activities arising from the relationship implicate the tribe's sovereign interests. They do not.

As stated earlier, the extensive scheme under 25 C.F.R. Part 169 demonstrates the regulation of such right-of-ways lies entirely with the federal government and is outside the control of tribes. The conditions and restrictions that federal regulations allow to be included in the right-of-way grants—like a smoking ban—and the existence of "negotiated remedies" for violations of the right-of-ways—like a $5,000 penalty for smoking—are only made possible by federal law.

See 25 C.F.R. § 169.403(b). Because Fettigs' lawsuit is based on the restrictions and conditions and remedies that owe their existence solely to federal regulations, it follows that the lawsuit is federal in nature and does not stem from tribal law. Therefore, in the absence tribal regulatory authority, it is axiomatic that the activity in question does not implicate tribal governance or internal relations.

2. The second *Montana* exception does not apply.

A tribe retains inherent power to exercise authority over the conduct of nonmembers "when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. The Supreme Court's decisions in *Strate* and *Hicks* dictate a narrow interpretation of the second exception. Both decisions caution that the second exception cannot be interpreted to severely shrink *Montana*'s general rule. *See Hicks*, 533 U.S. at 359-61; *Strate*, 520 U.S. 457-58. For example, in considering whether tribal courts may adjudicate claims against nonmembers stemming from accidents on state highways within a reservation, the *Strate* opinion acknowledged careless driving on a public highway running through a reservation certainly jeopardizes the safety of the tribal members, but concluded the second exception cannot be interpreted so broadly as to bring such claims within the adjudicative authority of the tribal court. *Strate*, 520 U.S. at 457-58.

Indeed, if read in isolation, the second exception "can be misperceived." *Id.* at 459. Instead, much like the first exception, the second *Montana* exception must be read in the context of those cases cited to support the exception. *See id.* at 458-59 (discussing cases cited in *Montana* regarding the second exception). The *Strate* court concluded the second exception was not applicable because "[n]either regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Id*. at 459 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

As to Fettigs' case, adjudicative authority over right-of-ways on trust allotments is not essential to preserving a tribe's right to make its own laws and be governed by them. This is especially true considering the extensive scheme under 25 C.F.R. Part 169, where the regulation of right-of-ways over allotted trust land lies entirely with the federal government and is outside the control of the tribes. Under these circumstances, tribal authority over such right-of-ways is not in need of preserving because it does not exist. *See id*. Therefore, the *Montana* rule applies here, not its exceptions, and the Tribal Court does not have jurisdiction over WPX.

C. The BIA's regulations and the right-of-way terms do not grant jurisdiction to the Tribal Court.

The Tribal Court argues it derives jurisdiction from the BIA's regulations and points specifically to 25 C.F.R. § 169.403. Here is the pertinent part of that regulation:

> (e) A right-of-way grant may provide that violations will be addressed by a tribe, and that disputes will be resolved by a tribal court, any other court of competent jurisdiction, or by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing actions or proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

25 C.F.R. § 169.403(e) (emphasis added).

The Tribal Court misapprehends this regulation. It does not expressly grant tribes the authority to adjudicate right-of-way disputes; instead, the regulation indicates the BIA, via a right-of-way grant, may allow violations to be resolved by a tribal court. Put another way, § 169.403(e) does not give jurisdiction directly to tribes, but rather it creates the option for the BIA to allow a tribe to hear a dispute. However, no provision in the right-of-ways grants jurisdiction to the Tribal Court or otherwise mandates that disputes are to be heard in a tribal forum. *See, e.g.,* 8-11; R. Doc. 1-1, at 2-5. Moreover, a unilateral expansion of tribal jurisdiction by the BIA in its regulations or right-of-way terms would be invalid because its origin would not be Congress. *See Montana*, 450 U.S. at 564 (referring to *congressional* delegation of power when defining limits of tribes' jurisdiction).

Next, the Tribal Court correctly points out the right-of-ways have a clause that reserves the tribe's jurisdiction, but they insinuate the clause combines with BIA regulations to become something more than a reservation and results in tribal jurisdiction over this lawsuit. Here is the clause:

> **RESERVATION OF JURISDICTION.** (25 CFR 169.10, 169.125) The Tribe maintains its existing jurisdiction over the land, activities, and persons within the right-of-way and this grant does not diminish to any extent: (a) the Tribe's power to tax the land, any improvements on the land, or any person or activity within the right-of-way; (b) the Tribe's authority to enforce Tribal law of general or particular application on the land subject to and within the right-of-way, as if there were no grant of right-of-way; (c) the Tribe's inherent sovereign power to exercise civil jurisdiction over nonmembers on Indian land; or (d) the character of the land subject to the right-of-way as Indian country under 18 U.S.C. 1151.

See, e.g., App. 9, R. Doc. 1-1, at 3 (emphasis added).

This clause does not endow the Tribal Court with the ability to hear the dispute between WPX and Fettigs. Instead, the language of the clause merely indicates a right-of-way grant is not to be construed as limiting or shrinking the tribe's *existing* jurisdiction. And, as WPX explained earlier, the tribe's existing jurisdiction does not encompass the parties' dispute.

II. WPX is not required to exhaust tribal remedies prior to seeking a federal injunction against the Tribal Court.

Before challenging an exercise of tribal court jurisdiction in federal court, parties must generally exhaust their tribal court remedies. *Kodiak*, 922 F.3d at 1133 (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-19 (1987) and *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-57 (1985)). This rule is prudential and based on comity for which the Supreme Court has recognized a number

of exceptions. *Nat'l Farmers Union Ins. Cos.,* 471 U.S. at 856 n. 21; *see Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006) (listing the recognized exceptions).

Exhaustion of tribal court remedies is not required when a tribal court's action "is patently violative of express jurisdictional prohibitions." *Hicks*, 533 U.S. at 369 (quoting *National Farmers Union*, 471 U.S. at 856 n. 21). When a tribal court plainly lacks adjudicatory jurisdiction over an action, "the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay." *Strate*, 520 U.S. at 459 n. 14 (citation omitted).

Here, WPX unsuccessfully challenged the Tribal Court's jurisdiction and thereafter appealed to the tribal appeals court and, prior to receiving a decision on the appeal, WPX commenced a federal action for injunctive and declaratory relief. WPX should not be required to finish the tribal appeal or try the merits of the case in Tribal Court before pursuing federal relief because, as explained in detail above, the Tribal Court lacks jurisdiction. More precisely, the exhaustion of tribal remedies in the absence of tribal jurisdiction is pointless.

Indeed, the Eighth Circuit has held that when it is plain a tribal court lacks jurisdiction, the question of whether a tribal court appeal has been undertaken, much less finished, is of no import. *See Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 672 (8th Cir. 2015). In *Murphy*, a non-Indian school district was sued in tribal court and sought injunctive relief in federal court, arguing

the tribal court lacked jurisdiction. *Id*. The tribal court officials asserted the federal suit was barred because the school district did not appeal the tribal court's jurisdictional decision to the tribal appellate court. The Eighth Circuit disagreed with the tribal officials, stating:

> In light of our holding that the Tribal Court lacks jurisdiction, "it would serve no purpose other than delay" to require the School District to appeal the Tribal Court's jurisdictional determination to the Tribe's Supreme Court. The School District was therefore not required to exhaust its administrative remedies before commencing this suit.

Id. (quoting *Strate*, 520 U.S. at 459 n. 14).

Murphy is not distinguishable from this dispute other than the fact WPX has gone farther toward exhaustion by filing and briefing its tribal appeal. Forcing WPX to wait for a decision from the tribal appeals court would serve no purpose other than delay because, similar to *Murphy*, it is plain the Tribal Court lacks jurisdiction. Therefore, the Tribal Court's arguments in this regard should be rejected and the preliminary injunction should remain in place.

III. Fettigs have failed to mount a viable appeal.

Fettigs' appeal is procedurally doomed. First, they only appealed the district court's order that stayed their counterclaims against WPX and this, in and of itself, was questionable because an order staying civil proceedings is interlocutory and not ordinarily a final decision for purposes of 28 U.S.C. § 1291. *See Window World Int'l, LLC v. O'Toole*, 21 F.4th 1029, 1032 (8th Cir. 2022). Regardless, Fettigs failed to

file an appellate brief in support of their appeal of the stay. Instead, they filed a "Motion to Concur" in which they ask to "simply support and concur" with the Tribal Court's briefing. However, because the briefing does not address the stay of Fettigs' counterclaims, but pertains to a separate district court order, the one that denied the Tribal Court's motion to dismiss WPX's suit and also granted WPX's motion for preliminary injunction.

It is a fundamental rule of federal appellate procedure that a circuit court may only review "a district court's ruling if a party challenges that ruling on appeal by raising the issue in its opening brief." *Anderson Mktg., Inc. v. Design House, Inc.*, 70 F.3d 1018, 1020 (8th Cir. 1995). Because Fettigs failed to file an opening brief, or any document, that challenged the district court's order that stayed their counterclaim, the Court is not able to consider their appeal and it should be dismissed.

Furthermore, a notice of appeal must "designate the judgment, order, or part thereof being appealed." Fed.R.App.P. 3(c)(1)(B). And while a notice of appeal that designates the final judgment in a case ordinarily will bring up for review all of the previous rulings and orders that led up to and served as a predicate for that final judgment, a notice is construed differently when the appellant specifies a particular order to the exclusion of others. *Rosillo v. Holten*, 817 F.3d 595, 597 (8th Cir. 2016). "[A] notice which manifests an appeal from a specific district court order or decision

precludes an appellant from challenging an order or decision that he or she failed to identify in the notice." *Parkhill v. Minnesota Mutual Life Ins. Co.*, 286 F.3d 1051, 1058-59 (8th Cir. 2002). Therefore, because Fettigs' notice of appeal did not pertain to the order the Tribal Court is challenging, Fettigs may not challenge that order now by merely adopting the Tribal Court's briefing. In sum, Fettigs did not appeal the preliminary injunction and their Motion to Concur should be denied.

CONCLUSION

For all the foregoing reasons, WPX requests the affirmance of the district court's grant of a preliminary injunction, and the dismissal of Fettigs' appeal.

August 22, 2022

Respectfully submitted,

/s/ Robin Wade Forward

Robin Wade Forward
STINSON LLP
424 South Third Street, Suite 206
Bismarck, ND 58504
rob.forward@stinson.com
Telephone: 701.221.8603
Facsimile: 701.221.8601

Counsel for Plaintiff-Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with (1) the type-volume limitation of Fed. R. App. P. 32(a)(7) because it contains 4,026 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and (2) the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in a 14-point Times New Roman font in the text and footnotes.

August 22, 2022

/s/ Robin Wade Forward
Robin Wade Forward
Counsel for Plaintiff-Appellees

CERTIFICATE OF ELECTRONIC SUBMISSION

I hereby certify that: (1) any required privacy redactions have been made; (2) the electronic submission of this brief is an exact copy of any corresponding paper document; and (3) this brief and accompanying addendum have been scanned for viruses and are free from viruses.

August 22, 2022

/s/ Robin Wade Forward
Robin Wade Forward
Counsel for Plaintiff-Appellees

CERTIFICATE OF SERVICE

I hereby certify that, on August 22, 2022, I caused a true and correct copy of the foregoing brief and accompanying addendum to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system, which will send notification of such filing to all registered users of the CM/ECF system.

August 22, 2022

/s/ Robin Wade Forward
Robin Wade Forward
Counsel for Plaintiff-Appellees