**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 11-CV-1162-WYD-MJD

THREE STARS PRODUCTION COMPANY, LLC,
an Oklahoma Limited Liability Company,

Plaintiff,

v.

BP AMERICA PRODUCTION COMPANY,
a Delaware corporation, f/k/a Amoco Production Company,

Defendant.

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**MOTION OF DEFENDANT BP AMERICA PRODUCTION COMPANY PURSUANT TO FED. R. CIV. P. 12(b)(7) and FED. R. CIV. P. 19**

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**COMES NOW** Defendant BP America Production Company ("BP"), by and through undersigned counsel, pursuant to Rules 12(b)(7) and 19 of the Federal Rules of Civil Procedure, moves in the first instance for an order requiring Plaintiff Three Stars Production Company ("Plaintiff" or "Three Stars") to join the Department of Interior ("DOI"), which was determined to be an indispensable party in a virtually identical proceeding commenced by Plaintiff in the Southern Ute Indian Tribal Court. *See, e.g.,* Complaint (5/2/2011) at ¶¶ 10-16 (Exhaustion of Tribal Remedies). In the event Plaintiff cannot or will not join the DOI as a party, the action should be dismissed pursuant to Rule 19. In addition BP requests entry of an order requiring the joinder of additional parties required by Fed. R. Civ. P. 19, including the Southern Ute Indian Tribe ("Tribe") and other owners of interests in the subject gas well. In support of this motion, BP states as follows:

## I. BECAUSE OF THE PRIOR ADJUDICATION, PLAINTIFF MUST JOIN THE DEPARTMENT OF INTERIOR OR DISMISS THIS ACTION

1. Plaintiff commenced an action against BP in the Southern Ute Indian Tribal Court ("Tribal Court") on February 18, 2010. The 2010 Complaint is virtually identical to the Complaint filed with this Court. *See* Complaint (2/18/2010) (Exhibit A). Certain allegations in the present Complaint are modified, as compared to the 2010 Complaint, but they involve the same dispute and the same claims for relief.

2. In the 2010 action, Plaintiff sued only BP (as here) and essentially requested a court order pooling or communitizing Plaintiff's alleged leasehold interest in an adjacent 80 mineral acres with 240 acres of a Tribal Lease granted (in trust) by the DOI and operated by BP.[1]

3. In the 2010 action, BP filed a motion pursuant to Rule 12(b)(7) to join all persons and entities that possessed an interest in the Tribal Lease, including the Tribe/DOI. Pursuant to Rule 24 and the Tribal Code, the Tribe intervened in the proceeding as a matter of right. *See* Tribe's Motion to Intervene as a Defendant (3/29/2010) at p.3 (Exhibit B).

4. The DOI, however, refused to voluntarily join the litigation as a party, as reflected in a letter from the Office of the Solicitor for the DOI, dated May 5, 2010. *See* 5/5/2010 Letter from the Office of the Solicitor (Exhibit C).

5. Applying the Federal Rules of Civil Procedure and federal law, and after extensive briefing, the Tribal Court dismissed the action because Plaintiff could not join the DOI,

[1] "Communitization" is the federal term for a procedure whereby federal or Tribal mineral leases are combined with other private or non-governmental leases for purposes of determining distribution of revenue from a well. In state regulatory proceedings, this concept is known as "pooling." Communitization or pooling is different from spacing. Spacing involves general regulatory orders regarding the number of allowed wells, usually over large geographic areas. "Spacing" does not "pool" and "pooling" does not "space."

which was determined to be indispensable. *See* Order Finding United States Indispensable and Dismissing Case (7/7/2010) (Exhibit D). The Court's findings included the following:

> "The United States Department of Interior regulates oil and gas operations on the Southern Ute Indian Reservation. Any order purporting to pool or communitize non-Indian and Indian mineral leases must be approved by the United States Department of Interior . . . . The Southern Ute Tribal Court could not render an enforceable judgment without the participation of the United States Department of Interior." (Order at ¶ 5).

6. Plaintiff appealed the dismissal to the Southwest Intertribal Court of Appeals for the Southern Ute Tribal Court, which affirmed the Tribal Court: "Accordingly, it is the Order of this Court that the Tribal Court's Order Finding the United States Indispensable and Dismissing this Case is Hereby Affirmed." *See* Opinion and Order (4/22/2011) (Exhibit E).

7. Plaintiff then commenced this action in the U.S. District Court for the District of Colorado asserting the same claims arising from the same dispute, but failed to join the DOI, the Tribe or any other party possessing an interest in the Tribal Lease.

8. Based on the previous litigation, Plaintiff was on notice that additional parties should be joined. *See* Tribal Court Order of Dismissal at ¶ 1 (Exhibit D). At a minimum, Plaintiff did not comply with Fed. R. Civ. P. 19(c), which requires pleading the reasons for nonjoinder of persons/entities identified as required parties.

9. Moreover, in view of the previous and final adjudication that the DOI is an indispensable party to this dispute, the doctrine of issue preclusion bars Plaintiff from re-litigating that determination in the present forum: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on

the same or a different claim." Restatement (Second) of Judgments § 27 (1982); *see also Park Lake Resources LLC v. United States Department of Agriculture*, 378 F.3d. 1132, 1136-37 (10th Cir. 2004) ("[E]ven though [the decision] . . . did not result in an adjudication on the merits, it has issue-preclusive consequences with respect to the issue decided.").

10. The Tribal Court proceeding was commenced by Plaintiff and involved the application of the Federal Rules of Civil Procedure and federal law. Plaintiff appealed the adverse trial court determination and lost a second time after the issues were fully briefed for the appellate court. At a minimum, Plaintiff must join the DOI or dismiss its case.

11. As noted by the Office of the Solicitor for the DOI, Plaintiff is not without a remedy. The remedy is administrative: Three Stars should seek approval from the DOI for a communitization agreement involving the Southern Ute 35-1 Well. *See* 5/5/2010 Office of the Solicitor Letter (Exhibit C). To date, Plaintiff has not pursued such relief.

12. Statement regarding whether Part I of this motion should be converted to a motion for summary judgment: The exhibits for Part I of BP's motion are matters of public record and most are referenced in the Plaintiff's Complaint at ¶¶ 10-16. To the extent the motion is viewed as a motion to dismiss, the Court may consider these exhibits without converting the matter to one for summary judgment. *See Pace v. Swerdlow*, 519 F.3d 1067, 1072-73 (10th Cir. 2008).

## II. IN ADDITION, PLAINTIFF IS REQUIRED BY RULE 19 TO JOIN ADDITIONAL PARTIES

**Overview--the Southern Ute 35-1 Well**

13. Plaintiff filed this action seeking a percentage of revenues from the Southern Ute 35-1 gas well (the "Southern Ute 35-1 Well"). Indeed, Plaintiff asserts a claim to 25 percent of the revenues from the Southern Ute 35-1 Well dating back to January 1992 and continuing into

the future. *See, e.g.,* Complaint at ¶¶ 104, 106. The claim is purportedly premised on recently and dubiously acquired oil and gas leases on 80 acres in the vicinity of the Southern Ute 35-1 Well.

14. The Southern Ute 35-1 Well is located on lands within the exterior boundaries of the Southern Ute Indian Reservation ("Reservation") as confirmed by Congress in 1984. *See* Complaint at ¶ 1; Public Law No. 98-290, 98 Stat. 201, 202 (1984). The Southern Ute 35-1 Well is located in the NW1/4SE1/4 of Section 35, Township 33 North, Range 11 West, N.M.P.M., which lands are owned (surface and minerals) by the United States of America in trust for the Tribe. *See, e.g.,* Complaint at ¶ 1; Affidavit of Kristin Moseley ("Moseley Affidavit") at ¶ 3 (Exhibit F).

15. The Southern Ute 35-1 Well is being operated, and has been operated, pursuant to a lease granted by the United States of America in trust for the Tribe, as lessor, to M.F. Trask, as lessee ("Tribal Lease"). *See* Moseley Affidavit at ¶ 4 (Exhibit F); Tribal Lease (Exhibit G). Trask was a predecessor-in-title to BP. *Id.* The Lease is denoted as Tribal contract MOO-C-1420-0842 and was approved by the Bureau of Indian Affairs effective September 15, 1971. *Id.* In total, the Tribal Lease covered approximately 1,400 acres. *Id.* The portion of the lands covered by the Tribal Lease which are pertinent to this lawsuit consists of 240 acres within the subject Section 35, namely, the SE1/4 and the N1/2SW1/4 (the "240 acres"). *Id.*

16. The Southern Ute 35-1 Well was drilled and completed in the Fruitland coal formation during 1991 by a predecessor-in-title to BP. *See* Moseley Affidavit at ¶ 4 (Exhibit F).

17. From the inception of production, revenues from the Southern Ute 35-1 Well have been distributed or allocated on a lease basis, *i.e.*, on the basis of the 240 acres owned and leased

by the United States of America in trust for the Tribe. *See* Moseley Affidavit at ¶ 5 (Exhibit F). The Well has not been operated or owned on a 320 acre basis. *Id.* at ¶ 4.

**Plaintiff's "Acquisition" of Leases on the 80 Mineral Acres**

18. Although Plaintiff requests 25% of past revenues covering a period of almost 20 years, Plaintiff did not obtain its purported oil and gas leases covering the 80 mineral acres in the vicinity of the Southern Ute 35-1 Well until October 2009 or thereafter.

19. During 2009 and 2010, an entity related to Plaintiff, Pinnacle Producing Properties LLC ("Pinnacle") obtained mineral leases for 97.5% of the 80 mineral acres. *See* Complaint at ¶¶ 96-98. Without joining all potentially interested parties, Pinnacle obtained a default judgment from a Colorado state district court in September 2009 that declared the Pinnacle leases to be effective January 1, 1992. *See id.* at ¶ 97.

20. After the default judgment was obtained by Pinnacle, Plaintiff obtained an assignment of the leases from Pinnacle. *See* Complaint at ¶¶ 98, 101. Subsequently, in October 2009 or thereafter, Plaintiff obtained leases for the remaining 2.5% of the mineral acres, which allegedly provided Plaintiff with 100 percent of the rights to the 80 mineral acres. *See id.* ¶¶ 102-103.[2]

21. Plaintiff then commenced an action in February 2010 in Tribal Court seeking a percentage of all revenues from the Southern Ute 35-1 Well accruing since the purported effective date of its leases on the adjacent 80 acres, *i.e.*, January 1, 1992. As discussed above,

[2] BP and the Tribe dispute and challenge the title to the leases covering the 80 mineral acres obtained by Pinnacle and Plaintiff. First, there are substantial questions as to the validity of the default judgment proceeding by which Pinnacle obtained approval of most of the leases. Second, and more importantly, title to the 80 mineral acres reverted back to the Tribe before Pinnacle/Three Stars obtained the leases.

Plaintiff could not pursue its claims without the participation of the DOI. Now Plaintiff asserts the same claims for relief in the U.S. District Court for the District of Colorado without joining the DOI and other required parties.

22. In effect, Plaintiff is seeking retroactive pooling or communitization of its alleged oil and gas leasehold (and the underlying 80 mineral acres) with the 240 mineral acres owned by the United States of America in trust for the Tribe. This claim is made without Plaintiff having availed itself during the last two decades of any of the procedures by which one pools into a unit. Further, it was not until 2009 that Plaintiff made "repeated" demands on BP regarding the leases on the 80 mineral acres.

**Plaintiff's Action Seeks to Diminish the Property Interests of the Tribe/DOI and Other Interest Owners in the Southern Ute 35-1 Well**

23. Plaintiff, representing that it now holds oil and gas leases on the 80 mineral acres located in the S1/2 SW1/4 of the subject Section 35, asserts that these additional 80 acres should be treated in the future, and should have been treated in the past (retroactive to January 1992), as being part of the Southern Ute 35-1 Well for purposes of allocating revenue. *See* Complaint at ¶¶ 5, 100-106.

24. Plaintiff's claims, if valid, would result in a re-allocation of revenues from the Southern Ute 35-1 Well on the basis of 320 acres instead of the current 240 acres covered by the Tribal Lease. Before the requested inclusion of Plaintiff's 80 acres, the interest owners in the Southern Ute 35-1 Well would own 100% of production and, after the proposed inclusion of the 80 acres, they would own, and would have owned, only 75% of production. As the following chart demonstrates, which is based in part on the Moseley Affidavit (Exhibit F), reallocation of

interests would have a significant detrimental economic impact on the current recipients of revenues from the Southern Ute 35-1 Well, including the Tribe:

| **240 Acres**<br>**Tribal Lease**<br>(current allocation) | | | **320 Acres:**<br>**Tribal Lease (240) plus**<br>**Plaintiff's Leases (80)**<br>(relief requested by Plaintiff) | |
|---|---|---|---|---|
| **Name/Type of Interest** | **Interest %** | | **Name/Type of Interest** | **Interest %** |
| BP Working Interest | 66.320441% | | BP Working Interest | 49.740331% |
| Davis Working Interest | 3.098122% | | Davis Working Interest | 2.323591% |
| Overriding Royalty Interests | 12.833333% | | Overriding Royalty Interests | 9.625000% |
| So. Ute Indian Tribe Royalty | 17.748104% | | So. Ute Indian Tribe Royalty | 13.311078% |
| | | | Three Star Working Interest | 20.312500% |
| | | | Farmer Royalty | 4.687500% |
| Total: | 100.000000% | | Total: | 100.000000% |

25. Because of the potential detrimental impact on these revenue interests, the owners must be joined as parties to the present action, as discussed below.

**Fed. R. Civ. P. 19--Generally**

26. Rule 19(a)(1) requires the joinder of a person or entity under the following circumstances: "(A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a

substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." "If a person has not been joined as required, the court must order that the person be made a party." Fed. R. Civ. P. 19(a)(2).

27. Moreover, when a required party cannot be joined, the Court "must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). Among other things, the Court should consider prejudice to the existing parties and whether a judgment rendered in a party's absence will be adequate. *Id.*

28. The purposes of Rule 19 include aiding judicial administration and protecting absent parties. "Adjudication of a case in the absence of persons who have a strong interest in the dispute may lead to a duplication of effort for all concerned. For this reason Rule 19 has been formulated to avoid circuity of actions and in this sense is an aid to judicial administration." 7 Fed. Prac. & Proc. Civ. § 1602 (3d ed.) (footnote omitted). In addition, "Rule 19 is designed to protect the interests of absent persons as well as those already before the court from multiple litigation or inconsistent judicial determinations." *Id.*

29. Despite its purported claims to revenues from the Southern Ute 35-1 Well, which is (i) located within the exterior boundaries of the Reservation, (ii) located on Tribal lands (surface and minerals), (iii) governed by an oil and gas lease from the DOI/Tribe, and (iv) subject to multiple ownership interests, Plaintiff only named BP as a defendant.

**Fed. R. Civ. P. 19 Requires Joinder of the Tribe/DOI as the Governing Sovereign Entity**

30. The surface estate and the mineral estate of the land on which the Southern Ute 35-1 Well is located is owned by the United States of America in trust for the Tribe. *See*

Moseley Affidavit at ¶ 3 (Exhibit F). This includes the coal deposits within which the Southern Ute 35-1 Well is completed. *Id.* at ¶¶ 3-4. The interests of the Tribe/DOI are evident.

31. As the sovereign and governmental entity that must consent to and regulate oil and gas operations on its lands, the Tribe and the federal trustee (DOI) are required and indispensable parties. Moreover, the ownership of mineral rights within the boundaries of the Reservation directly involves the Tribe's jurisdiction and requires its participation in the litigation. *See, e.g., Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1987).

32. The Tribe has jurisdiction over matters within its boundaries: "The jurisdiction of the Southern Ute Indian Tribe through its general council, its tribal council and courts, shall extend to all the territory within the exterior boundaries of the reservation, and to such other lands as may be added thereto by purchase, gift, Act of Congress or otherwise." Article I, Constitution of the Southern Ute Indian Tribe (Exhibit H). The Tribe's jurisdiction, therefore, extends to matters concerning land and mineral rights within the Tribe's exterior boundaries, which are reserved to the Tribal Council. *See* Article VII, Section 1(c), Constitution of the Southern Ute Indian Tribe (Exhibit H).

33. Plaintiff is attempting to circumvent the Tribe's governmental powers by demanding, among other things, a judicially mandated communitization of Plaintiff's purported interests with the Tribal Lease. As discussed below, any decision concerning pooling of mineral interests or execution of a communitization agreement requires the participation of the Tribe. Without the participation of the Tribe, effective relief cannot be awarded. *See Jicarilla Apache Tribe,* 821 F.2d at 540; *Petrogulf Corp. v. Arco Oil & Gas Co.*, 92 F. Supp.2d 1111, 1113 (D. Colo. 2000) (procedure for communitizing and pooling mineral interests on the reservation).

34. Moreover, contrary to Plaintiff's suggestions, the Tribe is not required to comply with the regulations and orders of the Colorado Oil and Gas Conservation Commission ("COGCC"). Through the Colorado Bureau of Land Management, the Tribe has, in effect, entered into a Memorandum of Understanding ("MOU") with the COGCC providing for the regulatory coordination of oil and gas activities within Colorado, but requiring the Tribe's consent to regulation of mineral development activities on the reservation. *See* MOU between the Colorado Bureau of Land Management & COGCC (8/22/91) at G, ¶ 4b (Exhibit I); MOU between Tribe & BIA/BLM (8/22/91) at ¶ III-D-4 (Jurisdiction of COGCC) (Exhibit J); *see also Kirkpatrick Oil & Gas Co. v. United States*, 675 F.2d 1122, 1125 (10th Cir. 1982) ("Congress must have intended that the Secretary have approval authority over any communitization of federal lands, and that no state-ordered forced pooling would bind the government without the Secretary's consent."); *id.* at 1126 ("If compulsory state pooling orders were applied to federally owned lands over the Secretary's objection, a state could impose acreage requirements and unit boundaries that conflict with the Secretary's judgment of the best standards for conservation purposes.").

35. In this case, there is no state pooling order and there is no federal communitization agreement. A communitization agreement could be obtained if Plaintiff prevailed in an administrative request for combining or pooling the additional 80 acres with the 240 acres of the Tribal Lease. *See Kirkpatrick Oil & Gas Company*, 675 F.2d at 1126 (if unable to obtain a communitization agreement, lessee should not be permitted to circumvent federal regime by obtaining a compulsory state pooling order). At a minimum, Indian mineral owners

must be consulted prior to a determination of whether a communitization agreement will be approved. *See* 25 C.F.R. § 211.28.

36. Further, as a matter of federal law, any communitization agreement involving the purported 80 acres and the Southern Ute 35-1 Well would require the approval of the DOI, in consultation with the Tribe. Any tribal lease for oil or gas "**shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary[.]**" 25 U.S.C. § 396d (emphasis supplied).

37. The Executive branch of the federal government has long required consultation between tribes and the Department of the Interior in the administration of Tribal leases. *See* 25 C.F.R. § 1.4(b), § 211.28. The federal regulatory scheme includes preemptive federal and tribal oversight of operations conducted under the authority of communitization agreements, even when those agreements pool or unitize tribally leased minerals with non-Indian minerals. *See* 25 U.S.C. § 396d; *see also Woods Petroleum Corp. v. Department of Interior,* 47 F.3d 1032, 1034 (10th Cir. 1995) (judicial review of DOI's decision regarding proposed agreement to communitize "Indian and non-Indian mineral interests"); *Samedan Oil Corp. v. Cotton Petroleum Corp.*, 466 F. Supp. 521, 526 (W.D. Okla. 1978) (Oklahoma state pooling orders were of no effect until DOI approval of communitization agreement).

38. The DOI acts in a fiduciary capacity with respect to Indian lands, including mineral interests: "[T]he Secretary and his delegates act as the Indians' fiduciary and thus must represent the Indians' best interests . . . . The power to manage and regulate Indian mineral interests carries with it the duty to act as a trustee for the benefit of the Indian landowners." *Woods Petroleum,* 47 F.3d at 1038 (citations omitted).

39. Plaintiff challenges the mineral rights of the Tribe and its jurisdiction to regulate oil and gas operations on the Reservation. Plaintiff seeks to evade the federal statutory regime and to circumvent the Tribe's interest as a sovereign entity to regulate activities on its lands in coordination with the DOI. A comprehensive and pervasive set of federal statutes and regulations governs the development of tribal minerals. *See* the Indian Mineral Development Act of 1982 (codified at 25 U.S.C. §§ 2101, et seq.); The Indian Mineral Leasing Act of 1938 (codified at 25 U.S.C. §§ 396a-396g); 25 C.F.R. Parts 211 and 225 (2009).

40. Complete relief cannot be granted unless the Tribe and its trustee are joined as parties. *See, e.g., Jicarilla Apache Tribe v. Hodel*, 821 F.2d at 539-40; *see also* 7 Fed. Prac. & Proc. Civ. § 1617 (when governmental interest is involved "and a judgment cannot be rendered without affecting that interest, the government must be made a party to the action"); *accord United States ex rel. Hall v. Tribal Development Corp.,* 100 F.3d 476, 478-81 (7th Cir. 1996); *Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337, 1339 (9th Cir. 1975).

**Fed. R. Civ. P. 19 Requires Joinder of Persons Receiving Revenues from the Southern Ute 35-1 Well, including the Tribe/DOI**

41. Plaintiff also has failed to join parties that would be detrimentally impacted by the relief Plaintiff requests in the present action. Plaintiff alleges that its purported leases on the 80 acres should be treated as contributing to production from the Southern Ute 35-1 Well, which would result in an allocation of revenues attributable to the Southern Ute 35-1 Well on a 320 acre basis instead of the current 240 acres. As demonstrated above, such a re-allocation of interests in Southern Ute 35-1 Well revenues would result in a diminishment of the interests of all persons and entities that currently hold the right to receive payments from revenues generated by the Southern Ute 35-1 Well on the basis of 240 acres.

42. The Tribe receives royalties based on production from the Southern Ute 35-1 Well and such payments are premised on the 240 acres that are covered by the Tribal Lease. *See* Moseley Affidavit at ¶¶ 5-6 (Exhibit F). In addition, there are numerous other persons and entities that receive payments from the Southern Ute 35-1 Well, which are also based on the 240 acre Tribal Lease. *Id.* at ¶¶ 7-8. There is another company besides BP which owns a portion of the leasehold under the Tribal Lease. *Id.* at ¶ 7. Also, there are nine persons or entities who/which receive payments on a 240 acre basis from production from the Southern Ute 35-1 Well based on ownership of overriding royalties in the Tribal Lease. *Id.* at ¶ 8.

43. All persons and entities that own interests in the Southern Ute 35-1 Well are required parties and should be joined pursuant to Rule 19. *See, e.g., Jicarilla Apache Tribe v. Hodel*, 821 F.2d at 540 ("But [n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." [internal quotes omitted]); *accord, United States ex rel. Hall v. Tribal Development Corp.,* 100 F.3d at 478-80; *see also,* 7 Fed. Prac. & Proc. Civ. § 1621 ("A federal court should not hesitate to require joinder of absentees whose interest may be affected by the action or who otherwise are needed for a just adjudication of the dispute.").

44. As a matter of simple mathematics, Plaintiff cannot demonstrate that distributing revenues from the Southern Ute 35-1 Well on a 320 acre basis would not detrimentally impact persons and entities, including the Tribe, owning interests in the Well. The prospect of injury to existing property rights requires their joinder pursuant to Fed. R. Civ. P. 19.

45. As a matter of law, Plaintiff is required to join the Tribe, the DOI, and other entities and persons with an interest in the Southern Ute 35-1 Well pursuant to Rule 19(b).

Equity and good conscience precludes proceeding with this action without all the required and interested parties.

## CONCLUSION

WHEREFORE, Defendant BP America Production Company requests the Court to enter an order pursuant to Fed R. Civ. P. 19 requiring Plaintiff to join the Department of Interior or dismissing the action, and to the extent appropriate, BP also requests an order pursuant to Fed. R. Civ. P. 12(b)(7) requiring Plaintiff to file an amended complaint joining as parties to this action, the Tribe, Department of the Interior and other entities and persons with an interest in the Tribal Lease as it pertains to the subject Southern Ute 35-1 Well.

**RESPECTFULLY SUBMITTED** this 23rd day of May, 2011.

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**CERTIFICATE OF SERVICE**

I do hereby certify that I have served a true and correct copy of the above and foregoing **MOTION OF DEFENDANT BP AMERICA PRODUCTION COMPANY PURSUANT TO FED. R. CIV. P. 12(b)(7) AND FED. R. CIV. P. 19** on the following parties this 23rd day of May 2011 (*) hand delivery; (**) ECF/Pacer electronic filing/service, or (***) via facsimile transmission to the number listed below:

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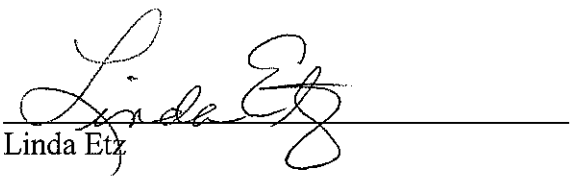

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