

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF WYOMING

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4 ENCANA OIL AND GAS (USA),
a Delaware corporation,

5 Plaintiff,

6 vs.

7 JOHN ST. CLAIR, an Individual
8 and Chief Judge of the Shoshone
and Arapaho Tribal Court,

9 Defendant,

10 ESTATE OF JEREMY JORGENSEN,

11 Intervenor Defendant.

Case No. 12-CV-00027-J

Cheyenne, Wyoming

March 2, 2012

8:33 a.m.

CERTIFIED COPY

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14 TRANSCRIPT OF MOTION PROCEEDINGS

15 BEFORE THE HONORABLE ALAN B. JOHNSON
16 UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography,
transcript produced by computer.

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1 (Proceedings commenced 8:33 a.m.,
2 March 2, 2012.)

3 THE COURT: Thank you. Please be seated.

4 It's nice to see Miss Varilek has recovered from two
5 weeks in Casper.

6 MS. VARILEK: Yes, Your Honor.

7 THE COURT: That courthouse was almost a sickroom up
8 there by the time we got done, everybody coughing and hacking.

9 Well, we're here today with Encana Oil & Gas which
10 have brought an action seeking extraordinary relief against
11 John St. Clair, an individual and as Chief Judge of the
12 Shoshone and Arapaho Tribal Court, and the Estate of Jeremy
13 Jorgenson, a decedent in a tragic motor vehicle accident,
14 under Docket 12-CV-27. This matter was earlier considered by
15 the Court in a case against DHS.

16 Mr. Murphy, it's your motion.

17 MR. MURPHY: Your Honor, may it please the Court --

18 THE COURT: Mr. Murphy.

19 MR. MURPHY: -- Mr. Berley, Miss Varilek,
20 Mr. Vincent.

21 MR. VINCENT: Mr. Murphy.

22 MR. MURPHY: Your Honor, I'd like to introduce to you
23 the Encana team that is here today and will be in court this
24 morning, and then I'm going to turn it over to Mr. Troy Eid
25 for the opening statement if Your Honor permits.

1 THE COURT: I haven't seen Mr. Eid for a couple of
2 years, but it's good to have him in court.

3 MR. EID: Thank you, Your Honor.

4 MR. MURPHY: First I'd like to introduce you to Mary
5 Viviano. Mary is the general counsel of Encana Oil & Gas
6 U.S.A., Inc., and she is also the vice president for the
7 United States for Encana Corporation. Also seated next to
8 Mary is Scott Regan. He is a counsel with Encana down in its
9 Denver office.

10 And then at the counsel table is Miss Jennifer Weddle
11 from the Greenberg Traurig firm in Denver. And her partner,
12 of course, is Troy Eid, also with the Greenberg Traurig firm
13 in Denver. And then my partner here at the table, you know
14 Scott Klosterman.

15 And, finally, I'd like to introduce Your Honor to
16 John Schmidt. John is Encana's team lead in Riverton, and he
17 is the company representative for today's hearing on the
18 preliminary injunction.

19 Those are my opening remarks.

20 THE COURT: Thank you.

21 MR. MURPHY: Thank you, Judge.

22 THE COURT: I'll hear from the other side.
23 Miss Varilek.

24 MS. VARILEK: Good morning, Your Honor. I would like
25 to just introduce ourselves, first of all. Kimberly Varilek

1 appearing as Attorney General for the Eastern Shoshone Tribe
2 on behalf of John St. Clair. I'd like to introduce Rich
3 Berley, who is also counsel with the Northern Arapaho Tribe
4 who will be also counsel for John St. Clair, and Mr. Berley
5 will be addressing the Court this morning.

6 THE COURT: Thank you, Miss Varilek.

7 MS. VARILEK: Thank you.

8 MR. VINCENT: Good morning, Judge Johnson. John
9 Vincent from Riverton for the plaintiff Estate of Jeremy
10 Jorgenson. With me is Mrs. Carly Schrinar. It's her first
11 time in federal court. She's one of our legal assistants.
12 And Karen Mitchell said to say hello. She had to watch her
13 grandkids last night, so she didn't feel up to coming down
14 here today. Thank you.

15 THE COURT: Thank you. Well, we have a lot of ground
16 to cover today, so why don't you get started.

17 MR. EID: Good morning, may it please the Court.

18 THE COURT: Mr. Eid.

19 MR. EID: It's good to see everyone. My name is Troy
20 Eid, and I'm counsel for Encana.

21 Your Honor, in framing why we're here today, I'd like
22 to separate, if I may, please, a distinction that we often
23 find when we teach Indian law, which I've done since 2007 at
24 the University of Colorado School of Law, and the sort of
25 aspirational view of what's happening here versus what the

1 federal law requires. And I want to set that up because what
2 I want to say more than anything is that we have great respect
3 for the fact that there's been a terrible accident that's
4 occurred here. Also have tremendous respect for the Chief
5 Judge, Judge St. Clair, who in Indian Country is a great
6 leader and is someone who I have a lot of respect for and have
7 admired for many years, and his positions have been
8 illuminating to me as a professor and as somebody who works in
9 this field. And so I just want to show and start with my
10 respect for what's happened here and why we're here.

11 Many of us feel like there should be some changes in
12 Indian law and are working in our different ways to try to
13 accomplish some of that, and I don't think anyone has done
14 more than Judge St. Clair has done in that regard. But I want
15 to start, if I may, and sort of frame where we're going in
16 this case based on what he has said in the past and what I
17 think we actually need to do and what federal law requires in
18 this tribunal and why we're seeking the relief that we are.
19 And it is an extraordinary measure that we're seeking here.

20 And I'm going to refer to just three things that
21 Chief Judge St. Clair has said to the U.S. Senate going back
22 to 2002. He's talked about federal law and specifically
23 precedent of the U.S. Supreme Court as, quote, judicial
24 termination, unquote, and he's talked about the threat that it
25 poses to tribal sovereignty. And he's been passionate about

1 this. And he told the Senate Committee on Indian Affairs that
2 the recent trend of U.S. Supreme Court jurisprudence toward
3 what he characterized as termination poses the greatest threat
4 to tribes since the allotment era of the 19th Century, which
5 just to catch everybody up is what President Roosevelt
6 described as the pulverization of the tribal land base.

7 THE COURT: Mr. Berley.

8 MR. BERLEY: Excuse me, Your Honor. I object. I'm
9 Richard Berley. I represent John St. Clair. And ordinarily I
10 never interrupt an opening statement, but it seems like we're
11 here for preliminary injunction. What Judge St. Clair may or
12 may not have said in some proceeding somewhere else has, has
13 nothing to do with whether Encana needs a preliminary
14 injunction to protect it from irreparable harm, and it just
15 seems inappropriate, Your Honor.

16 MR. EID: Your Honor, if I may, it is relevant, as
17 I'll show in just a moment, with a little patience.

18 THE COURT: Very well.

19 MR. EID: Next slide. "Termination" is a loaded
20 term, and it meant the destruction of tribes, and so to
21 compare what the Supreme Court in the precedence I'm going to
22 talk about, which plainly control this case directly, not just
23 in a small way, but in a direct way, it's directly relevant to
24 what we have to talk about.

25 Very significant that the same defendant told the

1 Senate and has advocated elsewhere that the code that the
2 Tribes have applies to all persons who have significant
3 contacts with the reservation, Indians and non-Indians. As an
4 aspirational statement, it's a wonderful premise. It may
5 someday actually happen, but it's not true as a matter of
6 federal law, as we'll talk about, and it's absolutely not true
7 in this case. The lands that we'll talk about here are not in
8 Indian Country, and even if they were, this judge has
9 absolutely no jurisdiction based on what the federal court,
10 which has been described as committing judicial termination,
11 has said repeatedly since 1981 without a break.

12 Next slide. The final slide, and again I appreciate
13 the latitude from my colleague, making a request, as some of
14 us have done in other settings, to the Congress to restore
15 sovereign powers of tribes is definitely worthy of respect.
16 And I would submit to you, Your Honor, as we go through this
17 today very briefly, that that is the appropriate forum for
18 this kind of an argument. When I read through the pleadings,
19 I see passion, I see a lot of energy. I respect it, and I'm
20 familiar with it, but it's not relevant to what this Court
21 actually has to do today because it's the wrong forum. We're
22 here in a court of law, we're not in the Congress, and the
23 President is not here or his administration either.

24 So I would frame it this way and then just turn to
25 what the federal law now requires us to do, as opposed to what

1 the aspirations are, because these are very aspirational
2 pleadings that we've been dealing with to try to stop what I
3 think is plain relief that we're due.

4 What does *Montana* say? You know, it is clear that
5 the Supreme Court did something extraordinary. As Chief Judge
6 St. Clair said in that same testimony, the presumption was
7 perhaps flipped in 1981. It used to be that the thought was
8 tribes retain all the powers that they have unless Congress
9 has specifically done something, but actually when you read
10 *Montana* it's really clear that that's not true anymore, and it
11 hasn't been true since 1981 in a whole series of Supreme Court
12 cases. *Montana* says the exercise of tribal power beyond what
13 is necessary in two narrow categories, which I'll talk about,
14 protecting tribal self-government or controlling internal
15 relations, is inconsistent with their dependent status and
16 cannot survive without express congressional delegation.

17 Now, students get this confused constantly. They've
18 been taught Felix Cohen still controls, this idea that tribes
19 have lots of powers unless Congress acts, but actually the
20 presumption in federal law is quite different, which is why
21 there is this passionate advocacy.

22 And then similarly in *Bourland*. Sir, it is
23 incredibly important in this case, as I'll talk about what
24 happened in DHS, they didn't cite *Bourland*, and I don't know
25 why they didn't, but, you know, *Bourland* actually disposes of

1 this case directly. And *Bourland* tells us that defendant
2 shuts both eyes to the reality that after *Montana* tribal
3 sovereignty over nonmembers cannot survive without express
4 delegation and is therefore not inherent, as Justice Thomas
5 told us in that case.

6 So this leads to the law, what federal law actually
7 requires. We have exhausted remedies here, sir. This is not
8 the DHS case. We didn't hide or run away from defendant. We
9 spent two years of time and money and effort to work through
10 this court system. And defendant has now come here and said,
11 well, as a matter of comity you need to require exhaustion and
12 also respect for the tribal judicial system. But, you know, a
13 couple things. Number one, it's not DHS. This isn't a motion
14 to dismiss. And you may recall that in that case the judge,
15 the Tribal Court judge, the defendant, didn't even have a
16 chance to rule. We've spent two years there, sir. We've been
17 all the way through up to summary judgment. We have a clear
18 interlocutory statement, a statement from the Tribal Courts of
19 Appeal saying they don't have any interlocutory jurisdiction
20 and, therefore, we now have to go through not one but two
21 trials. So that's why it's different. And it's different
22 because, as I'll talk about in a second, the Tenth Circuit
23 says it's different.

24 And so the defendant determined the Tribal Court's
25 adjudicatory jurisdiction on December 20th this past year, so

1 we're done. We have exhausted. And I say that based on
2 federal law, the *Enlow* case, which is clear, and then, sir,
3 very importantly, a case that was decided after your ruling in
4 the *Marathon* case, and that's the *Crowe & Dunlevy versus*
5 *Stidham* case from last year. That's a case where the district
6 court issued a preliminary injunction because of the concern
7 that there would be a significant risk of irreparable harm
8 because the movant would have to spend time and money and
9 effort litigating before a tribal court, going to trial in a
10 court that likely lacked jurisdiction.

11 There is no jurisdiction here. We've spent two years
12 of time and money. We've exhausted. The Tribal Court of
13 Appeals says no interlocutory appeal. The only thing we could
14 do, sir, at this point in time is actually go through two
15 trials, and we don't have to because the Tenth Circuit says we
16 don't have to in *Crowe & Dunlevy*.

17 So that's my first point to you and to this Honorable
18 Court. We've exhausted, we're done, and the federal law is
19 clear in the Tenth Circuit and in the U.S. Supreme Court.

20 Secondly, this land is not within Indian Country
21 within the meaning of 18 U.S.C. Section 1151. The reservation
22 does not include the Riverton Reclamation Project Area, where
23 Mr. Jorgenson's car accident tragically occurred, where the
24 entire stretch of Tunnel Hill Road is that was relevant here,
25 and where the well site is located. None of it is in Indian

1 Country, and here's why, sir.

2 Non-Indian settlement commenced after the Tribes
3 ceded the lands, as was provided in this 1905 Act. And you'll
4 hear testimony on this. But that's when the opening occurred.

5 Some of the relinquished lands, which includes the
6 two sections at issue here which we'll go through, Sections 19
7 and Sections 30, those are the lands at issue here, they
8 became -- some of the relinquished lands became part of the
9 Riverton Reclamation Project Area which Congress created in
10 1918, and since that time it's been controlled by the U.S.
11 Department of the Interior and the Bureau of Reclamation. At
12 that moment in 1905 the lands were opened. They were improved
13 by the federal government. They were opened broadly to public
14 use. And legally, Your Honor, we're done at that point
15 because the Supreme Court in *Bourland* says we're done. That's
16 the end of this case, and it's the end of the Tribal Court's
17 jurisdiction.

18 We know historically that the state, county, and
19 federal authorities have, understandably because it's federal
20 land, exercised jurisdiction, or it's a county road in the
21 case of Tunnel Hill Road, they've exercised their jurisdiction
22 over this Riverton Reclamation Project Area for decades.

23 So the opening, which I'll talk about is directly
24 relevant because of *Bourland*.

25 Now, 1939 is important. Congress restored to trust

1 status certain lands within the ceded 1905 area, lands that
2 had not been disposed of, such as sales to non-Indians,
3 leasing, by that time, by 1939. There was still some surplus
4 land, and Congress restored that surplus land to trust, but
5 none of that land, none of it is what we're talking about
6 today. The 1939 Act expressly exempted from such restoration
7 all lands that were, quote, within any reclamation project
8 heretofore authorized within the diminished or ceded portions
9 of the reservation, unquote. That's what the '39 Act said.

10 So what happened in '53? In '53 Congress compensated
11 the Tribes for the reclamation project area, more than a
12 million dollars was paid, a sum certain, divesting the Tribes
13 of all rights, title, interest to the previously ceded lands,
14 the 1905 ceded lands, and did not retain any interest in or
15 title to these lands. That's what happened in '53. It was a
16 compensation for the reclamation project.

17 And in context, this was when Congress was in the
18 termination era, they were around the country, they had
19 created the Indian Lands Commission, and they were wrapping up
20 the Indian business all around the country. As a matter of
21 public policy, it's tragic in many, many respects, but it's
22 the law. It's what they did, and we have to follow the law.

23 Finally, in 1958 Congress restored beneficial
24 ownership of the mineral estate to the Tribes but did not
25 alter the status of surface lands, just like the *Bourland*

1 case, and also just like happened all over the West. It was
2 common for Congress to restore beneficial ownership of mineral
3 estates but not surface lands that had been previously ceded
4 and opened broadly to public use.

5 So, in sum, the '53 Act compensates the Tribes for
6 the lands ceded to the U.S. by the 1905 Act that became the
7 Riverton Reclamation Project. The '58 Act merely restored the
8 Tribes' beneficial interest -- remember, not ownership; it's
9 still in trust -- beneficial interest in subsurface mineral
10 interests.

11 All three of those acts unambiguously show that the
12 Tribes received sums certain for the ceded lands that
13 ultimately became the Riverton Reclamation Project. And here
14 the Supreme Court tells us what to do. Where language of
15 cession is buttressed by Congress's commitment to compensate
16 for a sum certain opened lands, Congress meant to diminish
17 those lands.

18 Now, I've used the D word, I know it upsets people,
19 but it's what happened here. It's the historical reality.
20 And even if somehow the statutory language was ambiguous, the
21 legislative history is absolutely clear in this case. They
22 say ceded. They say diminished. And the Supreme Court told
23 us in the *Solem* case, in *South Dakota v Yankton Sioux*, and in
24 *Hagen versus Utah* that that's the end of the analysis.
25 Diminishment has occurred. It's done. You look at the plain

1 language. If you don't think it's plain, which it is here,
2 you go to the legislative history.

3 And here, as in *Yankton Sioux* as in *Hagen*, unallotted
4 and ceded lands were severed from the reservation back in
5 1905, it was diminished as of that date, and for that reason
6 defendants, despite aspirations, things like the Code that I
7 referenced earlier on which he says has power over people off
8 the reservation, even though *Montana* says it's limited to
9 tribal members and to tribal territory, quote/unquote, the
10 defendant is powerless to assert jurisdiction over what
11 amounts to nontribal federal public lands.

12 *Montana*: Tribes' sovereignty limited to their
13 members and their territory.

14 There is absolutely no such thing as what I read in
15 the motion to dismiss on page 16. Defendant does not have
16 some extraterritorial jurisdiction. It's a really interesting
17 aspirational thought, there may be some value, except that the
18 federal law doesn't require it, so that's an argument to take
19 to the Congress.

20 Number 3. I am arguing the alternative, and comity
21 is a concept where one court of competent jurisdiction defers
22 to another court of competent jurisdiction. And I've sought
23 to explain here that we did exhaust, that this Tribal Court
24 does not have power over what amounts to nontribal federal
25 public land, but I also want to say comity considerations are

1 irrelevant. The land at issue here is not within federally
2 recognized Indian Country regardless if it's classified as
3 diminished or disestablished.

4 And this is the *Bourland* case, and it's worth
5 focusing on. Congress has broadly opened up those lands for
6 public use, quote/unquote. That's the phrase *Bourland* uses.
7 They did that in 1905. And thereby, quote, eliminated the
8 tribes' power to exclude non-Indians from those lands and with
9 that the incidental regulatory, and I've inserted, and
10 adjudicatory jurisdiction formerly enjoyed by the Tribe.

11 Now, it's important to understand what this means.
12 1905 up and -- prior to that point there was a treaty. The
13 tribe had the power to exclude non-Indians from the lands
14 within its borders. Congress abrogated that treaty, a
15 tragedy, but something that *Lone Wolf versus Hitchcock*,
16 U.S. Supreme Court 1903, said tribes' lands can be abrogated,
17 treaties can be abrogated. That's what the law required, and
18 it's what the law still requires today. Congress opened the
19 lands in 1905. They had begun the allotment process before.
20 They then in 1905 began the settlement process, and they
21 ultimately created the reclamation district. The end of the
22 power to exclude that the tribes had occurred in 1905, and
23 it's gone. It is gone now. It's been gone since 1905. It's
24 dead, and it needs to be understood legally from a federal law
25 standpoint it's gone, which is why we should not be here,

1 according to the Supreme Court majority in *Bourland*.

2 Now, I inserted adjudicatory jurisdiction. *Bourland*
3 dealt with regulatory, but *Nevada versus Hicks*, U.S. Supreme
4 Court 2001, says a tribe's adjudicatory jurisdiction may never
5 exceed its regulatory jurisdiction. They're coextensive. So
6 even an abrogated treaty right of unimpeded use and occupation
7 of lands can no longer serve as the basis for tribal exercise
8 of the lesser included power of civil and regulatory
9 jurisdiction. The Supreme Court had said that in *Bourland*.
10 They had said it earlier in the *Brendale* case in 1989. If you
11 can't exclude, which you can't after 1905 on this area that
12 we're talking about, if you can't exclude, the Tribes
13 obviously cannot impose civil regulatory or adjudicatory
14 jurisdiction. The Supreme Court has told us that not once but
15 repeatedly.

16 *Bourland* makes clear that *Montana's* framework focuses
17 on the effect of land alienation at that moment. And *Montana*,
18 as *Bourland* put it, unequivocally stated, quote/unquote, that
19 when Congress broadly opened up treaty reservation lands here
20 to non-Indians, which is what the 1904 [sic] Act did and then
21 the ensuing Riverton Reclamation Project, quote, the effect of
22 the transfer is the destruction of preexisting Indian rights
23 to regulatory control, unquote. And that includes
24 adjudicatory control under *Nevada versus Hicks*.

25 And moreover, I want to address the issue that came

1 up in the motion. Congress's explicit reservation of certain
2 rights, which occurred in 1958 by the restoration of the
3 subsurface estate, doesn't change this analysis. You still
4 focus, sir, on 1905 and when the opening occurs. What
5 *Bourland* says is Congress's explicit reservation of certain
6 rights to the Tribes, such as, as in that case, recognizing
7 subsurface rights, does not operate as an implicit reservation
8 of all former rights. When you lost the power to exclude on
9 the surface lands, it was over unless Congress went back
10 somehow and fixed it, which they didn't do in this case. And
11 sir, maybe they should, but they didn't.

12 And what *Bourland* said about Congress's explicit
13 reservation of certain rights does not operate as implicit
14 reservation of all former rights, and when Congress reserves
15 limited rights to a tribe, the very presence of such a limited
16 reservation of rights suggests that the Indians would
17 otherwise be treated as the public at large. And that's the
18 reality here.

19 Now, sir, if for some reason this land is found to be
20 within Indian Country and everything I've said is unavailing,
21 comity considerations are secondary here. We did exhaust, as
22 I talked about, but more than that, comity considerations are
23 secondary because federal law requires this Court to assert
24 its own jurisdiction to protect the rights of Plaintiff as a
25 non-Indian under *Montana*. Tribal Court exhaustion is required

1 as a matter of comity, not as a jurisdictional prerequisite.
2 That's key. It's analogous, as the Supreme Court said in the
3 *Iowa Mutual* case, it's analogous to principles of abstention.
4 It is not a jurisdictional prerequisite.

5 And comity has to be interpreted narrowly, as the
6 U.S. Supreme Court said in the *Colorado River* case, in light
7 of the virtually unflagging obligation of federal courts to
8 exercise the jurisdiction given to them.

9 Now, requiring Tribal Court exhaustion here,
10 additionally, beyond the fact that we did exhaust as the Tenth
11 Circuit views exhaustion, requiring more of it would serve no
12 purpose other than delay. It would be impermissible under
13 *Crowe & Dunlevy*. And it's plain here under *Montana* that
14 there's no federal grant that provides for tribal governance
15 of nonmembers' conduct on land governed by this main rule in
16 *Montana*. That's the *Strate* case.

17 And so, finally, if we even get to this point about
18 *Montana*, the two very narrow exceptions just don't apply here.
19 We shouldn't get to this point, in our view, but just to close
20 this out, Plaintiff never consented to the exercise of civil
21 jurisdiction by Defendant. And *Atkinson Trading Post* is
22 directly on point here. *Montana's* consensual relationship
23 exception requires that the tax or regulation imposed by the
24 Indian tribe have a nexus to the consensual relationship
25 itself.

1 There is no nexus in a workforce development program
2 like TERO and a preference system like TERO to any kind of
3 other relationship in a wrongful death case. Just it's too
4 attenuated. It's not close. And there was no on-reservation
5 commercial agreement apart from TERO that would establish that
6 according to the *Atkinson Trading* case and also the subsequent
7 U.S. Supreme Court case in *Plains Commerce Bank*.

8 And if we doubted it, *Crowe & Dunlevy* tell us this
9 just last year. Quote, for ancillary jurisdiction over
10 plaintiff as a nonmember of the tribe to be appropriate under
11 this first exception to *Montana*, the consensual relationship
12 exception, the dispute before the tribal court must arise
13 directly out of that consensual relationship. It has to be
14 linked directly, and it's not.

15 And you can't confer -- I'm sorry. You cannot infer
16 consent, Your Honor, from the larger context of unrelated
17 commercial dealings. And that's *Atkinson*, which couldn't be
18 more clear. It says it's not in for a penny, in for a pound.
19 It says that there's got to be a nexus.

20 The Supreme Court reminded us of this yet again in
21 *Plains Commerce Bank*, which I point out is the most recent of
22 the *Montana* cases, all of which the tribes have lost since
23 1981 on these issues. And in *Plains Commerce Bank* the holding
24 was that lengthy on-reservation commercial relationships
25 between the non-Indian and the tribal government are

1 insufficient to satisfy that first *Montana* exception. It just
2 isn't enough.

3 Finally, the second *Montana* exception doesn't apply.
4 The Supreme Court has so narrowed that that it is limited to,
5 quote, catastrophic, unquote, circumstances where the
6 non-Indians' conduct, quote, imperils the subsistence of the
7 community, unquote. Tragic as this case is, it does not
8 imperil the subsistence of the community. And you see that in
9 *Plains Commerce Bank*, and you see it in *Atkinson*. And in
10 *Atkinson* it says unless the non-Indian's conduct -- I'm sorry.
11 In *Plains Commerce Bank* it says unless the non-Indian's
12 conduct is so severe that it actually imperils the political
13 integrity of the Indian tribe, there can be no assertion of
14 civil authority beyond tribal lands. That's quoting *Montana*.

15 So in sum, Your Honor, we exhausted. We're done,
16 according to the Tenth Circuit precedent. We don't need to
17 worry about comity when the jurisdictional requirement is that
18 this non-Indian's rights be vindicated. It's not tribal land.
19 Even if it were, *Montana* makes it clear that the presumption
20 is that a non-Indian does not have to succumb to this Tribal
21 Court's jurisdiction.

22 We thank you, Your Honor.

23 THE COURT: Mr. Berley.

24 MR. BERLEY: Your Honor, I'm Richard Berley. I
25 represent Judge St. Clair, the Chief Judge of the Shoshone and

1 Arapaho Tribal Court.

2 In our view, we shouldn't have to be here today at
3 all. Encana filed this lawsuit a couple of weeks ago.
4 There's not even an answer on file. They asked Judge
5 St. Clair to stay the proceedings in Tribal Court while they
6 pursued this lawsuit here, and after some back and forth Judge
7 St. Clair issued a stay. You have the record of the
8 communications between the parties that led to the stay, but
9 essentially Encana asked for a stay below, and they got it,
10 and that should have been the end of it. We're here for a
11 preliminary injunction. Encana isn't satisfied with the stay
12 they got, and instead they would prefer a preliminary
13 injunction from this Court. They're not entitled to it, Your
14 Honor.

15 As you pointed out not only today but in prior
16 rulings, a preliminary injunction is an extraordinary remedy,
17 and when you're talking about an injunction against another
18 court, it's a drastic remedy. You have to show you're
19 entitled to it clearly and unequivocally. The most important
20 thing that you have to show is that if you don't get the
21 injunction, the federal court preliminary injunction, you will
22 be irreparably harmed. The harm can't be hypothetical. It
23 has to be certain. It has to be great, actual, and imminent.
24 They have a stay. They can't possibly make this showing.

25 Encana in their, in their papers makes some weak

1 complaints about the stay, but it's a perfectly fine stay.
2 Nothing will happen in Tribal Court in the Jorgenson case
3 until this Court rules at least on the Tribes' -- on Judge
4 St. Clair's motion to dismiss, which was just filed on
5 Tuesday. And once this Court rules, however it rules, the
6 Tribal Court will act consistently with this Court's ruling or
7 not act consist -- if so directed by this Court.

8 Encana wants to jump to the merits. They're doing
9 this completely backwards. They want to present and have, I
10 guess, presented to you a reservation boundaries case to you
11 today, but first they would have -- they have to show clearly
12 and unequivocally that they'd suffer irreparable harm despite
13 the issuance of the Tribal Court stay before they should be
14 permitted to put -- to go to the merits.

15 In our view, going to the merits on the reservation
16 boundaries or diminishment is a waste of time and resources.
17 We were called in specially to represent Judge St. Clair when
18 he was sued. We've had nothing to do with the Jorgenson case
19 below. We've barely rolled up our sleeves with regard to this
20 case, which was just recently filed. The Complaint and
21 exhibits from Encana total over a thousand pages. We've
22 barely scratched the surface about what -- we understand
23 Encana wants to bring in witnesses basically to the merits of
24 their disestablishment case today, and we've barely been able
25 to scratch the surface about what Encana's witnesses are

1 likely to say. That's not how they should be presented. If
2 and when this Court decides it wants to go to the merits of a
3 disestablishment case, of a diminishment case, it should be
4 done in an orderly way. We should have the opportunity to
5 depose those witnesses so we might have a chance to put on
6 some meaningful cross-examination and actually have a useful
7 proceeding.

8 What makes sense today, Your Honor, is first -- is to
9 do things in the right order. First of all, since Encana
10 hasn't even remotely shown that they could suffer irreparable
11 harm and need an injunction today, the injunction, the request
12 for preliminary injunction should be denied.

13 Then this Court should rule on Judge St. Clair's
14 motion to dismiss this case for failure to exhaust tribal
15 remedies. It's clear Encana has not exhausted tribal
16 remedies. Encana in its papers made virtually no attempt to
17 distinguish its situation from the DHS case. Where this Court
18 has already ruled with regard to this precise incident about
19 Encana's -- that Encana's codefendant and contractor, with
20 whom it's in privity, has to exhaust its tribal remedies,
21 including tribal appellate remedies, before it can go to
22 federal court to challenge the Tribes' jurisdiction.

23 To say that the, that Encana has exhausted tribal
24 remedies below is, is -- I mean, it runs counter to, to
25 multiple cases that Encana is required to exhaust appellate

1 remedies as well as trial court remedies. The Supreme Court
2 said this in the *Iowa Mutual* case in 1987. The Tenth Circuit
3 has said it repeatedly, including in *Kerr-McGee* and the *Bank*
4 *of Oklahoma versus Muscogee* cases. This Court has said it
5 multiple times, including in the DHS case. Exhaustion
6 requires going through the tribal appellate system. This
7 isn't a mystery. It's black letter law.

8 We objected initially to having counsel go through
9 Judge St. Clair's testimony before -- whatever testimony he
10 was presenting elsewhere. Judge St. Clair issued an order on
11 jurisdiction. It speaks to itself. We're hesitant to go
12 beyond it. We represent the Judge specially. It may be that
13 at an appropriate time, if and when this Court wants to get
14 into a merits trial on the reservation boundaries, that the
15 two Tribes will come in with their counsel, who have been
16 working on this case for quite some time, but we're not, we're
17 not here to do a reservation boundaries trial today.

18 There has been some -- all I will say is that in our
19 papers we show that there is certainly a colorable claim, more
20 than a colorable claim that key portions of the lands at issue
21 either do have reservation status or the *Montana* exceptions
22 apply to them. This Court has already made a preliminary
23 showing -- a preliminary holding in its DHS ruling that the
24 *Montana* exceptions likely apply, that there is a nexus between
25 the agreements and the way Encana and DHS run the extraction

1 of the Tribes' trust oil and gas resources, and that these oil
2 resources are of key importance to the reservation.

3 You know, the history of this reservation and the
4 boundaries of this reservation have been debated in a number
5 of contexts, and there are a number of -- you know, we're
6 talking about a century's worth of legislation and a century's
7 worth of activities on the ground that may have some effect on
8 the diminishment of the reservation. Today is not the time to
9 solve those. The Tribe's motion to dismiss has to be dealt
10 with. If this Court denies the Tribe's motion to dismiss, the
11 Tribe gets to file an answer, and then we should go through it
12 in an orderly way. And we don't decide diminishment on the
13 basis of a preliminary injunction motion filed, what, to be
14 heard three weeks after the filing of a lawsuit here, when a
15 stay that's been requested has been granted.

16 I will say that we do think that a key point is
17 that -- in terms of just the cases that have been cited by
18 counsel, they're all readily distinguishable. The Crowe case
19 involving an effort by a tribal court to require an attorney,
20 who wasn't even a party before it, to pay back fees to a
21 tribal body that wasn't even the same tribal body that
22 had -- whose court was issuing the ruling, I mean, even the
23 court there acknowledged that those were extraordinary
24 circumstances. There was no stay. I mean, there are probably
25 ten major distinguishing characteristics between -- with the

1 Crowe attorney case.

2 *Bourland*, if you're talking about what the nexus is
3 between a tribe's interests in its core oil and gas resources,
4 which are fundamental and which this Court has already
5 recognized are fundamental to the, to this reservation, and
6 comparing it to the right of a tribe to manage fishing on a
7 lake, non-Indian hunting and fishing on a lake on a former
8 reservation where the lake bed was restored, I mean, it's
9 completely different. It's factually distinguishable.

10 The *Enlow* case, there was a tribal supreme court
11 ruling, and the court there held that appellate remedies had
12 been exhausted.

13 I think it's interesting that they have not until
14 today tried to distinguish the DHS ruling that this Court has
15 made. And to come in here and say, well, Encana is different
16 from DHS because Encana has exhausted its tribal remedies
17 is -- it's just -- including appellate remedies, it just
18 hasn't been done. The appellate remedies have not been
19 exhausted.

20 Anyway, Your Honor, we hope you recognize that really
21 the key issue here is whether Encana is entitled to a
22 preliminary injunction, and the key issue in making that
23 determination is whether Encana can make a showing that
24 without the preliminary injunction it would be irreparably
25 harmed, and it has to make that showing clearly and

1 unequivocally, and it hasn't even begun to make that showing.
2 When the time comes to get to the merits of this lawsuit, to
3 determine the reservation boundaries, if and when you
4 determine that time has come, we'll be prepared to do it at
5 that time, Your Honor.

6 I will say at this point we do have the 1958 Act. We
7 think it's clear. Once the minerals are restored to the
8 Tribes in trust, once Congress has decided that the Indian,
9 that the Indian statutes will henceforth govern the
10 development of any subsurface oil and gas held in trust for
11 the Tribes, once BIA, rather than BLM, will be administering
12 those resources, we think that it's clear that at very least
13 the subsurface, the oil and gas estate, has been restored. So
14 there's at least a colorable case there and in our view a
15 strong case, but we think that should be addressed in due
16 time, Your Honor, not today. Thank you.

17 THE COURT: Mr. Vincent.

18 By the way, I'm not sure everybody is aware that I
19 authorized him to intervene.

20 MR. VINCENT: Thank you, Your Honor. May it please
21 the Court and Mr. Murphy --

22 MR. MURPHY: Mr. Vincent.

23 MR. VINCENT: -- as well as everybody, Rich.

24 Your Honor, as I was listening this morning and
25 coming down here, I, I had various things going through my

1 mind, but one of the things that I landed on was the
2 significance of this case to me as an individual person. My
3 grandfather was an orphan who came from France before the turn
4 of the last century and ultimately homesteaded his first place
5 on a ranch on the flanks of Black Mountain. That place is now
6 shown on maps as, shown as Vincent's Cabin. And so since that
7 time my family has been connected, to one extent or other,
8 with the reservation and with the people and with the
9 activities on the reservation. And so that's kind of where
10 I'm starting this morning as I'm listening to the arguments.

11 The other thing that I'm thinking about is that
12 Encana has six lawyers in court today and I don't know how
13 many business people. The Tribes have their lawyers. And I
14 represent the family of a young man who was killed under
15 circumstances that are horrendous. And I would be remiss if I
16 did not point out that the reason we are here today is that
17 Encana knows just how horrendous those facts are and are
18 trying to avoid trial in the Tribal Court at any cost.

19 Now, we think that in terms of dealing with the issue
20 that Encana has brought to the Court today, the issue that
21 Encana has brought to the Court today is whether they are
22 entitled to a preliminary injunction. The issue isn't
23 diminishment. The issue isn't who has jurisdiction
24 necessarily. It's whether Encana, whether Encana is entitled
25 to an injunction. And that we believe turns on one fact or

1 one determination, and it's one that we think is significant,
2 and that is do -- have we presented in our opposition to the
3 Court a showing that a colorable claim of Tribal Court
4 jurisdiction exists in this case. Because if it does, their
5 injunction must fail, and we get to try the case in Tribal
6 Court. And maybe then Dr. -- our geographer back there, maybe
7 then he will come and provide testimony to the Tribal Court
8 that he has never provided in the Tribal Court before this
9 proceeding. In other words, we're being ambushed by this.
10 This wasn't done in the lower court.

11 Now, there's two cases that give rise to this
12 situation, and I filed them both. The first case was for a
13 fellow I grew up with, Charlie Whitlock. He's a white guy,
14 and he was a pumper for Encana, and he was injured in an
15 explosion. And we filed the case in Tribal Court and -- in
16 April of '09, one month after we filed the initial case in
17 Tribal Court against DHS in March of '09. Encana was brought
18 in in the fall, I think September or October.

19 Now, the thing that -- if I -- if my voice -- if you
20 sense from my voice that I am perplexed, I am. I'm quite
21 perplexed because in that case --

22 And Mrs. Schrinar, could you run this machine for me,
23 please?

24 I want to have Mrs. Schrinar put up the Complaint
25 that Encana filed in that case.

1 Or you can just use my Complaint if you want to here.
2 We could show just the front page to the Court and everybody.

3 And as everybody can see, this is the front page of
4 the Complaint called Encana against Charlie Whitlock and his
5 wife Phyllis and his children Challis and Chesnie. Chesnie is
6 a minor. Challis is now a grown-up -- or not a grown-up, but
7 over 18. Now, in this case Encana was coming to federal court
8 to block the efforts of the Tribal Court, the Tribal Court to
9 conclude the case. And we'll talk a little bit more about the
10 opinion, but here's the reason that I'm exceedingly perplexed
11 about the position that Encana takes today.

12 And Mrs. Schrinar, if you could go to page 2,
13 paragraph 6, please.

14 We see there that Encana alleges, Encana alleges,
15 that Mr. Whitlock was injured in an accident at the Tribal
16 43-1 well located on the Wind River Reservation on
17 December 20th, 2005. As we'll see in just a moment, that well
18 is probably, as the crow flies, maybe a mile or two from the
19 well site for Jorgenson.

20 And if we could put the map up, the map shows that
21 the Jorgenson location is in Section 30, and the Whitlock
22 location is southwest of there. And I'm, you know, I'm
23 just -- that looks like a couple of miles to me.

24 Interestingly enough, these cases, as I say, were
25 companion cases. They were filed within a few days of each

1 other, a few months of each other.

2 And this is the next thing.

3 If we could put -- let's put the Whitlock lease up
4 first, and we'll just, we'll just look at this. And you might
5 want to bring it down just a hair. Thank you.

6 The significance of this is this is the Whitlock
7 lease, and the only reason that I wanted to put it up here was
8 to show that this lease is identical in terms of its printing
9 and things of that nature, even the idea that it's been
10 withdrawn somehow, with the Jorgenson lease at issue in this
11 case. They're identical. And in that case this company that
12 says they need a preliminary injunction because the land isn't
13 on the reservation said the land was on the reservation.

14 Now, I'm from Riverton, and you've got to say it slow
15 and say it twice sometimes, but that doesn't compute for me.

16 And so that's how we start our thoughts about this
17 case. And so -- I, I can read -- here's another, I think,
18 thing that's kind of important. Dr. Wilson will tell us that
19 the 1905 Act --

20 THE COURT: I'm missing the language. I'm looking at
21 the lease.

22 MR. VINCENT: I'm sorry?

23 THE COURT: Help me out. Show me where that language
24 is.

25 MR. VINCENT: Which language is that?

1 THE COURT: The language that specifically describes
2 the legal description as on the reservation.

3 MR. VINCENT: It doesn't. It just has the legal
4 description.

5 THE COURT: Right.

6 MR. VINCENT: But what I'm saying is that in the
7 Complaint, Encana said that the Whitlock lease was on the
8 reservation, and this is the lease -- actually, this is the
9 Jorgenson lease, but the first lease, which is marked as
10 Exhibit -- if you could just put -- okay, they're both Exhibit
11 K. The Whitlock lease here is the one that Encana said, at
12 page 6 of their Complaint, was on the Wind River Indian
13 Reservation.

14 If we could see -- if we could put that up there.
15 Just page 6 or paragraph 6.

16 Paragraph 6 of Encana's Complaint in, um, I've
17 forgotten the civil number now, but it's Encana against
18 Whitlock, and at paragraph 6, and that is Civil
19 No. 9-CV-224-D, and in there Encana said, Encana said that
20 Charles Whitlock was injured in an accident on the Tribal 43-1
21 well located on the Wind River Indian Reservation.

22 And so that case when it went back to Tribal Court,
23 we had another year or so of proceedings, and ultimately that
24 case settled, and Encana required that we obtain settlement
25 approval from the Tribal Court for the minor child

1 particularly. And she was a white person. And so we did.
2 And so Encana availed itself of the jurisdiction of this
3 Tribal Court that they say doesn't have jurisdiction to get
4 that case settled.

5 After that, after that was done and after Judge
6 St. Clair entered his decision on jurisdiction on
7 December 20th, Encana finally entered its order -- submitted
8 its order dismissing the Tribal Court case in Whitlock with
9 prejudice. It was presented on January 27th by Encana
10 counsel, of 2012, and signed that day.

11 It's interesting to note -- I believe, Miss Schrinar,
12 if you could go to the second page -- that I had approved that
13 order on 9/28/11. Mr. Holscher approved it on 1/26/12. Now,
14 the significance of that is that this is long after Judge
15 St. Clair had rendered his jurisdictional decision, it's long
16 after Encana had apparently decided it was going to attack
17 jurisdiction in the companion case, and we think is
18 significant.

19 Finally, in terms of this particular lease, we have
20 the assignment of this lease, as Ms. Schrinar will put up, and
21 we will mark it as an exhibit, but if you could show that to
22 the Court and counsel, please, and this is the assignment of
23 the oil and gas lease which indicates that the property here
24 is located in -- covering the lands in the Wind River Indian
25 Reservation. And so we think the documents are abundantly

1 clear. We will have maps where Encana has drawn maps showing
2 this particular area to be their Wind River Indian leases and
3 that type of thing.

4 So, so those are the, those are the, the matters that
5 we thought we ought to, we ought to describe. And I, rather
6 than go through each and every one of these cases, I thought
7 it good to summarize the many cases that this Court has been
8 called upon to decide through the years on this type of issue.

9 The first one that I was directly involved with was
10 the *Marathon against Corey Johnston* case, and that was decided
11 in June of 2004, and that is -- I believe we attached these to
12 one of those electronic things. But anyway the Court goes
13 through in great detail to describe the exhaustion rule and
14 the exceptions for that and discusses futility and how the
15 exhaustion rule is applied with regard to Encana -- or to the
16 *Montana* test. It discusses the *Montana* case really and *Strate*
17 in a great deal of detail. And the Court said at page 16, it
18 said what we have to figure -- I'm sorry, Carly -- what we
19 have to figure out now is whether the Shoshone and Arapaho
20 court may properly exercise jurisdiction over the present
21 matter. And, of course, that was another fellow that was
22 hurt, and the injury, as in this one, occurred on a portion of
23 the Wind River Reservation where the Shoshone and Arapaho
24 Tribes retained an ownership interest in their role as land
25 lessors. And then we described the lease. And so this is,

1 this is ground that's been plowed seven, eight years ago now.
2 And it says that in circumstances such as that that it's the
3 Court's opinion that there are comity concerns that warrant
4 the application of the exhaustion requirement. And then the
5 Court goes on to say: Even in those situations where the
6 Supreme Court has curtailed tribal authority over
7 non-Indians -- this is at page 17 -- the Tribes retain a core
8 sovereign interest in protecting health and welfare. And then
9 at page 18 the Court notes that: The tribal courts, in our
10 opinion, have an overwhelming interest in workplace safety of
11 corporations operating on the tribal land because invariably
12 significant numbers of tribal members may constitute the
13 relevant workforce. We would miss the forest for the trees
14 were we to rely on facts -- or rely -- or to only focus on the
15 fact that in this particular instance of alleged negligence
16 involved a nonmember employee.

17 So we've known from this Court for seven years now
18 about that holding.

19 And then the next case that I wasn't of record in but
20 I was familiar with is Dr. Stockton's case, and that case was
21 decided shortly after the *Marathon* case in July of 2004. The
22 significance of that case was that the Court discusses the,
23 the requirement that Encana must, in addition to all of the
24 other elements, show a likelihood of success on the merits.
25 And, and I -- they haven't really done that I don't think

1 because they didn't even present their case, their entire
2 case, to the Tribal Court. But a part of that, Dr. Stockton
3 was convinced of his success on the merits, that he'd win, and
4 this Court wasn't, wasn't at all persuaded by those arguments.
5 And so then it went on to say we had to see, first look and
6 see if there's any exceptions to the tribal exhaustion rule.

7 And I should mention that the, there were the same
8 concerns about two trials and those types of things. You
9 know, we're talking about a defendant that's the biggest
10 natural gas producer in North America. Its main office is in
11 Canada. It has offices in Riverton. And, and, you know,
12 there -- I really -- I mean, they've got six lawyers sitting
13 here today. I don't think that we have to worry about them
14 running out of money before I can try a case against them. So
15 I don't think that's a good reason, and it didn't appear to be
16 in the *Stockton* case.

17 It says that -- this Court concluded Dr. Stockton
18 hadn't established a likelihood of success on the merits
19 because he hadn't, for one reason, hadn't exhausted Tribal
20 Court remedies. He hadn't gone through the appellate
21 procedure. And that's at page 14.

22 The next case that the Court or where the Court had
23 the opportunity to decide these issues is the case of -- is
24 the *McDonald's* case, and that was decided in 2007. And of all
25 of the opinions this one is of the most interest to me. I

1 don't know why it, it seems to resound with me more
2 than -- not that the other ones don't, but it is a good
3 opinion.

4 And at that case there is a general description of
5 the exhaustion requirement and what that means at page 6 and
6 the four exceptions to the exhaustion requirement.

7 There's no claim that we've made any assertion of
8 jurisdiction in the Tribal Court by harassment or bad faith,
9 until I guess this morning, and I still don't know whether
10 there's a violation of an express jurisdictional prohibition
11 shown. I don't know of any congressional act or anything like
12 that that specifically prohibits this type of case on this
13 type of lease.

14 The third exception is futility due to an inadequate
15 opportunity to challenge the Tribal Court's jurisdiction.
16 Mercy, in this case Encana is saying they're getting too much
17 due process, they want out of there.

18 And then, fourth, where the tribal exhaustion rule
19 doesn't apply where it's plain that no federal grant provides
20 for tribal government -- or governance of nonmembers' conduct
21 on land covered by the main rule.

22 Now, so we don't really, I think, have to worry about
23 any of those. And then we look at the comity concerns that
24 are advanced when that's properly applied.

25 The first is furthering a congressional policy

1 supporting tribal self-government. In our small community it
2 becomes more and more important that the tribal courts have
3 the ability to regulate and enforce a justice system within
4 the exterior boundaries. And so we think that this action
5 here really defeats that purpose.

6 The second comity concern is that there be an orderly
7 administration of justice allowed in the Tribal Court so that
8 they can develop a full record. And, of course, we haven't
9 had that opportunity. And we'll hear from a person who has
10 never once testified in this case, never once been deposed in
11 this case, never, ever before today.

12 And so -- and then the Court in the *McDonald's* case
13 performs I think a yeoman-like effort in terms of discussing
14 each one of these exceptions that -- with regard to the
15 motivation by harassment or bad faith, the Court simply says,
16 look, there's plenty of authority this way and that way, and
17 so this, this matter does -- it is a fair dispute over what
18 the legal status of Riverton is.

19 And here it's even more clear because in the
20 companion case this company with all these lawyers said just
21 the opposite of what they're telling us today, just the
22 opposite, and went to the Tribal Court to get authority to
23 settle the case. And in this case, in this case, we went to
24 Tribal Court to get authority to settle the wrongful death
25 case that involved an allocation of funds among the claimants

1 that was conditioned on a condition subsequent. It didn't
2 materialize, so the settlement ended, but the fact of the
3 matter is this company used the Tribal Court in that fashion
4 in this case and now says they don't have jurisdiction.
5 That's what they're telling us. And I think I went out there
6 and got that authority four or five months ago. We can look
7 it up.

8 And so, and so anyway, we have good grounds to say
9 that Encana has acknowledged this and probably, I think, and
10 will argue at some point is barred by the doctrine of
11 res judicata from even raising this issue because it's,
12 they're -- both leases are in the '53 Act area, they both had
13 the same lease terms, it's the same company, same court, same
14 everything. And so -- or, at a bare minimum, judicial
15 estoppel. And I just haven't had a chance to think through
16 that.

17 So, anyway, so then the Court goes on in the
18 *McDonald's* case and really explained the confusion, if there
19 is confusion, about the land status of Riverton. And that
20 went on, the Court spent three pages doing that. And the
21 Court concludes at page 11 by saying this, and I think it -- I
22 think that this is something that we should all bear in mind.
23 If Riverton is located outside of reservation boundaries, the
24 Tribal Court would likely -- Tribal Court jurisdiction would
25 likely violate express jurisdictional prohibitions. If

1 Riverton is located within the boundaries of the reservation,
2 the situation involves a straightforward *Montana* analysis.
3 That's at page 11. As we've seen, Encana has taken apparently
4 both positions now.

5 The third exception is futility, and, of course, we
6 all know that speculative futility is not enough to justify
7 federal jurisdiction in this type of case.

8 And the fourth exception is that there is no federal
9 grant. And then at page 13 we, we -- the Court again notes
10 that the status of Riverton as being on or off the reservation
11 is important if it's not within the boundaries, but here, as
12 I've mentioned, Encana said in the companion case that the
13 wells are within the reservation.

14 COURTROOM DEPUTY: Five minutes, Counsel.

15 MR. VINCENT: Okay. I'm sorry, I told you I wouldn't
16 take this long, and I didn't mean to.

17 And then the Court said that we don't really have to
18 decide that in this case, we can use *Montana*, and the
19 hamburger contract isn't enough of a contact to grant it.

20 And then we have the Encana *Whitlock* cases decided by
21 Judge Downes, and there are two of them. He -- and those
22 were -- the first one was entered in August of 2009. He again
23 discusses the exhaustion remedy, and the Court found, excuse
24 me, that the contractual link, the federal oil and gas lease
25 for the Tribal 43-1, constitutes a consensual relationship

1 between the Tribes and Encana. This Court has already held
2 that, that the oil and gas lease constitutes that agreement.
3 And Encana made the same argument in this case that they made
4 before Judge Downes. They said *Atkinson* doesn't, doesn't
5 permit that. It says that it doesn't stand for the
6 proposition that it's in for a penny, in for a pound. And
7 this is what the Court said, it said at page 8, Encana misread
8 that principle. Encana's liability, if ultimately it's
9 subject to any, stems from activities undertaken as a result
10 of the authorization to develop tribal energy resources. And
11 while the Whitlocks may not be tribal members, it's this
12 consensual agreement with Encana and the Tribes to develop
13 these resources that creates in the Tribes the authority to
14 regulate the manner in which the resources are developed. And
15 then the Court finds the second exception also applies because
16 of the deal.

17 And then there's the second *Whitlock* case which is
18 important at page 7 because the Court says: As we have
19 mentioned, the existence of the lease -- it's at the bottom of
20 the page. As the Court has mentioned, the existence of the
21 lease, the existence of the lease establishes a colorable
22 claim of Tribal Court jurisdiction and, therefore, renders the
23 exhaustion exception inapplicable.

24 And then we have the DHS case which, of course, is
25 one that's already been discussed and one that this Court

1 decided in the, in January of 2010. And that case is
2 important because at page 9 the Court says that the, that this
3 lease and the taxation and regulations imposed by the Tribes
4 through TERO agreements, severance taxes, and the like show
5 that this nexus requirement has been met. And the Court said
6 to show why we say we have a nexus here let's look at the
7 cases where we said we didn't. And *McDonald's* and *Ford Motor*
8 *Company* there wasn't a nexus; in this case there is.

9 And the Court goes on to say at page 10 that unlike
10 the above case, in which the consensual relationship was
11 rather remote, the business license that both Encana and DHS
12 have from the Tribes, the oil and gas lease which Encana has
13 from the Tribe and allowed them to enter into a contract with
14 DHS to drill the well, and the TERO agreements that both
15 Encana and DHS have with the Tribes and that Encana paid
16 for -- or reimbursed or paid for DHS's payments under TERO, in
17 this Court's words, provide clear indications of direct
18 business drilling agreements between DHS and the Tribes. And
19 it just says that these types of business agreements create a
20 sufficient nexus.

21 So, so -- and then again says we -- to exhaust that
22 means you've got to exhaust.

23 And so I have other things to say, and I'm sure
24 I've -- I didn't mean to use this much time. I thank you for
25 your attention. This is a very important case to my client,

1 whom I'm very proud to represent, and it is a case I believe
2 that will, if ultimately tried and resolved, provide not only
3 monetary recovery but I believe changes in the way these
4 operations are conducted so that we don't see these types of
5 things occurring and reoccurring time and again. And I know
6 that may sound trite and so forth, but that's the significance
7 of the case to me and to my clients. And thank you.

8 THE COURT: Mr. Eid.

9 MR. EID: Your Honor, may I do a short rebuttal?

10 Thank you, Your Honor. I have just a few slides this
11 time and not a whole show.

12 It's important to understand, Your Honor, what it is
13 we have to prove here to prove irreparable harm because, with
14 all due respect to my learned colleagues, it was misstated.
15 Under *Bourland* the only thing we have to prove to get relief
16 from you now is that the 1905 Act ceded these lands and at
17 that time the opening occurred. The effect of alienation was
18 such, under the *Montana* doctrine, that the Tribal Court lost
19 any power it might have had at that moment. All we have to
20 prove and why we have the witnesses to prove it here today to
21 get the relief that we need is that issue. We don't need to
22 prove anything else, and it's very important to understand
23 that. Let me explain quickly why that is.

24 *Crowe & Dunlevy*, which does apply directly to this
25 case -- and as an aside, Mike McBride brought the case.

1 Crowe & Dunlevy, he's a partner there, is a big law firm, it's
2 a big company, there's no issue there -- made it very clear in
3 the Tenth Circuit there is an established federal right to be
4 protected against the unlawful exercise of tribal court
5 judicial power. That right is -- that's our right. That's
6 why we're here. We seek to vindicate that right.

7 And we know *Bourland* gives us the relief that we
8 need. *Bourland* makes clear, as I said, that the *Montana*
9 framework for examining the effect of land alienation
10 controls. And again to quote, with your patience, *Montana*
11 unequivocally stated, words of the Supreme Court in *Bourland*,
12 that when Congress broadly opened up a treaty reservation to
13 non-Indians, which is exactly what the 1905 Act did and the
14 ensuing Riverton Reclamation Project legislation did, quote,
15 the effect of the transfer is the destruction of preexisting
16 Indian rights to regulatory control. And that includes
17 adjudicatory control.

18 So all we have to prove is that. And *Osage versus*
19 *Irby*, which we talk about in our briefs, that's Tenth Circuit
20 2010, makes it clear the ownership of the mineral interests
21 vests absolutely no ownership in the tribe. So that issue is
22 done.

23 *Stockton*, as I mentioned, is, is inapposite because
24 *Bourland* tells us what we need to prove. And all we've had to
25 do is show the probability of success on the merits, which

1 we've done. We've shown the irreparable harm at this point,
2 which is the continued denial of our federal right to not be
3 in a court that has no jurisdiction over us.

4 And, finally, let me just say the *Whitlock* case --
5 and I appreciate so much the remarks of my learned colleague,
6 but it's not the same land, and it's not relevant at all to
7 this proceeding. And we'll prove that to you very quickly.
8 They're in different sections. We're going to talk about
9 Section 19 and Section 30. That's why we're here. That's why
10 we've got to get this relief. So while I appreciate the fact
11 that in that case Encana talked about tribal land, it's not
12 the same land, and we'll prove that in the, in the witnesses
13 that we'd like to, with your permission, produce for this
14 Court.

15 Again, the issue is only the narrow issue for us to
16 prove. In 1905 was this opened broadly to a public use by
17 Congress? *Montana* says the effect of land alienation
18 controls. We're done at that point. The Tribal Court, no
19 matter what else, has no jurisdiction over us, and *Crowe &*
20 *Dunlevy* told us that in following the precedence just last
21 year. So that's all we have to prove here. We don't need to
22 prove any of the rest of this stuff. And in that sense my
23 colleagues are both correct. We don't need to be prepared for
24 all of those things. We just have to prove this, and we get
25 the irreparable harm established, and I think we're done here

1 today.

2 THE COURT: Let me ask a couple of questions.

3 MR. EID: Yes, sir.

4 THE COURT: It seems to me that Mr. Berley's
5 arguments have some resonance anyway. I note that I have not
6 ruled yet on a motion that Miss Varilek has filed, file a
7 response in this matter. I assume that all we have before us
8 today is the issue of whether or not an injunction should
9 properly issue in this case, nothing more. And I think both
10 you and Mr. Berley and Mr. Vincent agree that that is the
11 issue. Mr. Berley's argument that we're not here to settle,
12 once and all, all of the issues concerning diminishment or as
13 Judge St. Clair refers to disestablishment as a more accurate
14 term in his view, but only that limited issue of whether or
15 not Encana has met the four standards for granting relief at
16 this point in the form of some sort of injunction.

17 Are we all on the same page in that regard?

18 MR. EID: Your Honor, I would say that we are with
19 respect to what this proceeding is about. And certainly I
20 have a disagreement about the desirability of a stay from a
21 Tribal Court that has no jurisdiction over us, and obviously I
22 will not agree to that.

23 THE COURT: Now, as long as I have everybody here, as
24 I understand it, there are very limited presentations, but
25 again, Mr. Berley's response to you in this matter that they

1 really have not had time to prepare to meet that testimony has
2 some resonance to me also. Are we going to need to afford
3 some additional time? I think Miss Varilek indicated that she
4 would require about a week, and certainly Mr. Berley has
5 indicated that he isn't prepared to cross-examine today. When
6 could we do that?

7 MR. BERLEY: Excuse me, Your Honor. I think what may
8 make sense would be once we get your --

9 THE COURT: There's no -- I understand there's no
10 time threat in this matter that I'm hearing. The question is
11 is does *Bourland* say what Plaintiffs or Petitioners say it
12 says, does their argument have merit or not, and in the
13 meantime the case that has been sitting there since January of
14 2010 in the Tribal Court is still sitting there and is stayed.

15 MR. BERLEY: Your Honor, we agree that there's
16 no -- we believe you're right that there's no time pressure
17 right now given the Tribal Court's stay, whatever Encana may
18 think about the desirability of that stay versus a federal
19 court injunction. I think what may make sense, Your Honor,
20 if -- is that we should try to reach agreement with Encana
21 about a litigation schedule, about how this case should be
22 managed. If this Court thinks that a preliminary injunction
23 right now is unnecessary and the next step is to go through
24 the Tribe's motion to dismiss on exhaustion and to argue about
25 whether that applies -- I mean, there are similar legal issues

1 that are out there. I mean, diminishment is -- there are
2 opportunities to bring that up at different times, and the
3 briefings include references to that argument about -- in the
4 form of whether there are exceptions to the requirement of
5 exhaustion and so on.

6 But in terms of when we should schedule these folks
7 to testify, our view is that if and when you want to hear
8 testimony about the diminishment of the reservation, when that
9 becomes relevant, that's when these folks should testify. And
10 if you don't think it's relevant now because, because with the
11 Tribal Court stay Encana can't show that they will be
12 irreparably harmed, then, um, it should be done before there
13 is going to be a trial on the issue of diminishment.

14 We would like to at least try to consult with them
15 and see if we can agree on time periods and maybe hopefully
16 either bring back an agreed schedule to you or, if we can't
17 agree, we can tell you that we haven't been able to agree, and
18 then you can decide when and if to schedule these, these
19 folks.

20 THE COURT: Yeah, the only thing I'm suggesting, I'm
21 not prepared to rule on the arguments, you know, just offhand
22 on the arguments that are presented under *Bourland* and *Crowe*
23 and *Osage*. And if you perceive that it's necessary to present
24 this evidence in support of those arguments, then I think in
25 fairness Mr. Berley and Mr. Vincent deserve an opportunity to

1 be able to be prepared to cross-examine or to present their
2 own witness.

3 MR. BERLEY: Your Honor, there's one other thing. If
4 you really want to hear these witnesses before ruling even on
5 the motion for preliminary injunction, it may very well
6 be -- I have appeared specially for the Judge, so I'm here for
7 a very short time, and it may very well be that the two Tribes
8 may want to enter -- may decide and they may want to consider
9 whether they should intervene themselves and, if it looks like
10 we're really going to have a diminishment lawsuit before this
11 Court, and so we should also have time to permit them to make
12 that decision and to --

13 MR. EID: Your Honor, may I speak? With all due
14 respect, and I appreciate that you may order additional
15 proceedings, I don't have to prove time pressure. I don't
16 have to -- it's not relevant whether there's time pressure or
17 not. As I just mentioned a moment ago, I think the precedence
18 is very clear. They don't have any jurisdiction over us, and
19 at that moment we should -- presumptively, because the law is
20 presumptive for *Montana* and everything I've explained,
21 presumptively this preliminary injunction ought to issue. And
22 if we have a hearing afterwards, that's fine, but these
23 witnesses are here, and they will prove the burden that I have
24 described. They can cross them all they want. They can cross
25 them at a later session, too. But we've spent a lot of time

1 and money to get them here in front of the Court, a lot of
2 preparation. They've had this thing for two years in Tribal
3 Court. We've worked in good faith with them. But under no
4 circumstances do I want to agree to more purgatory in Tribal
5 Court that does not have jurisdiction over us, and they don't.
6 And I'm not going to agree to any arrangements, I cannot,
7 where Judge St. Clair continues to have some say over what we
8 do because he does not. Until we have an answer from this
9 Court, we're not going back to Judge St. Clair. I can't do
10 it. It's my right as a U.S. citizen and my client's right as
11 a U.S. citizen.

12 THE COURT: Well, I'll resolve the issue.

13 MR. EID: Understood, sir.

14 THE COURT: Let's proceed to hear the testimony of
15 your witnesses for what, what they have to say here today, and
16 we can allow Miss Varilek to file her supplement.

17 MR. EID: Very good. Thank you, Your Honor.

18 MR. BERLEY: Your Honor, we'll just note our
19 objection. We feel that this is not, it's not the right time
20 to hear these witnesses unless they're going to testify to
21 Encana suffering irreparable harm despite the Tribal Court's
22 stay.

23 MR. VINCENT: And I join in that, Your Honor.

24 THE COURT: You may have a continuing objection.

25 MR. VINCENT: Thank you.

1 MR. MURPHY: Ready, Your Honor?

2 THE COURT: We're ready.

3 MR. MURPHY: Your Honor, Encana would call its first
4 of three witnesses, John Schmidt.

5 COURTROOM DEPUTY: Please raise your right hand.

6 (The witness was sworn.)

7 COURTROOM DEPUTY: Thank you. Please be seated.

8 Please state your full name for the record.

9 THE WITNESS: John Schmidt, J-o-h-n S-c-h-m-i-d-t.

10 JOHN SCHMIDT,

11 called for examination by the Plaintiff, being first duly
12 sworn, on his oath testified as follows:

13 DIRECT EXAMINATION

14 Q. (BY MR. MURPHY) Good morning, Mr. Schmidt.

15 A. Good morning.

16 Q. How old are you?

17 A. I am 23.

18 Q. Where are you currently employed?

19 A. I am employed by Encana Oil & Gas U.S.A.

20 Q. That's the plaintiff in this case?

21 A. Yes.

22 Q. What's your particular job with Encana?

23 A. I am the field operations lead for Riverton, Wyoming.

24 Q. And over what group of people or operations do you
25 supervise as the operations lead?

1 A. I supervise operations on the Muddy Ridge field, the
2 Pavillion field, a field we call Frenchie Draw, which is
3 between Casper and Riverton, and then a Hay Reservoir field,
4 which is east of Rock Springs.

5 Q. Which of those fields are located within the Riverton
6 Reclamation Project Area?

7 A. The Muddy Ridge field and the Pavillion field.

8 Q. In what Wyoming county are these fields located?

9 A. Fremont County.

10 MR. MURPHY: Permission to approach the witness, Your
11 Honor?

12 THE COURT: You may.

13 By the way, I have no objection to any counsel
14 approaching the witness today.

15 MR. MURPHY: Thank you.

16 THE COURT: No need to ask.

17 Q. (BY MR. EID) I've handed you Hearing Exhibit 1; is that
18 right?

19 A. Yes.

20 Q. Can you tell His Honor what that is?

21 A. Your Honor, this is a lease between the Bureau of
22 Rec -- or Bureau of Land Management and J.F. Hornbeck, which
23 is an Encana predecessor.

24 Q. And what's the effective date of that lease?

25 A. 1954.

1 Q. Is that lease still in effect today?

2 A. It is.

3 Q. Was it in effect when Mr. Jorgenson was injured and died
4 on January 1st of 2009?

5 A. Yes, it was.

6 Q. Is this the operative oil and gas lease for the well
7 Jeremy Jorgenson was working on in the hours before his death?

8 A. Yes.

9 MR. MURPHY: Your Honor, I would move the
10 introduction of Exhibit No. 1.

11 THE COURT: Exhibit 1 is received. I've already seen
12 it from Mr. Vincent, I think.

13 MR. VINCENT: Yeah, I have no objection.

14 MR. MURPHY: Thank you.

15 THE COURT: I think it's also attached to some of the
16 pleadings.

17 MR. MURPHY: It's in the record in so many places,
18 Your Honor.

19 (Plaintiff's Exhibit 1 received.)

20 Q. (BY MR. MURPHY) I just handed you what we've marked as
21 Hearing Exhibit No. 2; is that right?

22 A. Yes.

23 Q. Is that a map?

24 A. It is.

25 Q. Does this map show the area that is covered by this

1 particular oil and gas lease?

2 A. Yes, it does.

3 Q. How is the leasehold area shown on Exhibit No. 2?

4 A. It's Section 19. It is shown with a shaded yellow color.

5 Q. Is Section 19 within what you call the Muddy Ridge field?

6 A. It is.

7 MR. MURPHY: Your Honor, I would move the
8 introduction of Exhibit No. 2.

9 THE COURT: It is received.

10 (Plaintiff's Exhibit 2 received.)

11 Q. (BY MR. MURPHY) Let me put up the -- up on the board is a
12 blowup of Exhibit No. 2; is that right, Mr. Schmidt?

13 A. Yes, that's correct.

14 Q. And were you telling the Court that the yellow area is the
15 leasehold area for this particular lease?

16 A. Correct, the yellow area --

17 THE COURT: Mr. Berley, if you need to move around to
18 be able to see, feel free to do so. Mr. Vincent, you as well.

19 MR. VINCENT: Thank you.

20 Q. (BY MR. MURPHY) What section is the yellow area in?

21 A. It's in Section 19.

22 Q. In Fremont County?

23 A. Fremont County, Wyoming.

24 Q. Are there any acres in Section 19 that are not covered by
25 this lease?

1 A. Yes, there were five acres excluded. They're shown in the
2 white color.

3 Q. Let me see if I can get the pointer here.

4 COURTROOM DEPUTY: Just hold the red button.

5 Q. (BY MR. MURPHY) Is this the area that's not covered by
6 the lease?

7 A. Yes, that is the area.

8 Q. Are you familiar with the wells and facilities Encana has
9 in the Muddy Ridge field?

10 A. I am.

11 Q. Have you been to the well site where Jeremy Jorgenson was
12 working in the hours before his death?

13 A. I have.

14 Q. Would you be able to show Judge Johnson the location of
15 this particular well that Jeremy Jorgenson was working on?

16 A. Yes, I could.

17 Q. Do you need to get down from the witness stand to point
18 that out to His Honor?

19 A. Yes.

20 Q. Okay. Go right ahead. And you'll need to speak up
21 because you're not on mike.

22 A. This would be the well site.

23 Q. In Section 19?

24 A. In Section 19.

25 Q. Is that on tribal trust lands?

1 A. It's on Riverton reclamation lands.

2 Q. Do you know what entity owns those lands?

3 A. Bureau of Reclamation.

4 Q. Is that a division or department of the United States of
5 America?

6 A. It is a department of the United States of America, yes.

7 Q. What is the name of this well?

8 A. It's the Muddy Ridge 19-24.

9 Q. And what road is adjacent to the Well 19-24?

10 A. The Tunnel Hill Road.

11 Q. Can you show His Honor where Tunnel Hill Road is
12 located --

13 A. I can.

14 Q. -- on Exhibit 2?

15 A. I can. It's this road right here.

16 Q. Is this a tribal road?

17 A. No, it is not.

18 Q. What entity maintains Tunnel Hill Road?

19 A. The Fremont County Road and Bridge.

20 Q. Does Tunnel Hill Road even pass into tribal trust lands?

21 A. It does not.

22 Q. Where does Tunnel Hill Road pass?

23 A. Tunnel Hill Road stays completely within the Riverton
24 reclamation area. Would you like me to go back to --

25 Q. I think you can return to your seat now. Well, I want you

1 to stay for one more thing, Mr. Schmidt.

2 A. Okay.

3 Q. Have you been shown the area where Jeremy Jorgenson drove
4 off Tunnel Hill Road and died?

5 A. I have not shown that area yet.

6 Q. Could you show that to His Honor?

7 A. It's right down here in Section 30, approximately a mile
8 from the location.

9 Q. All right. Thank you very much. Now you can return.

10 How many wells does Encana have in the Muddy Ridge
11 and Pavillion fields?

12 A. We have about 216 wells in those two fields.

13 Q. How many of those 216 wells are located on tribal trust
14 mineral lands?

15 A. Approximately 23.

16 Q. How many of those 216 wells are located on nontribal trust
17 lands?

18 A. 193.

19 Q. Is this Well 19-24 located on tribal trust land?

20 A. It is not.

21 Q. And, again, who owns the land upon which this well sits?

22 A. It's the United States Government, Bureau of Reclamation.

23 Q. Does Encana employ any Native Americans in its Fremont
24 County operations?

25 A. We do.

1 Q. Approximately how many Native Americans does Encana employ
2 in Fremont County, Wyoming?

3 A. We have around 20 Native American employees.

4 Q. Are those considered full-time employees?

5 A. Yes.

6 Q. Part of the permanent workforce?

7 A. Yes.

8 Q. In what kinds of jobs are these Native Americans employed
9 with Encana?

10 A. We have them in several positions. We have coordinators
11 for our wells, we have lease operators, plant operators, and
12 rig supervisors.

13 Q. Are any of these positions supervisory positions?

14 A. Yes, they are.

15 Q. Does Encana want to employ qualified Native American
16 workers?

17 A. Absolutely, we do.

18 Q. Is there a tribal office or agency which helps train
19 Native American workers?

20 A. There is.

21 Q. And what is that tribal entity?

22 A. It's TERO.

23 Q. Do you have any contact with TERO?

24 A. I do.

25 Q. What is your understanding about TERO?

1 A. TERO was formed for two reasons. One, to ensure that
2 Native Americans are employed on tribal lands. You're
3 required to have 50 percent tribal employment. The other is
4 to help train workers for employment.

5 Q. Does TERO require that Encana and other employers pay any
6 fees to TERO when Encana wants -- when Encana works on the
7 Wind River Indian Reservation?

8 A. They do.

9 Q. Does TERO require that Encana and other employers be
10 licensed by TERO every year?

11 A. They do.

12 Q. Does TERO require that Encana and other employers enter
13 into a written agreement every year for work performed on the
14 Wind River Indian Reservation?

15 A. They do.

16 Q. I've just handed you what I've marked as the Hearing
17 Exhibit No. 3.

18 A. Yes.

19 Q. Can you identify Exhibit 3?

20 A. I can.

21 Q. What is it?

22 A. That is the 2009 TERO agreement.

23 Q. What are the effective dates of this TERO agreement with
24 Encana?

25 A. January 1st, 2009 through December 31st of 2009.

1 Q. And who signed this 2009 TERO agreement for Encana?

2 A. It was signed by Jim Jenkins.

3 Q. Was Mr. Jenkins authorized to sign this TERO agreement for
4 Encana?

5 A. He was.

6 Q. Was this 2009 TERO agreement in effect for the period of
7 time when Jeremy Jorgenson died on January 1st, 2009?

8 A. It was.

9 MR. MURPHY: Your Honor, I would move the
10 introduction of Hearing Exhibit No. 3.

11 THE COURT: It is received.

12 (Plaintiff's Exhibit 3 received.)

13 MR. MURPHY: I want to put that up on the Elmo, Your
14 Honor. It's about a five-page document.

15 Q. (BY MR. MURPHY) Mr. Schmidt, let me direct your attention
16 to the very first paragraph of the 2009 TERO agreement. Can
17 you read that to the Court, those two sentences?

18 A. I can. "Whereas this agreement is entered into on this
19 date January 1st, 2009, between the Eastern Shoshone and
20 Northern Arapaho Tribes Employment Rights Office, TERO, and
21 Encana Oil & Gas USA, Inc., Employer, with respect to
22 employment practices on the Wind River Indian Reservation."

23 Q. Does that paragraph and particularly that sentence tell us
24 where this TERO agreement governs Encana's employment
25 practices?

1 A. It does.

2 Q. And what does it tell us?

3 A. On the Wind River Indian Reservation.

4 Q. Does this TERO agreement govern any of Encana's employment
5 practices off the Wind River Indian Reservation or outside or
6 beyond the Wind River Indian Reservation?

7 A. No, it does not.

8 Q. Does the TERO agreement speak to the issue of employment
9 goals of Native Americans?

10 A. It does.

11 Q. What are those employment goals? And you might direct His
12 Honor to what page they're on and what paragraph.

13 A. They will be on page 3, paragraph 6.

14 Q. Can you see that on your screen now?

15 A. I can.

16 Q. What does the TERO agreement tell us with respect to the
17 employment practices and goals?

18 A. It basically states that we would employ 50 percent of our
19 employees on the reservation by local Indian or Indian
20 employees.

21 Q. Did Encana comply with this TERO employment and goal in
22 2009?

23 A. We did.

24 Q. Does Encana pay an annual fee to TERO?

25 A. We do.

1 Q. Is that annual fee described on page 3 of Exhibit 3?

2 A. It is.

3 Q. Is that in paragraph 7?

4 A. It's in paragraph 7.

5 Q. Did Encana pay this annual fee to TERO for the year 2009?

6 A. Yes, we did.

7 Q. Can you explain to Judge Johnson that annual fee and how
8 it is calculated?

9 A. I can. Anyone that works on the Wind River Indian
10 Reservation, their gross yearly salary is subject to a fee of
11 2 percent. So anyone that works on the Indian reservation,
12 like if I go out there 10 percent of the time, 10 percent of
13 my gross salary counts towards that 2 percent. So that's how
14 it's calculated. And anyone that has worked on the Indian
15 reservation is subject to that 2 percent fee.

16 Q. Does Encana quarrel or quibble with that fee?

17 A. We do not.

18 Q. Let me direct your attention to paragraph 8 of the TERO
19 agreement. Would you please read that sentence to His Honor?

20 A. "The director of TERO and compliance officers shall have
21 the right to inspect all sites where employment is taking
22 place under the provisions of this agreement upon" -- I think
23 that says Wind. It's flickering on my screen.

24 Q. Yeah, it's flickering on mine, too.

25 A. -- "the Wind River Indian Reservation." There you go.

1 Q. Under paragraph 8 of Exhibit 3 did TERO have the right to
2 inspect Encana company sites upon the Wind River Indian
3 Reservation?

4 A. Yes, they did.

5 Q. Does TERO have the right to inspect Encana company sites
6 outside of or beyond the Wind River Indian Reservation?

7 A. No, they do not.

8 Q. Did TERO ever inspect Encana Well 19-24 while it was being
9 drilled in December of 2008?

10 A. Not to my knowledge.

11 Q. Did Encana comply with all the terms of the 2009 TERO
12 agreement?

13 A. Yes, we did.

14 Q. I've just handed you what we've marked as Hearing Exhibit
15 No. 4. Is that right?

16 A. Yes.

17 Q. Can you identify that for all of us?

18 A. I can. It's the 2010 TERO agreement.

19 Q. So it was the very next one.

20 A. The very next year.

21 Q. Who signed Exhibit No. 4 for Encana?

22 A. That also was signed by Jim Jenkins.

23 Q. And who signed it on behalf of TERO?

24 A. Stanford St. Clair, TERO director.

25 Q. Are the terms in the 2010 TERO agreement identical or

1 nearly identical to the terms in the 2009 TERO agreement?

2 A. Yes, they are.

3 MR. MURPHY: Your Honor, I'd move the introduction of
4 Hearing Exhibit No. 4.

5 THE COURT: It's received.

6 (Plaintiff's Exhibit 4 received.)

7 Q. (BY MR. MURPHY) Direct your attention to page 1 of that
8 agreement. Again, does the TERO agreement govern employment
9 practices on the reservation, according to the preamble or the
10 first paragraph?

11 A. Yes, it does.

12 Q. And what does the second sentence say?

13 A. "...with respect to employment practices on the Wind River
14 Indian Reservation."

15 Q. Does TERO or this TERO agreement govern employment
16 practices off, beyond, or outside the Wind River Indian
17 Reservation?

18 A. It does not.

19 Q. Did Encana pay the 2010 annual TERO fee?

20 A. Yes, we did.

21 Q. Was the 2010 annual fee calculated in the same manner as
22 the 2009 annual fee?

23 A. Yes, it was.

24 Q. Let me direct your attention to paragraph 8 on page 3.

25 Well, first of all, let me direct your attention to

1 paragraph 7 about the annual fee. Was it calculated in the
2 same manner and according to the same formula as the 2009
3 agreement?

4 A. Yes, it was. 2 percent of the gross wage and payroll
5 attributable to employees on the Wind River Indian
6 Reservation.

7 Q. Then under paragraph 8 on inspections, is that the same
8 clause or sentence that we read from the 2009 agreement?

9 A. Yes.

10 Q. And does that tell us where TERO has the right to inspect
11 Encana locations?

12 A. Yes, upon the Wind River Indian Reservation.

13 Q. Is there any authority under this agreement to do
14 inspections outside of or beyond the Wind River Indian
15 Reservation?

16 A. No.

17 Q. Did Encana comply with all the terms of the 2010 TERO
18 agreement?

19 A. We did.

20 Q. In either 2009 or 2010 did TERO ask or require that Encana
21 agree that, quote, the Tribal Court of the Wind River Indian
22 Reservation have jurisdiction over all civil matters arising
23 on the reservation?

24 A. They did not.

25 Q. In either the 2009 or the 2010 TERO agreements did TERO

1 ask or require that Encana, quote, irrevocably consent to the
2 application of tribal law and to such Tribal Court
3 jurisdiction and further agree not to raise lack of
4 jurisdiction as an affirmative defense arising out of Encana's
5 activities?

6 MR. BERLEY: Objection, Your Honor. We don't know
7 where this language is coming from, or I don't, and it seems
8 to be leading. So if this could be -- if there could be some
9 foundation, that would be helpful.

10 MR. MURPHY: The foundation will come in about 30
11 seconds in the very next exhibit, which is the 2011 TERO
12 agreement where TERO inserted that language. And I've shared
13 these agreements with other counsel before today's hearing.

14 THE COURT: Very well.

15 Q. (BY MR. MURPHY) I'm sure you don't remember the question.

16 A. Okay, I was going to say one more time.

17 Q. Okay. In either the 2009 or the 2010 annual TERO
18 agreements did TERO ask or require that Encana, quote,
19 irrevocably consent to the application of tribal law and to
20 such Tribal Court jurisdiction and further agree not to raise
21 lack of jurisdiction as an affirmative defense arising out of
22 Encana's activities?

23 A. They did not.

24 Q. Would Encana have signed such language and agreed to the
25 general jurisdiction of the Shoshone and Arapaho Tribal Court

1 if TERO had asked or required that Encana sign such language
2 in those TERO agreements?

3 A. We would not have signed that. We would not give up those
4 rights.

5 MR. VINCENT: If I could just interpose an objection,
6 I was a little slow in getting up there, but the question is
7 obviously leading and suggestive, is obviously self-serving,
8 is obviously calling for legal conclusions and things like
9 that. I know that we need to get through this, but I just
10 thought I'd object one time so it's there.

11 MR. MURPHY: Always good to hear from my friend.

12 MR. VINCENT: I just wanted you to know I was
13 listening, Pat.

14 THE COURT: It is leading. I will sustain the
15 objection, strike the testimony.

16 MR. BERLEY: Your Honor, I'd also like to object on
17 relevance. Mr. Jorgenson died in 2009. What happened in
18 2010, what happened in 2011 in an effort to address or try to
19 negotiate regarding jurisdictional disputes is of no
20 relevance.

21 THE COURT: I'll overrule the objection.

22 Q. (BY MR. MURPHY) Let me ask a new question, Mr. Schmidt.

23 In 2011 did TERO ask or require that Encana sign this
24 consent to jurisdiction language in its 2011 annual TERO
25 agreement?

1 A. Yes, they did.

2 Q. I just handed you what we've marked as Hearing Exhibit

3 No. 5. What is Exhibit 5?

4 A. Exhibit 5 is the 2011 TERO agreement.

5 Q. Did Encana sign Exhibit 5?

6 A. We did not.

7 Q. Did Encana refuse to sign Exhibit 5?

8 A. We did.

9 Q. Are there different and material terms in Exhibit 5 as
10 compared to Exhibits 3 and 4?

11 A. Yes, there are.

12 Q. Are those different terms important to Encana?

13 A. Very important to Encana.

14 MR. MURPHY: Your Honor, I would move the
15 introduction of Exhibit No. 5.

16 THE COURT: Recognizing the, the relevance argument
17 that has been presented by Mr. Berley, it will be received for
18 the purpose that -- to show that there is no agreement with
19 TERO presently.

20 MR. MURPHY: There is an additional purpose, a
21 relevancy here, and it's this. What you will see in just a
22 moment when we put it on the Elmo is the language that TERO
23 has tried to put in to assert or somehow gain Encana's
24 admission or concession that it now be subject to its
25 jurisdiction, language that it never had at the time of

1 Mr. Jorgenson's death or even the year or two after, after his
2 death.

3 MR. BERLEY: Your Honor, we have an additional
4 objection. It's our understanding that this may have been
5 tendered in the course of settlement interactions between the
6 Tribes and Encana. We have no problem with the way you
7 characterized -- if this is only in for the purpose of showing
8 that this is not a signed agreement, we have no problem with
9 that.

10 MR. VINCENT: I join in that objection, and also
11 note, as counsel has, that this agreement is one that came
12 into effect long after Mr. Jorgenson's death. So thank you.

13 THE COURT: All right. It will be received.

14 (Plaintiff's Exhibit 5 received.)

15 Q. (BY MR. MURPHY) Mr. Schmidt, what are the biggest
16 proposed changes in the 2011 TERO agreement?

17 A. If you look on page 2, paragraph 7 --

18 Q. Just give me one second here, and I'll put this on the
19 board for everyone. Let me blow that up a little, too.

20 THE COURT: Let me just ask a question. Mr. Schmidt,
21 does Mr. Jenkins work for you?

22 THE WITNESS: He does. He does not work for me. He
23 works for Encana.

24 THE COURT: All right. In his -- would you have any
25 say-so for Encana in determining or negotiating the terms and

1 conditions of the TERO agreement?

2 THE WITNESS: Yes. I usually go to the TERO office
3 and work with them on these agreements. And then after I
4 approve them, I send them off to our legal department, and
5 then my supervisor, our team lead, who at the time was Jim
6 Jenkins, would then sign them or not sign them based on our
7 opinions.

8 THE COURT: I see.

9 MR. MURPHY: Thank you, Judge.

10 Q. (BY MR. MURPHY) I think you were about to share with us
11 paragraph 7 about the annual fee and how it's now proposed to
12 be different than the '09 and '010 versions.

13 A. Yes. Paragraph 7, the yearly fee has changed from
14 2 percent of gross wages and salaries to 2 percent of total
15 contracts or contract within the exterior boundaries of the
16 Wind River Reservation. That's a completely different
17 statement and clause than the previous two years that I'm
18 familiar with.

19 Q. Tell the Judge how you perceived it to be different when
20 you first read this.

21 A. Well, I interpreted it to say that 2 percent of total
22 contracts would also entail 2 percent of all our oil sales and
23 all our gas sales on top of the wages and salaries, and that's
24 everything within the exterior boundaries of the reservation,
25 which completely changes the game in my mind.

1 Q. Talking about changing the game, wouldn't that
2 dramatically increase the TERO fee?

3 A. It would. Their previous fee typically runs somewhere in
4 the high twenties, 28 to \$30,000 a year. Adding an additional
5 2 percent of mineral sales would pull it up into, you know,
6 somewhere in the millions maybe. I don't know. I'd have to
7 research that, but it would certainly be a huge, huge
8 increase.

9 Q. Did you bring this to the attention of the Encana legal
10 counsel in Denver, Colorado?

11 A. I did.

12 Q. If you would turn to the new paragraph about the general
13 jurisdiction on page 3 of 4, please.

14 A. Yes, paragraph 13. That's a completely new inserted
15 paragraph, and I brought that to our legal department's
16 attention, too, because basically they were asking for Encana
17 to give up all their rights and to be subject to the tribal
18 courts.

19 Q. Was this anywhere within the Wind River Indian
20 Reservation? Within the exterior bound -- let me rephrase
21 that.

22 Was this new language in paragraph 13 not only
23 applicable to the Wind River Indian Reservation but to any of
24 the lands within its exterior boundaries?

25 A. Yes, that's the way I read it.

1 Q. Did you recommend that Encana sign this general consent to
2 jurisdiction clause?

3 A. I recommended that we not sign it.

4 Q. And has it ever been signed?

5 A. We have not signed.

6 Q. Did Encana thereafter reach some accord or understanding
7 with TERO as to what the fee should be for 2011?

8 A. Yes. I went back and worked with TERO and renegotiated
9 the fees, explained to them why what they were asking was
10 extremely vague and unfair, and we went back to the old
11 original agreement of 2 percent of gross salaries and wages.

12 Q. And did Encana pay that?

13 A. We did pay that.

14 Q. Did you personally feel it was asking too much for Encana
15 to pay the 2 percent number on all of the gross contracts or
16 sales?

17 A. I did.

18 MR. BERLEY: Objection. That's -- I mean, we're very
19 much leading.

20 THE COURT: It is leading.

21 Q. (BY MR. MURPHY) Did you have an opinion one way or
22 another on whether that was a fair price to extract from
23 Encana?

24 A. I did have an idea. I felt like it was too much. I felt
25 like an additional 2 percent is, is above and beyond what's

1 expected. We already pay an additional fee to operate on the
2 reservation or on Indian minerals lands.

3 Q. What are the monies that the Tribes receive from Encana's
4 operations with its oil wells?

5 A. Well, they have the royalties, and then they have an
6 additional tribal tax that's placed upon our minerals that we
7 sell.

8 Q. What's the royalty payment to the Tribes?

9 A. The average royalty payment is 20 percent.

10 Q. 20 percent of the gross production from that well?

11 A. 20 percent of the gross production. Some leases are less,
12 some are more, but that was an average.

13 Q. So if you earn a dollar from the production of gas on a
14 well, 20 percent goes to the Tribes right off the top?

15 A. Roughly, yes.

16 Q. And is there also a tribal tax that is imposed --

17 A. There's --

18 Q. -- on that gross production?

19 A. There's a 6.8 percent tribal tax also on that.

20 Q. So you've got to add the 20 percent and the 6.8 percent to
21 find out the real monies that Encana pays to the Tribes on a
22 dollar of gas?

23 A. Correct. And that's what I went over with TERO when we
24 were discussing this agreement.

25 Q. Did they see your point of view?

1 A. They did, and that's why we went back to the 2 percent of
2 gross wages and salaries.

3 THE COURT: Can I interrupt you? This is -- it's now
4 10:30. It's time to take our, our break. I have another
5 matter scheduled next door, and we'll be moving next door for
6 that.

7 MR. MURPHY: Thank you, Your Honor.

8 (Proceedings recessed 10:34 a.m. to 11:36 a.m.,
9 resuming in chambers with counsel for the
10 parties and the Court.)

11 THE COURT: I have a bit of an emergency. My wife
12 called and said she needed to go to the hospital. Linda went
13 out there, and she can't get an answer at the door. So --

14 MR. VINCENT: You've got to go.

15 MR. EID: Go, go.

16 MR. MURPHY: No, go.

17 MS. WEDDLE: Go, Judge.

18 THE COURT: Take off.

19 MR. MURPHY: Do you want us to wait around until we
20 hear back from you?

21 THE COURT: That's what I was just thinking. We're
22 doing all the interviews of the candidates for the new
23 magistrate, for our magistrate judge position, this afternoon
24 starting at 1:30, but I can be with you until 1:30 and --

25 MS. WEDDLE: You've got to go, Judge.

1 MR. EID: Just go.

2 MR. MURPHY: We'll stand down. You go.

3 MR. BERLEY: We'll be available.

4 MR. EID: Yeah, no problem.

5 (Proceedings recessed 11:36 a.m.,

6 March 2, 2012.)

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C E R T I F I C A T E

I, JULIE H. THOMAS, Official Court Reporter for the
United States District Court for the District of Wyoming, a
Registered Merit Reporter and Certified Realtime Reporter, do
hereby certify that I reported by machine shorthand the
proceedings contained herein on the aforementioned subject on
the date herein set forth, and that the foregoing pages
constitute a full, true and correct transcript.

Dated this 6th day of March, 2012.

/s/ Julie H. Thomas

JULIE H. THOMAS
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter
CA CSR No. 9162