Patrick J. Murphy (#5-1779)
Scott P. Klosterman (#6-3081)
WILLIAMS, PORTER, DAY & NEVILLE, P.C.
159 North Wolcott, Suite 400
P.O. Box 10700
Casper, WY 82602-3902
Telephone: (307) 265-0700
Facsimile: (307) 266-2306
E-Mail: pmurphy@wpdn.net
sklosterman@wpdn.net

Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF WYOMING**

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

---

**ENCANA'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

---

Plaintiff Encana Oil & Gas (USA) Inc. ("Encana") opposes the Defendant's Motion to Dismiss predicated on the allegation that Encana has failed to exhaust its Tribal Court remedies. In fact, Encana has exhausted its Tribal Court remedies through extensive summary judgment and supplemental briefing to Defendant over a period of years, as well as through unsuccessful efforts to secure the review of Defendant's orders by the Shoshone and Arapaho Court of Appeals. Defendant's December 20, 2011 Order (Complaint Exhibit 1) is the Tribal Court's

final word on subject-matter jurisdiction before Encana would be forced to spend significant unrecoverable sums defending itself against additional discovery and in various proceedings, including two separate trials anticipated by Defendant -- all in a forum without jurisdiction. The exhaustion rule -- as a rule of comity -- is not a doctrine that requires a litigant to suffer the loss of the very federal right it seeks to protect. No further Tribal Court exhaustion is required under the United States Supreme Court's precedents. And even if the Supreme Court's case law prescribed that Encana had to proceed through two trials in a Tribal Court that lacks jurisdiction before Encana could be deemed to have exhausted its tribal remedies, the futility exception to exhaustion applies in this case. Accordingly, there is no basis for dismissal.

## I. IF THE TRIBAL EXHAUSTION RULE APPLIES, ENCANA'S EXTENSIVE DEVELOPMENT OF THE RECORD ON JURISDICTION BEFORE THE TRIBAL COURT HAS SATISFIED ANY REQUIREMENT TO EXHAUST.

United States Supreme Court exhaustion policy provides a tribal court the first opportunity to examine its own jurisdiction. *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). The Court's precedent indicates that exhaustion "is required as a matter of comity, not as a jurisdictional prerequisite .. and instead is "analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)." *Iowa Mut.*, 480 U.S. at 16 n.8. The doctrine of comity/abstention must be interpreted narrowly in light of the "virtually unflagging obligation of federal courts to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817. And here, the Supreme Court and the Tenth Circuit have recently reaffirmed the predicate for this Court's jurisdiction, to which its "virtually unflagging" *Colorado River* obligations attach:

- Whether a tribal court has "adjudicative authority over nonmembers is a federal question." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2716 (2008).
- "[T]here is an established 'federal right to be protected against the unlawful exercise of Tribal Court judicial power'" and thus unlawful exercise of tribal civil jurisdiction, as an ongoing violation of federal common law is actionable under *Ex Parte Young*, 209 U.S. 123 (1908). *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)).

Three specific "comity concerns" are advanced by proper application of the exhaustion rule and should be considered as this Court evaluates its "virtually unflagging" obligation to resolve the federal question before it. These comity concerns include: "(1) furthering congressional policy of supporting tribal self-government; (2) promoting the orderly administration of justice by allowing a full record to be developed in the tribal court; and (3) obtaining the benefit of tribal expertise if further review becomes necessary." *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1507 (10th Cir. 1997)(citing *Nat'l Farmers Union*, 471 U.S. at 856-857). With the extensive record on subject-matter jurisdiction developed before the Tribal Court (*see* Complaint Exhibits E, F, and Q (compilation exhibits showing some parts of the tomes of material submitted to the Tribal Court)), any comity accommodations that needed to be afforded to the Tribal Court to first answer the federal question presented by this case have been more than met. Encana and all the other parties to the Tribal Court proceedings submitted hundreds of pages of material to Judge St. Clair, including on Encana's part, unrefuted expert

testimony establishing that all events relevant to the litigation occurred within a federal enclave dedicated to federal public works that has been out of Tribal ownership and control since 1905.

The Tribal Court ruled (albeit accidentally) on Encana's Motion for Summary Judgment for Lack of Subject-Matter Jurisdiction on February 24, 2011. On that date, Defendant signed a proposed order prepared by the Estate that included language denying all jurisdictional motions. Exhibit A hereto. That denial of Encana's jurisdictional motion came after Defendant had set the parties to a supplemental briefing schedule and calendared an evidentiary hearing on jurisdictional matters. In other words, Defendant ruled on the Motion in the middle of the additional briefing and submissions he had directed the parties to make to him on the jurisdictional issues. Recognizing the apparent clerical error, Encana made an emergency motion for reconsideration and emailed and called Defendant seeking clarification. Receiving no such clarification within the timeframe required to appeal the denial of its motion, Encana appealed Defendant's denial of its jurisdictional motion and detailed the circumstances to the Shoshone and Arapaho Court of Appeals, which declined to consider that matter or any of the other orders with respect to which Encana appealed. Eventually, Defendant indicated he had not meant to deny Encana's motion for summary judgment on jurisdictional grounds in his February 24, 2011 Order and he later directed even more submissions by the parties on jurisdictional issues. Exhibit B (Sept. 2011 Order directing last submission by Oct. 7, 2011).

Thus, all three comity considerations have been satisfied. The Tribal Court had ample time and material before it in the exercise of its governmental powers. The record was very fully developed. *See e.g.*, Complaint Exhibits E, F, and Q. And Defendant, the Chief Judge of the Tribal Court with dozens of years on the bench, rendered a very lengthy and thorough opinion on subject-matter jurisdiction on December 20, 2011. Therefore, there are no materials or

arguments that have not been considered by the Tribal Court. There is no more Tribal expertise to be brought to bear on this issue; the Shoshone and Arapaho Court of Appeals had made clear it will not entertain any appeal of any issues before there is a judgment in the case following trials on the merits. The Tribal Court was afforded the opportunity to make an initial determination regarding the existence of tribal jurisdiction over the case. That is all the exhaustion that is required. *See 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).

The expansive opportunity to review jurisdiction undertaken in the Tribal Court on summary judgment motions in the Estate litigation is vastly different than the cases cited by Defendant in which litigants sought federal court review following -- at most -- motions to dismiss in tribal court.

## II. ENCANA IS NOT REQUIRED TO FURTHER EXHAUST UNDER THE EXCEPTIONS TO THE RULE.

The exhaustion requirement[1] is subject to the following exceptions: (1) "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,'" *Nat'l Farmers Union*, 471 U.S. at 857 n.21 (2) "where the [tribal court] action is patently violative of express jurisdictional prohibitions," *id*.; (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction," *id*.; (4) "[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by [the main rule established in *Montana v. United States*, 450 U.S. 544 (1981)]," *Strate v. A-1 Contrs*., 520 U.S. 438, 459 n.14 (1997); or (5) it is otherwise clear that the

[1] "As a prudential rule based on comity, the exhaustion rule is not without exception." *Crowe & Dunlevy*, 640 F.3d at 1150.

tribal court lacks jurisdiction so that the exhaustion requirement "'would serve no purpose other than delay,'" *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (internal citation omitted). Several of these exceptions apply to the instant case.[2]

Express Jurisdictional Prohibition. As this Court recognized in *McDonald's Corp. v. Crazythunder* (Case No. 06-CV-180J), if an accident site at issue in litigation "is located outside the Reservation boundaries, then Tribal Court jurisdiction here would likely violate express jurisdictional prohibitions." Exhibit C, p. 11 (Order Denying Motion to Dismiss). That is exactly the circumstance here. As discuss more fully below, unrefuted expert testimony and review of the relevant federal acts demonstrate conclusively that Township 4 North, Range 3 East Section 19 of Fremont County, Wyoming is part of a federal enclave alienated from the Tribes since 1905. Mr. Jorgenson's accident occurred outside the Reservation and thus, Tribal Court jurisdiction is foreclosed. *Strate*, 520 U.S. at 442; *Montana*, 450 U.S. at 560, n.9 ("what is relevant . . . is the *effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land*") (emphasis added).

Moreover, the Court need not even reach the question of whether or not Township 4 North, Range 3 East Section 19 is part of the Reservation because the Tribes' jurisdiction over that parcel is foreclosed by the U.S. Supreme Court's controlling decision in *South Dakota v. Bourland*, 508 U.S. 679 (1993). In *Bourland*, the Supreme Court found that, regardless of what purpose land might be conveyed pursuant to an Act of Congress, "when Congress has broadly opened up such land to non-Indians [for federal public works], the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." 508 U.S. at 692. The bright-line rule enunciated in *Bourland* controls with equal force here. *See* section III, *infra*, regarding Acts

[2] Encana preserves the right to rely upon or assert other exceptions to the exhaustion requirement, as developed in the record for this case.

of Congress withdrawing Township 4 North, Range 3 East Section 19 for the Riverton Reclamation Project. Thus, the express jurisdictional prohibition of *Bourland* excuses any requirement to exhaust Tribal Court remedies.

No federal grant provides for Tribal governance with respect to Township 4 North, Range 3 East Section 19. No federal law establishes any authority for the exercise of Tribal civil regulatory authority with respect to the Riverton Reclamation Project. Under *Strate*, then, exhaustion is not required. 520 U.S. at 459 n.14.

Futility. Even if tribal appellate review were deemed necessary to fully "exhaust" here, it is clear that the Tribal Court "has no jurisdiction, [and thus] exhaustion would serve no purpose other than delay" (which is the futility doctrine) and the exceptions to exhaustion would apply.[3] *Crowe & Dunlevy*, 640 F.3d at 1150; *see also 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 and citing *Hicks*, 533 U.S. at 369). *Rolling Frito Lay* summarizes the issue concisely:

> Thus, in order to determine whether plaintiff must first litigate its federal question in tribal court, we must examine the merits. If it is plain that the tribal court is without jurisdiction, plaintiff will be subjected to needless delay and expense for no countervailing purpose. Plaintiff claims the federal right to be free of tribal jurisdiction. It would be anomalous indeed to require plaintiff to first suffer the loss of the very right for which it seeks protection (to be free of tribal jurisdiction) before affording an opportunity to protect its right.

2012 U.S. Dist. LEXIS 9555, *4-5 (emphasis supplied). Moreover, "**[c]omity does not require deference to a court which has no jurisdiction**." *Id*. at *14 (emphasis added). "In the absence of any compelling argument establishing tribal court jurisdiction" over a non-Indian, "the

[3] The federal law basis for the Tribes' lack of civil regulatory authority over Township 4 North, Range 3 East Section 19 is set forth infra, section III.

exhaustion requirement would serve no purpose, and there is no need to require further tribal court litigation before the exercise of federal jurisdiction . . ." *Crowe & Dunlevy*, 640 F.3d at 1153; *see also Tunica–Biloxi Indians of Louisiana v. Pecot*, 351 F. Supp. 2d 519, 524 (W.D. La. 2004) ("A trial on the merits, however, is not required to satisfy the tribal exhaustion doctrine").

## III. TOWNSHIP 4 NORTH, RANGE 3 EAST, SECTION 19 IS NOT PART OF THE WIND RIVER INDIAN RESERVATION, BUT RATHER, IS PART OF A FEDERAL ENCLAVE OVER WHICH THE TRIBES HAVE NO CIVIL REGULATORY AUTHORITY.

Contrary to Defendant's assertions (Doc. No. 37, p. 8), Encana has submitted to Defendant many volumes of "substantial and compelling evidence" that the Wind River Reservation was diminished. Encana is prepared to present further evidence of diminishment to this Court at the March 2 hearing scheduled in this matter.

Initially, it is important to note that the Reservation's diminishment is a fact state and federal court have visited many times. *See* Complaint ¶¶ 38-60; *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. 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"). Courts have reached these conclusions relying upon the very same cases cited by Defendant:

> It is more than fair to characterize the Wyoming Supreme Court's decision in [Yellowbear's] direct appeal as a thorough review and application of the history of the Reservation, the 1905 Act, and the controlling Supreme Court precedent. The Court recounted the relevant history of the Reservation's establishment. It recognized that development on the Reservation followed the national shift in Indian policy after the passage of the General Allotment Act of

> 1887 permitted allotment of land to Indians and sale of surplus land to non-Indians. *Id.* at 1274. The 1905 Act, a surplus land act, ratified the 1904 treaty negotiated by Inspector McLaughlin and the Reservation's tribes. *Id.* After reprinting the Act in its entirety in the opinion, the Court described the relevant facts and holdings of the seven United States Supreme Court cases described above and the "analytical construct" they created. *Id.* at 1278-82. The Court then applied this analytical construct to the 1905 Act . . .
>
> After conducting the review permitted, the Court finds that the Wyoming Supreme Court properly took into consideration and applied the law as set forth by the United States Supreme Court . . .

*Yellowbear v. Wyoming Attorney General*, 636 F. Supp. 2d 1254, 1271-1272 (D. Wyo. 2009) (discussing *Yellowbear*, 174 P.3d 1270), *aff'd in unpublished opinion*, *Yellowbear v. Attorney General of Wyoming*, 380 Fed. Appx. 740, 741 (10th Cir. 2010) ("The Wyoming state courts consistently rejected Mr. Yellowbear's jurisdictional argument. Ultimately, when the Wyoming Supreme Court took up the question, it explained that a 1905 Act of Congress long ago diminished the Wind River Reservation and that the current boundaries of the reservation do not encompass the site of Mr. Yellowbear's crime").

The same binding United States Supreme Court precedents and historical facts that led these many courts to come to the same diminishment analysis should prevail in this Court as well. The relevant federal actions that divested the Tribes of their inherent authority with respect to Township 4 North, Range 3 East, Section 19 of Fremont County include at least those acts and their legislative histories appended in Appendix 1 hereto. The historical background germane to Township 4 North, Range 3 East, Section 19 of Fremont County is reflected in the following brief timeline:

- 1868: Wind River Reservation established by Treaty with the Shoshones and Bannocks, July 3, 1868 (15 Stat. 673).

- 1902: 1902 Act (32 Stat. 388), an appropriations act by 57th Congress, Sess I., Chap. 1093, authorized Secretary of the Interior to take all steps necessary to site, develop and construct reclamation projects throughout the West, including in Wyoming.

- 1905: 1905 Act (33 Stat. 1016) "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" within a defined geographic area, including Township 4 North, Range 3 East, Section 19 of Fremont County. 33 Stat. 1016. This lend cession was common and consistent with federal policy at the time to open up significant tracts of land on Indian reservations for disposal to non-Indian or for disposal as public lands, often public lands dedicated to public works, particularly reclamation projects.

- 1916: Act of August 21, 1916 (39 Stat. 519) authorized the Secretary of the Interior to undertake mineral leasing on the 1905 Act "ceded" lands, which included Township 4 North, Range 3 East, Section 19 of Fremont County.

- 1918: The Secretary of the Interior issued an order on September 27, 1918 withdrawing a large section of the 1905 Act lands (then being held by the United States for various disposal) from the public domain and dedicating them to the Riverton reclamation project. Township 4 North, Range 3 East, Section 19 of Fremont County was among the properties withdrawn by the Secretary and dedicated to the Riverton reclamation project.

- 1920: An appropriations act, the Act of June 5, 1920 (41 Stat. 974, 915) provided as follows:

> Riverton project, Wyoming: For the reclamation of lands within and in the vicinity of the ceded portion of the Wind River or Shoshone Reservation, including operation and maintenance, continuation of construction, and incidental operations, $100,000.

- 1923: The United States undertook construction of the various works of the Riverton reclamation project followed. *See* Complaint Exhibit I at p. 12 and following. Construction continues in phases for a period of many years. *Id*.

- 1939: The 1939 Act (53 Stat. 1128) restored to trust status various lands within the 1905 Act ceded area that had not been disposed of (by sale to non-Indians, leasing, etc.) by that time. The 1939 Act expressly excepted from such restoration efforts any lands -- such as Township 4 North, Range 3 East, Section 19 of Fremont County -- that were "within any reclamation project heretofore authorized within the diminished or ceded portions of the reservation." 53 Stat. 1128, § 5.[4]

[4] Note that Township 4 North, Range 3 East, Section 19 of Fremont County had been withdrawn for the Riverton reclamation project by order of the Secretary of the Interior dated September 27, 1918.

- 1953: The 1953 Act (67 Stat. 592) established the perimeter boundaries of the Riverton reclamation project, Fremont County, Wyoming and set out Township 4 North, Range 3 East, Section 19 as within 316 station points specifically described therein as forming the geographic boundaries of the Riverton reclamation project. The 1953 Act provided $1,009,500 to the Tribes as compensation for "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," including Township 4 North, Range 3 East, Section 19.

  The legislative history reveals that the purpose of the 1953 Act was "to compensate the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation in Wyoming for approximately 161,500 acres of land which the Indians relinquished to the Federal Government for reclamation purposes." House of Representatives Report No. 269. Congress was very clear about what it was doing in the 1953 Act: **"**It is our understanding that the bill is intended to extinguish the tribes' interests in and to all of the undisposed of, ceded lands within the boundaries of the Riverton project, including the minerals and oil and gas, but that in lieu thereof the tribes shall receive 90 percent of the royalties, bonuses, or rentals received by the United States for such minerals or oil and gas." In other words, Congress paid the Tribes for the disposal of the Riverton reclamation project lands with $1,009,500 and 90 percent of mineral leasing proceeds going forward from that date (reserving 10 percent to the BLM for its costs of administration).

  On November 17, 1953, Encana's predecessor, J.F. Hornbeck, entered into the oil and gas lease that governs Well No. 19-24, lease number W-024513, from the Bureau of Land Management pursuant to the 1916 Act. Complaint Exhibit G. The effective date of the Lease was May 1, 1954.

- 1958: The 1958 Act, 72 Stat. 935, declared that the mineral estate associated with the Riverton reclamation project lands to which all right, title and interest of the Tribes had been extinguished by the 1953 Act, was to be taken into trust by the United States for the benefit of the Tribes and any lease thereon were to be made pursuant to the Indian Mineral Leasing Act of 1938 instead of the 1916 Act. The legislative history of the 1958 explains that the change was made to address the fact that 1916 lease were made without competitive bidding and without bonuses, and thus leasing under the Indian Mineral Leasing Act of 1938 was expected to yield a larger return for the Tribes. Senate Report No. 1746.

- 1992: The Secretary of the Interior publishes notice in the Federal Register that 45,059.53 acres of lands withdrawn by the Secretarial Order of Sept. 27, 1918 and other Secretarial Orders be continued for a period of an additional 50 years pursuant to the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714.

> Proposed Modification, Continuation and Termination of Bureau of Reclamation Withdrawals, Riverton Reclamation Project; Wyoming, 57 Fed. Reg. 46,593 (Oct. 9, 1992). Township 4 North, Range 3 East, Section 19, lots 1-4 of Fremont County is specifically identified in the Federal Register as a continuing withdrawal for Reclamation purposed. *Id*. at 46,594. Thus, it was the announced intention of the United States to continue to hold Township 4 North, Range 3 East, Section 19 of Fremont County as withdrawn until at least 2042.

The Tribes' loss of their landowners' right to exclude is substantially identical to that the U.S. Supreme Court found dispositive of the corresponding loss of civil regulatory power in *Bourland*. Defendant's argument that "[b]ecause the Tribes have retained the mineral estate at issue in this case, it, along with subservient surface estate, are subject to the Tribes' civil regulatory jurisdiction"[5] cannot overcome *Bourland*. The fact that the Tribes now benefit from the Lease does not grant them any jurisdiction. *Osage Nation v. Irby*, 597 F.3d 1117, 1125 (10th Cir. 2010).

Defendant cites the Ninth Circuit's decision in *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 484 U.S. 997 (1988) in support of his argument that the Tribes are sovereigns with respect to the subsurface estate and this gives them general civil regulatory authority over Encana. It is true that in *Crow*, the Ninth Circuit held that the minerals in the subsurface were actually part of the Crow Tribe's reservation while the tribe had no interest in the surface of the same lands. *Id*. at 902. But *Crow* does not support Defendant's claim. The Ninth Circuit held the subsurface to be part of the Crow's reservation because an act of Congress provided for such status. *See* Act of May 19, 1958, 72 Stat. 121. That Act expressly restored to reservation status all lands returned to tribal beneficial ownership under the Act.

> Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made part of the existing reservations for such tribe or tribes.

[5] Doc. No. 37, p. 8

Act of May 19, 1958, 72 Stat. 121. It bears mention that it was the exact same Congress in 1958 that used plain language to establish reservation status for withdrawn lands returned to the Crow Tribe that used equally clear language to restore only mineral title, and not any reservation status, to the Wind River Tribes in the 1958 Act.

Here, the Tribes' sovereignty interest in the 1905 Act lands was terminated by the 1905 Act. There is no comparable statute in this case which grants the Tribes jurisdiction over the subsurface of the 1905 Act lands. The Ninth Circuit has itself distinguished *Crow* on exactly the same basis when presented with argument virtually identical to Defendant's here. *See Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457, 464 (9th Cir. 1996). Instead, a "reservation" must be "lands set aside for federal protection for the residence of tribal Indians." *Cohen's Handbook of Federal Indian Law* 34 (1982 ed.).

## IV. *MONTANA* ANALYSIS DOES NOT APPLY TO MATTERS OUTSIDE A RESERVATION, OUTSIDE INDIAN COUNTRY.

"*Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests." *Plains Commerce Bank*, 128 S.Ct. at 2721 (italicized emphasis in original, underlined emphasis supplied); Exhibit C, McDonald's, p. 11 (holding that, if a parcel of land "is not within the boundaries of the Reservation, there is no argument that the Tribal Court could have jurisdiction"). "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*

*Nevada v. Hicks*, 533 U.S. 353, 392 (2001) ("[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe") (O'Connor, J., concurring in part and concurring in judgment).

These clear standards, coupled with the clear land status at the accident site, require that *Montana* does not apply. As demonstrated in Section III above, Township 4 North, Range 3 East Section 19 has not been part of the Wind River Indian Reservation since 1905 when it was ceded to the United States. It has not been part of the Reservation since it was dedicated to the Riverton reclamation project by the Secretarial Order of Sept. 27, 1918. It has not been part of the Wind River Indian Reservation since the Tribes were compensated for it with $1,009,500 and minerals proceeds therefrom in 1953. Indeed, it has been a persistent withdrawal since 1918 and will continue as such until at least 2042. Proposed Modification, Continuation and Termination of Bureau of Reclamation Withdrawals, Riverton Reclamation Project; Wyoming, 57 Fed. Reg. 46,593 (Oct. 9, 1992). Moreover, this Court should reject Defendant's invitation to cloud this matter with consideration of prior cases involving different lands perhaps covered by the 1905 Act but disposed of in different ways. *McDonald's*, *Marathon*, etc., dealing with Riverton or other locations not part of the Riverton reclamation project and its very specific federal legal history, are irrelevant to the very clear showing about the federal enclave status of Township 4 North, Range 3 East Section 19 here.

Accordingly, *Montana* cannot be used by Defendant to bootstrap extraterritorial jurisdiction. Whatever Encana's on-Reservation consensual relationships or impacts to health, welfare and economic security might be or not be, they are of no consequence to the Tribes' inability to regulate Encana's conduct elsewhere -- on the federal enclave of the Riverton reclamation project, in Wyoming, in Colorado or in any other jurisdiction in which the Tribes do

not have a landowner's right to exclude. The landowner's right to exclude, which the Tribes lost at Township 4 North, Range 3 East Section 19 in 1905, is the sole source of regulatory authority over non-Indians. *Bourland*, 508 U.S. at 694; *see also Atkinson Trading Post v. Shirley*, 532 U.S. 645, 649-50 (2001) (holding "Tribal jurisdiction is limited: For powers not expressly conferred upon them by federal statute or treaty, Indian tribes must rely on their retained sovereignty"). Thus, if that sole source of regulatory authority is not present -- inherent sovereignty's landowner's right to exclude, *Montana* analysis is never triggered. That principle is consistent with established precedent that parties cannot, by their actions -- such as entering into contracts or engaging in particular activities that might impact health, welfare or economic security -- vest a court with subject-matter jurisdiction it would not otherwise have.[6]

Contrary to Defendant's argument, none of the three cases cited for the proposition that tribes may assert extraterritorial jurisdiction and yet receive the benefit of the exhaustion doctrine so hold. *Texaco, Inc. v. Zah*, 5 F. 3d 1374 (1993) (finding "Indian country" status of lands subject to tribal tax challenge dispositive as to civil regulatory jurisdiction as opposed to reservation boundaries and appellant had failed to assert any exception to exhaustion requirement) (contrast the instant case, where the Wyoming Supreme Court has previously declared that the 1905 Act lands ceased to be "Indian country," *Yellowbear*, 174 P.3d at 1284); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F. 3d 21, 32 (1st Cir. 2000) (holding that a contract dispute between a tribe and an entity doing business with it, concerning the disposition of tribal resources, is a tribal affair for purposes of the exhaustion

[6] *See Insurance Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982)("No action of the parties can confer subject matter jurisdiction upon a federal court"); *Smith v. Norwest Financial Wyoming, Inc.*, 964 F. Supp. 327, 331 (D. Wyo. 1996)("Parties cannot consent to nor can they waive subject matter jurisdiction"); *Weller v. Weller*, 960 P.2d 493, 496 (Wyo. 1998)("A lack of subject matter jurisdiction constitutes a fundamental defect in a proceeding which cannot be cured by waiver or consent of the parties").

doctrine, even if the actions required by contract took place on fee lands); *Richmond v. Wampanoag Tribal Court Cases*, 431 F.Supp.2d 1159, 1178 n.34 (D. Utah 2006) (ruling in *pro se mandamus* case that there "appears to be no serious question that federal district courts may exercise jurisdiction over cases or controversies involving tribal members and arising out of off-reservation activities, to the same extent as would be true of non-Indian litigants," unless the case is "subject to tribal jurisdiction" and exhaustion might apply).

Instead, as the U.S. Supreme Court has routinely held, diminishment such as that which occurred at Wind River divests the resident tribe of jurisdiction. *See Yankton Sioux Tribe*, 522 U.S. at 351 (declaratory judgment action brought by tribe to enforce its right to regulate a landfill allegedly within the exterior boundaries of the reservation, thus requiring a diminishment analysis; Court found no tribal jurisdiction in light of diminishment); *Hagen v. Utah*, 510 U.S. 399, 411-412 (1994) (direct review upholding state court's jurisdiction over an Indian's crime that allegedly occurred in Indian country; Court determined reservation had been diminished and state had jurisdiction).

## V. IF *MONTANA* WERE APPLIED, NEITHER OF THE MONTANA EXCEPTIONS IS MET IN THIS CASE.

Defendant's arguments that both *Montana* exceptions apply ignore binding United States Supreme Court precedent that, since 1981, has severely limited the applicability of the *Montana* exceptions.[7] To illustrate, the decisions in *Plains Commerce Bank*, *Strate*, and *Hicks* provide

[7] *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

powerful and compelling guidance to address Defendant's arguments and reliance relating to the *Montana* exceptions. In summary, these decisions instruct that this Court should reject Defendant's arguments.

The Supreme Court consistently applies a presumption of non-tribal authority over non-Indians and their property. *See Bourland*, 508 U.S. at 694. As the Court said in *Strate*: "Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." 520 U.S. at 445. Encana is a nonmember, non-Indian company. Complaint, ¶ 3. No federal law provides the Tribes with any jurisdiction over Encana. And neither of the limited circumstances justifying departure from the general rule that Tribes lack civil regulatory authority over non-Indians should apply here.

The Court's more recent cases illustrate the extraordinarily limited applicability of the *Montana* exceptions. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655-656 (2001) (rejecting Navajo Nation's imposition of hotel occupancy taxes on non-Indians guests at non-Indian hotel located on fee lands; finding tax not justified by *Montana*'s "consensual relationships" exception even though the Nation provided various governmental services to hotel and its guests; and holding that tribal licensure programs were not legitimate predicate sufficient to establish a consensual relationship for first *Montana* exception); *Plains Commerce Bank*, 128

---

> 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.

S. Ct. at 2724 ("the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations"). *Atkinson Trading* and *Plains Commerce Bank* could not be clearer: for the consensual relationship exception to be met, the claim must arise directly from the contract. *Atkinson Trading Post*, 532 U.S. at 656 (finding "[a] nonmember's consensual relationship in one area thus does not trigger tribal civil jurisdiction in another -- it is not 'in for a penny, in for a pound'" (internal citation omitted); *Plains Commerce Bank*, 128 S. Ct. at 2724 ("lengthy on-reservation commercial relationships" between non-Indian and tribal government are insufficient to satisfy the first *Montana* exception).

Here, the Estate has brought no contract claims. The Estate has no contract with Encana. The Estate's tort claims are necessarily not connected to any on-Reservation consensual relationships Encana has with the Tribes. Therefore, application of the first *Montana* exception is precluded. This is because the Supreme Court's precedents establish that, to satisfy *Montana's* consensual relationship exception, the tribal regulatory act must: (a) flow from the specific consensual relationship and (b) be undertaken pursuant to inherent sovereignty (e.g., pursuant to the landowner's right to exclude). *Plains Commerce Bank*, 128 S.Ct. at 2724-2725. Neither prong is met in this instance.

Nor can Encana's consent to tribal jurisdiction somehow be inferred from its willingness to comply with the Tribal Employment Rights Ordinance or receive governmental services, if any, from Tribal government: "the generalized availability of tribal services patently insufficient to sustain the Tribe's civil authority over nonmembers on non-Indian fee land." *Atkinson Trading*, 532 U.S. at 655. Notably, the governmental services provided by the Navajo Nation to the hotel in *Atkinson Trading* were far more comprehensive than any in the case at bar.

The second *Montana* exception has been even more narrowly defined by the Supreme Court. The second exception is limited to "catastrophic" circumstances where the non-Indian's conduct "imperil[s] the subsistence of the community." *Id.* at 2726. No such catastrophe is present here. *See Atkinson Trading*, 532 U.S. at 657 (unless the non-Indian conduct "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") (quoting *Montana*, 450 U.S. at 566)). Nothing about Encana's oil and gas activities threatens the governmental composition of the Tribes or destabilizes Tribal membership in any way.

Thus, neither of the narrow *Montana* exceptions is met in this case.

## CONCLUSION

For these reasons, Encana opposes the Estate's intervention and accordingly, requests that this Court deny the Estate's Motion to Intervene.

DATED this 1st day of March 2012.

ENCANA OIL & GAS (USA) INC., Plaintiff

/s/ Jennifer H. Weddle
Patrick J. Murphy (#5-1779)
Scott P. Klosterman (#6-3081)
WILLIAMS, PORTER, DAY & NEVILLE, P.C.
159 North Wolcott, Suite 400
P. O. Box 10700
Casper, WY 82602-3902
Telephone: (307) 265-0700
Facsimile: (307) 266-2306
E-Mail: pmurphy@wpdn.net
sklosterman@wpdn.net

Troy A. Eid, Admitted *Pro Hac Vice*
Jennifer H. Weddle, Admitted *Pro Hac Vice*
GREENBERG TRAURIG LLP
1200 Seventeenth Street, Suite 2400
Denver, CO 80202
Telephone: (303) 572-6500
Facsimile: (303) 572-6540
E-Mail: eidt@gtlaw.com
weddlej@gtlaw.com

Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a true and correct copy of the foregoing was delivered to the Court via the CM/ECF System and served upon counsel via electronic transmission this 1st day of March 2012.

| | | |
|---|---|---|
| Kimberly D. Varilek<br>EASTERN SHOSHONE TRIBE<br>OFFICE OF ATTORNEY GENERAL<br>3 Ethette Road, Suite 21<br>P.O. Box 538<br>Fort Washakie, WY 82514<br>kvarilekesag@gmail.com | ☒<br>☐<br>☐<br>☐ | CM/ECF Electronic Transmission<br>Fax<br>Overnight Delivery<br>U. S. Mail |
| Brian W. Chestnut<br>Joshua Osborne-Klein<br>Richard M. Berley<br>ZIONTZ CHESTNUT VARNELL BERLEY & SLONIM<br>2104 4th Avenue, Ste. 1230<br>Seattle, WA 98121<br>bchestnut@zcvbs.com<br>joshok@zcvbs.com<br>rberley@zcvbs.com | ☒<br>☐<br>☐<br>☐ | CM/ECF Electronic Transmission<br>Fax<br>Overnight Delivery<br>U. S. Mail |
| John R. Vincent<br>Aaron J. Vincent<br>Ann E. Davey<br>VINCENT LAW OFFICE<br>301 East Adams<br>P.O. Box 433<br>Riverton, WY 82501<br>jvr@johnvincentlaw.com<br>aaron@johnvincentlaw.com<br>ann@johnvincentlaw.com | ☒<br>☐<br>☐<br>☐ | CM/ECF Electronic Transmission<br>Fax<br>Overnight Delivery<br>U. S. Mail |

/s/Jennifer H. Weddle
Jennifer H. Weddle