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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiff Encana Oil & Gas (USA) Inc. ("Encana") moves this Court for a preliminary injunction to prevent Defendant Judge St. Clair from continuing to improperly assert civil adjudicatory jurisdiction over Encana, thereby subjecting Encana to lengthy, costly, and unwarranted proceedings in Tribal Court in contravention of federal law.

U.S.D.C.L.R. 7.1 CERTIFICATION

The undersigned has conferred with Defendant orally, by telephone, and by email. Encana filed its Complaint in this matter on February 6, 2012. Thereafter, Plaintiff took

steps to serve the Complaint upon Defendant as quickly as possible. (Doc. No. 6). As soon as Plaintiff learned that service had been accomplished on February 7, 2012, the undersigned called Defendant at his office number and left a message with the Clerk of the Tribal Court, Ms. Katrina Washakie. The undersigned also emailed Defendant at his usual business email address to request to confer regarding this Motion. *See* **Exh. 1** hereto. The undersigned spoke with Judge St. Clair at 1:45 p.m. on Thursday, February 9, 2012. Judge St. Clair told the undersigned he felt he should not vacate the March 5, 2012 scheduling conference in Tribal Court, nor should he agree to not hold a trial in the *Jorgenson v. Encana/DHS* case until this Court rules on the merits of this case. Defendant Judge St. Clair also sent the undersigned an email in this same vein. **Exh. 2** hereto. The undersigned advised Defendant that he would file this Motion forthwith, and pledged to both e-mail and mail a copy of this Motion to Defendant. The undersigned also advised Defendant that he would inform him as to any hearing date and time that this Court may set for the hearing/oral argument on this Motion. Finally, Defendant advised the undersigned that he delivered the Complaint in this matter to the Joint Business Council ("JBC") yesterday morning seeking legal representation in this case.

Because of Defendant's unwavering views regarding his authority over Encana, as demonstrated in Encana's Complaint at paragraphs 1-2, 25, 72-95 and Exhibits A-1 and A-2 thereto, and Defendant's indication in his February 9 telephone conference with the undersigned and in his email message (**Exh. 2**), that he would not agree to stay Tribal Court proceedings, Encana understands that Defendant opposes this Motion.

SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Defendant is the Chief Judge of the Tribal Court for the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation ("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") where all the events relative to the litigation occurred on federal public lands that are not part of the Wind River Indian Reservation. *See* Complaint, ¶ 1 and Exhibit A thereto (A-1, *Order of the Court Regarding Jurisdiction*, and A-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 outside Tribal lands on public roads maintained by Fremont County and on federal lands where Encana was present by virtue of a federal oil and gas lease from the United States Bureau of Land Management. Complaint, ¶¶ 1, 12, 16, 18, 32. 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.

Despite the substantial body of federal law supporting motions to dismiss and for summary judgment based on lack of subject-matter jurisdiction presented by Encana to Defendant in briefing over several years, Defendant has evinced his total refusal to "accept the limitations imposed on tribal jurisdiction" by federal law. *Compare* Complaint Exhibit A-1 *with Rolling Frito-Lay Sales LP v. Stover*, 2012 U.S. Dist. LEXIS 9555, *16 (D. Ariz. Jan. 26, 2012) (awarding preliminary injunction against continued tribal court litigation activity where there was no jurisdiction over non-Indian defendant). Defendant's continuing improper assertion of authority over Encana is *ultra vires* and therefore actionable in this Court. *Ex Parte Young*, 209 U.S. 123 (1908); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011) ("there is an established 'federal right to be protected against the unlawful exercise of Tribal Court judicial power'")(quoting *MacArthur v. San Juan County*, 309 F.3d 1216, 1225 (10th Cir. 2002)); *accord Burlington N. R.R.. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991) ("tribal sovereign immunity does not bar suit from prospective relief against tribal officers allegedly acting in violation of federal law").

It is appropriate at this time for this Court to enjoin any further violation of federal law by Defendant because Encana has exhausted its Tribal Court remedies as required by *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). Defendant's December 20, 2011 Order denying Encana's Motion for Summary Judgment for Lack of Subject-Matter Jurisdiction is a

final order that may not be appealed and thus constitute the Tribal Court's final word on subject-matter jurisdiction over the Tribal Court action.[1]

Ongoing violation of federal law is plainly Defendant's intent. In his January 27, 2012 Order, served by mail on Encana on January 30, 2012, 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. Complaint, Exh. A-2. Defendant's January 27 Order is outside the scope of his authority. The March 5, 2012 Scheduling Conference set by Defendant is outside the scope of his authority. A jury trial on the Estate's claims is outside of his authority, as is a bench trial on some or all of the Tribes' claims. *Any* action Defendant might take vis-à-vis Encana in the Tribal Court action is outside the scope of his authority. Accordingly, Encana respectfully moves that this Court grant preliminary injunctive relief restricting any further proceedings in the Tribal Court action to prevent irreparable harm to Plaintiff, namely the improper imposition of lengthy and costly trial, or trials, in a forum without jurisdiction.

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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* Complaint, 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).

FACTUAL BACKGROUND

Encana is a non-Indian, Delaware corporation with its principal place of business in Denver, Colorado. Complaint, ¶ 3. Encana is the lessee of record for various mineral leases situated in the Wind River Basin, both within and outside the boundaries of the Wind River Indian Reservation. *Id.*, ¶¶ 11-12 and Exh. G thereto. One of those leases is lease number W-024513, entered into by the United States Department of the Interior Bureau of Land Management, and Encana's predecessor in 1953. Complaint, Exh. G. This case arises out of events that took place on January 1, 2009 on that leasehold and surrounding federal public lands that are not part of the Wind River Indian Reservation or Indian country. Complaint, ¶¶ 10, 35-60, 109.

On that date, Jeremy Jorgenson ("Jorgenson") reported to work as a floor-hand for DHS Drilling Company ("DHS"), a company engaged to provide contract drilling services for Encana on DHS Rig No. 17. *Id.*, ¶ 11. Rig No. 17 was in operation at an Encana well governed by the 1953 lease, known as Tribal Muddy Ridge 19-24B-M ("Well No. 19-24"), located at Township 4 North, Range 3 East in Section 19 of Fremont County, Wyoming. *Id.*, ¶¶ 11-12. After reporting to work on at Well No. 19-24 that day, Jorgenson drank alcohol to the point that he became intoxicated, then left work in his personal automobile despite unsuccessful attempts by on-site colleagues to stop him, and ultimately lost control of his vehicle, wrecked and was ejected causing his death. *Id.*, ¶¶ 14, 15, 17.

The road Jorgenson traveled when he left the worksite, 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. *Id.*, ¶ 16. Jorgenson's vehicle and body came to rest approximately forty feet from Tunnel Hill Road, on United States Bureau of Reclamation lands. *Id.*, ¶ 18. Only non-Indian governmental entities responded to the accident scene. *Id.*, ¶ 21. All of the relevant events to the Tribal Court action thus occurred exclusively on lands not owned or controlled by the Tribes in any way, as is clear from the plain language of federal statutes addressing those lands, the legislative history of those statutes, and from the sworn testimony of various experts. *See* Complaint, ¶¶ 35-60 and Exhibits E-2-B, E-2-F, and H thereto.

After initially pursuing wrongful death litigation solely against DHS, the Estate sued Encana in Tribal Court on October 19, 2009. Complaint, ¶¶ 22-23 and Exh. C thereto. From the outset of the Tribal Court action, Encana maintained that the exercise of jurisdiction by the Defendant was prohibited by federal law. Complaint, ¶ 24. Nonetheless, acting in good faith and with respect for the Tribal Court, Encana proceeded to exhaust its Tribal Court remedies, and provided the Tribal Court the opportunity, in the first instance, to reach the proper decision with respect to jurisdiction. *See* Complaint Exh. E. Regrettably, Defendant resolved the question of the Tribal Court's subject-matter jurisdiction erroneously on December 20, 2011. Complaint, Exh. A-1. On January 27, 2012, Defendant took his first post-exhaustion-of-tribal-remedies action against Encana and issued his Order Setting Scheduling Conference wherein he evinced his intent to subject Encana to a panoply of additional Tribal Court proceedings. Complaint, Exh. A-2.

ARGUMENT

A. PRELIMINARY INJUNCTION FACTORS

To obtain a preliminary injunction, the moving party must demonstrate: (i) a likelihood of success on the merits; (ii) a likelihood that the moving party will suffer irreparable harm absent a preliminary injunction; (iii) that the balance of equities tips in the moving party's favor; and (iv) that an injunction is in the public interest. *Winter v. Nat'l Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008); *Chamber of Commerce v. Edmonson,* 594 F.3d 742, 764 (10th Cir. 2010). Here, each of these factors favors the issuance of an injunction in favor of Encana. Additionally, injunctive relief is especially proper where, as here, a party has been improperly subjected to Tribal Court proceedings. *Crowe & Dunlevy*, 640 F.3d at 1158; *Rolling Frito-Lay*, 2012 U.S. Dist. LEXIS 9555, *16.

B. ENCANA HAS SATISFIED EACH OF THE PREREQUISITES FOR INJUNCTIVE RELIEF.

1. <u>There Is a Substantial Likelihood That Encana Will Prevail on the Merits of Its Claims.</u>

Where a tribal court plainly lacks jurisdiction over a non-Indian, the non-Indian's "probability of success on the merits is without question." *Crowe & Dunlevy*, 640 F.3d at 1158. And the lack of Tribal Court jurisdiction over Encana could not be more clear. As detailed in Encana's Complaint, it is a matter of hornbook federal law that there is no tribal court jurisdiction over non-Indian defendants with regard to conduct outside an Indian reservation that does not implicate a tribe's ability to continue to exist or govern itself. *See Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors*, 520

U.S. 438 (1997); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008). The United States Supreme Court's seminal cases on tribal civil jurisdiction -- *Montana*, *Strate*, *Atkinson Trading, Hicks*, and *Plains Commerce Bank* -- have been universally interpreted exactly as Encana has set forth in its Complaint at paragraphs 96-108. *See* Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, §§ 7.01, 7.02 (2005 ed. & Supp. 2009). The very limited boundaries of tribal jurisdiction prescribed by the Supreme Court's precedents apply with equal force in the context of preliminary injunctions issued against tribal courts improperly asserting jurisdiction over non-Indians. *Crowe & Dunlevy*, 640 F.3d at 1158; *Rolling Frito-Lay*, 2012 U.S. Dist. LEXIS 9555, *16.

a. <u>The Defendant has no civil adjudicatory jurisdiction over the non-Indian Encana.</u>

There is a strong presumption against tribal jurisdiction over non-Indians. This presumption has become only clearer and stronger since the Supreme Court first extended its implicit divestiture jurisprudence to the civil context with *Montana* in 1981:

> The Court's most recent pronouncement leaves no ambiguity. The Court said that "tribes do not, as a general matter, possess authority over non-Indians who come within their borders," *Plains, 554 U.S. at 328, 128 S. Ct. at 2718*, and that "the general rule [of *Montana* . . .] restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians." *Id. at 328, 128 S. Ct. at 2719* (emphasis added). If there were any doubt about this, the Court then relied on Montana's general proposition to state that "efforts by a tribe to regulate nonmembers,

> especially on non-Indian fee land, are 'presumptively invalid.'" *Id. at 330, 128 S. Ct. at 2720.*

Rolling Frito-Lay, 2012 U.S. Dist. LEXIS 9555, *7-8 (quoting *Plains Commerce Bank*).

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. Of course there has been no such congressional delegation to the Tribes here. Moreover, "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)

But even 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 because it is the Bureau of Reclamation that controls the subject lands. *See Strate*, 520 U.S. 438 (Indian tribes lack civil jurisdiction over non-Indians on state

highway right-of-way). This is because 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 adjudicative jurisdiction over a non-Indian company that the Tribes lack any corresponding power to regulate. Indeed, regulation of Encana at Township 4 North, Range 3 East in Section 19 of Fremont County, Wyoming lies exclusively with the United States. In juxtaposition, "a tribal court's power is limited to that which is needed to (1) protect self-government, and (2) 'control internal relations.'" *Rolling Frito-Lay*, 2012 U.S. Dist. LEXIS 9555, *10 (quoting *Montana*, 450 U.S. at 564).

b. Neither of the *Montana* exceptions justifies the Defendant's continued exercise of civil adjudicatory jurisdiction over Encana.

Montana provided two narrow exceptions to the general rule that Indian tribes lack civil jurisdiction over non-members on tribal 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. Neither applies here. The lands at issue here are a federal enclave not part of the Reservation, where *Montana* permits the Tribes no civil jurisdiction whatsoever. Yet, even assuming the federal enclave is somehow within Indian country, the two *Montana* exceptions do not apply because Encana has *never* expressly consented to the civil jurisdiction in Tribal Court with respect to any off-Reservation activities and

Encana's consent to tribal jurisdiction over off-Reservation activities cannot somehow be inferred from its willingness to comply with tribal policies or receive governmental services, if any, from Tribal government with respect to on-Reservation activities.

The Supreme Court's more recent cases clarify how very narrowly the Court views the *Montana* exceptions. In *Atkinson Trading*, 532 U.S. 645, 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.

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.

532 U.S. at 656. Therefore, Encana's compliance or not with tribal policies with respect to on-Reservation activities cannot give rise to a consensual relationship triggering the first *Montana* exception. This is because "consent alone is not enough." *Rolling Frito-Lay*, 2012 U.S. Dist. LEXIS 9555, *11. Rather, "the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 128 S. Ct. at 2724. No such characteristics may be ascribed to the Tribes' efforts to exert extraterritorial reach over Encana in the Tribal Court action and consequently, the first *Montana* exception does not apply.

The second *Montana* exception is likewise inapplicable to the instant case. The *Atkinson Trading* Court also held the Navajo Nation's hotel occupancy tax as applied to non-members on non-Indian fee lands within the reservation's exterior 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,"[2] 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

[2] *Id.* at 657.

566). Here, no tribal services were provided to investigate Jorgenson's accident, no tribal services were provided at Well No. 19-24, and nothing about Encana's operation of a gas well on federal public lands imperils the existence of either Tribe.

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.

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 all the relevant events took place *outside* of the Tribes' Reservation on non-tribal federal public lands. *See* discussion of historic diminishment of Wind River Indian Reservation, Complaint, ¶¶ 35-60 and *see* Affidavits of David Geible, Richard Inberg and Paul Wilson, Ph.D., Complaint Exhibits E-2-B, E-2-F, and H, respectively.

2. ENCANA WILL SUFFER IRREPARABLE INJURY WITHOUT A PRELIMINARY INJUNCTION.

A plaintiff satisfies the irreparable harm requirement by showing a "significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." *RoDa Drilling Co. v Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (internal quotation omitted). Without an order enjoining Defendant's further violation of federal law, Encana will most certainly suffer noncompensable harm by being forced to

"expend time money and effort . . . litigating" before a court without jurisdiction but which enjoys sovereign immunity from suits for damages. *Crowe & Dunlevy*, 640 F.3d at 1157; *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3D 1222, 1232 (10th Cir. 2010) (*Ex Parte Young* doctrine extends only to prospective injunctive relief and not to actions for money damages); *Feinerman v. Bernardi*, 558 F. Supp 2d 36, 51 (D. D.C. 2008) ("where . . . plaintiff in question cannot recover damages from the defendant due to the defendant's sovereign immunity, any loss of income suffered by plaintiff is irreparable *per se*"); *Kan. Health Care Ass'n Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) (sovereign immunity's presence as barrier to monetary recovery meets irreparable harm requirement).

Without a preliminary injunction, Encana would be unable to recoup the monies certain to be expended further defending the Tribal Court action with respect to the additional discovery, Scheduling Conference, and jury and bench trials anticipated in Defendant's January 27, 2012 Order. Complaint Exh. A-2. Given the virtually unlimited scope of Tribal Court proceedings contemplated by Defendant (*Id.*), Encana would be irreparably harmed by the loss of significant sums required to defend itself in a forum without jurisdiction. *Rolling Frito-Lay*, 2012 U.S. Dist. LEXIS 9555, *16.

3. THE INJURY TO ENCANA OUTWEIGHS ANY *DE MINIMUS* INCONVENIENCE THE REQUESTED INJUNCTIVE RELIEF MIGHT CAUSE DEFENDANT.

Any inconvenience that Defendant may experience as a result of the issuance of injunctive relief is greatly outweighed by the harm that will inure to Encana in the absence of this remedy. Defendant will be only minimally impacted, if at all, by the

issuance of an injunction. Specifically, the injunctive relief Encana seeks will only require Defendant to comply with federal law. Compliance with federal law cannot be the basis of any inconvenience to Defendant. Nor could requiring him to refrain for exercising jurisdiction that he does not have be inconvenient for Defendant. *Id.* at *16-17 (an injunction "will simply remove plaintiff's burden of defending itself in an improper forum"). Thus, this factor also supports the issuance of a preliminary injunction.

4. A PRELIMINARY INJUNCTION IS NOT CONTRARY TO THE PUBLIC INTEREST.

The granting of the injunctive relief sought by Encana will not offend the public interest. To the contrary, the issuance of a preliminary injunction will serve the public interest because it would protect well-established rights provided under federal law. The improper exertion of tribal authority over a non-consenting non-Indian is always at odds with the public's interest. *Crowe & Dunlevy*, 640 F.3d at 1158; *see also Rolling Frito-Lay*, 2012 U.S. Dist. LEXIS 9555, *17 ("the public interest is not advanced by having a court that lacks jurisdiction determine a party's legal rights").

CONCLUSION

Encana has demonstrated all the predicate factors for entry of a preliminary injunction against Defendant precluding any further violations of federal law by him.

Respectfully submitted this 10th day of February 2012.

s/ Patrick J. Murphy
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COUNSEL FOR PLAINTIFF ENCANA OIL & GAS (USA) INC.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the following Plaintiff's ***Motion for Preliminary Injunction*** was delivered to the Court via the CM/ECF System and served upon counsel via U.S. Mail and electronic transmission this 10th day of February, 2012.

Honorable John St. Clair
SHOSHONE AND ARAPAHO TRIBAL COURT
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/s/Patrick J. Murphy
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