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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

ENCANA OIL AND GAS (USA), a Delaware Corporation, Plaintiff, v. JOHN ST. CLAIR, an Individual and Chief Judge of the Shoshone and Arapaho Tribal Court, Defendant.	)	Civil Action No. 12-CV-27-J

MOTION OF DEFENDANT JOHN ST. CLAIR TO DISMISS FOR FAILURE TO EXHAUST TRIBAL REMEDIES AND MEMORANDUM IN SUPPORT

Defendant John St. Clair, Chief Judge of the Shoshone and Arapaho Tribal Court, moves the Court to dismiss without prejudice the complaint of Encana Oil & Gas (USA) ("Encana") on the grounds that Encana has failed to exhaust its tribal remedies. Oral argument is requested.

INTRODUCTION

This matter concerns two consolidated lawsuits filed in the Shoshone and Arapaho Tribal Court by the estate of Jeremy Jorgenson, a member of the Eastern Shoshone Tribe, seeking damages from Encana and DHS Drilling Co. ("DHS"). The consolidated case is currently stayed pending a decision from this Court. Dkt. # 30-1. Encana filed this action seeking declaratory and

injunctive relief prohibiting Judge St. Clair from continuing to assert jurisdiction over Encana in Tribal Court. Dkt. # 1, ¶¶ 112-125.

This Court previously determined that DHS, the other Tribal Court defendant, must exhaust its tribal court remedies, including tribal appellate review, before seeking relief from this Court. As described below, the tribal exhaustion rule applies with equal force to Encana. Because Encana has yet to exhaust tribal remedies, Judge St. Clair respectfully asks this Court, as a matter of comity and respect for the tribal judicial system, to dismiss this case without prejudice and order Encana to exhaust available tribal remedies, including tribal appeals, prior to seeking relief from this Court.[1]

BACKGROUND

In Tribal Court, the personal representative for Mr. Jorgenson alleged that Encana entered into a contract with DHS to drill oil wells on the Wind River Reservation[2] pursuant to a mining lease currently held by Encana to exploit oil and gas held by the United States in trust for the Shoshone and Arapaho Tribes. Dkt. # 1-4, ¶¶ 6-8. Under the contract between Encana and DHS, Encana maintained responsibility for supervising and controlling the drilling work. Dkt. # 1-4, ¶ 13. DHS employed Mr. Jorgenson as a floor hand. Dkt. # 1-4, ¶ 11. On January 1, 2009, while working at DHS Rig # 17, Mr. Jorgenson and other members of the DHS crew allegedly consumed alcohol at the worksite while on duty. Dkt. # 1-4, ¶¶ 17-19. Mr. Jorgenson thereafter wrecked his motor vehicle less than a mile from the worksite and died. Dkt. # 1-4, ¶¶ 20-21. At the time of Mr. Jorgenson's death he was only twenty years old (under the legal drinking age).

In Tribal Court, Mr. Jorgenson's personal representative alleged that Encana was liable for Mr. Jorgenson's death because Encana negligently, carelessly, and recklessly failed to

[1] If the Court were to decline to dismiss this case on exhaustion grounds, Judge St. Clair may seek dismissal on other grounds available by law, including that the Court lacks subject matter jurisdiction because of the Tribes' sovereign immunity, and that the *Ex Parte Young* exception to sovereign immunity is inapplicable.

[2] Encana alleges that the well site is not within the Wind River Reservation, but rather within a "federal enclave" that was excluded from the Wind River Reservation in 1905. For the reasons below, this position is incorrect and, moreover, is not determinative of whether Encana must exhaust tribal remedies before seeking redress from this Court.

properly supervise the worksite. Dkt. # 1-4, ¶¶ 22-28. The personal representative also alleged that Encana's allowance of alcohol consumption at the worksite "constituted gross deviations from the terms of the DHS and Encana Zero Tolerance policies, Lease, relevant operating regulations and industry practices and the duty of care DHS and Encana owed" to Mr. Jorgenson. Dkt. # 1-4, ¶ 18.

On August 24, 2009, DHS, the co-defendant in the Tribal Court case, filed a complaint with this Court seeking an order prohibiting the Tribal Court from exercising jurisdiction. *DHS Drilling Co. v. Estate of Jeremy Jorgenson*, No. 09-CV-200-J, slip op. at 3 (D. Wy. Jan. 6, 2010) (Dkt. # 1-21, pp. 55-66). This Court dismissed the action, ruling that "DHS must complete further tribal proceedings, including appellate review if necessary, in order to comply with the tribal exhaustion rule." *Id.* at 12 (emphasis added).

On December 10, 2009, Encana filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. This motion was denied on May 20, 2010. Exhibit A. There was no attempt to appeal this ruling by Encana. Then, on December 20, 2010, Encana filed a Motion for Summary Judgment Based Upon Lack of Subject Matter Jurisdiction. Thereafter, the Tribal Court consolidated the action against DHS with the action against Encana.

The Eastern Shoshone Tribe ("EST") and Northern Arapaho Tribe ("NAT") filed motions to intervene which the Court granted January 18, 2011. NAT's complaint in intervention alleged, *inter alia*, that Encana's failure to adequately supervise Mr. Jorgenson's worksite and insure a safe working environment constituted a breach of Encana's oil and gas lease, its TERO agreement with the Tribes and its tribal business license. Dkt. # 1-14, pp. 20-44, ¶¶ 21-29.

After allowing Tribal intervention, the Tribal Court decided pending non-jurisdictional partial summary judgment motions and a discovery motion compelling Encana to produce title opinions regarding the site at issue. Dkt. # 1-2, pp. 3-22. On March 3, 2011, Encana attempted to appeal these rulings to the Shoshone and Arapaho Court of Appeals. Exhibit B. However, because the Tribal Court system does not allow for interlocutory appeals, the appeal was denied on the basis that the rulings in question were not final. Dkt. # 1-3, pp. 2-3.

On December 20, 2011, Judge St. Clair issued his ruling denying Encana's pending Motion for Summary Judgment Based Upon Lack of Subject Matter Jurisdiction. Judge St. Clair's "Order Regarding Jurisdiction" reviewed the arguments presented by Encana and DHS regarding whether the well-site was located on the Wind River Indian Reservation and held that the site "is within the exterior boundaries of the Wind River Reservation." *Estate of Jorgenson v. DHS Drilling Co.*, *No CV-09-0012*, slip op at 19 (Shoshone and Arapaho Tribal Court December 20, 2011) (Dkt. # 1-2, pp. 3-22). In addition, Judge St. Clair determined that "Plaintiffs have made a *prima facie* case (under *United States v. Montana)* that the claims asserted are based on consensual relationships between the Defendants and the Tribes and that important and substantial health and safety concerns of the Tribes as well as economic and political interests are implicated." Accordingly Judge St. Clair denied Encana and DHS' motions for summary judgment and set a scheduling conference.

Encana did not attempt to appeal the Tribal Court's Order Regarding Jurisdiction. Instead, on February 6, 2012, Encana filed its Complaint for Declaratory and Injunctive Relief in this Court. On February 17, 2012, Judge St. Clair issued a stay of all Tribal Court proceedings in the *Jorgenson* litigation pending rulings from this Court. Dkt. # 30-1.

STANDARD OF REVIEW

Judge St. Clair moves to dismiss this case pursuant to the rule that tribal remedies must be exhausted before a party may challenge tribal court jurisdiction in federal court. Because tribal exhaustion is a matter of comity, the court should "construe the motion as one for dismissal without prejudice on the ground of abstention." *Petrogulf Corp. v. Arco Oil & Gas Co.*, 92 F. Supp. 2d 1111, 1114 (D. Colo. 2000); *see also Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56 (1985); *Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991).

ARGUMENT

I. THE TRIBAL EXHAUSTION RULE APPLIES IN THIS CASE.

The Supreme Court established the tribal exhaustion rule to further Congress's "strong interest in promoting tribal sovereignty, including the development of tribal courts." *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991). Under the rule, "as a matter of comity, a federal

court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies." *Tillett*, 931 F.2d at 640. "The rule applies to cases in which the tribal court's jurisdiction is at issue." *Petrogulf*, 92 F. Supp. 2d at 1113 (citing *Nat'l Farmers*, 471 U.S. at 855-56); *see also Tillett*, 931 F.2d at 640 (affirming that "federal courts should not entertain a challenge to the jurisdiction of a tribal court until tribal court remedies have been exhausted") (internal citation and quotation marks omitted). The rule has been applied to disputes involving both on-Reservation activities and "'non-Indian activity occurring outside the reservation . . . .'" *Petrogulf*, 92 F. Supp. 2d at 1117 (quoting *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1378 (10th Cir. 1993)). The Tenth Circuit "takes a strict view of and expansively applies the tribal exhaustion rule." *Farmers Ins. Exchange v. Sage*, No. 02-CV-94-J (D. Wyo. Feb. 10, 2003) (citations omitted) (Exhibit C).

II. ENCANA HAS NOT EXHAUSTED ITS TRIBAL REMEDIES.

Encana argues that it has exhausted tribal remedies because it sought interlocutory appeal of Judge St. Clair's summary judgment rulings on non-jurisdictional motions but "interlocutory appeals are unavailable under tribal law." Dkt. # 1, ¶ 30 (citation omitted); *see also* Dkt. # 1-3, pp. 2-3. Encana ignores the fact that it maintains options, even at the trial court level, to revisit the Tribal Court's ruling that the Jorgenson estate had made a *prima facie* case that the Tribal Court has jurisdiction under the so-called *Montana* exceptions, as well as a clear right to appeal all Tribal Court rulings to the Tribal Court of Appeals following entry of a final Tribal Court order or judgment. Exhibit D, § 15-1-5(3)(a) (instructing that "[a]n aggrieved party in a civil action may, with permission of the Court of Appeals, appeal from . . . [a]ny final order or judgment of the Shoshone and Arapaho Tribal Court") (emphasis added).

Federal case law on the tribal exhaustion rule is clear that exhaustion includes the full tribal appeals process. Indeed, the Supreme Court has expressly required tribal appellate review as an element of tribal exhaustion, even when the tribal system does not allow interlocutory appeals. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 12 (1987) (requiring tribal exhaustion despite fact that "Blackfeet Tribal Code . . . does not allow interlocutory appeals from

jurisdictional rulings"); *see also Marathon Oil Co. v. Johnston*, No. 03-CV-1031-J, 2004 WL 4960751, *3 (D. Wyo. June 1, 2004) (tribal exhaustion requirement not satisfied despite fact that Shoshone and Arapaho Tribal Court of Appeals does not allow interlocutory appeals). The *Iowa Mutual* Court reasoned that because "[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts" exhaustion of tribal remedies "[a]t a minimum . . . means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." 480 U.S. at 16-17. Numerous subsequent decisions, including a decision from this Court in the related case brought by DHS, confirm that exhaustion of tribal remedies includes tribal appellate review. *See, e.g.*, *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1509 (10th Cir. 1997) ("It does not serve Congress's interest in promoting development of tribal courts to second-guess the jurisdictional determinations of the Navajo district court before the tribal appellate process has run its course.") (emphasis added, citation omitted); *Bank of Oklahoma v. Muscogee Nation*, 972 F.2d 1166, 1169-70 (10th Cir. 1992) ("The Supreme Court has defined exhaustion of tribal court remedies to include appellate review within the tribal court system. The law is thus quite clear: For reasons of comity, federal courts should abstain from hearing cases that challenge tribal court jurisdiction until tribal court remedies, including tribal appellate review, are exhausted.") (emphasis added, citation omitted); *see also DHS Drilling Co. v. Estate of Jorgenson*, No. 09-CV-200-J, slip op. at 12 (D. Wy. Jan. 6, 2010) ("DHS must complete further tribal proceedings, including appellate review if necessary, in order to comply with the tribal exhaustion rule.").

Here, Encana has not availed itself of the tribal appellate review process that will be available to it following final judgment by the Tribal Court. Instead, Encana sought interlocutory review prohibited by the Tribes' appellate rules for unrelated non-jurisdictional motions. Encana still has the option of appealing the Tribal Court's jurisdictional and non-jurisdictional holdings; however, such appeals do not become ripe under tribal law until there is a final judgment by the Tribal Trial Court. By failing to allow the Tribal appellate process to "run its course," Encana has not complied with the tribal exhaustion rule. *See Kerr-McGee*, 115 F.3d at 1509; *see also Iowa Mut.*, 480 U.S. at 12.

III. NONE OF THE EXCEPTIONS TO THE TRIBAL EXHAUSTION RULE APPLY.

Despite the clear applicability of the tribal exhaustion rule, and this Court's ruling with respect to Encana's co-defendant in Tribal Court, Encana argues it need not exhaust its tribal remedies. Instead, it argues the worksite is outside of the Wind River Reservation, and that tribal jurisdiction over Encana, a "non-Indian corporation," is improper under *Montana v. United States*, 450 U.S. 544 (1981). Dkt. # 1, ¶ 116.

Courts have at times excused compliance the tribal exhaustion rule when it is "clear" that the tribal court lacks jurisdiction "so the exhaustion requirement 'would serve no purpose other than delay.'" *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459-60, n.14 (1997)); *see also Nat'l Farmers*, 471 U.S. at 856 n.21. However, Encana cannot demonstrate that the Tribal Court clearly lacks jurisdiction or that exhaustion of tribal remedies would serve only to delay proceedings. Accordingly, the foregoing exception to the tribal exhaustion rule is inapplicable.

The Tribal Court has considered arguments, authorities, and evidence submitted by the parties over a period of many months, in relation to multiple motions, briefings and arguments. The Tribal Court's Order Regarding Jurisdiction is based on consideration of these materials and speaks for itself. The Tribal Court anticipates that the parties will submit additional evidence and make additional arguments during trial and on appeal. The following sections provide additional context for the findings and conclusion the Tribal Court has made thus far in the *Jorgenson* matter.

a. <u>The Tribal Court Does Not Clearly Lack Jurisdiction at this Stage of the Proceedings.</u>

Encana's primary argument is that the Tribal Court "clearly" lacks jurisdiction because Congress diminished the Wind River Reservation, and the events giving rise to the Tribal Court action occurred within the diminished portion of the Reservation. This is identical to the argument DHS presented to this Court in 2009. *See DHS Drilling Co. v. Estate of Jorgenson*, No. 09-CV-200-J, slip op. at 6-7 (D. Wy. Jan. 6, 2010) (Dkt. # 1-21, pp. 55-66) ("DHS maintains that the circumstances surrounding the accident involved conduct that occurred outside the Wind

River Reservation. Specifically, DHS alleges that Rig No. 17 was located on land owned and controlled by the United States Bureau of Reclamation and that Tunnel Hill Road is a county road maintained and controlled by Fremont County. As such, DHS argues tribal jurisdiction is plainly improper, warranting exception to the tribal exhaustion rule."); *see also Encana v. Whitlock*, No. 09-CV-124-D, (D. Wyo. 2009) (requiring Encana to exhaust tribal remedies is case involving injury in same "federal enclave" at issue in this case) (Dkt. # 1-21, pp. 67-77).[3] The Court was correct to reject DHS's argument in 2009, and should reject Encana's reassertion of the same position.

To establish diminishment, Encana must provide "substantial and compelling evidence" that Congress intended to have such effect. *See Solem v. Bartlett*, 465 U.S. 463, 465 (1984); *see also DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975). Thus, in reviewing Encana's claims that Congress removed the land at issue from Wind River Reservation, the Court should presume that diminishment did not take place and that the Reservation boundary remains intact unless the language and legislative history of an act demonstrate substantial and compelling evidence of a congressional intention to diminish the Reservation. *Solem*, 465 U.S. at 465 (absent substantial and compelling evidence of diminishment, the Court is "bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening."). Encana cannot make this showing, especially in light of the fact that, in 1958, Congress expressly declared that the Tribes hold "all of the right, title and interests in all minerals, including oil and gas" underlying the surface lands at issue in this case. 72 Stat. 935. Because the Tribes have retained the mineral estate at issue in this case, it, along with the subservient surface estate, are subject to the Tribes' civil adjudicatory jurisdiction. *See, e.g., Crow Tribe of Indians v. Montana*, 819 F.2d 895, 898 (9th Cir. 1987) (minerals underlying a ceded strip adjacent to the Crow Reservation "'are a component of the reservation land itself'") (quoting *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1117 (9th Cir. 1981)); *see also Kinney-*

[3] *See infra*, note 7.

Coastal Oil Co. v. Kieffer, 277 U.S. 488, 505-06 (1928) (ownership of the mineral estate creates significant and superior rights to use and occupy the surface for the purposes of mineral extraction).

i. 1905 Act

One of the statutes that Encana argues diminished the Reservation is the 1905 Act, 33 Stat. 1016. However, contrary to Encana's reading, the 1905 Act merely opened the Reservation to non-Indian settlement—it did not disestablish or remove the particular lease site from the Reservation. The 1905 Act provides that the Tribes would "cede, grant and relinquish to the United States, all right, title and interest which they may have to" unallotted lands within the designated area, in consideration for the federal government's sale of such lands in the manner and for the price specifically designated in the statute. 33 Stat. at 1016, 1019. Congress further instructed that "the proceeds received from the sale of said lands . . . shall be . . . paid to the Indians belonging on the Shoshone or Wind River Reservation, or expended on their account only as provided in this agreement." 33 Stat. at 1018. In addition, Congress instructed that, in disposing of such lands, "the United States shall act as a trustee for said Indians" and "expend for said Indians and pay over to them the proceeds received from the sale thereof only as received . . . ." *Id.* at 1021.

These provisions of the 1905 Act, when viewed together, do not suggest immediate cession or payment, but rather established a "trust" mechanism by which the United States acted as a trustee charged with the task of selling specific lands to homesteaders and applying the proceeds, if any, for the Tribes' benefit.[4] This reading is consistent with judicial interpretations

[4] The 1905 Act at times uses the term "diminished reserve" or "diminished reservation" to describe the portion of the Reservation preserved for the exclusive use of tribal members. As determined by the *Solem* Court, these "isolated phrases," when balanced against the 1905 Act's other provisions discussed above, "cannot carry the burden of establishing an express congressional purpose to diminish." 465 U.S. at 475 (use of the phrase "the reservation thus diminished" to refer to unopened portion of a reservation not "dispositive"). Furthermore, at the time of the 1905 Act, "diminished" was "not a term of art in Indian law." *Id.* at 468, 475, n.17. Thus, when Congress spoke of the "diminished reservation," it was probably "alluding to the reduction in Indian-owned lands that would occur once some of the opened lands were sold to settlers," rather than "the reduction that a complete cession of tribal interests in the opened area would precipitate." *Id.* at 478; *see also id.* at 475 n.17.

of other surplus land acts that were held to merely make reservation land available for settlement, entry, and purchase, but did not effect a diminishment. *See, e.g., Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 355 (1962); *Mattz v. Arnett*, 412 U.S. 481, 501-02 (1973). Indeed, in *Solem*, the Court held that a phrase authorizing the Secretary to "sell and dispose" of surplus lands lacked an intent to diminish. 465 U.S. at 472. In contrast, in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), the Court held a statute that provided for "the total surrender of tribal claims in exchange for fixed payment," was evidence of explicit intent to diminish a reservation. *Id.* at 345.

Moreover, the history leading up to Congress's adoption of the 1905 Act confirms that Congress did not intend to diminish the Reservation. The trust arrangement established in the 1905 Act was very different from the "sum certain" payments provided for in the Lander and Thermopolis Agreements and similar legislation held to have disestablished other reservations that was enacted around the same time. *See, e.g., Yankton Sioux*, 522 U.S. at 338; *DeCoteau*, 420 U.S. at 441-42. Indeed, unlike the Lander and Thermopolis Purchase Acts, which were adopted within the decade preceding adoption of the 1905 Act, Article IX of the 1905 Act expressly provides that the United States would act as the Tribes' trustee in selling unalloted lands and would be obligated to pay the Tribes the proceeds from land sales "only as received." 33 Stat. at 1021. Moreover, in adopting the 1905 Act, Congress abandoned language from an 1891 agreement that may have more clearly supported a diminishment argument. The legislative history of the 1905 Act "shows a clear departure" from these prior negotiations, expressly recognizing that lands subject to the 1905 Act are "not restored to the public domain, but are simply transferred to the Government of the United States as trustee for these Indians." Cong. Rec. H1945 (Feb 6, 1905)).

In addition, over the last century, Congress has often expressed its understanding that the lands subject to the 1905 Act remain part of the Wind River Reservation. For example, in 1909, when Congress extended the time for mineral entry under the 1905 Act, it described the mineral claims as "within the Shoshone or Wind River Reservation" and distinguished the standards for location of mineral claims on the Reservation upon public lands. 35 Stat. 650 (1909); S. Rep.

No. 980. 60th Cong., 2d Sess., 1 (1909). In doing so, Congress recognized that the United States adopted the role of trustee with respect to the lands opened by the 1905 Act and assumed a special relationship with respect to these lands that was distinct from the outright acquisition of former reservation lands. S. Rep. No. 980. 60th Cong., 2d Sess., 1-2 (1909). Likewise, in 1916, Congress authorized the Secretary of Interior to lease 1905 Act lands for oil and gas production for the benefit of the Tribes. 39 Stat. 519. By authorizing such leases, Congress expressed a clear understanding that the area retained its reservation status. Cong. Rec. S12,159 (Aug. 9, 1916) (Senator Clark of Wyoming explained that the land ceded by the 1905 Act is "still Indian land and the Indians are entitled to it."). Also, when Congress appropriated funds to plan for the Riverton Irrigation Project during the 1910s, Congress repeatedly referred to the 1905 Act area as the "conditionally ceded lands" of the Wind River Reservation and directed that a portion of the appropriations were reimbursable from the Tribes' proceeds of land sales under the 1905 Act. *E.g.*, 39 Stat. 969, 993 (1917); 40 Stat. 561, 590 (1918); 41 Stat. 3, 30 (1919). Likewise, in 1939, when Congress halted settlement of lands within the 1905 Act area, it referred to such lands as a "portion[] of the Wind River Indian Reservation" and "restore[d] to tribal ownership" certain "undisposed-of surplus or ceded lands . . . ." 25 U.S.C. §§ 574, 575. *Cf. Seymour*, 368 U.S. at 356 (recognizing that this type of restoration legislation constitutes congressional recognition of the "continued existence" of an opened area "as a federal Indian reservation").

In sum, the evidence discussed above, along with additional historical materials and legislative history to be developed in the first instance by the Tribal Court and reviewed by the Tribal Court of Appeals if necessary, demonstrate that Congress did not intend the 1905 Act to diminish the Reservation, but instead created a trust arrangement whereby the Indians would be paid for the lands only when they were actually sold to settlers. *See Clark v. Boysen,* 39 F.2d 800, 812-14 (10th Cir. 1930) (1905 Act lands were ceded in trust to United States as trustee; lands opened under the 1905 Act are not public lands, but are lands "reserved for other purposes in connection with the Indian service"); *see also In re: The General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988) (1868 treaty priority date water rights were finally adjudicated to certain lands within the exterior boundaries of the Wind

River Reservation, including lands within the 1905 Act area. "Walton" rights were awarded in 4,655 acres within the 1905 Act area. Walton rights are not awarded on lands outside the exterior bounds of a Reservation.).

ii. 1953 Act

Encana also appears to believe that the 1953 Act, 67 Stat. 1953, which involved a subset of 1905 Act lands set aside for the Riverton reclamation project, diminished the Reservation. However, as with the 1905 Act, nothing in the 1953 Act expresses Congress's "clear" intent to effect diminishment. *See Solem*, 465 U.S. at 465-66.

When Congress acquires an interest in Reservation lands for reclamation purposes and provides for payment from reclamation funds, Congress's intention was to promote irrigation, not make changes to the Reservation boundary. For example, in the Boysen Act, Congress acquired lands for a reclamation reservoir east of the Riverton Reclamation Project and provided for payment from the Missouri River Basin project, a reclamation project. 66 Stat. 780 (1952). The Act incorporated a memorandum of understanding which reserved to the Tribes the mineral interests and surface uses. In 1956, Congress acquired land within the Wind River Indian Reservation for the Anchor Dam reclamation reservoir on the Reservation and provided for payment from the Missouri River Basin project with reclamation funds. 70 Stat. 987 (1956) ("Anchor Dam Act"). As with the 1953 Act, the Anchor Dam Act reserved mineral rights for the Tribes. *Id*. On December 3, 1986, the United States recognized that the Anchor Dam Act did not alter the Reservation status of the land when it transferred a portion of the lands back to the Tribes under the Federal Property And Administrative Services Act 40 U.S.C. § 521 *et seq*. (formerly 40 U.S.C. 472 *et seq*.) ("Excess Property Act"). *See* Exhibit E.

Due to uncertainties regarding implementation of the 1953 Act, and the decision in *United States ex rel the Shoshone Indian Tribe v. Seaton*, 248 F.2d 154 (D.C. Cir. 1957), *cert. denied*, 335 U.S. 923 (1958), Congress adopted the 1958 Act, 72 Stat. 935, which clarified Congress's intent and declared that the Tribes owned "all of the right, title and interests in all minerals, including oil and gas, the Indian title to which was extinguished" by the 1953 Act. By placing the minerals in trust status for the Tribes, the statute effectively acknowledges the

Tribes' ownership and control over the underlying mineral estate. Ownership of the mineral estate gives the Tribes and their lessees significant and superior rights to use and occupy the surface for the purposes of mineral extraction. *See Kinney-Coastal*, 277 U.S. at 505-06; *see also Crow Tribe*, 650 F.2d at 1117.

Other provisions of the 1958 Act further demonstrate Congress's understanding that the Tribes retain significant control and ownership over lands subject to the 1953 Act. For example, the 1958 Act provides that that the minerals underlying the Riverton project area would be leased under the 1938 Indian Mineral Leasing Act, 25 U.S.C. §§ 396a *et seq.* Indeed, section 1 of the 1958 Act makes it clear all leases, irrespective of the original statutory authority under which they were issued, were to be administered under the IMLA. Under the IMLA, it is the Tribes, not the United States, that determine in the first instance whether and on what terms minerals will be leased. *See* 25 U.S.C. § 396(a). Because section 2 of the 1958 Act required all leases under the 1953 Act to be subject to renewal at the end of their primary five-year term, all parties, by choosing to accept renewal of a lease issued under the 1953 Act, took such action knowing their lease would be administered under the IMLA. Furthermore, in section 1 of the 1958 Act, Congress required that all funds collected under the 1953 Act, including the 10% administrative fee, be returned to the Tribes. 72 Stat. 935, § 1 (gross proceeds credited to miscellaneous receipts of United States under 1953 Act shall be transferred to the Tribes).

* * *

The above discussion is only a small sampling of the considerable evidence, to be further developed before the Tribal Court, which supports the conclusion that neither the 1905 Act nor the 1953 Act compels the conclusion that the lands at issue in this case are outside of the Wind River Reservation. Because Encana cannot provide the compelling evidence required to prevail on its diminishment theories, the Court should require Encana to exhaust its tribal remedies, including tribal appellate review.

b. The Tribal Court has jurisdiction under both of the *Montana* exceptions.

Encana also appears to take the position that, even if the activities at issue occurred within the Reservation boundaries, the Tribal Court lacks jurisdiction over Encana, a non-Indian

corporation, under *Montana* and its progeny. In *Montana*, the Supreme Court held that tribal courts are generally precluded from asserting civil jurisdiction over non-Indians unless: (1) the non-Indian has entered into sufficient "consensual relationships" with the tribe or its members to justify tribal jurisdiction; or (2) the non-Indian conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-66.

In the instant case, both of the *Montana* exceptions are *prima facie* applicable. First, Encana operates at the site in question as the successor in interest to an oil and gas lease for the development or extraction of oil and gas owned in trust by the Tribes. The Tribes' ownership of the oil and gas subject to the lease is beyond dispute. 72 Stat. 935. The lease provides that Encana shall "carry on all operations in accordance with approved methods and practices . . . and for the health and safety of workmen and employees." Exhibit F, Lease Terms, § 2(j).[5] Encana's alleged failure to adequately supervise the worksite, which resulted in Mr. Jorgenson's intoxication and ultimate death, arguably violate Encana's commitment under the lease to provide a safe workplace. This Court has already determined (with respect to DHS) that the identical lease, along with DHS's TERO agreement with the Tribes and its tribal business license, have a direct nexus to the claims in the underlying tribal court case:

> [T]he various business agreements here between DHS and the Tribes create a sufficient nexus. The Court is not persuaded by DHS' argument that the underlying car accident is separate and distinct from the drilling agreements. Certainly, to the extent Jorgenson alleges negligent supervision and breach of care with respect to employment practices on the oil well, those activities arise from the oil drilling agreements between DHS and the Tribes. . . . Here, because the Tribes retain jurisdiction to regulate the conduct of nonmembers who enter consensual relationships with them and consensual relationships are readily apparent, the fourth tribal exhaustion exception does not apply.

DHS Drilling Co. v. Estate of Jeremy Jorgenson, No. 09-CV-200-J, slip op at 10-11 (D. Wyo. Jan. 6, 2010) (Dkt. # 1-21, pp. 55-66). In addition, in *Encana v. Whitlock*, No. 09-CV-124-D, (D. Wyo. 2009) (Dkt. # 1-21, pp. 67-77), a case involving a personal injury suit against Encana

[5] Encana is the successor in interest to the Hornbeck lease. *See* Dkt. # 1-20, pp. 53-54 (Assignment of Mining Lease to Tom Brown Inc.,); Dkt. # 1-20, pp. 12-13 (Certificate of Merger of Tow Brown and Encana).

arising from an accident at a nearby oil well in the 1905 Act area,[6] this Court determined that the "Encana's consensual relations with the Tribes for the development of the Tribe's energy resources, creates in the Tribes the authority to regulate the manner in which those resources are developed, and the entities developing them." *Id.* at 8 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)). It is thus well-established that Encana has entered into consensual relationships with the Tribes that are sufficient to support the Tribal Court's civil jurisdiction over the *Jorgenson* claims under the first *Montana* exception.

The applicability of the first *Montana* exception is not altered in any way by Tenth Circuit's recent decision in *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011). The *Crowe* case involved the "exceptional circumstances" of a tribal court attempting to assert jurisdiction to enforce a fee agreement that a non-Indian law firm had entered into with a related tribal entity. *Id.* at 1150-51. The tribal court argued that it had jurisdiction over the non-Indian law firm on the grounds that the firm had consented to jurisdiction by practicing in the tribal court. *Id.* at 1151. The Tenth Circuit disagreed, finding that enforcement of the fee agreement "has nothing to do" with the firm's relationship to the tribal court "based on their Bar membership." *Id.* at 1152-52. None of these "exceptional circumstances" are present in the instant case. Rather, as this Court has already determined, the Tribal Court has legitimate grounds to assert jurisdiction, based on Encana's oil and gas lease and other agreements between Encana and the Tribes, to "regulate the manner in which the oil and gas resources are developed, and the entities developing them." *Encana v. Whitlock*, No. 09-CV-124-D, slip op. at 8 (D. Wyo. 2009) (Dkt. # 1-21, pp. 67-77); *see also DHS Drilling Co. v. Estate of Jeremy Jorgenson*, No. 09-CV-200-J, slip op at 10-11 (D. Wyo. Jan. 6, 2010) (Dkt. # 1-21, pp. 55-66) ("Certainly, to the extent Jorgenson alleges negligent supervision and breach of care with respect to employment practices on the oil well, those activities arise from oil drilling agreements between DHS and the Tribes. Here . . . consensual relationships are readily apparent.").

[6] As is true of the lands at issue in the instant case, the lands at issue in *Whitlock* were within the 1905 Act area, and the subsurface estate was held by the United States in trust for the Tribes. Exhibit G (map depicting location of the lease at issue in *Whitlock* (Pavillion Field) and the location of the lease at issue in the instant case the case at bar (T4N, R3E, Sec. 19, W.R.M.), which are both north of the Big Wind River and within the 1905 Act area.

In addition, the Tribal Court has *prima facie* jurisdiction over Encana under the second *Montana* exception because Encana's conduct arguably directly impacts the political integrity, economic security, and health and welfare of the Tribes. It is undeniably a critical role of tribal government to protect the health and safety of tribal members and others who work on oil and gas rigs that extract minerals held in trust for the Tribes. For nearly a century, revenues from these reserves have been the lifeblood of the Tribes' government and the principal means of support for the Tribes' members; historically, these reserves have generated approximately 90% of total tribal revenues from their trust oil and gas resources. In *Shoshone and Arapaho Indian Tribe v. Hathaway*, No. 5367 Civ. (U.S.D.C. D.Wyo. 1969), the District Court held the Wyoming Oil and Gas Commission has no jurisdiction over any of the Tribes' oil and gas wells. The land in *Hathaway* is in the opened portion of the Reservation with the same statutory history as the land in this case.

Also, the political integrity and economic security of the Tribes would be diminished if they were prevented from exercising jurisdiction to enforce obligations in mineral leases to protect the "health and safety of workmen and employees" at such sites. Indeed, as this Court held in *Encana v. Whitlock*, No. 09-CV-124-D (D. Wyo. Aug. 28, 2009):

> EnCana's activities clearly affect the Tribes' economic security as well as its health and welfare. . . . The Tribal courts have an obvious interest in the operations of corporations operating on tribal land. Tribal members may themselves constitute the workforce for such operations. Tribal members may also simply find themselves in close proximity to the corporations' work sites, where they may be subjected to the possibility of harm from the corporations' operations. Therefore, this Court agrees that the second exception is applicable to the factual circumstances in this case.

Id. at 9-10. In addition to these interests, the Tribes have a strong interest in controlling the introduction of liquor, particularly to under-age tribal members working to develop tribal trust resources, which also supports tribal jurisdiction in this case. *See United States v. Mazurie*, 419 U.S. 544, 548 (1975). Accordingly, Tribal Court jurisdiction is supported by the second exception articulated by the *Montana* Court.

c. <u>The exhaustion rule applies even if all the activities giving rise to this case had occurred outside of the Wind River Reservation.</u>

"Civil disputes arising out of the activities of non-Indians on reservation lands almost always require exhaustion if they involve the tribe," but disputes involving off-reservation activities may also trigger the tribal exhaustion rule. *Ninigret Dev. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 32 (1st Cir. 2000). Accordingly, even if Encana were correct that the conduct giving rise to this case occurred outside of the Wind River Reservation, this would not foreclose application of the tribal exhaustion rule.

The Tenth Circuit has expressly instructed that arguments that a tribe lacks jurisdiction because the "activity in question took place off tribal land" should "first be heard in the tribal court." *Bank of Oklahoma*, 972 F.2d at 1170. Indeed, in *Texaco, Inc. v. Zah*, 5 F.3d 1374 (10th Cir. 1993), the Tenth Circuit rejected a claim that exhaustion of tribal remedies was not required because the "tribal courts lack jurisdiction in this case because the Navajo Nation's authority over non-Indians terminates at the reservation boundary," *id.* at 1376-77, holding that application of the tribal exhaustion rule was not necessarily foreclosed even in cases involving off-reservation conduct:

> When the dispute involves non-Indian activity occurring outside the reservation . . . the policies behind the tribal exhaustion rule are not so obviously served. Under these circumstances, we must depend upon the district courts to examine assiduously the *National Farmers* factors in determining whether comity requires the parties to exhaust their tribal remedies before presenting their dispute to the federal courts.

Id. at 1378 (citation omitted); *see also Richmond v. Wampanoag Tribal Court Cases*, 421 F. Supp. 2d 1159, 1178 n.34 (D. Utah 2006) ("Even where a lawsuit arises from and Indian tribe or tribal entity's off-reservation activities, exhaustion of tribal remedies may be required."); *Ninigret*, 207 F.3d at 32 ("To trigger exhaustion, an 'off-the-reservation' claim must at a bare minimum impact directly upon tribal affairs."). The "*National Farmers* factors" referred to in the *Texaco* decision are: "'(1) furthering congressional policy of supporting tribal self-government; (2) promoting the orderly administration of justice by allowing a full record to be developed in the tribal court; and (3) obtaining the benefit of tribal expertise if further review

becomes necessary.'" *Petrogulf*, 92 F. Supp. 2d at 1113 (quoting *Kerr-McGee*, 115 F.3d at 1507).

Here, it is clear that the *National Farmers* factors favor application of the tribal exhaustion rule. It is undisputed that the Tribes retain rights to the mineral estates underlying the lands at issue. This tribal interest is of core importance to the Tribes as it provides critical royalty and tax payments as well as opportunities for employment of tribal members (such as Mr. Jorgenson). Congress's policy of "supporting tribal self-government" clearly favors allowing the Tribes to regulate conduct associated with the development of these tribal interests, including ensuring that extraction of the Tribes' oil and other minerals is conducted in a manner that does not put the Tribes' resource or members at risk. Furthermore, Encana concedes that the surface lands involved in the instant dispute are controlled by the federal government. Thus, these lands have a character very similar to tribal trust lands—they are managed by the federal government for the benefit of the Tribes. The Supreme Court has recognized the heightened interest of tribes in regulating non-member conduct on lands with such character. *See, e.g.*, *Bourland*, 508 U.S. at 688-89; *see also Merrion*, 455 U.S. at 144-45; *Strate*, 520 U.S. at 456.

The second comity factor, the orderly administration of justice, also favors application of the tribal exhaustion rule. As the Tenth Circuit found in *Petrogulf*, "[p]ermitting the tribal court to assess its own jurisdiction and potentially determine the merits of this case will minimize the likelihood of a 'procedural nightmare' by decreasing the possibility that any decision [the federal court] make[s] will be overturned in the appeals process, thereby requiring the parties to address the same issues again in the tribal court." 92 F. Supp. 2d at 1117-18 (citing *National Farmers*, 471 U.S. at 856). In addition, the Northern Arapaho Tribe's complaint in intervention alleges that Encana violated tribal law in addition to the lease, TERO agreement, and business license. Thus, "to the extent that tribal law in any way influences this case, abstaining at this stage of the case will decrease the likelihood that [the Court] will have to certify any questions to the tribal court." *Id.* at 1118.

The third comity factor, "obtaining the benefit of tribal expertise" for further review, also favors abstention. As can be seen by the summary provided above, analysis of the boundaries of

the Wind River Reservation involves assessment of considerable legislative and factual materials, including legislative reports indicating Congress's intent, subsequent congressional and administrative actions that may elucidate congressional intent, and factual materials regarding the Tribes' contemporaneous understanding of the effect of the agreement and the demographics of the area. This Court should allow this record to be developed and reviewed in the first instance by Tribal Court, and, if necessary reviewed by the Tribal Court of Appeals, so if the Court is eventually called upon to review the Tribal Court's determination, it "will have at its disposal a fully developed tribal court record from which to evaluate any challenges to that jurisdiction" and will also "have the benefit of the tribal court's interpretation of tribal law and customs that may apply to this case." *Petrogulf*, 92 F. Supp. 2d at 1118.

CONCLUSION

Encana has not exhausted its tribal remedies in this case and has not demonstrated that it should be excused from the tribal exhaustion requirement. Accordingly, as a matter of comity, and in deference to Congress's strong interest in promoting tribal sovereignty and the development of tribal courts, Judge St. Clair respectfully asks the Court to dismiss Encana's complaint without prejudice on abstention grounds.

RESPECTFULLY SUBMITTED this 28th day of February, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the date hereof, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties in this matter who are registered with the Court's CM/ECF filing system.

/s/ Richard M. Berley
Richard M. Berley, admitted *pro hac vice*