ORIGINAL

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

ENCANA OIL & GAS (USA) INC., a Delaware corporation,	)	
Plaintiff,	)	
v.	)	Civil Action No. 12CV27-J
JOHN ST. CLAIR, an Individual and Chief Judge of the Shoshone and Arapaho Tribal Court,	)	
Defendant.	)	

COMPLAINT

For its Complaint against Defendant Chief Judge John St. Clair of the Shoshone and Arapaho Tribal Court, Plaintiff Encana Oil & Gas (USA) Inc. ("Encana") alleges as follows.

NATURE OF THE ACTION

1. This is an action for declaratory and injunctive relief. Defendant is the Chief Judge of the Tribal Court for the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation ("Tribes"), both of which are federally-recognized Indian tribes. Defendant continues improperly to assert civil adjudicatory jurisdiction over Plaintiff, a non-Indian company, in connection with a wrongful death action brought on behalf of the estate of an individual member of the Eastern Shoshone Tribe, Jeremy Jorgenson ("Estate"). *See* Exh. A: (1) *Order of the Court Regarding Jurisdiction*, and (2) *Order Setting Scheduling Conference* filed in *The Estate of Jeremy Jorgenson, Northern Arapaho Tribe and Eastern Shoshone Tribe v. DHS Drilling Co. and Encana Oil & Gas (USA), Inc.*, CV-09-0012 ("Tribal Court action"). The Tribal Court is not vested with the power to adjudicate the claims brought against Encana in the Tribal Court action because Encana is a non-Indian, and because all the relevant events took place on public roads maintained by Fremont County and on federal public lands where Encana was present by virtue of a federal oil and gas lease from the United States Bureau of Land Management. Simply put, none of the operative events with respect to the Estate's claims took place within federally-recognized Indian country. Encana's unrelated consensual dealings with the Tribes are legally insufficient to trigger extraterritorial Tribal Court jurisdiction over alleged off-reservation torts arising within a federal enclave of lands over which the Tribes lack civil regulatory authority.

2. Defendant's continuing and illegal assertion of authority over Encana is *ultra vires* and therefore actionable in this Court. Defendant, having rejected Encana's Motion for Summary Judgment for Lack of Subject-Matter Jurisdiction filed in the Tribal Court action, is plainly acting outside the scope of his authority. Defendant's manifest intention to keep asserting jurisdiction over Encana through various trials on the merits (*a jury trial and an*

additional bench trial (*see* Exh. A-2, ¶ 6)) unquestionably violates well-settled federal common law. Accordingly, Encana respectfully requests this Court to (1) issue a judicial declaration that Defendant's assertion of jurisdiction over Encana is unlawful and in violation of federal law; and (2) grant immediate relief in the form of a preliminary injunction to prevent irreparable harm to Plaintiff.

PARTIES, JURISDICTION AND VENUE

3. Plaintiff Encana Oil & Gas (USA) Inc. is a Delaware corporation with its principal place of business in Denver, Colorado. Encana Oil & Gas (USA) Inc. is an indirect, wholly-owned subsidiary of Encana Corporation, a public corporation formed under the laws of Canada.

4. Defendant is an individual, a Wyoming resident, and a member of the Eastern Shoshone Tribe. Defendant serves as Chief Judge of the Shoshone and Arapaho Tribal Court.

5. This Court has subject-matter jurisdiction over the action pursuant to 28 U.S.C. § 1331 because this action arises under the Constitution, laws or treaties of the United States. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2716 (2008) (determining a tribal court's "adjudicative authority over nonmembers [of a federally recognized Indian tribe] is a federal question").

6. Defendant's unlawful exercise of Tribal Court jurisdiction, as an ongoing violation of federal common law, is actionable under *Ex Parte Young*, 209 U.S. 123 (1908) because "there is an established 'federal right to be protected against the unlawful exercise of Tribal Court judicial power.'" *See also Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011) (quoting *MacArthur v. San Juan County*, 309 F.3d 1216, 1225 (10th Cir. 2002)).

7. This Court further has subject-matter jurisdiction in this instance under *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) and *Nat. Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S.

845 (1985) because Plaintiff has exhausted all available Tribal Court remedies. Defendant rejected Encana's Tribal Court motions to dismiss and for summary judgment based on lack of subject-matter jurisdiction. *See* Exh. A, *Order of the Court Regarding Jurisdiction*. Defendant's December 25, 2011 Order denying Encana's motion for summary judgment is a final order that may not be appealed.[1]

8. The Court has personal jurisdiction over all parties to this action.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(1), (b)(2) and (b)(3).

GENERAL ALLEGATIONS

The Estate's Case

10. This case arises out of events that took place on January 1, 2009.

11. On that date, Jeremy Jorgenson ("Jorgenson") reported to work as a floor-hand for DHS Drilling Company ("DHS") on Rig No. 17, which was in operation at Encana's Well No. 19-24.

12. The well, known as Tribal Muddy Ridge 19-24B-M ("Well No. 19-24"), is located at Township 4 North, Range 3 East in Section 19 of Fremont County, Wyoming.

13. Prior to January 1, 2009, DHS, a Colorado corporation with its principal place of business in Wyoming, had entered into a contract to provide drilling services for Encana at Well No. 19-24, as well as other locations.

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[1] The Shoshone and Arapaho Court of Appeals has already ruled in the Tribal Court action that an order on a motion for summary judgment cannot be subject to appellate review because it addresses "a limited issue" and interlocutory appeals are unavailable under tribal law. *See* Exh. B, July 12, 2011 Order, ¶¶ 2, 6. Therefore, Judge St. Clair's December 20, 2011 Order is the final word of the Tribal Court system on Encana's subject-matter jurisdiction arguments. The Tenth Circuit has held that tribal remedies are sufficiently exhausted when a tribal court rules on its adjudicatory jurisdiction vis-à-vis a non-Indian. *Enlow v. Moore*, 134 F.3d 993, 995-996 (10th Cir. 1998) (tribal remedies exhausted where the tribal court had the chance to review the non-Indian's jurisdictional claim and exercised that opportunity).

14. After reporting to work on Jan. 1, 2009, Jorgenson drank alcohol to the point that he became intoxicated.

15. Jorgenson then entered his personal automobile and drove away from the DHS Rig No. 17 location after several unsuccessful attempts by on-site colleagues to prevent his departure.

16. The road Jorgenson traveled when he left the work site, Tunnel Hill Road, is a public road owned by the United States Bureau of Reclamation but controlled and maintained by Fremont County, Wyoming pursuant to a decades-old grant of easement/agreement between those two governmental entities.

17. Following his departure from the rig site, Jorgenson lost control of his vehicle, wrecked and was ejected, causing his death.

18. Jorgenson's vehicle and body came to rest approximately forty feet from Tunnel Hill Road, on United States Bureau of Reclamation lands.

19. Jorgenson had a blood alcohol content of .19 when he died. He also tested positive for marijuana.

20. Jorgenson did not pass through any tribal lands during his course of travel leading to the fatal car accident.

21. Only non-tribal governmental entities were involved in the investigation of Jorgenson's accident. Those entities included the Fremont County Sheriff's Office, the Wyoming Highway Patrol, and the Fremont County Coroner.

22. On October 19, 2009, the Estate initiated a Complaint for wrongful death against Encana in the Wind River Indian Reservation Shoshone and Arapaho Tribal Court. *See* Exh. C, Estate's Complaint.

23. The Estate filed its claims against Encana after first having filed against DHS on March 5, 2009.

24. From the very outset of the Tribal Court action, Encana has always maintained that exercise of jurisdiction by Defendant St. Clair was improper.

25. The Estate moved that Defendant St. Clair set a trial date in the Tribal Court action. Exh. D, January 5, 2012 Motion to Terminate Confidential Settlement Agreement with Encana, Conduct Scheduling Conference, and Sever Intervention Claims from [Estate's] Claims for Trial, ¶ 10. Defendant granted the Estate's Motion, in significant part, on January 27, 2012 and the parties were served with notice of that Order by mail on January 30, 2012. Exh. A-2.

Exhaustion of Tribal Court Remedies

26. Encana exhausted its Tribal Court remedies on its subject-matter jurisdiction arguments by submitting: (1) a Motion to Dismiss for Lack of Subject-Matter Jurisdiction (filed December 10, 2009, denied May 20, 2010) and (2) a Motion for Summary Judgment Based on Lack of Subject-Matter Jurisdiction (filed December 2, 2010, denied December 20, 2011).

27. Encana submitted significant factual and legal materials to support its arguments relating to subject-matter jurisdiction. All of Encana's subject-matter jurisdiction submissions to Defendant are attached hereto in compilation as Exhibit E.

28. It would be grossly unjust, detrimental and prejudicial to Encana and to all the parties to the Estate's wrongful death case that they be required to incur the cost of defending a futile Tribal Court jury trial and an additional futile Tribal Court bench trial[2] where, as here, the Tribal Court clearly lacks subject-matter jurisdiction to adjudicate the Estate's wrongful death case.

[2] Defendant's January 27, 2012 Order contemplates at least two trials, including a jury trial and a subsequent "second phase bench trial." Exh. A-2, p.3.

29. DHS made similar motions to dispose of the Tribal Court action for lack of subject-matter jurisdiction. *See* Exh. F, Compilation of subject-matter jurisdiction submissions by DHS.

30. Despite Encana's attempts to seek appellate review of Defendant's Orders, as discussed above at footnote 1, the Shoshone and Arapaho Court of Appeals ruled that a motion for summary judgment cannot be subject to appellate review because it addresses "a limited issue" and interlocutory appeals are unavailable under tribal law. *See* Exh. B, July 12, 2011 Order.

31. Therefore, Judge St. Clair's December 20, 2011 Order denying both Encana's and DHS's subject-matter jurisdiction motions is the final word on subject-matter jurisdiction from the Tribal Court system, as expressly determined by the Shoshone and Arapaho Court of Appeals, and is not appealable.

The Well Site

32. Well No. 19-24 is located on lands owned and controlled by the United States Bureau of Reclamation.

33. The oil and gas lease that governs Well No. 19-24, lease number W-024513, was entered into by the United States Department of the Interior Bureau of Land Management, and Encana's predecessor, J.F. Hornbeck, on November 17, 1953. Exh. G, *Lease for Oil and Gas* (1953). The effective date of the Lease was May 1, 1954. The Lease is currently active and is held by production.

34. Under the Lease, the Tribes do not have executive rights.

35. As detailed in Encana's submissions to Defendant, Well No. 19-24, the subject portion of Tunnel Hill Road, and the accident site are not located on lands within the current boundaries of the Wind River Indian Reservation ("Reservation").

36. Rather, all three localities exist on lands that, while within the original boundaries of the Reservation, were ceded to the United States more than a century ago[3] and have been continuously owned and controlled by the federal government as non-tribal trust lands since 1904. Indeed, as stated by Dr. Paul Wilson in an Affidavit attached and incorporated hereto as Exh. H:

> "the subject Encana well, Tunnel Hill Road, and area where Mr. Jorgenson's automobile accident occurred are all on lands owned by the United States of America, Bureau of Reclamation. None of them lie on Tribal Trust lands. None of them lie on Wind River Indian Reservation lands. All of these places are located on lands within the Riverton Reclamation Project, the federal enclave within the original exterior boundaries of the Wind River Indian Reservation, . . ."

Exh. H, Affidavit of Dr. Paul Wilson, ¶ 7.[4]

Historical Background

37. Neither the location of Well No. 19-24 nor the location of the accident is within the boundaries of the Reservation.

38. The second Treaty of Fort Bridger, signed in 1868, established the Wind River Indian Reservation for the Eastern Shoshone Tribe. The Treaty was later ratified by Congress on February 16, 1869. 15 Stat. 673. Article XI of the Treaty states, "No treaty for the cession of

[3] As explained more fully below, the land cessation agreement between the Tribes and the United States was reached in 1904 and enacted into law in 1905.

[4] Evidence presented by experts such as Dr. Wilson has been deemed useful and appropriate in diminishment cases by the Tenth Circuit. *See Osage Nation v. Irby*, 597 F.3d 1117, 1125 (10th Cir. 2010).

any portion of the reservation herein described ... shall be of any force or validity ... unless executed and signed by at least a majority of all adult male Indians occupying or interested in the same." *Id.* at 676. A decade later, in 1878, the United States settled the Northern Arapaho Tribe on the Wind River Indian Reservation as well.

39. Following its creation and development, the Wind River Indian Reservation (the "Reservation"), like many reservations during the Western settlement period, was diminished by an act of Congress. Congress's authority to modify treaties unilaterally was upheld in the 1903 Supreme Court ruling in *Lone Wolf v. Hitchcock*, which states that Congress acts in "perfect good faith," consistent with the federal government's trust responsibilities to Indian tribes, by exercising its so-called plenary power to determine tribal relations, including modifying or invalidating treaties and other agreements. 187 U.S. 553, 568 (1903).

40. It was shortly after the *Lone Wolf* decision that U.S. Representative Mondel of Wyoming introduced H.R. 13481, which intended to ratify a previous agreement with the Tribes to cede roughly 1.4 million acres of land from the Reservation to the federal government. When commenting on H.R. 13481, the Committee on Indian Affairs noted that such a cession would leave the Tribes with roughly 800,000 acres of land in a "diminished reserve." *The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, 753 P.2d 76, 125-126 (Wyo. 1988) ["*Big Horn I*"], *aff'd sub nom. Wyoming v. United States*, 492 U.S. 406, 109 S. Ct. 2994, 106 L. Ed. 2d 342 (1989). Congress amended H.R. 13481 and required Eastern Shoshone and Northern Arapaho approval of the land cession.

41. To gain such approval, U.S. Indian Inspector James McLaughlin began negotiating an agreement whereby the Eastern Shoshone and Northern Arapaho Tribes would cede a large portion of the Reservation to the federal government.[5] On April 21, 1904, after explaining the terms of HR 13481 to the Tribe, 282 Eastern Shoshone adult males agreed to cede certain parts of the Reservation to the federal government. 33 Stat. 1016, 1019. This Agreement, which ceded the very portion of the Reservation where the events in the Jorgenson case took place, was amended and ratified by Congress on March 3, 1905 (hereinafter the "1905 Act").

42. The 1905 Act unambiguously established the locations in question as *outside* the newly reconfigured exterior boundaries of the Reservation, beyond federally recognized Indian country. The Act changed the original boundaries of the Reservation, opened a portion of the former Reservation to settlement through the allotment process, and provided a sum certain to the Tribes, whose adult male members approved the McLaughlin agreement through the process required by the 1905 Act.

43. Throughout the 1905 Act, Congress unequivocally expressed its intent to diminish the Reservation. Furthermore, the lands in question here lie entirely within the portion of the former Reservation categorized by the 1905 Act as diminished lands.

44. Specifically, Article I of the 1905 Act provides: "Indians belonging to the ...Wind River Reservation ...do hereby cede, grant and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation, except the lands" south of the Big Wind River. 33 Stat. 1016.

[5] Previously, in 1897, McLaughlin had visited the Reservation and negotiated the Thermopolis Purchase Act, 30 Stat. 62, where the federal government acquired the hot springs from the Tribes.

45. It is uncontested that the well site, Tunnel Hill Road, and the accident site lie north of the Big Wind River.

46. Additionally, Article II of the 1905 Act states: "In consideration of the lands ceded, granted, relinquished, and conveyed by Article I of this agreement." *Id.*

47. Taken together, or separately, the first two articles of the 1905 Act indicate that the land in question was ceded to the federal government.

48. Moreover, the 1905 Act unconditionally granted a sum-certain to the Tribes in exchange for the ceded land. Article IX, Sec. 3 appropriated over $140,000 to be used for the benefit of the Tribes. *Id.* at 1021. This appropriation was designed to be repaid from the proceeds generated from the sale of the ceded land. There was no guarantee, however, that enough ceded land would be sold to fully cover the amount of this appropriation. The 1905 Act did not contain a reimbursement provision if the sales of the ceded lands did not equal or cover the fixed appropriation. Thus, the Tribes received a fixed sum for their lands even if none of the ceded land sold.

49. In addition to the unambiguous terms of cessation outlined above, the 1905 Act also refers to the remainder of the reservation as the "diminished reservation" or the "diminished reserve." Thus, when ratifying the 1905 Act Congress believed the ceded portions were no longer incorporated with the smaller, "diminished" Reservation. For example, Article I allowed certain tribal members who had already received allotments of land within the ceded area to "select other lands within the diminished reserve." *Id.* at 1016. Articles III, IV and VI provided for the construction of an irrigation system and schools within the "diminished reservation." *Id.*

at 1017-1018. Finally, Article IX, Sec. 3 appropriated funds for the "survey and marking of the outboundaries of the diminished reservation" and "construction and extension of an irrigation system on the diminished reservation." *Id.* at 1020-1021. The resurveying was necessary because the 1905 Act altered the original exterior boundaries of the Reservation.

50. After the 1905 Act, Congress routinely allocated Indian Affairs funds to projects within the "diminished" Reservation, but no Indian Affairs funds were ever allocated for projects on the ceded lands. *See e.g.*, 41 Stat. 1225, 1247 (appropriating $90,000 in 1921 for the continuing work constructing an irrigation system, roads and bridges within the "diminished" Reservation).

51. Additional statutes likewise demonstrate that the 1905 Act diminished the Reservation and revised its boundaries. Between 1940 and 1972, for instance, the federal government enacted ten land restoration acts which restored previously ceded land to the Reservation.[6] Congress would not have needed to pass these statutes had the 1905 Act not diminished the Reservation.

52. As a result, state and federal courts have consistently held that the 1905 Act diminished the Reservation and the Tribes' respective authority over these lands. *See Yellowbear v. State*, 174 P.3d 1270, 1284 (Wyo. 2008) ("We conclude ... it was the intent of Congress in passing the 1905 Act to diminish the Wind River Indian Reservation and to remove from it the lands 'ceded, granted, and relinquished' thereunder. . . . [T]hose lands are no longer part of the reservation, and are not 'Indian country'"); *U.S. ex rel The Shoshone Indian Tribe v.*

[6] *See* 5 Fed. Reg. 1805; 7 Fed. Reg. 7458; 7 Fed. Reg. 11100; 8 Fed. Reg. 6857; 9 Fed. Reg. 9749; 10 Fed. Reg. 2254; 10 Fed. Reg. 7542; 13 Fed. Reg. 8818; 39 Fed. Reg. 27561; and 40 Fed. Reg. 43732.

Seaton, 248 F.2d 154, 155 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 923 (1958) (The 1905 Act plainly show[s] that Congress intended to extinguish all rights and interests of the tribes in these lands").

53. A majority of the ceded lands — including all the lands relevant to this case — are currently encompassed by the Riverton Reclamation Project. Following the 1905 Act, the United States initiated a multi-million dollar reclamation project in the Wind River Basin on the ceded lands. Since that time, the United States has appropriated millions of dollars to develop the Riverton Reclamation Project, where Well. No. 19-24, Tunnel Hill Road and the Jorgenson accident site are located. *See generally*, Exh. I, Autobee, Robert, *Riverton Unit: Pick-Sloan Missouri Basin Program*, United States Bureau of Reclamation, 1996. Those funds and roughly 100 years of federal management efforts have provided irrigation to the Riverton area. *Id.*

54. In 1953, to further clarify the Bureau of Reclamation's ownership of surface and mineral estates located within the Riverton Reclamation Project, Congress once again reaffirmed its intention to diminish the Wind River Indian Reservation by issuing a cash settlement to the Tribes. On August 15, 1953, Congress enacted Public Law 284 (the "1953 Act"). The 1953 Act provided a financial settlement to the Tribes, extending to subsurface mineral rights as well as surface interests, on the expressed condition that such settlement

> . . . shall be deemed to constitute full, complete, and final compensation, except as provided in section 5 of this Act, for **terminating and extinguishing** all of the right, title, estate, and interest, including minerals, gas and oil, of said Indian tribes and their members of, in and to the lands, interests in lands, and any and all past and future damages **arising out of the cession to the United States, pursuant to the Act of March 3, 1905 (33 Stat.**

> **1016) of that part of the former Wind River Indian Reservation** lying within the following described boundaries . . .

(emphasis added). Nothing in the legislative history or the language of the 1953 Act granted any authority or jurisdiction to the Tribes. On the contrary, the 1953 Act appropriately recognized that the 1905 Act was a cession of tribal lands. The additional cash settlement to the Tribes provided by the 1953 Act, extending beyond surface lands to subsurface interests, leaves no doubt that the lands at issue in the Jorgenson case were ceded by the Tribes to the federal government in the 1905 Act. *See* Exh. H, Wilson Affidavit at ¶ 13.

55. Congress' intent in enacting the 1953 Act was succinctly and correctly stated by Assistant Secretary of the Interior, Roger Ernst, in his 1958 report to Senator James E. Murray, then-Chairman of the Committee on Interior and Insular Affairs:

> The Act of August 15, 1953 (67 Stat. 592), extinguished the Indian title to the undisposed of, ceded lands that were located within the Riverton Reclamation Project (approximately 161,500 acres), added them to the public domain, and provided for payment to the Indians of $1,009,500 as complete compensation. This legislation was based upon negotiations with the tribes.

Exh. H, Wilson Affidavit, ¶ 13.

56. On August 27, 1958, Congress returned the mineral estate underlying all public domain lands within the Riverton Reclamation Project to the Tribes. 72 Stat. 935 (the "1958 Act"). The 1958 Act allowed all leases that had been previously issued with respect to those minerals underlying the public domain on a noncompetitive basis to continue so long as "oil or gas is being produced under the lease in paying quantities." *Id.* Nothing in the 1958 Act made

the Lease a tribal lease, nor conferred any jurisdiction to the Tribes to regulate the Lease (or any other pre-1958 lease) or either the subsurface mineral estate or the surface estate.

57. The 1958 Act was exceedingly narrow in purpose and effect. Its primary intent was to remedy two interrelated problems of the 1953 Act. First, the 1958 Act instructed 100 percent of the funds acquired from mineral leasing to be provided to the Tribes. This replaced the provisions of the 1953 Act that had provided that only 90 percent of the beneficial interest of mineral leases be remitted to the Tribes; the other 10 percent was to be used by the federal government to pay for managing those leases. Second, the 1958 Act restored the subsurface mineral interest to the Tribes, with the United States holding that interest in Trust. This restoration allowed the Tribes to engage in competitive mineral-leasing instead of the noncompetitive mineral leasing provided for under the 1953 Act. Exh. H Wilson Affidavit ¶ 14.

58. Accordingly, Senate Report 1748 characterized the 1958 Act as addressing these limited concerns:

> Although the Indians agreed to the 1953 act at the time it was enacted, they were not aware that it would result in leasing oil and gas under public land laws without competitive bidding and without bonuses. It would appear that competitive leases under the Tribal Mineral Leasing Act of 1938 would have yielded a larger return. This is supported by the fact that prior to the 1953 Act, the Bureau of Indian Affairs executed 12 competitive mineral leases on these lands under the authority granted by the Act of August 21, 1916 (39 Stat. 519) . . .

59. Importantly, the 1958 Act did not affect or alter the boundaries of the Reservation from those established by the 1905 Act. It did not transfer legal title to lands or subsurface minerals to the Tribes. The 1958 Act also did not transfer the executive rights in the

minerals to the Tribes: the executive rights, including the right to negotiate and execute leases for those minerals, remained with the United States. *See* Exh. J Public Law 85-780, approved August 27, 1958.

60. Finally, the 1958 Act did not purport to include the Riverton Reclamation Project as part of the Reservation.

61. The 1905, 1953 and 1958 Acts demonstrate conclusively that Congress has compensated the Tribes for lands ceded to the United States in 1905 that subsequently became the Riverton Reclamation Project, and which remain a non-tribal federal enclave today. These ceded lands of the Riverton Reclamation Project have never been returned, or restored, to the Tribes. Well No. 19-24 is situated within this enclave, as is the relevant portion of Tunnel Hill Road where Jeremy Jorgenson's accident occurred.

Encana's On-Reservation Business Contacts

62. Encana has a license to do business on the Wind River Reservation.

63. Encana conducts various oil and gas activities on the Reservation. The Tribes' 1982 Resolution establishing the Tribal Employment Rights Office ("TERO") requires "[a]ll employers *operating within the exterior boundaries* of the Wind River Reservation" to provide, among other things, Indian preferences in employment. Exh. K, Resolution No. 4967, ¶ 2 (emphasis supplied).

64. Nothing in Resolution No. 4967 or the Tribal Employment Rights Ordinance, No. 4968, purports to apply the Tribes' TERO efforts outside the territorial boundaries of the Wind River Indian Reservation. Encana has, in the past, paid TERO fees to the Tribe associated with

its and DHS's activities at Well No. 19-24, although no tribal law requires off-Reservation application of the TERO.

The Tribes' Claims in Intervention

65. After the close of discovery in the Tribal Court action (November 15, 2010), on December 13, 2010, the Northern Arapaho Tribe filed a "Notice of Intent to Intervene," stating that it intended to intervene in the Estate's case, but was waiting for the Eastern Shoshone Tribe to decide whether it would join the Northern Arapaho and the Tribes would intervene jointly. Exh. L, *Notice of Intent to Intervene* (Dec. 13, 2010).

66. On December 21, 2010, the Northern Arapaho Tribe filed a Motion to Intervene and Motion for Suspension of Scheduling Deadlines, as well as a Complaint. In the Motions and Complaint, the Northern Arapaho Tribe claimed that tribal employment agreements for on-Reservation employment and the Tribe's interests in the mineral estate to be developed by Well No. 19-24 created protectable interests and the predicate for various tort and contract claims advanced against Encana by the Northern Arapaho Tribe. Exh. M, Northern Arapaho Tribe's Intervention Submissions: *Northern Arapaho Tribe's Motion to Intervene and Motion for Suspension of Scheduling Deadlines* (Dec. 21, 2010); *Northern Arapaho Tribe's Memorandum in Support of Motion to Intervene* (Dec. 21, 2010); *Complaint of Intervenor Northern Arapaho Tribe* (Dec. 21, 2010).

67. In its December 21, 2010 Complaint, the Northern Arapaho Tribe alleged six claims for relief: (1) a declaratory judgment that the Lease site was within the Wind River Indian Reservation and, furthermore, because the surface estate is subservient to the mineral estate, and

the Northern Arapaho tribe, as co-owner the mineral estate that exists below the Lease site, possessed regulatory and subject-matter jurisdiction over claims against Encana; (2) a breach of contract claim for alleged violation of general safety terms contained in the Lease; (3) a breach of contract for violation of the terms of the TERO Agreement, entered into by Encana for on-Reservation activities; (4) a claim for alleged violations of the terms of the business licenses granted to Encana by the Tribes; (5) a claim for an alleged breach of the covenant of good faith and fair dealing; and (6) a claim for trespass, resulting from Encana's continued operation after the alleged violations, and allegedly resultant revocation of the Lease, TERO Agreement, and business licenses.

68. On December 30, 2010, the Eastern Shoshone Tribe filed a Motion to Intervene, Brief in Support, and Complaint claiming sovereign jurisdictional interests in the Estate's case. The Eastern Shoshone Tribe asserted protectable interests based on the regulatory authority of the Tribe over the mineral estate and the disposition of the Reservation's physical and jurisdictional boundaries. Exh. N, Eastern Shoshone Tribe's Intervention Submissions: *Motion to Intervene for the Eastern Shoshone Tribe* (Dec. 30, 2010); *Brief in Support of Eastern Shoshone Tribe* (Dec. 30, 2010); *Complaint of Intervenor Eastern Shoshone Tribe* (Dec. 30, 2010).

69. In its December 30, 2010 Complaint, the Eastern Shoshone Tribe listed a single claim for relief: a request for declaratory judgment similar to the one sought by the Northern Arapaho Tribe, namely, that the Eastern Shoshone was co-owner of the underlying, dominant mineral estate and that this ownership, coupled with the Lease, brought the surface estate within

the regulatory jurisdictional reach of the Eastern Shoshone Tribe and the Shoshone and Arapaho Tribal Court.

70. Encana did not oppose the Tribes' intervention, although Encana did object to the overly broad scope of intervention sought by the Northern Arapaho Tribe. Exh. O, *Defendant Encana's Response to the Northern Arapaho Tribe's Motion to Intervene and Motion for Suspension of Scheduling Deadlines* (Dec. 28, 2010). However, Defendant St. Clair granted the full intervention of the Tribes, holding that the leasehold interests of the Tribes in addition to Encana's employment agreements and business licenses were sufficient to satisfy the interest requirement by tribal law. Exh. P, *Order Allowing Full Intervention Pursuant to Rule 10* (Jan. 18, 2011).

71. Thereafter, Defendant allowed two additional rounds of briefing on subject-matter jurisdiction, first allowing the Tribes to each respond to Encana's Dec. 2, 2010 Motion for Summary Judgment for Lack of Subject-Matter Jurisdiction, each followed by Encana's Reply Brief, and second, allowing an additional round of submissions as to any other subject-matter jurisdiction material in October 2011. Exh. Q, Compilation of pleadings filed by Encana, the Northern Arapaho Tribe, and the Eastern Shoshone Tribe after intervention of the Tribes.

72. Defendant has held that the "claims of the Tribes are substantially connected to the claims of [the Estate]. Both justice and judicial economy require that all parties have the opportunity to participate fully in this matter." Exh. A-2, ¶ 6. Thus, the Tribes' claims in intervention are part-and-parcel of the Estate's claims and therefore equally infirm in terms of subject-matter jurisdiction.

Judge St. Clair's Erroneous Subject-Matter Jurisdiction Rulings

73. Judge St. Clair denied each and every submission on subject-matter jurisdiction presented by Encana, as well as those submitted by DHS. *See* Exhibits E and F (compilation of subject-matter jurisdiction submissions).

74. On December 20, 2011, Judge St. Clair issued the *Order of the Court Regarding Jurisdiction* (Exh. A, "Order"), in which he held that the relevant site is within the boundaries of the Reservation and that the Plaintiff had made a prima facie case that the claims asserted were based on a consensual relationship between Encana and the Tribe.

75. The Order makes no mention of the federal enclave where the subject well and Tunnel Hill Road are located, or where Mr. Jorgenson's car accident occurred.

76. The Order disregards all of the Affidavit testimony and exhibits submitted by Encana's experts, Richard Inberg and David Geible (attached as exhibits to Encana's motion, *see* Exhibits F and B to Exh. E-2 hereto). The Defendant disregarded Mr. Inberg's unrefuted testimony that "The subject well, subject portion of Tunnel Hill Road, and the accident site are all located on land that was originally (1868 Treaty) within the exterior boundaries of the Wind River Indian Reservation, but which was sold back to the United States of America in 1904 or 1905." Ex. E-2-F, ¶ 6. The Defendant also disregarded Mr. Geible's unrefuted testimony that "The accident site is not located within the exterior boundaries of the Wind River Indian Reservation. Mr. Jorgenson's path of travel from the well location to the accident site did not pass through any Tribal Trust lands or into any land within the exterior boundaries of the Wind River Indian Reservation." Ex. E-2-B, ¶ 6C The Defendant also disregarded Mr. Geible's

unrefuted testimony that "The subject well, subject portion of Tunnel Hill Road, and the accident site are all located on land that was originally within the exterior boundaries of the Wind River Indian Reservation, but which was sold back to the United States of America in 1904. These lands have been continuously owned by the United States of America ever since." *Id.*, ¶ 6D.

77. The Order disregards the July 30, 2003 map of the Wind River Indian Reservation, WY prepared by Charlie E. Dillahunty, Jr., the map which hangs on the wall of the BIA Office in Fort Washakie, Wyoming.

78. The Order mistakenly concludes that the part of the Reservation within the federal enclave of the Riverton Reclamation Project was not diminished, despite the plain language and intent of the 1905 Act and as the Acts of 1953 and 1958 reinforce. *See* Exh. A, Order at ¶ 14.

79. The Order assumes that all of the relevant events and locations – the subject well, Tunnel Hill Road, and the site of Jorgenson's automobile accident – occurred or are situated within the exterior boundaries of the Reservation. In fact, none is located within the Reservation, but on non-tribal lands that form a federal enclave.

80. Judge St. Clair was also incorrect in his wholesale acceptance of the Northern Arapaho Tribe's inaccurate interpretations of federal and state precedent bearing on the diminished status of the Reservation.

81. Specifically, the Northern Arapaho Tribe argued that *Big Horn I,* which adjudicated the Tribes' water rights, somehow supports a finding that the 1905 Act did not diminish the Reservation. This unsupported theory directly contradicts the Wyoming Supreme Court's later holding in *Yellowbear v. State*, 174 P.3d 1270 (Wyo. 2008).

82. Moreover, this Court has already rejected the Northern Arapaho Tribe's expansive reading of *Big Horn I* as somehow disproving Congressional diminishment of the Reservation. *See Northern Arapaho Tribe v. Harnsberger*, 660 F. Supp. 2d 1264, 1271 (D. Wyo. 2009) ("*Big Horn I* was limited to the narrow context of reserved water rights and the Court did not explicitly base its finding on a determination that the 1905 Act area was Indian country").[7]

83. Nonetheless, even *Big Horn I* itself demonstrates that the 1905 Act did in fact diminish the Reservation and vest the United States with title and authority over the ceded lands, including Township 4 North, Range 3 East, Section 19 of Fremont County, Wyoming. *See e.g., Big Horn I,* 753 P.2d at 135-36 (Thomas, J., dissenting) ("[T]he Act of March 3, 1905 had the effect of extinguishing Indian title and demonstrated and intent that the land should cease to be part of the reservation and Indian country.").

84. Additionally, *Yellowbear* recognized that the Tribes were compensated by the 1905, 1953 and 1958 Acts for lands that had been ceded in 1905 to the federal government. *Yellowbear*, 174 P.3d at 1284 ("We conclude . . . it was the intent of Congress in passing the 1905 Act to diminish the Wind River Indian Reservation and to remove from it the lands 'ceded, granted, and relinquished' thereunder. . . . [T]hose lands are no longer part of the reservation, and are not 'Indian country'"). *Accord: Northern Arapaho Tribe*, 660 F. Supp. 2d at 1271.

85. Yet Defendant St. Clair held that the Wyoming Supreme Court's *Yellowbear* ruling was not entitled to any deference and had no preclusive effect. Exh. A, Order at ¶ 20. This ignores the fact that less than a year earlier, the United States Supreme Court denied a

[7] These issues are again before the Tenth Circuit in the Northern Arapaho Tribe's appeal of Judge Brimmer's ruling in 660 F. Supp. 2d 1264. *See Northern Arapaho Tribe v. Harnsberger*, No. 09-8098.

petition for a writ of certiorari from *Yellowbear* from the decision of the Tenth Circuit on the diminishment question *Yellowbear v. Salzburg*, 131 S. Ct. 1488 (2011). In sum, the Wyoming Supreme Court and the Tenth Circuit *both* agree that the ceded portions of the Reservation have been diminished and are no longer part of Indian country.

86. Judge St. Clair also erred by concluding that because the Tribes are the beneficial owners of the subsurface mineral estate below Well No. 19-24, and the mineral estate is "dominant over ownership interests in the surface," the Tribes' beneficial interest in the mineral estate could be used as a basis to assert Tribal civil regulatory jurisdiction over the surface estate. Exh. A, Order at ¶ 22.

87. As a matter of law, Judge St. Clair may not rely on mineral estate dominance to assert such jurisdiction over Encana. None of the operative facts in this case occurred within the boundaries of the Reservation, and the Tribes may not extend jurisdiction over non-Indians simply because the United States holds mineral rights in trust for their benefit. Indeed, the Tenth Circuit addressed this issue in *Osage Nation*, 597 F.3d 1117, *see infra* note 10.

88. Paragraph 22 of the Order states that "[t]he Tribes also have an equitable interest in return of the surface estate to them pursuant to the Excess Property Act," but Judge St. Clair does not explain his reasoning or provide any further context on the applicability of the Excess Property Act. In any event, the Excess Property Act has no bearing whatsoever on Judge St. Clair's lack of civil adjudicatory authority over Encana.

89. More specifically, under the 1986 Excess Property Act, the U.S. General Services Administration ("GSA") is required to transfer, without consideration, excess real property

located within the reservation of any federally recognized Indian tribe to the Secretary of the Interior, to be held in trust for the benefit and use of a tribe. *See* 40 U.S.C. § 523 (2011). "Excess property" is "property under the control of a federal agency that the head of the agency determines is not required to meet the agency's needs or responsibilities." 40 U.S.C. § 102(3). The process to obtain property usually requires the preparation of a notice of availability for excess real property and the tribe's response that it is interested. *See* 40 U.S.C. § 521 (2011); *Shawnee Tribe v. United States*, 423 F.3d 1204, 1207 (10th Cir. 2005).

90. The Order asserts that the Tribes have an equitable interest in the surface estate's return under the Excess Property Act and that, in 1986, the Excess Property 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")." Exh. A, Order at ¶ 16. Despite Judge St. Clair's assertion that the Excess Property Act did not alter the Reservation status and that the Tribes are entitled to the surface estate's return under the Act, there was no evidence before Defendant that the Excess Property Act was intended to or does require the United States to transfer ownership of the Riverton Reclamation Project to the Tribes.

91. The Order does not indicate that the GSA ever issued a notice of availability for excess property or whether the Tribes followed any procedure for land acquisition under the Excess Property Act. More importantly, though, even assuming for argument's sake that the Excess Property Act's procedures had been followed by the Tribes with respect to the Reclamation lands at issue here, no such transfer would be required by the express terms of the

Excess Property Act itself. *See Shawnee Tribe v. United States*, 423 F.3d 1204 (10th Cir. 2005) (Excess Property Act does not support awarding former military installation within the original historical boundaries of Shawnee Reservation to the Tribe); *see also Skokomish Indian Tribe v. General Services Administration*, 587 F.2d 428 (9th Cir. 1978) (Skokomish Tribe had no vested interest in surplus Department of Agriculture property merely because it submitted an application for excess property).

92. Simply put, the Tribes do not hold an equitable interest in the surface estate that Judge St. Clair found they possessed under the Excess Property Act.

93. The Order also suggests that Encana's annual TERO agreements are a basis for the Tribal Court to assert extraterritorial jurisdiction. Exh. A, Order at ¶ 23 ("Plaintiff Jorgenson, who was placed originally at the worksite as a TERO trainee, is directly within that class of persons to whom provisions of the agreements regarding workplace safety apply."). TERO jurisdiction is strictly and appropriately limited to "employment practices ***on*** the Wind River Indian Reservation"; the Director of TERO and the TERO compliance officers may only inspect sites where employment is taking place "***upon*** the Wind River Indian Reservation." *See* Exh. R, 1/1/08 AGREEMENT BETWEEN THE EASTERN SHOSHONE AND NORTHERN ARAPAHO TRIBAL EMPLOYMENT RIGHTS OFFICE (TERO) & ENCANA OIL & GAS (USA) INC. (emphasis added). By definition, the accident location and well site are plainly not "on" or "upon" the Wind River Indian Reservation. Exh. H, Wilson Affidavit, ¶ 24.

94. Defendant St. Clair's finding that two contextual layers to the Estate's claims, alcohol use and workplace safety, would somehow justify the Tribal Court's exercise of civil jurisdiction, regardless where the alleged tortious conduct occurred, was likewise incorrect.

95. Taken together or separately, Judge St. Clair's erroneous and *ultra vires* actions are tantamount to an illegal and actionable exercise of extraterritorial Tribal Court jurisdiction on Encana.

96. Defendant continues to assert unbounded ability to impose multiple lengthy, costly and unwarranted proceedings on Encana including a jury trial on the Estate's claims, a second phase bench trial on some additional claims of the Tribes, and apparently participation in even more discovery, despite the fact that the discovery cut-off in the Tribal Court action passed on November 15, 2010. Exh. A-2.

Federal Law Basis for Encana's Claims

97. The Supreme Court first applied an implicit divestiture approach to disputes concerning Indian tribes' inherent civil authority in *Montana v. United States*, 450 U.S. 544 (1981). Extending its prior ruling that tribal courts lack any criminal jurisdiction over non-Indians, *Montana* declared that in civil cases, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 563-565.

98. *Montana* strictly limits Indian tribes' civil jurisdiction to the tribe's own members on tribal lands. "Neither *Montana* nor its progeny purports to allow Indian tribes to exercise

civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*." *Hornell Brewing Co. v. Rosebud Sioux Tribe*, 133 F.3d 1087, 1091 (8th Cir. 1998) (emphasis in original). "The mere fact that a member of a tribe or a tribe itself has a cultural interest in conduct occurring outside a reservation does not create jurisdiction of a tribal court under its powers of limited inherent sovereignty." *Id.*; *see also Plains Commerce Bank*, 128 S.Ct. at 2721 ("*Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests") (underlined emphasis supplied, italicized emphasis in original); *MacArthur v. San Juan County*, 2000 U.S. Dist. LEXIS 22792, *13 (D. Utah, Dec. 12, 2000) ("It is well-established that a tribe's jurisdiction will not extend to non-Indian conduct beyond the reservation's borders"); *BNSF Railway Co. v. Tsosie*, No. CV-05-0386-PHX-DGC (D. Ariz. 2006) ("*Montana* stands for the proposition that, absent express authorization by federal statute or treaty, tribal courts lack jurisdiction over activities of non-tribal members on non-tribal land"), hereto Exh. S.

99. *Montana* provides two narrow exceptions to the general rule that Indian tribes lack civil jurisdiction over non-members on tribal lands:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that 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 565-566.

100. The lands at issue here are a federal enclave outside the exterior boundaries of the Reservation, where *Montana* does not permit the Tribes to exercise any civil jurisdiction whatsoever. Yet, even assuming the federal enclave is somehow within Indian country, the two so-called *Montana* exceptions do not apply. Encana has *never* expressly consented to the civil jurisdiction in Tribal Court with respect to any off-Reservation activities. *Montana,* 450 U.S. at 565.

101. Nor can Encana's consent to tribal jurisdiction somehow be inferred from its willingness to comply with TERO or receive governmental services, if any, from Tribal government. In *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), the Court held that the Navajo Nation lacked civil jurisdiction to levy a tax on non-member guests of a hotel located on fee lands within the exterior boundaries of the Navajo Indian Reservation. The Court rejected the argument that the Navajo Nation had satisfied *Montana*'s "consensual relationships" exception by providing various governmental services, including frequently used emergency response services, to the petitioner hotel and its guests, finding "the generalized availability of tribal services patently insufficient to sustain the Tribe's civil authority over nonmembers on non-Indian fee land." *Id.* at 655. Notably, the governmental services provided by the Navajo Nation to the hotel were far more comprehensive than any in the case at bar.

102. Additionally, the Court rejected the non-member's compliance with a general licensing regime as sufficient to establish as consensual relationship:

> *Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself. In *Strate*, for example, even though respondent A-1 Contractors was on the reservation to perform landscaping work for the Three Affiliated Tribes at the time of the accident, we nonetheless held that the Tribes lacked adjudicatory authority because the other nonmember "was not a party to the

> subcontract, and the Tribes were strangers to the accident." 520 U.S. at 457 (internal quotation marks and citation omitted). A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another -- it is not "in for a penny, in for a Pound." E. Ravenscroft, The Canterbury Guests; Or A Bargain Broken, act v, sc. 1.[8]

103. The *Atkinson* Court also held the Navajo Nation's hotel occupancy tax as applied to non-members on non-Indian fee lands within the reservation boundaries was not justified under *Montana*'s second exception. Acknowledging that the hotel was located within a part of the Navajo Reservation that possessed "an overwhelmingly Indian character,"[9] the Court stated that it nevertheless "fail[ed] to see how petitioner's operation of a hotel on non-Indian fee land 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" 532 U.S. at 657 (quoting *Montana*, 450 U.S. at 566). The Court ruled that "unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands." 532 U.S. at 657-658 n.12 (quoting *Montana,* 450 U.S. at 566). The Court's most recent *Montana* doctrine case, *Plains Commerce Bank,* further limits the applicability of the second *Montana* exception to extreme circumstances:

> The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' "conduct" menaces the "political integrity, the economic security, or the health or welfare of the tribe." *Montana, 450 U.S, at 566, 101 S. Ct. 1245, 67 L. Ed. 2d 493.* The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community.

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[8] 532 U.S. at 656. The quoted reference to "*Strate*" refers to *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).
[9] *Id.* at 657.

128 S.Ct. at 2726 (holding that disposition of land that had been alienated from tribe for 50 years was plainly not "catastrophic" to tribal self-government sufficient to trigger application of the second *Montana* exception). No such catastrophe is present here, where Encana is operating *outside* of the Tribes' reservation on non-tribal federal public lands.

104. Yet again assuming *arguendo* that the lands at issue in this case are somehow deemed to be within Indian country, Defendant still lacks civil jurisdiction over Encana as a non-Indian. *See Strate*, 520 U.S. 438 (Indian tribes lack civil jurisdiction over non-Indians on state highway right-of-way). Importantly, the *Strate* Court held that "[a]s to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." 520 U.S. at 453. Accordingly, Defendant may not assert jurisdiction over a non-Indian company that the Tribes lack any power to regulate.

105. Even if the land at issue were somehow to be treated as Indian trust land, the Tribes still lack civil adjudicatory jurisdiction over Encana, whose actions cannot reasonably be characterized as potentially "catastrophic" to tribal government as required by *Plains Commerce Bank* in order for the second *Montana* exception to apply. In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Supreme Court declared even tribal ownership of land is merely "one factor to consider" in judicially determining whether an exercise of tribal governing authority over nonmembers "is 'necessary to protect tribal self-government or to control internal relations.'" 533 U.S. at 360.

106. Add to this the fact that the Reservation lands at issue in this case have been diminished by Congress. Diminishment occurs when the original treaty-based boundaries of a

reservation have been reduced by subsequent agreements or treaties, or by unilateral Congressional Acts. *See e.g., South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789, 798 (1998) (holding that congressional intent justified diminishment of the Yankton Sioux Reservation); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (holding the Rosebud Sioux Reservation had been diminished); *DeCoteau v. District Court*, 420 U.S. 425 (1975) (finding congressional intent to terminate the Lake Traverse Indian Reservation and return lands to public domain). *Montana* and its progeny reinforce the reality that, in addition to diminishment, the Tribes lack any civil regulatory or adjudicatory jurisdiction over Encana.[10]

107. Lastly, only lands set aside for the benefit of Indians may constitute Indian country susceptible to tribal jurisdiction. *See* Exh. T, Brief of the United States in Opposition to Petition for Writ of Certiorari in *Daugaard v. Yankton Sioux Tribe*, No. 10-931 (May 2011). As a matter of federal law, the definition of Indian country is a matter for the United States government to determine, not Indian tribes themselves.

108. In this vein, two United States District Courts have recently addressed the limitations of tribal jurisdiction over non-members. First, in *Fife v. Moore*, the United States District Court for the Eastern District of Oklahoma, the Petitioners, members of the Muskogee (Creek) Nation, sought a temporary restraining order and preliminary injunction to enjoin criminal trials set to begin in the District Court of the Muscogee (Creek) Nation. -- F.Supp.2d --, 2011 WL 1533147 (E.D. Okla. April 22, 2011). It was undisputed, as it is in the instant case,

[10] Additionally, the Tenth Circuit has recently confirmed that retention of the tribal mineral estate is insufficient to overcome reservation diminishment. *Osage Nation*, 597 F.3d 1117 (reviewing language identical to the 1905 Act and concluding congressional intent to diminish).

that the situs of the alleged crimes was not trust land. The tribe asserted that it possessed the authority to define Indian country and argued that the Muskogee (Creek) Nation Criminal Act provided for the prosecution on Indians "regardless of the geographical location of any act or omission." *Id.* at *3. The Petitioners countered, and the court agreed, that a tribe may not define Indian country for itself, but must proceed consist with relevant federal statute and congressional action. *Id.* (citing the definition of Indian country in 18 U.S.C. § 1151).

109. In a second case addressing tribal jurisdiction, *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe*, the United States District Court for the Northern District of Iowa held that a tribal court could not exercise jurisdiction over the Tribe's claim against a non-Indian company for conversion of tribal funds because the tribe failed to make any allegation that this conduct occurred within the relevant geographical boundaries. -- F.Supp.2d --, 2011 WL 3648551, at *10 (N.D. Iowa Aug. 19, 2011). As the court explained, federal cases only "permit tribal regulation of nonmember conduct *inside the reservation* that implicates the tribe's sovereign interests" *Id.* (emphasis in original) (citing *Plains Commerce Bank*, 554 U.S. at 332).

110. Finally, it is a matter of public record that the United States government asserts *daily* that the Riverton Reclamation Project is located outside Indian country, "in central Wyoming in Fremont County on the ceded portion of the Wind River Indian Reservation." United States Bureau of Reclamation, Riverton Unit Project Details Summary, *http://www.usbr.gov/projects/Project.jsp?proj_Name=Riverton%20Unit* (last visited Jan. 30, 2012).

111. In sum, Defendant may not assert civil adjudicatory jurisdiction over Encana as a non-Indian company operating outside federally-recognized Indian country. The lands at issue are diminished. Neither of *Montana's* two narrow exceptions applies. And federal law provides no other coherent basis for subjecting Encana to a trial that Defendant seeks to conduct on a non-Indian for an alleged tort which occurred outside the Tribes' own boundaries.

CLAIMS FOR RELIEF

Count One: Declaratory Relief

112. Encana realleges and incorporates by reference each of the preceding paragraphs.

113. Pursuant to 28 U.S.C. § 2201, this Court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

114. As set forth herein, Encana and Defendant have an actual controversy regarding Defendant's assertion of civil adjudicatory jurisdiction with respect to wrongful death claims brought against Encana.

115. Encana is entitled to, and requests, a declaratory judgment regarding the propriety of Defendant's assertion of civil adjudicatory jurisdiction over the wrongful death claims brought against Encana by the Estate, as well as the claims in intervention brought by the Tribes.

116. Specifically, Encana requests, and is entitled to, a ruling that Tribal Court jurisdiction over the claims against Encana violates United States Supreme Court precedent. The Reservation has been diminished, so that the lands in question clearly fall outside its exterior boundaries and are not part of federally recognized Indian country. Moreover, Defendant is

powerless to assert civil jurisdiction over Plaintiff, a non-Indian corporation. As discussed above, neither of the two narrow exceptions provided in *Montana*, which holds that Indian tribes lack any civil jurisdiction over non-Indians, apply here.

117. Pursuant to 28 U.S.C. § 2202, "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

118. Encana seeks that the Court declare:

(1) at a bare minimum, tribal civil adjudicatory jurisdiction is coextensive with tribal civil regulatory jurisdiction (*Strate*);

(2) inherent sovereign powers of the Tribes do not extend to the activities of nonmembers of the tribe (*Strate*);

(3) the Tribes are without inherent authority to regulate outside the boundaries of the Reservation (*Montana*) and are therefore without adjudicatory authority with respect to events occurring outside the Reservation (*Strate*);

(4) No nexus exists between either Encana's on-Reservation consensual relationships, and the alleged off-Reservation conduct (*Atkinson Trading*) and consequently, Encana's on-Reservation activities cannot give rise to extraterritorial Tribal Court jurisdiction based on *Montana's* first exception;

(5) If actual disposition of land alienated from a tribe for 50 years is insufficient to trigger the second *Montana* exception, a single vehicle accident on lands alienated from the Tribes for more than 100 years cannot serve as such a trigger (*Plains*

Commerce, 128 S.Ct. at 2723 ("While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations"));

(6) Encana has exhausted its Tribal Court remedies on subject-matter jurisdiction; and

(7) The Tribal Court lacks jurisdiction over the claims raised by the Estate and the claims in intervention asserted by the Northern Arapaho Tribe and Eastern Shoshone Tribe, as part and parcel of the Estate's Claims.

119. The Court is requested to grant Encana any such "further necessary or proper relief," as appropriate.

Count Two: Injunctive Relief

120. Encana realleges and incorporates by reference each of the preceding paragraphs.

121. As set forth above, Encana is likely to succeed on the merits of its claim for declaratory relief because Defendant's assertion of civil regulatory authority over Encana with respect to the Estate's claims, and the Tribes' claims in intervention, violate United States Supreme Court and Tenth Circuit precedent.

122. Unless Defendant is enjoined from further assertion of jurisdiction over Encana with respect to the Estate's claims, Encana will suffer irreparable harm, and has no adequate remedy at law. *See Rolling Frito-Lay Sales LP v. Stover*, 2012 U.S. Dist. LEXIS 9555, *16 (D. Ariz. Jan. 26, 2012) (being subjected to potentially lengthy and costly litigation in tribal court without jurisdiction satisfied irreparable harm requirement; damages action against plaintiff

wrongfully asserting tribal court jurisdiction not only inadequate, but also likely unavailable so no adequate remedy at law).

123. The balance of hardships tips sharply in favor of Encana. *Id.* at *17 (granting injunction against tribal court action without jurisdiction does not prevent litigants from pressing claims in courts of competent jurisdiction).

124. Public policy favors the issuance of an injunction. *Id.* ("public interest is not advanced by having a court that lacks jurisdiction determine a party's legal rights").

125. Based on the foregoing, Encana is entitled to preliminary and permanent injunctive relief, barring Defendant from further asserting civil adjudicatory jurisdiction over Encana with respect to the Estate's claims and the Tribes' ancillary claims in intervention, including but not limited to enjoining Defendant from implementing any of the burdens outlined in Defendant's January 27, 2012 Order (Exh. A-2), such as ordering Encana to participate in any additional discovery, requiring Encana to appear at the March 5, 2012 Scheduling Conference, or demanding Encana's participation in both a jury trial and a bench trial on the merits.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Defendant, as follows:

(a) For declaratory relief, as set forth herein;

(b) For preliminary, and permanent injunctive relief, as set forth herein; and

(c) For any further, necessary, or proper relief that the Court deems appropriate.

REQUEST FOR SERVICE TO BE MADE BY APPOINTED U.S. MARSHAL OR DEPUTY MARSHAL OR BY A PERSON SPECIALLY APPOINTED BY THE COURT

Pursuant to Rule 4(c)(3) of the Federal Rules of Civil Procedure, Plaintiff hereby respectfully requests that the Court order that service of this Complaint be made by a United States marshal or deputy marshal or other person specially appointed by the Court. Plaintiff makes this request out of respect for Defendant's office and to ensure that there can be no doubt about the authority of the individual effectuating service upon Defendant to do so. Such an appointment would be in the interests of efficiency and justice. Plaintiff is willing to reimburse the U.S. marshal or other person appointed to effectuate service for his or her travel expenses and the value of his or her professional services rendered in the course of effectuating service upon Defendant. A separate Request document and proposed order on this issue are being filed contemporaneously herewith.

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DATED this 6th day of February 2012.

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