UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 10-35455

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K2 AMERICA CORPORATION,
Plaintiff-Appellant,

v.

ROLAND OIL & GAS, LLC
Defendant-Appellee

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

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# BRIEF OF AMICUS CURIAE BLACKFEET TRIBE

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## INTEREST OF THE BLACKFEET TRIBE

The Blackfeet Tribe of the Blackfeet Indian Reservation ("Tribe") submits this amicus brief at the invitation of the Court issued by order dated March 14, 2011. The Tribe has an interest in this matter because it involves issues relating to Reservation land and resources and the Tribe's jurisdiction and authority to manage and control Reservation lands and resources and those of Tribal members. This amicus brief is authored in whole by the undersigned counsel for the Blackfeet Tribe.

## ARGUMENT

### I. Introduction

This case involves a suit between K2 America, Inc., a Montana corporation, and Roland Oil and Gas, LLC, a Montana limited liability company, engaged in oil and gas activities on the Blackfeet Reservation through leases of Tribal land and individual Indian trust allotments. K2 alleged various tort claims against Roland, including tortious interference with prospective economic advantage, misappropriation of trade secrets, conversion, civil conspiracy and implied contract/unjust enrichment, in connection with Roland's acquisition of certain Tribal and individual allotment leases.

Among other things, K2 alleged that it retained John Harper, a Blackfeet Tribal member and part owner of Roland, t to perform a variety of oil and gas

development activities related to oil and gas leases on the Reservation, including siting activities, drilling activities and production operation. In the course of performing his duties, John Harper allegedly acquired information relating to Plaintiff's business plans and prospective lease acquisitions, as well as geologic and engineering data concerning the intended acquisitions. It is further alleged that John Harper, through Roland, used the information to acquire the leases for Roland. Complaint ¶¶ 6-7, 10. K2 seeks damages and a constructive trust.

## II. Exhaustion of Tribal Court Remedies is Required

Even if jurisdiction is established in the federal court, Plaintiff must first exhaust tribal court remedies. The District Court must "stay [] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction." *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 857 (1985). This exhaustion requirement reflects the federal "policy of supporting tribal self-government and self-determination," *id.* At 856, including the presumptive civil jurisdiction of tribal courts over activities on reservation lands. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). Exhaustion is based on comity rather than lack of subject matter jurisdiction, but is mandatory even if federal jurisdiction exists. As the court held in *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 920 (9th Cir. 2008):

> Principles of comity require federal courts to dismiss or to abstain from deciding claims over which tribal court jurisdiction is "colorable," provided there is no evidence of bad faith or harassment. . . . Exhaustion of tribal remedies is "mandatory."

*Citing Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991). Exhaustion is required even if the federal court has jurisdiction, *Iowa Mutual*, 480 U.S. at 17; *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221 1229-30 (9th Cir. 1989); *Wellman v. Chevron*, 815 F.2d 577 (9th Cir. 1987), and even if federal law may completely preempt state law. *Gaming World International v. White Earth Band of Chippewa Indians*, 371 F.3d 840, 849-851 (8th Cir. 2003).

Here, Blackfeet Tribal Court jurisdiction is "colorable." The Blackfeet Tribal Law and Order Code asserts jurisdiction over all persons within the Reservation. Preface, Blackfeet Law and Order Code, http://www.narf.org/nill/Codes/blackfeetcode/blftcodetoc.htm. The parties to the present dispute are oil and gas companies doing business regularly on the Reservation under leases of Reservation resources involving both Tribal lands and individual Tribal member allotted lands. Roland is partially owned by a Blackfeet Tribal member.[1] It appears that some or all of the alleged conduct occurred or

[1] Some references in the record appear to indicate that Defendant is majority owned by a Blackfeet Tribal member. Courts have varied in how Indian owned corporations organized under state law are treated for jurisdictional purposes. *Compare Baraga Prods., Inc. v. Comm'r of Revenue*, 971 F.Supp. 294 (W.D. Mich. 1997) with *Airvator v. Turtle Mtn. Mfg. Co*., 329 N.W. 2d 596 (N.D. 1983).

been carried out on the Blackfeet Reservation, specifically on Tribal and allotted lands. Complaint ¶¶ 6-7 and 10. The negotiation for the leases with the Tribe and we believe with Tribal members, and acquisition of the leases, through the approval of the local BIA Superintendent took place on the Reservation.

Under similar circumstances, tribal jurisdiction has been determined to be sufficiently colorable to require exhaustion. *See Stock West v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992). In *Stock West*, suit was brought by a non-Indian corporation against the tribal attorney, also a non-Indian, for legal malpractice and false representation in connection with an attorney opinion letter concerning a loan agreement relating to tribal timber trust resources. On appeal, the court held that the district court was correct in staying its hand "until the Colville tribal courts have resolved the substantial questions of tribal sovereignty presents by the facts in this case." 964 F.2d at 920. *See also Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d at 1228, holding that exhaustion is required where the "dispute arises out of the reservation and concerns tribal resources" and no statutes or treaty limited tribal jurisdiction.

There are some narrow exceptions to the exhaustion requirement. Exhaustion may not be required "where an assertion of tribal jurisdiction 'is motivated by desire to harass or is conducted in bad faith' or where the action is

patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers Union*, 471 U.S. at 856 n.21. We do not understand that any of these exceptions have been invoked by the K2. Instead, K2 argues the Blackfeet Tribe lacks jurisdiction as a general matter over trust lands because they are not freely alienable, and that tribes generally do not have jurisdiction over non-Indians. Such a challenge to tribal court jurisdiction can be made in federal court after tribal court remedies have been completely exhausted, including any available appeal processes. *National Farmer's Union* , 471 U.S. at 852-53. [2]

[2] We note that arguments such as those made by K2 have been almost uniformly rejected. *See e.g., Iowa Mutual v. LaPlante*, 455 U.S at 146: "Tribal authority over activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." Most recently in *Water Wheel Camp Recreational Area, Inc. v. Gary LaRance, Chief Judge, Colorado Indian Tribes Tribal Court*, No. 09-17349 (9th Cir. June 10, 2011), this court upheld tribal court jurisdiction over "a non-Indian closely held corporation and its non-Indian owner in an unlawful detainer action for breach of a lease of tribal lands and trespass." Slip Op. at 4. In a comprehensive review of tribal regulatory and adjudicatory jurisdiction, the court held that tribal jurisdiction should be analyzed under the tribal power to exclude rather than *Montana v. United States*, 450 U.S. 544 (1981), and among other things, distinguished *Phillips Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932 (9th Cir. 2009), relied on by K2, on the ground that the activity involved occurred off the reservation and therefore did not relate to the tribe's authority to exclude or its interest in managing its own land." Slip Op. at 8044.

## III. There is No Basis for Federal Court Jurisdiction

### A. Jurisdiction Under 28 U.S.C. § 1331

Federal courts have jurisdiction under 28 U.S.C. § 1331 over civil actions arising under the Constitution, laws, or treaties of the United States. "The presence or absence of federal –question jurisdiction is governed by the well-pleaded complaint" rule. '[W]hether a case is one arising under [federal law], in the sense of the jurisdictional statute, … must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may impose'." *Oklahoma v. Graham*, 489 U.S. 838, 840-41 (1989) (citations omitted).

Federal question jurisdiction was not alleged in this case. The complaint exclusively pleads tort claims based on local law and not federal law, i.e. tortious interference with prospective economic advantage, misappropriation of trade secrets, conversion, civil conspiracy and implied contract/unjust enrichment. The plaintiff does not allege that federal law is the basis for any of the claims or that the claims depend on the resolution of a substantial question of federal law. *See Peabody Coal Company v. Navajo Nation*, 373 F.3d 945 (9th Cir. 2004). Such ordinary tort claims do not arise under the Constitution or any federal laws of treaties. *Superior Oil Company v. Merritt*, 619 F.Supp. 526, 531 (D. Utah 1985).

K2 seeks relief in the form of damages and the imposition of a constructive trust "requiring Defendant to assign all of its right, title and interest in and to the lease" to K2. K2 also seeks a declaratory judgment that it is the rightful owner of the lease of allotted land. However, K2 does not dispute the validity of the subject leases under federal law. Indeed, K2's request for a constructive trust is dependent on the validity of the Roland's leases.[3] Further, whether K2 is entitled to a constructive trust as a remedy for his claims does not raise any federal question. A constructive trust is a remedy based on common law rather than federal statute, which is 'flexibly fashioned in equity to provide relief where a balancing of interest in the context of a particular case seems to call for it." *In re N. Am Coin & Currency, Ltd.*, 767 F2d 1573, 1575 (9th Cir. 1985).

K2's request for a constructive trust provides the only arguable federal law involvement -- such a remedy cannot be effectuated without the approval of the Secretary of the Interior. Approval of the Secretary is required for any transfer or assignment of an oil and gas leases. *See* 25 U.S.C. § 396; 25 C.F.R. § 211.53; and 25 C.F.R. § 212.53 (making 25 C.F.R. § 211.53 applicable to allotted leases). Consent of the Indian lessor may also be required if the lease requires such consent. 25 C.F.R. § 211.53. However, since the court is not obligated to grant a constructive trust, particularly if money damages are adequate, and the court may

[3] Plaintiff apparently does not seek a constructive trust over the lease of Tribal land. Complaint ¶6, seeking imposition of a constructive trust on the "Allotment Lease."

conclude that it cannot grant such relief in the absence of the Secretary, the fact that Plaintiff has requested such relief cannot serve as the basis for federal court jurisdiction. Just as federal court jurisdiction cannot be established in anticipation that a defense based on federal law may be raised, *see Oklahoma Tax Commission v Graham*, 489 at 841, federal court jurisdiction cannot be established in anticipation that the court may or may not award a particular type of relief or any federal law defenses the Defendant may have to such relief. *See Morongo Band of Mission Indians v. California Board of Equalization*, 853 F.2d 1376, 1386 (9th Cir. 1988).

To the extent the requested relief raises a federal law issue; such issue is not involved in this case. K2 has represented in the court below that it "does not seek in any way to limit or otherwise infringe upon the Secretary of Interior's right to approve the assignment and understands that the equitable relief it seeks is subject to that government process. K2 considers the imposition of a constructive trust subject to the BIA's approval of the assignment to be meaningful relief." Plaintiff's Response to Defendant's Motion to Dismiss, Document # 42, at 30. *See also* Response at 2 ("K2 is willing to take judgment against Defendant subject to [the approval of the Secretary];" Response at 32 ("Such relief would be binding on the Defendant, but subject to the approval of the Secretary of the Interior.")

Given K2's representations, no federal question is raised with respect to its tort claims or the requested remedy, and thus there is no basis for jurisdiction under 28 U.S.C. § 1331.

### B. Jurisdiction 28 U.S.C. § 1360(b) and the Doctrine of Complete Preemption

28 U.S.C. § 1360(b) is part of Public Law 280, Act of Aug. 15, 1953, 67 Stat. 588. Public Law 280 was enacted during a time when official federal Indian policy focused on "the earliest practicable termination of all federal supervision and control over Indians" under the so-called termination policy. *See* Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 1.06 (2005 ed.). In furtherance of that policy, 28 U.S.C. 1360(a) delegates jurisdiction over some civil matters to the six listed states, and provides an option for other states to assume jurisdiction. Section 1360(b) establishes exceptions to the jurisdiction delegated to the states in section 1360(a).

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

K2 points to section 1360(b) as establishing complete preemption of state jurisdiction over Indian trust property, and thereby vesting exclusive jurisdiction in the federal court, notwithstanding that there is no federal question jurisdiction. The Tribe disagrees.

Section 1360(b) applies only as a limitation on the jurisdiction of states delegated authority under 1360(a). Montana is not one of the states that were delegated jurisdiction under 1360(a), and the Blackfeet Tribe has not consented to jurisdiction under Public Law 280. *See Kennerly v. District Court*, 400 U.S. 423 (1973). The terms of the statute have no applicability outside of the Public Law 280 states, and therefore section 1360(b) has no application in the present case. Indeed, the primary cases cited in support of Plaintiff's preemption argument are cases from Public Law 280 states, and in one case, a Public Law 280 reservation. *See Boisclair v. Superior Court*, 801 P.2d 305 (Cal. 1990) (a mandatory Public Law 280 state); *Heffle v. Alaska*, 633 P.2d 264 (Alaska 1981) (a mandatory Public Law 280 state); *Krause v. Neuman*, 943 P.2d 1238 (Mont. 1997) (a consensual Public Law 280 reservation).[4]

[4] *In the Matter of Big Spring*, 2011 MT 109 (May 19, 2011) the Montana Supreme Court upheld the jurisdiction of the Blackfeet Tribe to probate Indian owned fee property on the Reservation, and overruled *Krause v. Neuman*, *supra*, as well as a significant number of other case, to the extent they relied on principles and tests for determining jurisdiction that the court rejected in it opinion.

Section 1360(a) does reflect Congress' intent to maintain the exclusive tribal-federal relationship as to Indian property even where jurisdiction is delegated to states under Public Law 280, but section 1360(b) is not the source of the exclusive tribal-federal relationship or any preemption of state law based on that relationship.[5] Further, we know of no case that has construed section 1360(b) as establishing complete federal preemption for purposes of federal court jurisdiction in a Public Law 280 state -- or a non-Public Law 280 state -- such that it establishes an exception to the well-pleaded complaint rule.

Complete preemption "provides an exception to the well-pleaded complaint rule and is different from preemption used only as a defense." *Gaming Corporation of America v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th Cir. 1996). In order to establish complete preemption, "a statute must have 'extraordinary pre-emptive power,' a conclusion that courts reach reluctantly. *Id*. As this Court has noted, there are only a "handful of 'extraordinary' situations where even a well-pleaded state law complaint will be deemed to arise under federal law for jurisdictional purposes." *Homan v. Laulo-Rowe Agency*, 994 F.2d 666, 668 (9th Cir. 1993), identifying only two acts that the Supreme Court has identified as having preemptive force, the Labor Management Relations Act, 19 U.SC. § 185(a),

[5] State jurisdiction over Indians and Indian property is preempted by federal law as a general matter, but the source of preemption is not section 1360(b). *See Rice v. Olson*, 324 U.S. 786, 789 (1945) (the "policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history"). *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985).

and the Employee Retirement Income Security Act of 1974, 29 U.S. C. § 1001 et seq. A third instance was based on the decision in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), holding that a "state law complaint alleges a present right of possession of Indian lands." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987).

Even when it applies, "all claims are not necessarily covered," and must "fall into the scope of complete preemption." *Id*. at 548. Here, K2's tort claims – which have nothing to do with ownership or right of possession to Indian property and raise issues only as to the business relationship between the parties – do not come within the scope of 1360(b) – even if we assume preemption can be established, which as we have shown, is doubtful at best.

Significantly, section 1360(b) has never been construed as preempting or otherwise restricting or limiting the inherent tribal sovereignty of Indian tribes. Even within Public Law 280 states, it is generally understood that Public Law 280 is not a limitation on tribal jurisdiction, and that tribes within such state have at least concurrent jurisdiction with the states. *See* Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 6.04[3][c]. In non-Public Law 280 states, tribal jurisdiction is completely unaffected by Public Law 280, and continues to be governed by longstanding principles of inherent tribal sovereignty and specific federal statutes. *Worcester v. Georgia*, 31 U.S. 515, 555 (1832). Whether tribal jurisdiction exists

here should be decided in the first instance by the Blackfeet Tribal Court. See discussion on exhaustion in Section I above.

**C. Jurisdiction Under 25 U.S.C. § 345 and 28 U.S.C. § 1353**

Neither 28 U.S.C. § 1353 nor 25 U.S.C. § 345 provide any basis for federal jurisdiction. These statutes, which are similar and "equivalent in meaning," *Seifert v Udall*, 280 F.Supp 443, 446 (D. Mont. 1968), provide for federal court jurisdiction in cases brought by Indians involving rights to an allotment of land under treaty or act of Congress. Only two types of suits are allowed under section 345, "suits seeking issuance of an allotment and suits involving 'the interest and right of the Indian in his allotment or patent after he acquired it'." *United States v. Mottaz*, 476 U.S. 834, 844-48 (1986). Since the present suit involves neither type of action, no claim is stated under section 345 or section 1353. *See United States v. Turtle Mountain Housing Authority*, 816 F.2d 1273 (1987). Moreover, section 345 requires that such actions be brought by persons "who are in whole or in part of Indian blood or descent" and does not authorize suits by non-Indians. *United States v. Preston*, 352 F.2d 352, 355-56 (9th Cir. 1965); *Seifert v. Udall, supra*. Finally, because Plaintiff assumes the validity of Defendant's lease, see discussion above at __, section 345 and section1353 are inapplicable. *Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d at 1382.

## CONCLUSION

The Court of Appeals should direct the district court to dismiss or stay this case pending exhaustion of remedies in the Blackfeet Tribal Court.

Dated this 17th day of June, 2011.

Respectfully submitted,

s/ Jeanne S. Whiteing

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 17, 2011.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class mail, postage prepaid to the following non-CM/ECF participants:

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