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UNITED STATE DISTRICT COURT FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

PACIFICORP, an Oregon corporation,)	Cause No.: CV-07-14-BLG-CSO
)	
Plaintiff,)	
)	
vs.)	PACIFICORP'S BRIEF IN SUPPORT
)	OF MOTION FOR SUMMARY
KENNARD REAL BIRD, HENRY REAL)	JUDGMENT RE: JURISDICTION
BIRD, JAMES REAL BIRD, RICHARD REAL)	
BIRD, BIRDENA REAL BIRD, and ROSE)	
LEE REAL BIRD,)	
)	
Defendants.)	
)	

I. INTRODUCTION AND FACTUAL BACKGROUND

This federal case arises following a trespass lawsuit filed against PacifiCorp in Crow Tribal Court by six beneficial owners of two allotments (hereinafter the “Real Birds.”) PacifiCorp owns and operates a federally licensed, high-voltage electrical transmission line providing power to the western United States. A portion of that line crosses the Crow Indian Reservation. PacifiCorp or its predecessors in interest have enjoyed this federally granted right-of-way across the Reservation, including the Real Bird allotments, for more than 50 years. The Real Birds’ tribal court lawsuit would undermine PacifiCorp’s federally granted rights and potentially create a tribal result inconsistent with federal law. In Crow Tribal court, the Real Birds seek “declaratory and injunctive relief, and an accounting of net profits derived from trespasses, and disgorgement of such net benefits to Plaintiff’s, treble damages, experts and attorney’s fees, and costs” as well as an “injunction requiring PacifiCorp to remove all of its transmission lines and access roads and to restore the premises to the condition prior to the installation and construction of such facilities.”

PacifiCorp’s predecessor originally acquired the right-of-way at issue on May 16, 1957. In 2006, PacifiCorp renewed its right-of-way through an agreement with the Crow Tribe and with approximately one thousand five hundred individual allottees. That agreement was reviewed and approved by the Bureau of Indian Affairs (“BIA”). Now, the Real Birds seek to negate the actions of both the Crow Tribe and the BIA and subject PacifiCorp to jurisdiction in an improper forum. PacifiCorp has filed this federal court action to enjoin the tribal court litigation and to obtain a declaration from this court that the Crow Tribal Court lacks jurisdiction over PacifiCorp to hear the Real Birds’ claims.

II. STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R.Civ.P. 56 (c); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In considering a motion for summary judgment, the Court's role is to review whether a genuine issue of material fact exists, thus precluding judgment as a matter of law and requiring a trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A "genuine issue" exists where a jury could reasonably return a verdict for the non-moving party. Id. at 248-52. A "material fact" is a fact which might, under the applicable substantive law, affect the outcome of the case. Id. at 248; Burlington Northern Railroad Company v. Red Wolf, 23 M.F.R. 263 (1998).

III. SUMMARY OF UNDISPUTED FACTS

The Real Birds are the beneficial owners of allotments 0463-A and 3602. Tribal Court Complaint at page 2; Exhibit A at 2.¹ PacifiCorp owns and operates a high voltage electrical transmission line that crosses a portion of the Real Bird allotments. Id. The right-of-way for this transmission line was originally granted by the federal government to PacifiCorp's predecessor in interest on May 16, 1957, for a term of 50 years. Original right-of-way grant; Exhibit B. This right-of-way was granted by the United States pursuant to federal law, 25 U.S.C. §§ 342-348, and was consented to by the Real Birds predecessor in interest. Exhibit A at page 2.

In addition to the main line right-of-way, Indian Reservation Road ("IRR") number 52 provides access to a portion of the right-of-way and also crosses the Real Bird

¹ The Real Birds have never filed an Answer so it is somewhat difficult to identify which facts remain in dispute.

allotments. The Real Birds contend that PacifiCorp constructed this road and trespasses upon it. Exhibit A at page 3. IRR number 52 is a public road, maintained with public funds, and is on the BIA inventory of public roads. See Affidavit of Michael Addy, Trip Map of Road 52, and list of Indian Reservation Roads Program; Official Indian Reservation Road Inventory; Exhibit C; 25 C.F.R. § 170.120.

In 2006, before expiration of its right-of-way, PacifiCorp entered into a right-of-way renewal agreement with the Crow Tribe and also negotiated separate individual agreements with approximately one thousand five hundred individual allottees. That agreement was reviewed and approved by the BIA. BIA consent: Exhibit D. The Real Birds did not consent to the right-of-way renewal. In accordance with federal law, 25 U.S.C. § 357, and with applicable Montana State law condemnation procedures, PacifiCorp filed suit in this Montana Federal District Court to condemn its right-of-way across the Real Bird property. See PacifiCorp v. Approximately 33.4 Acres, Cause No. CV-06-122, United States District Court for the District of Montana. PacifiCorp's right-of-way expired on May 15, 2007 and the condemnation suit was filed in September of 2006. Any use of the Real Bird allotments after expiration of the right-of-way, but during the condemnation action, becomes an element of just compensation to be awarded to the Real Birds in the condemnation suit. Etalook v. Exxon Pipeline Company, 831 F.2d 1440 (9th Cir. 1987).

This federal court previously ruled, in response to a Motion to Dismiss filed by the Real Birds in the condemnation action, that this federal court has exclusive jurisdiction to hear the condemnation claim. May 30, 2007 Order, Exhibit E. The Real Birds' tribal court complaint for injunctive relief requiring PacifiCorp to remove its

transmission line requests the exact opposite result of PacifiCorp's federal condemnation case which seeks a perpetual right-of-way for the transmission line across the Real Bird property. PacifiCorp had a federally granted right-of-way for its power lines across the Real Bird property and, upon completion of the condemnation action, will have such a right-of-way perpetually into the future. As such, the Real Birds have no power to exclude PacifiCorp from either the right-of-way or the IRR road. See Big Horn County Electric Coop v. Adams, 219 F.3d 944 (9th Cir. 2000); 25 C.F.R. § 170.120 ("Indian Reservation Roads (IRRs) must be open and available for public use.")

No federal statute provides for tribal court jurisdiction over PacifiCorp. The American Indian Agricultural Resource Management Act (AIARMA), 25 U.S.C. § 3713, was enacted in 1993. The statute provides for concurrent tribal court jurisdiction over agricultural trespass claims under certain limited circumstances:

Indian tribes which adopt the regulations promulgated by the Secretary pursuant to subsection (A) shall have concurrent jurisdiction with the United States to enforce the provisions of this section and the regulations promulgated thereunder. The Bureau and other agencies of the federal government shall, at the request of the tribal government, defer to tribal prosecutions of Indian agricultural land trespass cases. Tribal court judgments regarding agricultural trespass shall be entitled to full faith in credit in federal and state courts to the same extent as a federal court judgment obtained under this section. Nothing in this Act shall be construed to diminish the sovereign authority of Indian tribes with respect to trespass.

25 U.S.C. § 3713 (c). The Crow Tribe did not adopt the federal regulations found at 25 C.R.F. § 166 until February 20, 2007. Crow tribal legislature bill number CLB07-03; Exhibit F. The Real Birds have stipulated that the Crow Tribe did not adopt the regulations referenced in AIARMA until after the tribal court action was filed. February 7, 2008 Scheduling Order. The AIARMA contains no private right of action in an

allottee. Absent the power to exclude PacifiCorp from either the right-of-way or IRR Number 52, and without any federal grant of jurisdiction over PacifiCorp, the Crow Tribal Court lacks jurisdiction to hear the Real Birds' Complaint.

IV. ARGUMENT

A. Tribal jurisdiction is limited

Unlike traditional governmental entities, Indian tribes have only limited jurisdiction over non-members. The Supreme Court has long recognized that “through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty.” Montana v. United States, 450 U.S. 554, 563-64 (citing United States v. Wheeler, 433 U.S. 313, 323 (1978)). A tribe’s sovereign power is “limited to ‘their members and their territory.’” Atkinson Trading Company v. Shirley, 532 U.S. 645, 650; Montana, 450 U.S. at 563. “Only full territorial sovereigns enjoy the ‘power to enforce laws against all that come within the sovereign’s territory, whether citizens or aliens,’ and Indian tribes ‘can no longer be described as sovereigns in this sense.’” Atkinson, 532 U.S. at 653 n. 5 (quoting Duro v. Reina, 495 U.S. 676, 685 (1990)). Accordingly, the Supreme Court has adopted “the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of a tribe.” Montana, 450 U.S. at 565. More recently, the Supreme Court confirmed the limited nature of tribal jurisdiction.

Where non-members 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 it cannot survive without express congressional delegation.’

Nevada v. Hicks, 533 U.S. 353, 359 (2001) (citation omitted).

This presumption against tribal jurisdiction applies to non-member conduct where ever it occurs within a reservation, whether on non-member or tribal land. “[T]he general rule of Montana applies to both Indian and non-Indian land.” Hicks, 533 U.S. at 360. As the Ninth Circuit has observed, “It is the membership status of the un-consenting party [over whom a tribe seeks to claim civil authority], not the status of the real property, that counts as the primary jurisdictional fact.” Smith v. Kalish Kootenai College, 434 F.3d 1127, 1131 (9th Cir. 2006)(en banc)(citation omitted)(cert denied), 126 Supreme Court 2893 (2006). The Supreme Court has “repeatedly demonstrated its concern that tribal courts not require ‘defendants who are not tribal members’ to ‘defend [themselves against ordinary claims] in an unfamiliar court.’” Id at 1131 (quoting Strate, 520 U.S. at 442) (alternation in original). Indeed, “where the non-members are defendants, the [Supreme] Court has thus far held that the tribes lack jurisdiction, irrespective of whether the claims arose on Indian lands.” Id at 1132. In fact, in Hicks, the Supreme Court stated, “[W]e have never held that a tribal court had jurisdiction over a non-member defendant.” Hicks, 533 U.S. at 357 n. 2.

Montana’s main rule admits of only two narrow exceptions. First, a tribe “may regulate, through taxation, licensing, or other means, the activities of non-members who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” Montana 450 U.S. at 565. Second, a tribe may exercise civil authority over non-Indians “when the non-Indian’s conduct threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe.” Id at 566. To establish tribal jurisdiction over PacifiCorp, “it is incumbent upon the [tribal member plaintiff] to establish the existence of one of

Montana's exceptions.” Atkinson Trading, 532 U.S. at 654. In other words, the burden of proving the application of one of the exceptions to the general rule that the Crow Tribal Court lacks jurisdiction over a non-Indian entity like PacifiCorp lies on the Real Birds. In this case, neither exception applies.

B. There is no qualifying, consensual relationship

Montana's first exception for “consensual relationships” does not apply in this case. To satisfy this exception, a tribal plaintiff must establish some “commercial dealing, contract, lease, or other private consensual relationship between the non-Indian defendant and the tribe or its members.” Atkinson, 532 U.S. at 655; Hicks 533 U.S. at 359 n. 3. Equally important, the tribal assertion of authority must “have a nexus to the consensual relationship itself.” Atkinson, 532 U.S. at 656.

Here, the Real Birds cannot point to any qualifying, consensual relationship that is sufficient to support the exercise of tribal adjudicatory jurisdiction over their trespass claims. There is no consensual relationship, nor any relationship of any kind, between the Real Birds and PacifiCorp. While the Real Birds may argue that a consensual relationship was established by their predecessor's consent to the original right-of-way grant, the 9th Circuit has made it abundantly clear that an allottee's or a tribe's consent to the grant of a federal right-of-way falls far short of creating a “consensual relationship” sufficient to establish tribal jurisdiction over a non-member.

In Big Horn, the Ninth Circuit examined an electrical transmission right-of-way authorized under the same grant as PacifiCorp's. “The rights-of-way for Big Horn's transmission and distribution systems across Indian land were granted by the Secretary of the Interior with the consent of the Tribe pursuant to 25 U.S.C. § 323-28.” Big Horn, 219

F.3d at 948. The Ninth Circuit confirmed that the agreements creating the right-of-way were not the type of consensual relationship with which the first Montana exception is concerned. “[T]he agreements creating Big Horn’s rights-of-way were insufficient to create a consensual relationship with the Tribe” Big Horn, 219 F.3d at 951.

The Ninth Circuit reached an identical result in Red Wolf.

A right-of-way created by Congressional grant is a transfer of a property interest that does not create a continuing consensual relationship between a tribe and a grantee.

Red Wolf, 196 F.3d at 164; See also State of Montana v. King, 191 F.3d 1108, 1113-14 (9th Cir. 1999); Yellowstone County v. Pease, 96 F.3d 1169, 1176 (9th Cir. 1996). The right-of-way grant providing PacifiCorp with the ability to cross the Real Bird allotments is not the type of continuing, commercial, consensual relationship required by the first Montana exception. Again, no other consensual relationship between PacifiCorp and the Real Birds or their respective predecessors in interest exists.

C. The tribal self government exception also does not apply.

The Supreme Court in Strate, established that the second Montana exception is to be narrowly construed and is focused solely on the protection of tribal self-government:

Read in isolation, the Montana rule’s second exception can be misperceived. Key to its proper application, however, is the Court’s preface: “Indian tribes are to retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members ... But [a tribe’s inherent power does not reach] beyond what is necessary to protect tribal self government or to control internal relations.

Strate, 520 U.S. at 459 (citation omitted) (alteration in original). The Ninth Circuit has consistently held that the second Montana exception is to be narrowly construed. “The Supreme Court has given Montana’s second exception a narrow construction, and only

allows a tribe to do ‘what is necessary to protect tribal self government or to control internal relations’.” Big Horn 219 F.3d at 951. “Although framed in broad terms, Montana’s second exception is narrowly construed.” Boxx v. Long Warrior, 265 F.3d 771, 777(9th Cir. 2001). Although “virtually every act that occurs on the reservation could be argued to have some political, economic, health, or welfare ramification to the Tribe, the exception was not meant to be read so broadly.” County of Lewis v. Allen, 163 F.3d 509, 515 (9th Cir. 1998)(en banc).

The Supreme Court has established that the exception is limited to political impacts on a tribe’s ability to govern itself. “Montana’s second exception grants Indian tribes nothing ‘beyond what is necessary to protect tribal self-government or to control internal relations.’” Atkinson, 532 U.S. at 658-659 (internal citations omitted.) Consequently, “tribal assertion of regulatory authority over non-members must be connected to that right of the Indians to make their own laws and be governed by them.” Nevada v. Hicks, 533 U.S. at 361.

In the context of a tort claim like trespass, courts have consistently held that jurisdiction to hear such a claim does not impact tribal self-government sufficient to trigger the second Montana exception. “Self-government and internal relations are not directly at issue here, since the issue is whether the Tribe’s law will apply, not to their own members, but to a narrow category of outsiders.” Nevada v. Hicks, 533 U.S. at 371. Hicks specifically addressed tribal jurisdiction to hear claims of “trespass to land and chattels, abuse of process, and violation of civil rights.” Hicks, at 356.

Moreover, any impact on a tribe must be to the tribe as a whole, not to a particular member or to particular property, like that owned by the Real Birds, in order to justify tribal court jurisdiction.

Second, we reject Pease's argument that the Tribe has jurisdiction under the second Montana exception. Although he concedes that this action directly concerns only his particular property, he argues that the overall impact of the loss of land due to potential foreclosures could be devastating to the Tribe's land holdings and political integrity. The contention fails to establish a 'direct effect on the political integrity, the economic security, or the health or welfare of the Tribe as a whole.'

Yellowstone County v. Pease, 96 F.3d at 1176-7 (emphasis in original).

Given that the Real Birds can pursue their trespass complaints in state court or as an element of damage in the federal condemnation case, they are not left without a remedy. "The absence of tribal jurisdiction does not leave the Tribe or its members without redress for non-members alleged wrongs. Tribal plaintiffs may find a forum in either a state or federal courts, as appropriate." Burlington Northern v. Red Wolf, 196 F.3d at 1066; Montana v. Gilham, 133 F.3d 1133, 1139 n. 6 (9th Cir. 1998). The Ninth Circuit reached a similar conclusion in County of Lewis v. Allen. "Surely subjecting county law enforcement officers to suit in tribal court is not necessary to protect Indian tribes or their members who may pursue their causes of action in state or federal court." 163 F.3d at 515.

In order to evaluate any potential impact to the Crow Tribe as a result of PacifiCorp's alleged trespass, formal discovery was served. The Real Birds' responses to that discovery are attached as Exhibit G. With respect to the financial burden caused by PacifiCorp's presence on the right-of-way, the Real Birds answered, "Defendants individually have incurred no specific monetary costs associated with PacifiCorp's

facilities on Crow tribal lands.” With respect to any financial impact on the Crow Tribe, the Real Birds responded, “Defendants do not have sufficient access to Crow Tribal records to determine the costs incurred by, expenditures incurred by, or payments to, the Crow Tribe as a consequence of PacifiCorp’s facilities on Crow Tribal lands.” With respect to emergency response measures or having to deal with fire, ambulance, or PacifiCorp related clean up costs, the Real Birds responded, “Defendants are unaware of any such activities on their land. Defendants individually have incurred no specific monetary cost associated with PacifiCorp’s facilities on tribal lands.” When asked specifically if PacifiCorp’s presence had imperiled the political integrity of the Crow Tribe as a whole, the Real Birds answered, “Defendants do not have sufficient access to Crow Tribal records to determine the degree of threat to the tribe’s political integrity as a consequence of PacifiCorp’s facilities on Crow Tribal lands.”

In response to a specific interrogatory seeking to track the second Montana exception, the Real Birds could identify no impact on the Crow Tribe’s ability to make its own laws and be governed by them whatsoever:

Interrogatory No. 5: For each of the past five years, do you contend that the drain or impact on your resources caused by PacifiCorp’s presence or activities on its right-of-way is so severe as to imperil the health, welfare, or safety of the Crow Tribe as a whole? If so, please set forth all facts which relate to or support this contention, identify all witnesses with knowledge or information regarding this contention, and identify any documents relating to this contention.

Answer: The United States Congress has found and declared that “Indian agricultural lands are renewable and manageable natural resources which are vital to the economic, social, and cultural welfare of many Indian tribes and their members.” (25 U.S.C. § 3701(c)(3), and Defendants assert that their lands are aptly so described.

No documents, expenses, or any indication that the Crow Tribe has had difficulty governing itself were provided. Again, the Real Birds have the burden of establishing

application of the second Montana exception. “[I]t is incumbent upon the Navajo nation to establish the existence of one of Montana’s exception.” Atkinson, 532 U.S. at 654.

The Real Birds have presented no evidence to meet this burden.

D. No congressional grant provides for jurisdiction

Absent one of the Montana exceptions, the only other source of tribal court jurisdiction would be some express congressional grant. The only possible grant of tribal court jurisdiction identified by the Real Birds is the American Indian Agricultural Resources Management Act (“AIARMA”), 25 U.S.C. § 3713. As noted, however, the AIARMA only provides for tribal court jurisdiction if the appropriate regulations have been enacted. 25 U.S.C. § 37113(a)(1). For any alleged trespass pre-dating the 2007 tribal legislation adopting the regulations, no tribal court jurisdiction exists as a matter of federal law.

For any alleged trespass going forward, again, as noted, those damages are already at issue in the federal condemnation case. Etalook v. Exxon Pipeline Company, 831 F.2d 1440 (9th Cir. 1987). If the Crow Tribal Court hears these claims and enters a damage award, the risk of a result inconsistent with the first filed, federal condemnation case becomes quite problematic. Similarly, the federal court in the condemnation action has already determined that it has exclusive jurisdiction to assess PacifiCorp’s request for a perpetual right-of-way, but the Crow Tribal Court has been asked to order PacifiCorp to remove its lines from the Real Bird property, further subjecting PacifiCorp to potentially inconsistent directives.

Moreover, while the AIARMA provides for tribal jurisdiction under certain limited circumstances, its enforcement is specifically left to a tribe or to the federal

government. There is no implied or express private right of action in the statute for individual allottees. The Supreme Court and the 9th Circuit have defined the circumstances in which a private right of action to enforce a statute will be found. See Cort v. Ash, 422 U.S. 66 (1975).

In determining whether a federal statute creates a private right of action, congressional intent is the cornerstone of the analysis. The Supreme Court has established a four-factor test for discerning whether a statute creates a private right of action. Under that test, we must ask: (1) whether the plaintiff is a member of a class that the statute especially intended to benefit; (2) whether the legislature explicitly or implicitly intended to create a private cause of action; (3) whether the general purpose of the statutory scheme would be served by creation of a private right of action; and (4) whether the cause of action is traditionally relegated to state law such that implication of a federal remedy would be inappropriate.

Orkin v. Taylor, 487 F.3d 734, 739 (9th Cir. 2007) (citation omitted). In Orkin, the 9th Circuit determined that the Holocaust Victims Redress Act did not create a private right of action against private art owners.

Here, 25 U.S.C.A. § 3713(c) provides that enforcement authority for the AIARMA lies with Indian tribes and with the United States. There is no reference to any other group or individual who can enforce this statute. The tribal government can request that the BIA or other federal agencies defer to tribal prosecutions of these cases. 25 U.S.C.A. § 3713(c). The statute also references the “sovereign authority of Indian tribes” to address such trespass. 25 U.S.C.A. § 3713(c). The plain language of the statute recognizes that any such actions will be brought by tribes, not by individuals like the Real Birds.

Similarly, the regulations for enforcement only refer to tribal or BIA action. 25 C.F.R. §166.802 entitled “Who can enforce this subpart” states, “The BIA enforces the

provisions of this subpart. If the tribe adopts the provisions of this subpart, the tribe will have concurrent jurisdiction to enforce this subpart. Additionally, if the tribe so requests we will defer to tribal prosecution of trespass on Indian agricultural lands.” 25 C.F.R. § 166.802 (2007).

The purposes of the Act include affirming “the authority of the Indian tribal governments in the management and regulation of Indian agricultural lands,” and assisting “the Indian tribal governments to assume a greater role in the management of these programs.” Senate Report 103-186, Public Law 103-177, American Indian Agricultural Resource Management Act, Nov. 18, 1993. Again, the Act’s purposes relate to tribal authority, not individual enforcement.

In one of the few reported cases addressing the AIARMA, another federal district court concluded precisely as much. Where plaintiffs were “neither the Secretary of the Interior nor a Tribe,” they were “thus, unable to bring a claim directly under AIARMA.” Marek v. Avista Corp., Not Reported in F.Supp.2d, 2006 WL 449259 *3 (D.Idaho). In Marek, the plaintiffs were enrolled tribal members and part owners of an allotment upon which they claimed trespass by the defendant. No implied private right of action under the AIARMA was found. For purposes of the jurisdictional inquiry now before this Court, neither the AIARMA nor any other federal statute constitutes an express congressional grant of jurisdiction to the Crow Tribe Court over PacifiCorp. As such, no tribal court jurisdiction exists.

E. Exhaustion is not required because the Crow Tribe plainly lacks jurisdiction over PacifiCorp

The exhaustion doctrine does not apply in this case. Exhaustion is not a jurisdictional bar, but is instead a prudential rule. Thompson v. Adams, CV-98-110-

PLG-JDS (D. Mont. September 30, 2002). In Strate, the Supreme Court adopted a new exception to the exhaustion doctrine. Strate, 520 U.S. at 459 n. 14. When a case involves non-member conduct on land governed by Montana's main rule, it is the role of the federal court to determine the scope of tribal jurisdiction. Id. Therefore, any exhaustion requirement, “must give way, for it would serve no purpose other than delay.” Id.; Hicks, 533 U.S. at 369.

The Ninth Circuit has repeatedly applied this principle in granting summary judgment to non-Indian litigants challenging assertions of tribal jurisdiction. See e.g., Boxx v. Long Warrior, 265 F.3d at 778 (“Because we conclude that the tribal court lacks jurisdiction over this claim, exhaustion is not required”); Red Wolf, 196 F.3d at 1066-67 (“Because tribal courts plainly do not have jurisdiction over this controversy pursuant to Montana and Strate, the Railroad was not required to exhaust its tribal remedies before proceeding in federal court”); State of Montana Department of Transportation v. King, 191 F.3d 1108, 1115 (9th Cir. 1999) (State not required to exhaust tribal remedies, whether administrative or judicial, where tribe lacked jurisdiction). This Court has done the same. “Therefore, when tribal court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement ... must give way for it would serve no purpose other than delay.” Glacier County School District No. 50, East Glacier Park, Montana v. Galbreath, 47 F. Supp. 2d 1167, 1172; Wolf Point School District No. 45 and 45A v. Michaelson, CV01-190-BLG-RVC (January 11, 2002). As demonstrated above, the Crow Tribal Court lacks jurisdiction to impose trespass liability upon PacifiCorp. In these circumstances, requiring PacifiCorp to exhaust tribal remedies would “serve no purpose other than delay.” Strate, 520 U.S. at 459 n. 14.

CONCLUSION

For the foregoing reasons, PacifiCorp respectfully requests that the Court grant its motion, declare that the Crow Tribal Court lacks jurisdiction over PacifiCorp to hear the Real Birds' Complaint, and permanently enjoin the Real Birds from attempting to file suit against PacifiCorp in Crow Tribal Court.

DATED this 17th day of April, 2008.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on April 17, 2008, a copy of the foregoing document was served on the following persons by the following means:

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