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

Paradigm Energy Partners, LLC, Plaintiff, vs. Mark Fox, in his official capacity as Chairman of the Tribal Business Council of the Mandan, Hidatsa & Arikara Nation, Chief Nelson Heart, in his official capacity as Chief of Police for the Mandan, Hidatsa & Arikara Nation, Defendants.	)	**ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** Case No.: 1:16-cv-304

I. BACKGROUND

On August 19, 2016, the Plaintiff's filed an "Emergency Motion for Temporary Restraining Order." See Docket No. 4. The Plaintiff sought a temporary restraining order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, specifically requesting an order prohibiting the Defendants from interfering with the Plaintiff's construction of two pipelines in McKenzie and Mountrail Counties, North Dakota. On August 22, 2016, the Defendants filed a motion to dismiss for lack of jurisdiction. See Docket No. 8. The Plaintiff filed a response in opposition to the Defendant's motion on August 23, 2016. See Docket No. 9. On August 23, 2016, the Court issued an order granting the temporary restraining order. On August 30, 2016, the Defendants filed a motion to dissolve the temporary restraining order. See Docket No. 19. On August 31, 2016, the Plaintiff filed a response to the Defendant's motion. See Docket No. 21. Thereafter, on September 1, 2016, a hearing was held in Bismarck, North Dakota, on the Plaintiff's request for a preliminary

injunction. For the reasons set forth below, the Plaintiff's request for a preliminary injunction is granted.

II. FACTS

The Plaintiff, Paradigm Energy Partners, LLC ("Paradigm Energy"), is a Delaware limited liability company with its principal place of business in Irving, Texas. See Docket No. 1. No person or entity having an ownership interest in Paradigm Energy is a resident or citizen of North Dakota. Paradigm Energy is engaged in the business of constructing two pipelines that run underneath Lake Sakakawea in McKenzie and Mountrail Counties, North Dakota (collectively, the "Sacagawea Pipelines"). One pipeline will transport natural gas (the "Natural Gas Pipeline") and one will transport crude oil (the "Oil Pipeline"). When completed, the Sacagawea Pipelines will cross underneath Lake Sakakawea by boring approximately 100-feet beneath the lakebed and will run 70 miles to transport natural gas and oil to a collection point in Mountrail County for delivery to interstate carriers. See Docket No. 5-4, p. 4. Defendant Mark Fox is the Chairman of the Tribal Business Council of the Mandan, Hidatsa & Arikara Nation ("Nation") and is a citizen of North Dakota. Defendant Chief Nelson Heart is the Chief of Police for the Nation and is a citizen of North Dakota.

Lake Sakakawea is located within the Fort Berthold Indian Reservation; however, both Lake Sakakawea and its subsurface are owned by the United States. In 1949, the Nation conveyed all of its "right, title and interest" in the land under Lake Sakakawea to the United States in order to build the Garrison Dam. The Army Corps of Engineers (the "Corps of Engineers") operates Lake Sakakawea for the federal government pursuant to its authority under the 1944 Flood Control Act and the 1949 Takings Act.

Paradigm Energy began obtaining approval from the necessary state and federal agencies to construct the Sacagawea Pipelines in 2015. The 70-mile long pipelines span over privately owned lands, state trust lands, and Fort Berthold Indian Reservation lands – fee surface, allotted, and tribal lands. In order to pass underneath Lake Sakakawea, there is a need to obtain a permit from the Corps of Engineers.

The portion of the pipelines located on tribal trust lands requires approval from the Department of the Interior, Bureau of Indian Affairs ("BIA") for the land use, construction, maintenance, operation, and final abandonment and reclamation of approximately 3.26 miles of the pipelines and access roads located on allotted lands within the boundary of the Reservation. The portion of the project crossing the Reservation needs approval from the Nation. Of the remaining length of the system, 21.99 miles occurs on Reservation fee lands; 2.82 miles exist on North Dakota State Trust Lands; and 41.47 miles exist on privately-owned lands outside of the Reservation under the jurisdiction of the North Dakota Public Service Commission. There is approximately 8,980 feet of the pipeline system that would pass under Lake Sakakawea.

The BIA is the surface management agency for potentially affected tribal lands and individual allotments. The Corps of Engineers is responsible for the issuance of a realty permit and regulatory program authorization for the lake crossing. The U.S. Fish and Wildlife Service manages wetland and grassland easements in the area crossed by the northern portion of the project.

The pipelines cross several governmental jurisdictions. Compliance with Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, is required for the passage under Lake Sakakawea, which is addressed through authorization by the Corps of Engineers. North Dakota Public Service Commission approval is required for a transmission pipeline system within the State of North

Dakota but outside the Reservation boundaries. The BIA's role includes approving easements and right-of-ways for both access roads and the Sacagawea Pipelines. Compliance with the National Environmental Policy Act ("NEPA") is required due to the need for approvals by two federal agencies – the BIA and the Corps of Engineers. In accordance with NEPA, the Bureau of Indian Affairs completed an environmental review of the Sacagawea Pipelines. On August 28, 2015, the BIA, along with the U.S. Fish and Wildlife Service, issued a "Finding of No Significant Impact." See Docket No. 5-9. The Corps of Engineers completed its own NEPA review and issued a "Mitigated Finding of No Significant Impact" on April 15, 2016. See Docket No. 5-10.

The undisputed evidence reveals that Paradigm Energy obtained all of the necessary right-of-way agreements and easements from the Corps of Engineers, the BIA, allottees, private landowners, and the Nation. The pipeline project has been approved by both state and federal regulators in accordance with the standard regulatory process which includes public hearings and the solicitation of public comments. The record further reveals that throughout the entire regulatory process at the state and federal level, the Nation provided no comments on the pipeline project.

On June 1, 2016, Paradigm Energy obtained an "Easement for Fuel Carrying Pipeline Right-of-Way" from the Corps of Engineers. See Docket No. 5-6. The easement granted Paradigm Energy a right-of-way for the construction of the Sacagawea Pipelines under Lake Sakakawea. The easement was issued pursuant to the federal government's exclusive statutory authority under the Mineral Leasing Act (30 U.S.C. § 185) to grant right-of-ways for pipelines crossing federal lands. The relevant provisions of the easement from the Corps of Engineers provides as follows:

> This Easement is made on behalf of **THE UNITED STATES OF AMERICA** (the "United States"), between **THE SECRETARY OF THE ARMY**, acting by and through the Chief, Real Estate Division, U.S. Army Engineer

> District, Omaha District, hereinafter referred to as the "Grantor," under and by virtue of the authority vested in Title 30, United States Code, Section 185, and **SACAGAWEA PIPELINE COMPANY, LLC, duly organized and existing under and by virtue of the laws of the State of Delaware, with its principal office at 545 East John Carpenter Freeway, Irving, Texas 75062,** hereinafter referred to as the "Grantee."
> **NOW THEREFORE:**
>
> The Grantor, for good and valuable consideration set forth below, the receipt and sufficiency of all of which are hereby acknowledged, upon and subject to the terms, covenants and conditions set forth in this Easement for right-of-way, does hereby:
>
> Grant and convey to Grantee, an easement for a fuel carrying pipeline right-of-way for the installation, construction, operation, maintenance, repair, replacement and termination of a **sixteen inch ("16") diameter, horizontal directional drill (HDD) buried oil pipeline for the purpose of transporting crude oil and a sixteen inch ("16") diameter, HDD buried natural gas pipeline**, and related facilities, hereinafter collectively referred to as the "pipeline" and "Facilities", over, across, in and upon lands of the United States **at and under Lake Sakakawea and the Garrison Dam Project**, as described and identified in **EXHIBITS "A" and "B"**, hereinafter referred to as the "Premises", and which are attached hereto and made a part hereof; with the width of a right-of-way being fifty feet plus the ground occupied by the pipeline (that is, the pipe and its related facilities) . . .

See Docket No. 5-6, p. 2.

The record reveals that Paradigm Energy paid the Corps of Engineers **$124,488** to obtain the easement for the pipeline right-of-way under Lake Sakakawea. In addition to the easement obtained from the Corps of Engineers to bore two pipelines under Lake Sakakawea, Paradigm Energy also obtained permits from private landowners to access their lands to install the Sacagawea Pipelines. Paradigm Energy's permit with one private landowner prohibits the use of his land after November 1, 2016. The November 1, 2016, deadline cannot be extended without the landowner's consent, and the landowner has refused to extend that deadline.

With respect to the surface land easements, the Nation's Tribal Business Council requested that Paradigm Energy obtain over 600 tribal members' signatures on a petition supporting the

Sacagawea Pipelines. Paradigm Energy asserts it obtained the requested signatures on a petition prepared by the Nation's attorneys. See Docket No. 5-7.

On June 22, 2016, Paradigm Energy obtained surface right-of-ways from the Nation and individual landowners for which they paid the sum of **$834,660.50**. See Docket No. 20-1, pp. 8-21. The easement for the installation of the pipelines across and over tribal land provides as follows:

GRANT OF RIGHT-OF-WAY Tribal Tract No(s), 1857 T5231, T2194, T2085-C, T1092A

That the United States of America, acting by and through the Bureau of Indian Affairs, Department of the Interior Fort Berthold Agency, P.O. Box 370, New Town, North Dakota 58763, for and on behalf, with the consent of Three Affiliated Tribes and Individual Indian Landowners, hereinafter referred to as GRANTOR, under authority contained and under the Act of February 5, 1948 (62 Stat. 17; 25 USC 323-328); and Part 169, Title 25, *code of Federal Regulations*, which by reference are made a part hereof, does hereby grant to: **SACAGAWEA PIPELINE COMPANY, LLC, 545 E. John Carpenter Freeway, Suite 800, Irving, Texas, 75062**, hereinafter referred to as GRANTEE.

1. **GRANT.** In consideration of: **Seven Hundred Fifty Thousand Six Hundred Sixty Dollars and 50/100 ($750,660.50)** paid to the Tribe and Indian Landowners by Monday, June 27, 2016.
   - All Tribal Tracts will be assessed an annual rental fee, of **$2,000.00 per permanent acre**; and will be invoiced on the first anniversary of the approval date; and every year thereafter for the term of the Right-of-way, pursuant to Tribal Resolution 14-089-VJB.
   - Landowner of allotment 2085-B negotiated an annual payment of $2,400.00 to be paid in 10 year increments. The first payment of $24,000.00 will be due by Monday, June 27, 2016 with the remaining balance of $24,000.00 to be due on the anniversary of the approval date.
   - Landowner(s) of allotment 1093A-C negotiated an annual payment of $3,000.00 to be paid upfront and due by Monday, June 27, 2016.

GRANTOR does hereby grant to GRANTEE, a right-of-way for a 16" crude pipeline and a 16" gas pipeline, over and across the land embraces within a right-

of-way situated on the following described lands located in the County of McKenzie in the State of North Dakota:

Township 151 North, Range 94 West, Fifth Principal Meridian
Tribal Tract #T5231, W½NW¼NE¼SE¼ of Section 35
(333.40 feet and 0.23 acres of permanent disturbance)
Tribal Tract #T2194, N½SE¼NE¼ of Section 35
(1331.23 feet and 0.917 acres of permanent disturbance)
Tribal Tract 1857, S½NW¼ of Section 33
(2433.37 feet and 1.676 acres of permanent disturbance)
Tract #1984, E½ of Section 32
(3023.38 feet and 2.082 acres of permanent disturbance)
Tract #2085-B, E½SW¼, E½W½SW¼ of Section 32
(1993.76 feet and 1.373 acres of permanent disturbance)
Tract #2085-C, W½W½SW¼ of Section 32
(670.05 feet and 0.461 acres of permanent disturbance)
Tract #990A-C, S½NE¼SE¼ of Section 31
(1340.79 feet and 0.923 acres of permanent disturbance)
Tract #990A-B, S½NW¼SE¼ of Section 31
(1333.66 feet and 0.918 acres of permanent disturbance)
Tract #990A-A, S½NE¼SW¼ , Lot 3 of Section 31
(2464.56 feet and 1.697 acres of permanent disturbance)

Township 151 North, Range 95 West, Fifth Principal Meridian
Tract #1093A-C, S ½ N ½ SE ¼ of Section 36
(2663.19 feet and 1.834 acres of permanent disturbance)
Tribal Tract T1092A, Lot 7 of Section 36
(819.80 feet and 0.565 acres of permanent disturbance)

See Docket No. 20-1, pp. 9-10.

On April 16, 2015, more than a year before the surface right-of-ways and the easement for boring under Lake Sakakawea were obtained, Chairman Fox signed Tribal Resolution No. 15-065, through which the Nation approved all segments of the pipeline that crossed tribal lands. See Docket No. 1-2, pp. 2-3. Tribal Resolution No. 15-065 states as follows:

> **WHEREAS**, The Mandan Hidatsa and Arikara Nation ("Nation" or "Tribes") having accepted the Indian Reorganization Act of June 18, 1934 ("IRA"), and the authority under said Act and having adopted a Constitution and By-laws pursuant to said Act; and

WHEREAS, The Constitution of the Nation generally authorizes and empowers the Tribal Business Council to engage in activities on behalf of and in the interest of the welfare and benefit of the Tribes and of the enrolled members thereof; and

WHEREAS, Article III, Section 1 of the Constitution of the Nation provides that the Tribal Business Council is the governing body of the Tribes; and

WHEREAS, The Constitution of the Three Affiliated Tribes authorizes and empowers the Tribal Business Council to engage in activities on behalf of and in the interest of the welfare and benefit of the Tribes and of the enrolled members thereof; and

WHEREAS, Article VI, Section 5 (i) and Article IX of the Constitution authorizes the Tribal Business Council to lease tribal lands and resources, including minerals; and

WHEREAS, The Natural Resources Committee concluded it was in the best interest of the MHA Nation to authorize and grant consent for right-of-way to Sacagawea Pipeline Company on the following tracts: Tract No. 909A, Tract No. T2085-C, Tract No. T5231, Tract No. 1857, Tract No. T1092A.

WHEREAS, Now theretofore, the Tribal Business Council finds it is in the best interest of the MHA Nation to authorize and grant consent for right-of-way to Sacagawea Pipeline Company on the following tracts: Tract No. 909A, Tract No. T2085-C, Tract No. T5231, Tract No. 1857, Tract No. T1092A.

NOW THEREFORE BE IT RESOLVED, The Tribal business Council authorizes and grants consent for right-of-way to Sacagawea Pipeline Company on the following tracts: Tract No. 909A, Tract No. T2085-C, Tract No. T5231, Tract No. 1857, Tract No. T1092A.

See Docket No. 5-2, p. 2. The Nation reaffirmed this Resolution in June of 2016. See Docket No. 1-2, pp. 4-5. The June 2016 Resolution (No. 16-127-CSB) states:

A Resolution Entitled: *"Correction to Resolution No. 15-064-KH"*

WHEREAS, The Mandan Hidatsa and Arikara Nation (the "MHA Nation"), having accepted the Indian Reorganization Act of June 18, 1934 and the authority under said Act, and having adopted a Constitution and By-laws under said Act, and

WHEREAS, The Constitution of the Nation generally authorizes and empowers the Tribal Business Council to engage in activities on behalf of and in the interest of the welfare and benefit of the Tribes and of the enrolled members thereof; and

WHEREAS, Pursuant to Article III, Section 1 of its Constitution and By-Laws, the Tribal Business Council is the governing body of the MHA Nation; and

WHEREAS, Pursuant to Article VI, Section 5(1) of said Constitution, the Tribal Business Council has the power to adopt resolutions regulating the procedures of the Tribal Council, its Agencies and Officials; and

WHEREAS, The Tribal Business Council has authority to engage in activities on behalf of and for the welfare and benefit of the Tribes and of the enrolled members thereof; and

WHEREAS, The Tribal Business Council approved Resolution No. 15-065-KH, entitled "Grant of Right of Way" on April 16, 2015; and

WHEREAS, Resolution No. 15-065-KH contained an error that listed Tract No. 909A as a tract for which the Tribe would grant a right-of-way, and omitted Tract No. T2194 as the proper tract for which the Tribe would grant a right-of-way; and

WHEREAS, Correction of this error will not impact the right-of-way fees paid to the Tribe since the original calculation for the right-of-way fees was made on the acreage associated with Tract No. T2194.

NOW THEREFORE BE IT RESOLVED, that the Tribal business Council hereby amends Resolution No. 15-065-KH to replace any reference to "Tract No. 909A" with "Tract No. T2194."

BE IT FINALLY RESOLVED, that the Chairman is hereby authorized to take such further actions as are necessary to carry out the terms and intent of this Resolution.

See Docket No. 1-2, p. 4.

Paradigm Energy began constructing the Sacagawea Pipelines in March of 2016. The work on the Lake Sakakawea Segment of the Sacagawea Pipelines began in early June of 2016, in accordance with the permits and easements it had obtained for the project. See Docket No. 1, p.

6. On August 8, 2016, Paradigm Energy and its workers and contractors were served with an "Order to Cease and Desist" signed by Chairman Fox on behalf of the Tribal Business Council. See Docket No. 1-1. The "Order to Cease and Desist" asserts that "[c]onsent of the governing body of the MHA Nation is required before an oil and gas pipeline can be constructed under Lake Sakakawea within Reservation boundaries." See Docket No. 1-1. Chairman Fox acknowledged at the hearing on September 1, 2016, that neither he nor any members of the Tribal Business Council had ever requested a legal opinion as to whether the consent of the Tribe was required before work proceeded under Lake Sakakawea. This was confirmed by in-house Tribal counsel, Caleb Dog Eagle. After the "Order to Cease and Desist" was issued, the Defendants and their agents showed up at the Lake Sakakawea Segment construction site and informed Paradigm Energy's construction workers they would be arrested if they continued to work on the Lake Sakakawea Segment. See Docket No. 1, p. 7. On August 9, 2016, Paradigm Energy instructed its contractors to stop work. The construction of the Oil Pipeline under Lake Sakakawea is 100% complete, while construction for the Natural Gas Pipeline has recently started.

On August 19, 2016, Paradigm Energy filed a complaint and asserted claims of declaratory and injunctive relief. See Docket No. 1. That same day, Paradigm Energy filed a motion for a temporary restraining order, seeking to restrain and enjoin the Defendants from obstructing or interfering in any way with its construction of the Sacagawea Pipelines. See Docket No. 4.

On August 22, 2016, the Defendants filed a motion to dismiss. The Defendants argue the Court lacks jurisdiction because the Plaintiff has not pled a waiver of sovereign immunity, neither the Nation nor the United States has waived the Nation's sovereign immunity; the Plaintiff failed to exhaust tribal court remedies; the Plaintiff failed to join and is unable to join an indispensable party; and the Plaintiff has not properly served either defendant and therefore lacks personal

jurisdiction over the Defendants. See Docket No. 8. The Plaintiff filed a response in opposition to the Defendant's motion on August 23, 2016. See Docket No. 9. The gist of the Defendant's position is that Paradigm Energy is required to obtain the formal consent of the Nation before it ever bores a pipeline under Lake Sakakawea because the Nation owns the mineral estate or mineral rights under the lake pursuant to the Fort Berthold Minerals Restoration Act of 1984, Pub. L. No. 98-602, 98 Stat. 3152 (1984).

III. STANDARD OF REVIEW

Paradigm Energy initially sought 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:
>
> **(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. 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 preliminary injunction 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.

IV. LEGAL DISCUSSION

It is well-established that the movant has the burden of establishing the necessity of a temporary restraining order or a preliminary injunction. 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 stage, the Court need not decide whether the party seeking the preliminary injunction will ultimately prevail. PCTV Gold, Inc. v. SpeedNet, LLC, 508 F.3d 1137, 1143 (8th Cir. 2007). Although a temporary restraining order or 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. 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 Paradigm Energy has a likelihood of success on the merits. Paradigm Energy 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).

1. Surface Estate v. Mineral Estate

It is axiomatic in oil and gas law that the ownership of mineral rights is an estate in real property. Technically, it is known as a mineral estate, although it is often referred to as mineral rights. It is essentially the right of the owner to exploit, mine, and/or produce the minerals lying below the surface of the property. See Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979). The mineral estate (mineral rights) is often severed from the surface estate. Such a severance is accomplished with a conveyance or a reservation of the mineral rights. Id. In North Dakota, the mineral estate is often separate from or severed from the surface estate. The mineral property generally includes hydrocarbons (oil, gas, coal) and hardrock minerals (gold, silver, copper, and other minerals).

It is well-established in oil and gas law that while a mineral owner has the right to extract minerals from the subsurface, "the **landowner** continues to own both the surface and the subsurface of the lands." 1-2 Williams & Meyers, Oil and Gas Law § 218 (2015) (emphasis added); accord Emeny v. United States, 412 F.2d 1319, 1323 (Fed. Cl. 1969) (explaining lessee's right to minerals did not eliminate landowners' right to surface "and everything in such lands" except minerals); Lightning Oil Co. v. Anadarko E & P Onshore LLC, 480 S.W.3d 628, 635 (Tex. App. 2015) ("[T]he surface estate owner controls the earth beneath the surface estate.").

It is undisputed that the United States, through the Army Corps of Engineers, owns the land underlying Lake Sakakawea. The mineral interests in the land underlying Lake Sakakawea are held in trust by the United States for the benefit of the Nation. See Pub. L. 81-437, 63 Stat. 1026 (1949) and Pub. L. 98-602, 98 Stat. 3149 (1984).

When the mineral estate is severed from the surface estate, the mineral estate is said to be dominant in that it has the right to make use of the surface estate to the extent necessary to find and develop the minerals. Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 135 (N.D. 1979). However, this right is "limited to so much of the surface and such use thereof as are reasonably necessary to explore, develop, and transport the minerals" and this right must be exercised with due regard for the rights of the surface owner. Id. (emphasis added). "[T]he mineral estate owner has no right to use more of, or do more to, the surface estate than is reasonably necessary to explore, develop, and transport the minerals." Id. Thus, what is possessed by the mineral estate owner is the "fair chance" to recover the minerals. Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 15 (Tex. 2008). If there are no minerals beneath the surface, then the mineral estate "owns the legal fiction of an estate that is nothing." Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv., 630 F.3d 431, 441 (5th Cir. 2011).

More important, the severance of the mineral estate from the surface estate does not convey the subsurface. Dunn-Campbell, 630 F.3d at 441; 1-2 Williams & Meyers, Oil and Gas Law § 218 (2015) (the landowner continues to own both the surface and the subsurface, subject to certain rights to the minerals vested in the mineral owner). In other words, it is the surface estate, not the mineral estate, that owns and controls the subsurface. Lightning Oil Co.v. Anadarko E & P Onshore LLC, 480 S.W.3d 628, 635 (Tex. App. 2015). "The mineral estate owner does not own the 'molecules actually residing below the surface.'" Dunn-Campbell, 630 F.3d at 442 quoting (Coastal Oil & Gas Corp, 268 S.W.3d at 15). The mass of the geological structures in the earth that undergird the surface are owned and controlled by the owner of the surface estate. Lightning Oil Co., 480 S.W.3d at 635. Applying these fundamental principles, it is clear that the Nation does not own or control the earth surrounding its mineral interests underneath Lake Sakakawea. It is equally clear that the United States/Corps of Engineers, as the owner of the surface estate, controls the lake bottom and the subsurface of Lake Sakakawea, not the Nation which only owns the mineral estate beneath the lakebed.

2. 25 U.S.C. §§ 323-324

On August 8, 2016, Chairman Fox served an "Order to Cease and Desist" on Paradigm Energy. See Docket No. 1-1. In the "Order to Cease and Desist," Chairman Fox outlines the legal basis for the Tribal Business Council's contention that consent from a governing body of the Nation was required before Paradigm Energy constructed a pipeline under Lake Sakakawea. Specifically, in the "Order to Cease and Desist," Chairman Fox states:

> The subsurface under Lake Sakakawea is held in trust by the United States for the benefit of the MHA Nation pursuant to the Fort Berthold Mineral Restoration Act of 1984. Penetrating the subsurface estate required the consent of both the MHA Nation and the United States pursuant to 25 USC sections 323-24, and in accordance with the conditions prescribed in 25 CFR Part 169. Furthermore,

> Article IX Section (1) of the MHA Nation Constitution authorizes the Tribal Business Council to manage or otherwise deal with tribal lands and resources and to prevent the lease or encumbrance of tribal lands, interests in lands, or other tribal assets . . .

See Docket No. 1-1, p. 2.

Section 202(a) of the Fort Berthold Reservation Mineral Restoration Act of 1984 specifically provides:

> [A]ll mineral interests in the lands located within the exterior boundaries of the Fort Berthold Indian Reservation which were acquired by the United States for the construction, operation, or maintenance of the Garrison Dam and Reservoir Project . . . are declared to be held in trust by the United States for the benefit and use of the Three Affiliated Tribes of Fort Berthold Reservation.

Pub. L. No. 98-602, 98 Stat. 3152 (1984). Based upon a review of the plain language of Section 202(a), it is clear to the Court that all mineral interests under Lake Sakakawea within the exterior boundaries of the Fort Berthold Reservation are held in trust by the United States for the benefit and use of the Three Affiliated Tribes. Further, the United States is unquestionably the surface owner of Lake Sakakawea which is administered by the Corp of Engineers. See Pub. L. 81-437, 63 Stat. 1026 (1949); 33 C.F.R. §§ 222.5(d)(1), (o), 222.5 App. E.

In the "Order to Cease and Desist," Chairman Fox specifically references 25 U.S.C. §§ 323-324 as the statutory basis to require Paradigm Energy to obtain the consent of the Nation and the United States to penetrate the subsurface of the lands under Lake Sakakawea. The Court finds that the Defendants' interpretation of 25 U.S.C. §§ 323-324 is neither supported by the language of the statute or the supporting regulations. The Defendants have not submitted any case law, rules, regulations, or legal opinions to support their broad interpretation of the consent language found in 25 U.S.C. § 324.

25 U.S.C. § 323 empowers the Secretary of the Interior to grant right-of-ways "over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations . . . ." 25 U.S.C. § 323. Section 324 dictates that "[n]o grant of a right-of-way over and across any lands belonging to a tribe . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324. The Defendants argue that 25 U.S.C. §§ 323-324, in accordance with conditions prescribed in 25 C.F.R. 169, required Paradigm Energy to obtain consent from the Nation before it bored the pipelines under Lake Sakakawea. The Court disagrees.

Part 169 of the Code of Federal Regulations outlines the procedures and conditions under which the BIA would consider a request to approve right-of-ways over and across tribal lands pursuant to its broad authority under 25 U.S.C. §§323-328. See 25 C.F.R. § 169.1 (2016). Part 169.3(a) describes the lands to which Part 169 applies as "Indian land" and "BIA land." 25 C.F.R. § 169.3(a). Within Part 169, "Indian land" is defined as "individually owned Indian land and/or tribal land." 25 C.F.R. § 169.2. "Individually owned Indian land" is further defined as "any tract in which the surface estate, or an undivided interest in the surface estate, is owned by one or more individual Indians in trust or restricted status." Id. "Tribal land" is defined as "any tract in which the surface estate, or an undivided interest in the surface estate, is owned by one or more tribes in trust or restricted status." Id.

It is clear from a plain reading of 25 U.S.C. § 324, and the governing regulations, that the statute pertains to the surface estate – not the mineral estate. 25 U.S.C. § 324 governs right-of-ways "over and across any lands belonging to a tribe." All of the relevant regulations speak in terms of tracts in the *surface estate*. Nowhere is there any mention in the regulations of the mineral estate. These are very distinct and legal concepts, and it is clear the consent language in 25 U.S.C.

§ 324 pertains to the surface estate and not the mineral estate. Further, based upon the Court's careful reading of the plain language of Part 169, it is equally evident that Part 169, and by extension 25 U.S.C. §§ 323 and 324, do not apply to the mineral estate or mineral rights underlying Lake Sakakawea. Part 169 defines the lands to which the procedures and conditions under which the right-of-ways are approved, pursuant to 25 U.S.C. §§ 323 and 324, as lands in which the *surface estate* or an undivided interest in the *surface estate* is owned by individual Indians in trust or by one or more tribes in trust. 25 C.F.R. § 169.2 (emphasis added).

It is undisputed that all mineral interests under Lake Sakakawea within the exterior boundaries of the Fort Berthold Reservation are held in trust by the United States for the benefit and use of the Three Affiliated Tribes. The United States is the unquestionable owner of the surface estate and subsurface of the portion of Lake Sakakawea at issue in this litigation. Accordingly, contrary to the "Order to Cease and Desist," the consent of the United States and Paradigm Energy are not required for Paradigm Energy's pipeline boring and construction operations under Lake Sakakawea. The consent language in 25 U.S.C. § 324 applies to those lands in which the surface estate is owned by the Tribe. See 25 C.F.R. § 169.2. For such lands, the consent of the proper tribal officials – the Tribal Business Council of the Mandan Hidatsa and Arikara Nation – is required to grant a right-of-way. It is undisputed that the Nation, through the Tribal Business Council, did consent to the construction of the Sacagawea Pipelines "over and across lands" in which the surface estate was owned by the Tribe in trust. See "Grant of Right-of-Way" issued by the BIA on June 22, 2016, "with the consent of Three Affiliated Tribes and individual Indian Landowners" under the authority contained in 25 U.S.C. §§ 323-324. See Docket No. 20-1, pp. 8-21. Paradigm Energy paid the sum of **$834,660.50** for this right-of-way over the surface estate. However, the Court finds that neither 25 U.S.C. § 324, Part 169 of the

Code of Federal Regulations, nor any other federal statute, rule, or regulation, required Paradigm Energy to obtain the consent of the Tribe to place a pipeline in the subsurface estate of Lake Sakakawea which is owned by the federal government. The Court further finds as a matter of law that the language of 25 U.S.C. § 324, requiring the consent of tribal officials for the grant of a right-of-way "over and across lands belonging to a tribe," does not equate with boring a pipeline 100' under Lake Sakakawea in a surface estate owned by the federal government.

3. Paradigm Energy's Witnesses

Paradigm Energy seeks to ensure the timely construction of the Sacagawea Pipelines and the operation of its business by restraining Defendants from continuing to interfere with its right to lawfully construct the pipelines. Paradigm Energy asserts it is likely to prevail on all of its claims against the Defendants.

Paradigm Energy's Chief Operating Officer Criss Doss testified at the hearing on September 1, 2016. Doss also submitted a declaration in support of the request for injunctive relief. See Docket No. 5-4. The declaration of Doss established the following facts:

1. I am over 21 years of age and am fully competent to make this Declaration. The facts set forth below are based on my personal knowledge and experience and are true and correct. I am making this Declaration in support of the Emergency Motion for Temporary Restraining Order.

2. Since April 2014, I have served as the Chief Operating Officer for Paradigm Energy Partners, LLC and I continue to serve in that capacity at the present time. Paradigm Energy Partners LLC ("Paradigm") gathers and transports crude oil, natural gas, and gas liquids in the Bakken and Eagle Ford Shales. In my capacity as Chief Operating Officer, I am responsible for oversight and management of the following departments: Field Operations, Engineering & Construction, Rights-of-Way ("ROW") and Permitting, Supply Chain, Oil Movements (including scheduling and Control Room), Information Technology, Health, Safety and Environment and

Human Resources. I have personal knowledge of Paradigm's pipeline construction activities and operations in the State of North Dakota, including those activities at issue in this litigation.

* * *

3. On August 8, 2016, Paradigm and its contractors were served with a Cease and Desist Order signed by Mark Fox, Chairman MHA Nation, ordering Paradigm, its employees, contractors and others to stop construction of the Natural Gas Pipeline under Lake Sakakawea ("Order"). *See* Exhibit A, Order. Paradigm has complied with the Order and has stopped construction.

4. The Natural Gas Pipeline (and the related Oil Pipeline) are being constructed in an easement granted by the Department of the Army, Corps of Engineers (the "Corps"). Paradigm has a substantial ownership and economic interest in both the Natural Gas and the Oil Pipelines.

5. The Corps easement for the bore is 30 feet in width underneath the lakebed of Lake Sakakawea. Per the Corps permit, both pipelines must be installed prior to June 1, 2017. However, Paradigm is further limited by non-Corps related easements, each with their own restrictive provisions. The two pipelines share the same right of ways and run parallel to each other.

6. If Paradigm is not allowed to resume construction and boring operations with respect to its Natural Gas Pipeline by this Monday, August 22, 2016, completion of that pipeline will be imperiled with the almost certain result being that the Natural Gas Pipeline project will permanently collapse.

7. August 22, 2016 is the drop date by which operations have to be resumed because Paradigm has a critical right of way agreement with a major landowner ("Landowner") that by its terms prevents Paradigm from using the right of way area for its construction activities after November 1, 2016.

8. This Landowner is the linchpin to Paradigm's ability to continue constructing the Natural Gas Pipeline past November 1. Paradigm has contacted the Landowner and he refused to extend the November 1 date when work has to cease. His refusal to extend the November 1 deadline means that Paradigm has to complete the Natural Gas Pipeline by November 1.

9. But for the issuance of the Order, Paradigm would be able to meet the November 1 deadline. With the Order it cannot. November 1 is the drop-dead date because on that date the construction window closes for the pipelines.

See Docket No. 5-4, pp. 2-3.

Doss testified that Paradigm Energy sustained financial losses of $55,000 per day after the "Order to Cease and Desist" was issued on August 8, 2016. The total losses incurred up until the work commenced after the temporary restraining order was granted amounted to $750,000.

Criss Doss said the two pipelines need to be completed by November 1, 2016, or the "deal is done" and the project will be dead. Doss said that all construction activities are on a very tight deadline of November 1, 2016. According to Doss, the company will lose approximately $12.6 million if they are forced to walk away from the project. Doss testified the Oil Pipeline under the lake has been completed, but the Natural Gas Pipeline is in the early stages of construction.

Paradigm Energy asserts it has obtained the necessary easements and right-of-ways to construct the Sacagawea Pipelines in North Dakota, and all necessary approvals from the state and federal government, allottees, private landowners, and the Nation. It does not appear from the record before the Court that the Defendants have a valid legal basis for interfering with Paradigm Energy's construction of the Sacagawea's Pipelines.

CEO Troy Andrews testified on September 1, 2016, and said that at no time before October 2015, had anyone from the Tribe ever expressed any concerns about the need to obtain tribal consent to bore the pipelines under Lake Sakakawea. CEO Andrews said that on October 20, 2015, he met with the Missouri River Resources Board in North Dakota to discuss the project. Missouri River Resources is a wholly owned entity of the Three Affiliated Tribes of the Fort Berthold Reservation and has been in existence since 2011. Missouri River Resources is involved in oil and gas activities on the reservation. CEO Andrews said Missouri River Resources was

always very supportive of the Sacagawea Pipeline project. Paradigm Energy employs approximately 30-50 tribal members on the project with 20-30 employees working daily during boring operations. CEO Andrews said the pipelines will provide a significant financial benefit to the Tribe as well as creating many employment opportunities. Andrews said the Tribe also has an ownership interest in the pipelines. However, Andrews said he was informed for the first time in October 2015, that the Tribe felt they deserved more ownership in the project, or words to that effect.

Thereafter, CEO Andrews said that on April 14, 2016, there was a meeting with tribal officials in Denver, Colorado, at the Brown Palace. It was at that time Andrews said he was informed the Tribe wanted "more value" for their ownership interest in the construction project. CEO Andrews said neither Chairman Fox nor any other Tribal officials at that meeting in Denver expressed any dissatisfaction with the construction of the pipelines. To the contrary, CEO Andrews said the Tribe simply wanted "more value" in the project, namely, money and/or a more significant ownership interest. Andrews said Chairman Fox was outspoken on that subject but he (Fox) never made any mention of the need for tribal consent. Andrews said the demands from Chairman Fox for "more value" increased after May 2016. Andrews testified that from his perspective the increased demands for "more value" seemed to coincide with the level of discontent with the Dakota Access pipeline project on the Standing Rock Sioux Reservation.

CEO Andrews testified he attended a Tribal Council meeting in New Town on May 25, 2016, when the need for additional compensation and tribal consent was discussed. Following the meeting, Andrews said he met privately with Chairman Fox at a hotel and Chairman Fox demanded more money from Paradigm Energy at that time. This evidence was not disputed at the hearing.

On June 1, 2016, the Corps of Engineers issued an easement and pipeline right-of-way to bore under Lake Sakakawea, and drilling commenced around June 4, 2016. Both Andrews and Chairman Fox acknowledged at the hearing that neither of them had ever obtained a legal opinion concerning whether there was a need for tribal consent pursuant to 25 U.S.C. § 324 in order for Paradigm Energy to bore a pipeline under Lake Sakakawea. Both parties had a significant financial interest in this multi-million dollar construction project involving state-of-the-art infrastructure, but both parties chose to rely on their own self-serving opinions in interpreting 25 U.S.C. § 324, and neither party had ever requested any legal advice or opinions on the subject matter.

4. The Nation's Witnesses

Defendant Mark Fox is the Chairman of the Nation who testified at the evidentiary hearing on September 1, 2016. Chairman Fox has a law degree and has served as Chairman since 2014. Fox testified that he had always informed Paradigm Energy they needed to obtain the consent of the Tribe if they intended to bore under Lake Sakakawea, regardless of the easement and right-of-ways obtained from the Corps of Engineers. Chairman Fox said the need for consent was clearly conveyed to Paradigm Energy CEO Troy Andrews, and Chief Operating Officer Criss Doss on several occasions – beginning in 2015, at two Tribal Council meetings in June of 2016, and during informal settlement negotiations between the parties. Chairman Fox said Paradigm Energy officials were specifically informed at Tribal Council meetings on June 9, 2016, and June 16, 2016, of the need to obtain tribal consent.

According to Chairman Fox, there were informal settlement discussions held with Paradigm Energy officials on numerous occasions. It is undisputed that sums ranging from **$1-2 million** were discussed as compensation to be paid to the Tribe. CEO Andrews acknowledged his

appearance at the June 16, 2016, Tribal Council meeting to "get a deal done." Other witnesses who testified on behalf of the Nation were Carl Artman, who had previously submitted an affidavit in the case, and in-house Tribal counsel, Caleb Dog Eagle.

Based on the record before the Court, the Court finds that Paradigm Energy has the legal right to construct the Sacagawea Pipelines and has properly obtained all of the necessary permits, easements, and right-of-ways from state and federal regulators. The Court further finds that neither 25 U.S.C. § 324, nor any other federal statute, rule, or regulation, requires the formal consent of the Tribe to place a pipeline in the subsurface estate of Lake Sakakawea – an estate which is owned by the federal government rather than the Tribe. The United States, through the Corps of Engineers, controls the lake bottom and the subsurface of Lake Sakakawea, and the Nation only owns the mineral estate or mineral interest beneath the lakebed.

Thus, the Court finds there is a strong likelihood of success on Paradigm Energy's claims so 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 Paradigm Energy has shown the probability of success on the merits, and this *Dataphase* factor weighs strongly in favor of the issuance of a preliminary injunction.

The Defendants have argued the Court lacks jurisdiction and that sovereign immunity warrants a dismissal of this action. However, the Court finds that the *Ex parte Young* doctrine allows suits for declaratory and injunctive relief against government officials in their official capacities—notwithstanding the sovereign immunity possessed by the governmental entity itself. It is clear the *Ex parte Young* doctrine applies to Indian tribes as well. Vann v. U.S. Dept. of Interior, 701 F.3d 927, 929 (D.C.Cir. 2012) (citing cases and authorities); Ex parte Young, 209

U.S. 123 (1908); accord Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty., 991 F.2d 458, 460 (8th Cir. 1993) (discussing the *Ex parte Young* "exception" and affirming that "sovereign immunity did not protect the tribal officers because they had acted beyond the scope of the authority the tribe was capable of bestowing upon them").

At this stage of the litigation, the allegations contained in Paradigm Energy's complaint and other pleadings are sufficient to invoke the *Ex parte Young* doctrine. As the Eighth Circuit Court of Appeals has explained, "When the complaint *alleges* that 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." Northern States, 991 F.2d at 460 (quoting Tenneco Oil Co. v. Sac and Fox Tribe of Indians, 725 F.2d 572, 574 (10th Cir. 1984)) (emphasis added); see also Verizon Maryland, Inc. v. Public Service Com'n of Md., 535 U.S. 635, 646 (2002). Here, Paradigm Energy's complaint alleges in paragraphs 9, 57, and 58 that the Defendants have acted outside such authority. See Docket No. 1, pp. 2, 10.

B. IRREPARABLE HARM

Paradigm Energy 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.

Paradigm Energy contends it will suffer irreparable injury if the Defendants continue to interfere with its construction of the Sacagawea Pipelines. The Defendants seek to prevent Paradigm Energy from exercising its lawful right to construct the Sacagawea Pipelines and have no apparent legal basis for doing so. If the Defendants are allowed to continue to obstruct Paradigm Energy from continuing the construction of the Pipeline, even temporarily, the Defendants will wrongfully strip Paradigm Energy of its right to engage in the lawful construction of the Sacagawea Pipelines. Despite knowing for months that Paradigm Energy was planning to and had begun construction on the Sacagawea Pipelines under Lake Sakakawea, the Defendants waited until the construction of the Oil Pipeline was nearly complete to serve the "Order to Cease and Desist." Paradigm Energy asserts it only has until November 1, 2016, to complete the Sacagawea Pipelines based on a deadline imposed by a private landowner's permit. If the Oil Pipeline is not operational by that date, Paradigm Energy asserts it will not be able to meet its transportation commitments to shippers, the shippers will have the right to terminate their existing contracts, and a projected revenue loss from those contracts exceeds **$277 million**. In addition, there would be an estimated loss of **$253 million** in capital expenditures associated with the construction of the pipelines. See Docket No. 5-4. In addition, if the Natural Gas Pipeline is not completed by November 1, 2016, Paradigm Energy asserts it will lose its anchor natural gas customer, and the cost of building the Natural Gas Pipeline would become unjustifiable. According to Chief Operating Officer Doss, if the project is halted Paradigm Energy will sustain an immediate loss of **$12.6 million** from which the company would be unable to survive. Paradigm Energy argues that the time sensitive nature of the matter supports the issuance of a preliminary injunction.

The Court finds the threat of the Defendants' continued interference with Paradigm Energy's construction of the Sacagawea Pipelines is real and poses a significant threat of irreparable harm. 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 Paradigm Energy has sufficiently demonstrated the threat of irreparable harm, the Court finds this *Dataphase* factor weighs strongly in favor of the issuance of a preliminary injunction.

C. BALANCE OF HARMS

As outlined above, Paradigm Energy 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 stage, Paradigm Energy has demonstrated a strong likelihood of success on the merits and a real threat of irreparable harm. Based on the record before the Court, it does not appear that the preliminary injunction Paradigm Energy seeks will harm the Defendants in any significant way. Before the "Order to Cease and Desist" was issued on August 8, 2016, the Oil Pipeline had been completed under Lake Sakakawea. Grey Wolf Midstream, a tribal entity created

by Missouri River Resources to partner with Paradigm Energy on the project and develop the pipeline infrastructure, has a 12% ownership interest in the Sacagawea Pipelines and will arguably benefit financially from the completion of the pipelines. The issuance of a preliminary injunction will merely prevent the Defendants from attempting to deter the lawful construction of the Sacagawea Pipelines which was initially approved and supported by the Nation. As noted, the construction of the pipelines has been ongoing since March 2016, which was months before the "Order to Cease and Desist" was served.

The Court finds that the balance of harm factor favors Paradigm Energy. Given the relatively short time period and the potential for Paradigm Energy to suffer lengthy and costly delays resulting in significant harm, the Court finds the "balance of harm" *Dataphase* factor weighs in favor of issuance of a preliminary injunction.

D. PUBLIC INTEREST

The final *Dataphase* factor, which involves consideration of public policy, also favors the issuance of a preliminary injunction. The Legislative Assembly of North Dakota has specifically declared that the development and production of oil and gas is in the public interest. N.D.C.C. § 38-08-01 (stating it is "in the public interest to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state"). Granting a preliminary injunction comports with this public interest. Public policy, as clearly stated in North Dakota law, favors the development of oil and gas resources. In addition, it is certainly in the public interest to protect companies who are engaging in lawful business activities and who have obtained formal approval from all state and federal regulators involved in the regulatory and permit

process. Therefore, at this preliminary stage, the Court finds this *Dataphase* factor weighs strongly in favor of the issuance of a preliminary injunction.

In summary, after a careful review of the entire record and careful consideration of all of the *Dataphase* factors, the Court finds Paradigm Energy has met its burden under Rule 65(b) of establishing the necessity for the issuance of a preliminary injunction.

V. CONCLUSION

The Court has reviewed the entire record, carefully considered each of the *Dataphase* factors, and finds the Plaintiff has met its burden under Rule 65(b) of establishing the necessity of a preliminary injunction at this stage of the litigation. The issuance of an easement and right-of-way by the Army Corps of Engineers to Paradigm Energy on June 1, 2016, constitutes a valid federal authorization of the project. The easement unequivocally permits the boring of two 16" pipelines to be located approximately 100' below the lakebed of Lake Sakakawea. Lake Sakakawea is owned by the federal government, and the Corps of Engineers manages the lake for the federal government as the surface estate owner. The fact the Nation owns the mineral estate (mineral interest) under the lakebed does not equate with a right to control the surface owner's estate, or the right to demand "consent" from the Corps of Engineers or Paradigm Energy who obtained valid authorization from the Corps to drill a pipeline under the lake.

The Court finds as a matter of law that the Corps of Engineers has a lawful and exclusive ownership interest in Lake Sakakawea and the subsurface which permits the Corps to authorize the boring of two pipelines 100' below the lakebed as occurred on June 1, 2016. This federal authorization does not impair, impede, or encumber the mineral estate of the Tribe because the

minerals, if any, remain intact and continue to exist for the Tribe to explore, develop, and transfer the minerals if they elect to do so. The Tribe's right to the minerals does not eliminate the Corps of Engineers' right to the surface, the subsurface, and everything in such lands except the minerals.

The Court further finds as a matter of law that the federal authorization or permit issued by the Corps of Engineers (the easement for a pipeline right-of-way) does not require the consent of the Tribe under 25 U.S.C. § 324 before drilling can commence under the lakebed. To require the surface owner (the Corps of Engineers) or their grantee (Paradigm Energy) to obtain the formal consent of the mineral estate owner (the Tribe) before a pipeline is drilled under the lake – which is land within the surface owner's estate – would contravene decades of oil and gas law.

The Court **GRANTS** the Plaintiff's motion for a preliminary injunction. As a result, the Defendants and any person or entities acting in concert with or on behalf of the Defendants, are **RESTRAINED AND ENJOINED** from unlawfully interfering in any way with the Plaintiff and its representatives' access and construction of the Sacagawea Pipelines. Further, the Defendants' motions to dissolve the temporary restraining order (Docket No. 19) and to dismiss for lack of jurisdiction (Docket No. 8) are **DENIED**.

IT IS SO ORDERED.

Dated this 13th day of September, 2016.

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