IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

THREE STARS PRODUCTION COMPANY, LLC,

Plaintiff,

v.

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

Defendant.

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

COMES NOW Defendant BP America Production Company ("BP"), by and through undersigned counsel, and submits its Reply in Support of its Motion Pursuant to Fed. R. Civ. P. 12(b)(7) and Fed. R. Civ. P. 19 ("BP Motion") and responds to Plaintiff's Response in Opposition to BP's Motion ("Plaintiff's Opp."). Plaintiff ignores the procedural issues before the Court and presents theories that are not supported by the law or the record.[1] The issue is whether Rule 19 requires joinder of all parties potentially impacted by this action involving the Southern Ute 35-1 Well, which is operated pursuant to a mineral lease granted by the Department of Interior ("DOI") in trust for the Southern Ute Indian Tribe ("Tribe"). In further support of its Motion, BP states:

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[1] Plaintiff also disregards the confidential nature of settlement discussions and, instead, attaches such communications as part of the record. *See* Plaintiff's Opp. at Ex. 12.

I. THE TRIBAL COURT'S DETERMINATION IS BINDING ON PLAINTIFF

1. Issue preclusion applies to the final determination in the Tribal Court proceeding that the DOI is an indispensable party. *See* BP Motion at ¶¶ 1-11. Plaintiff, however, disregards the doctrine of issue preclusion. *See* Plaintiff's Opp. at pp.7-8. Plaintiff erroneously argues that issue preclusion does not apply because the standard of review is *de novo*. *See id.* at p.7. Plaintiff, however, is not requesting appellate review of the Tribal Court determination and is not challenging the subject matter jurisdiction of the Tribal Court.

2. Moreover, Plaintiff does not rely on 28 U.S.C. § 1331 as a basis for jurisdiction. *See* Complaint at ¶ 8 (alleging diversity jurisdiction). Under limited circumstances, a federal court may exercise its federal question jurisdiction to review a tribal court's determination of certain jurisdictional issues. *See Enlow v. Moore*, 134 F.3d 993, 995 (10th Cir. 1998) ("[T]he narrow issue before the federal district court was whether the tribal court could properly exercise subject matter jurisdiction . . . .").

3. This action, however, does not present a Tribal jurisdictional issue. Plaintiff cannot complain that it was "haled" into Tribal Court. Plaintiff commenced the Tribal Court proceeding and pursued an appeal, but failed to prevail on the indispensable party issue. *See* BP Motion at ¶¶ 1-2, 5-6. The cases cited by Plaintiff do not apply here, which involve judicial review of tribal courts' determinations of jurisdictional issues. *See Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1387 (10th Cir. 1996) (after determining the standard of review, appellate court held that tribes had power to enact a severance tax); *see also Atkinson Trading Co. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000) (affirming tribal court decision allowing hotel tax), *reversed,* 532 U.S. 645, 121 S.Ct. 1825 (2001).

4. Issue preclusion applies here. Plaintiff has litigated the indispensable party issue pursuant to federal law and rules. *See* BP Motion at ¶¶ 1-11. Plaintiff is barred from re-litigating the issue. *Id.* at ¶ 9; *see also Matosantos Commercial Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1208-12 (10th Cir. 2001) (personal jurisdiction ruling had preclusive effect in subsequent action). Plaintiff has not argued why it should be allowed to re-litigate the same issue. At a minimum, Plaintiff must join the DOI or dismiss this action.

5. Finally, the DOI is the "gatekeeper," not BP. *See, e.g.,* BP Motion at ¶¶ 11, 36-39. As a matter of federal law, any communitization agreement involving Plaintiff's purported interest in the 80 acres and the Southern Ute 35-1 Well requires the approval of the DOI, in consultation with the Tribe. *Id.* at ¶ 36; *see also* 25 C.F.R. § 211.28. If Plaintiff fails to obtain the desired regulatory result, it has the right to judicial review of the administrative determination. *See, e.g., Woods Petroleum Corp. v. Department of Interior,* 47 F.3d 1032, 1034 (10th Cir. 1995) (*on rehearing en banc*) (communitization agreement).[2]

II. PLAINTIFF IS REQUIRED BY RULE 19 TO JOIN ADDITIONAL PARTIES

6. There are other persons and entities with property and/or governmental interests at stake in this proceeding. *See* BP Motion at ¶¶ 13-45. Through affidavits and other documents, the interests of these parties required to be joined under Fed. R. Civ. 19 have been established and BP has met its burden of proof. *See, e.g., Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994). Indeed, Plaintiff does not dispute

[2] Plaintiff's counsel attaches a letter, dated May 18, 2010, that he sent to the DOI/Office of the Solicitor. *See* Plaintiff's Opp. at Ex. 15. BP would like the Court to note, however, that its counsel was not copied on the letter even though the issue was being litigated before the Tribal Court and even through the Office of the Solicitor had previously copied all parties on its May 5, 2010 letter regarding the indispensable party issue. *See* BP Motion at Ex. C.

the property interests, *see* Plaintiff's Opp., and grudgingly concedes the governmental interest of the Tribe, as a sovereign entity, *see id.* at p.17 n.4.

7. Instead, Plaintiff spins contorted theories as to why additional parties need not be joined. *See* Plaintiff's Opp. at pp.10-20. Nonetheless, Plaintiff does not dispute that it 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, which would impact detrimentally (a) all those currently possessing an interest in the Well, (b) the Tribe which claims ownership of the 80 mineral acres and (c) the Tribe/DOI, which are charged with managing the Tribe's mineral resources. *See, e.g.,* BP Motion at ¶¶ 23-25, 30-40. Further, Plaintiff's claim is purportedly premised on recently (2009) and dubiously acquired oil and gas leases on 80 acres in the vicinity of the Southern Ute 35-1 Well. *See* BP Motion at ¶¶ 18-22.

8. The manner in which Plaintiff's predecessor, Pinnacle Producing Properties LLC ("Pinnacle"), obtained most of the leases in 2009 raises fundamental fairness issues and demonstrates a course of conduct designed to exclude those parties potentially impacted by Plaintiff's tactics. Pinnacle obtained 97.5% of the 80 mineral acres through a questionable default judgment proceeding in 2009. *See* BP Motion at ¶¶ 19-20. The only party subject to the default was a long lost lessee, presumably deceased. *See Pinnacle et al v. Brown,* Case No. 09CV191, Entry of Default and Default Judgment (Dist. Ct. Colo. La Plata County, 9/9/2009) (attached as Exhibit 1). Neither BP, nor the Tribe, nor the DOI, nor any other potentially interested party was involved in the proceeding. *Id.* at ¶ 1. With no opposition, the default judgment was entered retroactive to January 1, 1992. *Id.* at p.3.

9. In effect, Plaintiff now seeks to enforce the retroactive default judgment against BP and others possessing a property or governmental interest in the Southern Ute 35-1 Well, even though they were not parties to the default judgment proceeding and, with the exception of BP, not named as parties in this action.[3]

10. More importantly, the leases acquired through the default judgment proceeding (and the remaining 2.5% acquired subsequent to the default) are not based on the valid title to the minerals. As noted in the default judgment, the minerals under the subject 80 acres were not developed. The absence of mineral development resulted in the reversion and transfer of the 80 mineral acres to the Tribe/DOI on May 27, 1966. *See* Answer of Intervenor Southern Ute Indian Tribe (3/29/2010) at pp. 12-13 (Exhibit 2). At a minimum, this action should not proceed without adjudication of the Tribe's claim to ownership of the subject minerals.

11. The required parties are entitled to an opportunity to defend their property rights and the Tribe/DOI have the right to be heard on the management of the mineral resources of the Tribe. Plaintiff's suggestion that, *in lieu* of joining required parties, BP sue for indemnification does not resolve the issues presented. Also, Plaintiff's cavalier references to "joint tortfeasors" are not valid or appropriate. The required parties are not "tortfeasors;" they are (a) owners of vested property interests in the Southern Ute 35-1 Well and (b) governmental sovereigns.

12. As a matter of law and pursuant to Rule 19, Plaintiff is required to join the Tribe, the DOI, and other parties with a property interest in the Southern Ute 35-1 Well. Equity precludes proceeding without all the required and interested parties.

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[3] Plaintiff's counsel in this action, Mr. Abadie, was also the counsel who obtained the state court default judgment on behalf of Pinnacle. *See, e.g.,* Default Judgment (Exhibit 1).

III. PLAINTIFF IS WRONG ON THE MERITS

Plaintiff presents an onslaught of arguments regarding its purported "claims." Although the current procedural posture does not provide an opportunity to thoroughly discuss the substantial flaws in Plaintiff's arguments, some of the most glaring errors are summarized below.

13. **There is no cause of action for drainage of minerals.** Plaintiff argues that it should be allowed to circumvent the regulatory regime because it purportedly has a claim for alleged "drainage." Drainage which occurs when gas reserves migrate to and from various tracts of land. *See, e.g.,* Plaintiff's Opp. at p.2. A claim based on drainage is not recognized, however. Absent regulatory intervention or pooling, the rule of capture governs:

> In recognition of the fact that oil and gas will migrate across property lines toward any low pressure area created by production from the common pool, the rule of capture declares that the owner of a tract of land acquires title to the oil or gas that he or she produces from wells on his or her land even though a part of the oil or gas may have migrated from adjoining lands without incurring liability to the adjoining landowner for drainage. [38 Am. Jur. 2d Gas & Oil § 8 (2d ed., updated May 2011).]

14. Spacing does not negate the rule of capture. In the absence of a pooling or communitization, Plaintiff is still subject to the rule of capture, as explained by the Colorado Court of Appeals in *INB Land & Cattle, LLC v. Kerr-McGee Rocky Mountain Corp.*, 190 P.3d 806 (Colo. App. 2008). "Under the rule of capture, a lessee under an oil and gas lease acquires title to the oil and gas that it produces from drilled wells, even though part of the minerals have migrated from adjoining lands." 190 P.3d at 808. In that decision, the Colorado Court of Appeals determined that an owner of minerals "drained" by a well on another's property had two basic remedies, seek permission to drill its own well or seek a pooling order.

15. "Thus, because a mineral owner generally has the right to drill offset wells, **the rule of capture essentially precludes claims of improper drainage** against a neighboring well operator." *INB Land & Cattle,* 190 P.3d at 808. (Emphasis added.) If the option to drill offset wells is not available, the mineral owner who is being drained may seek a forced pooling of its interests from the appropriate regulatory authority. *See id.* at 811. By filing this action and the previous Tribal Court proceeding, Plaintiff alleges a claim not recognized in Colorado or under the common law.

16. **The remedy is regulatory.** As demonstrated above, the rule of capture still prevails unless it has been modified by state pooling or federal communization. *See, e.g.,* 38 Am. Jur. 2d Gas & Oil § 8. State pooling or federal communitization provides such affirmative regulatory relief. *See* BP Motion at ¶ 2 n.1, ¶¶ 33-35. "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."

17. Plaintiff's claims, by whatever label, boil down to a request for retroactive and prospective pooling or communitization of its alleged mineral interests with those of the Tribe, BP and the other interest owners in the Southern Ute 35-1 Well. Unless Plaintiff's alleged mineral interests are legally joined with the production from the Well on the Tribal Lease, there is no basis for Plaintiff's claims. Without a communitization agreement (there is none) pursuant to the procedures in the Code of Federal Regulations or the Tribe's consent to a Colorado Oil and Gas Conservation Commission ("COGCC") pooling order (there is none), which both require DOI approval, there can be no combination of Plaintiff's purported leases with the Well

on the Tribal Lease. *See* BP Motion at ¶¶ 30-40. Instead, Plaintiff purports to rely on generic state spacing orders that do not authorize or effectuate pooling.

18. **There have been no regulatory "violations."** Plaintiff erroneously argues that spacing orders of the COGCC mandate the combination of the purported 2009 leases with the Southern Ute 35-1 Well. *See, e.g.,* Plaintiff's Opp. at pp.3-6. Communitization or pooling is different from spacing. Spacing provides rules for well locations and establishes the number of wells in a drilling and spacing unit. Pooling joins lands or tracts.

19. By filing an application for drilling in 1989, an applicant did not represent anything about pooling. In Colorado, spacing does not pool various lands within a spacing unit. *See, e.g.,* Plaintiff's Complaint at ¶ 37. Plaintiff's erroneous reliance on a spacing unit of 320 acres does **not** indicate that the entire 320 acres shall be subject to pooling or communitization. Even assuming that the spacing orders apply to the Tribe pursuant to the Memorandums of Understanding, *see* Plaintiff's Opp. at pp. 10-12,[4] the spacing orders do not authorize communitization or pooling.[5]

20. Moreover, there is no mention in the COGCC filings that the Southern Ute 35-1 Well involves any non-Tribal mineral interests.[6]

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[4] Accordingly, the Zimsky Affidavit (Plaintiff's Opp. at Ex. 7) is not relevant because it is based on spacing orders. Further, the affidavit is inadmissible because it does not qualify as lay or expert opinion pursuant to Fed. R. Evid. 701, 702.

[5] The COGCC Orders that specifically pertained to the Fruitland Coal were Order Nos. 112-61 and 112-85. Neither required pooling, even assuming that they were applicable to Tribal lands.

[6] Plaintiff's counsel improperly embellished the survey page of the APD filed in 1990 by Palo Petroleum. *See* Plaintiff's Opp. Ex. 10. As established by the attached Exhibit 3, an accurate copy, no such diagram of the subject lands was filed with the COGCC.

21. Pooling in Colorado is available to all interested parties, not just well operators like BP. Plaintiff is plainly wrong when it suggests that BP alone is responsible for pooling. Three Stars and its predecessors had an equal opportunity to apply for pooling with the COGCC, as provided in C.R.S. § 34-60-116(6), and the clear language of the statute has been confirmed in *INB v. Kerr-McGee Rocky Mountain Corp.*, 190 P.3d at 811.

22. Under the federal regime, Plaintiff has the option of submitting a "Preliminary Application for Approval to Communitize" with the BLM, which is appropriate "when there is some doubt as to whether the proposed communitized tract may be considered as logically subject to communitization." *See* Plaintiff's Opp. at Ex. 16 (App.1, p.2).[7] Plaintiff has not alleged that it has pursued any such preliminary application.

23. Plaintiff is relying on the benefits of its allegedly retroactive leases; it cannot urge the benefits of its "magical" retroactivity without assuming its burdens. One of those burdens is that Plaintiff should have applied for pooling long ago, if Plaintiff thought it was appropriate under the state system, or for communitization under the federal regime.

24. **No valid common law claims.** BP is not obligated to request communitization of Plaintiff's purported leases retroactive to January 1992. It was Palo Petroleum that represented to lessors that it would seek communitization: "At the time Palo acquired these top leases, we informed the Lessors that it was our intent to use our best efforts to communitize such leases with a tribal lease." *See* Plaintiff's Opp. Ex. 8 at ¶ 8. It is also alleged that Palo informed Amoco of "Palo's commitment," but no specific agreement is alleged. *Id.* at ¶ 10. Plaintiff does not explain why Palo Petroleum did not act between 1991 and 1995 to seek communitization if

[7] Plaintiff attaches only several pages from the BLM manual, which exceeds 40 pages. In addition, there are CFR's and other administrative materials regarding communitization.

that was, in fact, its intent.[8] Nor does Plaintiff explain why Palo Petroleum did not during that same time period file the promised declaratory judgment action (that Pinnacle filed almost two decades later).[9]

25. BP was not approached regarding communitization until 2009, after Pinnacle obtained the dubious default judgment for the leases on the 80 mineral acres. *See* Complaint at ¶ 15. Nonetheless, Plaintiff demands retroactive pooling or communitization back to 1992.

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 dismiss the action and, to the extent appropriate, BP also requests an order directing Plaintiff to file an amended complaint joining all required parties.

[8] During that period, Palo Petroleum was represented by Mr. Abadie one of Plaintiff's attorneys here.

[9] Any alleged promised or similar representations to the alleged mineral owners in the 1990s should be time-barred. *See e.g.*, C.R.S. § 13-80-101(1)(a) (three years statute of limitations on contract actions.)

RESPECTFULLY SUBMITTED this 5th day of July, 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 **REPLY OF DEFENDANT BP AMERICA PRODUCTION COMPANY IN SUPPORT OF MOTION PURSUANT TO FED. R. CIV. P. 12(b)(7) and FED. R. CIV. P. 19** on the following parties this 5th day of July, 2011 (*) hand delivery; (**) ECF/Pacer electronic filing/service, or (***) via facsimile transmission to the number listed below:

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