CASE NO. 12-8030
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ENCANA OIL & GAS (USA) INC., Plaintiff/Appellant,

vs.

THE HONORABLE JOHN ST. CLAIR, Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING
The Honorable Alan B. Johnson, District Court Judge
District Court No. 12-CV-27-J

OPENING BRIEF OF APPELLANT ENCANA OIL AND GAS (USA) INC. (ORAL ARGUMENT REQUESTED)

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

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

August 20, 2012

CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1, Appellant Encana Oil & Gas (USA) Inc. ("Encana") states that it is an indirect wholly-owned subsidiary of Encana Corporation, whose stock is publicly traded on the New York Stock Exchange and Toronto Stock Exchange.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 13,907 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 and in 14-point font in the Times New Roman style.

Dated this 20th day of August 2012.

GREENBERG TRAURIG, LLP

s/ Jennifer H. Weddle

ATTORNEY FOR APPELLANT-ENCANA OIL & GAS (USA) INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Miscellaneous

STATEMENT OF RELATED CASES

There are no prior appeals in this Court and there are no related appeals involving these same parties. There is, however, another appeal pending before this Court that involves many of the same issues presented to the District Court below. *Northern Arapaho Tribe v. Harnsberger*, No. 09-8098, also on appeal from the United States District Court for the District of Wyoming (Brimmer, J.), was submitted to this Court following oral argument on May 7, 2012.

In that case, the parties dispute whether the Northern Arapaho Tribe is able to contest – without the litigation participation of the Eastern Shoshone Tribe and the United States – the State of Wyoming's imposition of taxes on Tribal members on lands subject to the "1905 Act" (33 Stat. 1016), which accomplished a very large land cession from the Wind River Indian Tribes to the United States: "Indians belonging to the … Wind River Reservation ... do hereby cede, grant and relinquish to the United States, all right, title, and interest which they may have to all the lands."

Like *Northern Arapaho Tribe v. Harnsberger*, Encana's Complaint and Motion for Preliminary Injunction presented to the District Court also implicate the 1905 Act and lack of the Tribal Court's civil adjudicatory jurisdiction over Encana with respect to tort claims allegedly arising on lands likewise subject to the 1905 Act, and within the enduring federal enclave of the Riverton Reclamation Project.

JURISDICTIONAL STATEMENT

A. Basis for the District Court's Subject-Matter Jurisdiction.

The District Court had subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under the Constitution, laws, or treaties of the United States. *See also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008) (determination of tribal authority over [non-Indian] is a federal question).

B. Basis for This Court's Jurisdiction.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1), which permits the Court to hear appeals from interlocutory orders of the District Court which grant, continue, modify, refuse, or dissolve injunctive relief. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1147 (10th Cir. 2011) ("Orders granting or denying preliminary injunctions are among the types of interlocutory orders that are immediately appealable under 28 U.S.C. § 1292").[1] This Court also has jurisdiction over

[1] This Court generally regards the appeal of the denial of a preliminary injunction as moot where there is no longer a pending action in light of a dismissal. This Court has suggested that, under such circumstances, the proper course is to appeal from the district court's order dismissing the complaint. *See Rose v. Utah State Bar*, 2011 WL 5120695, *1 (10th Cir. Oct. 31, 2011) (unpublished). Encana here appeals both the District Court's order of dismissal and the order denying Encana's motion for preliminary

this appeal pursuant to 28 U.S.C. § 1291, which grants jurisdiction to courts of appeals "from all final decisions of the district courts of the United States."

C. This Appeal Is Timely.

Encana appeals from two orders: the District Court's Order Denying Preliminary Injunction [APP-2313-2334][2] and the District Court's Order Granting Defendant's Motion to Dismiss Without Prejudice [APP-2335-2236], both of which were entered on April 17, 2012. Encana timely filed its Notice of Appeal on May 2, 2012. [APP-2337]; *see also* FED. R. APP. P. 4(a)(1)(A).

D. This Appeal Is from a Final Order Disposing of Encana's Claims.

Although the District Court's Order Granting Defendant's Motion to Dismiss was entered "without prejudice," it constitutes a final, appealable order. In determining whether an order of dismissal without prejudice constitutes a final decision for purposes of 28 U.S.C. § 1291, this Circuit looks to the substance and objective intent of the order, and does not limit its

---

injunction because those two orders are closely intertwined. The District Court's 21-page Order Denying Preliminary Injunction is simply incorporated into its three-paragraph Order Granting Defendant's Motion to Dismiss Without Prejudice, thus they are referenced collectively herein as the "Orders."

[2] All references to the Appendix herein use the abbreviation "APP."

focus to the order's terminology. *Moya v. Schollenbarger*, 465 F.3d 444, 449 (10th Cir. 2006). This Circuit has endorsed a "practical" approach to finality, generally finding finality where an action – instead of merely a complaint – has been dismissed from the federal forum. *Id*.; *see also Coffey v. Whirlpool Corp*., 591 F.2d 618, 620 (10th Cir. 1979) (order of dismissal without prejudice constitutes appealable final order where intended to dispose of cause of action).

Thus, "where the dismissal finally disposes of the case so that it is not subject to further proceedings in federal court, the dismissal is final and appealable." *Amazon, Inc. v. Dirt Camp, Inc*., 273 F.3d 1271, 1275 (10th Cir. 2001). The critical determination as to whether an order is final "is whether plaintiff has been effectively excluded from federal court under the present circumstances." *Facteau v. Sullivan*, 843 F.2d 1318, 1319 (10th Cir. 1988); *see also Korgich v. Regents of N.M. Sch. of Mines*, 582 F.2d 549, 550 (10th Cir. 1978) (order without prejudice appealable where dismissal "sounded the 'death knell' of the litigation in federal court"). A dismissal without prejudice generally constitutes a final decision for purposes of appeal where no amendment to the complaint can cure the alleged defect. *See Constien v. United States*, 628 F.3d 1207, 1211 (10th Cir. 2010); *Moya*, 465 F.3d at 449-50 (collecting cases). Here, the District Court's Order

dismissing the action at issue effectively precludes Encana from proceeding further in the District of Wyoming, and because no amendment to Encana's Complaint can remedy its alleged failure to exhaust tribal remedies, the District Court's Order of Dismissal is final and appealable under 28 U.S.C. § 1291. *See Enlow v. Moore*, 134 F.3d 993, 994 (10th Cir. 1998) (exercising appellate jurisdiction under 28 U.S.C. § 1291 to review the district court's order of dismissal without prejudice for failure to exhaust tribal remedies).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WITH ITS UNPRECEDENTED AND IMPERMISSIBLE EXPANSION OF THE COMITY-BASED DOCTRINE OF TRIBAL COURT EXHAUSTION.

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY FAILING ADEQUATELY TO CONSIDER EVIDENCE DEMONSTRATING THAT EXCEPTIONS TO THE TRIBAL COURT EXHAUSTION DOCTRINE APPLY.

STATEMENT OF THE CASE

On February 6, 2012, Encana filed a declaratory judgment action in the United States District Court for the District of Wyoming, seeking a declaration that the assertion of subject-matter jurisdiction over Encana by the Shoshone and Arapaho Tribal Court violates federal law. The named defendant in that action was the Honorable John St. Clair, Chief Judge of the

Shoshone and Arapaho Tribal Court. Encana asserted *Ex Parte Young*[3] claims against Judge St. Clair, seeking to enjoin his *ultra vires* assertion of civil adjudicatory jurisdiction over Encana for off-reservation tort claims that had persisted for two and a half years in Tribal Court prior to Encana's filing with the District Court. Between October 2009 and February 2012, Judge St. Clair continually and improperly asserted jurisdiction over Encana, a non-Indian company, in connection with the wrongful death action brought on behalf of the estate of an individual member of the Eastern Shoshone Tribe,[4] Jeremy Jorgenson ("Estate"), and with respect to claims in intervention brought by the Tribes.[5]

Encana's case before the District Court was straightforward: the Tribal Court is not vested with subject-matter jurisdiction to adjudicate the claims brought against Encana, a non-Indian, because all of the relevant events took place on public roads maintained by Fremont County and on federal public lands where Encana was present by virtue of a federal oil and gas lease from the United States Bureau of Land Management ("BLM"). Simply put, none of the operative events with respect to the Estate's or the

[3] 209 U.S. 123 (1908).

[4] Together with the Northern Arapaho Tribe, the "Tribes."

[5] *See* [APP-44-69].

Tribes' claims took place within Indian Country. Encana argued that its unrelated consensual dealings with the Tribes are legally insufficient to trigger extraterritorial Tribal Court jurisdiction over an off-reservation accident arising upon and within a federal enclave of lands over which the Tribes lack civil regulatory authority.

On February 10, 2012, Encana filed a Motion for Preliminary Injunction in which Encana requested the District Court to enjoin further Tribal Court proceedings against Encana to prevent the irreparable harm from the improper imposition of trials[6] in a forum lacking subject-matter jurisdiction, citing this Court's recent authorities. [APP-1010-1026]; *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011) ("[T]here is an established 'federal right to be protected against the unlawful exercise of Tribal Court judicial power'") (quoting *MacArthur v. San Juan County*, 309 F.3d 1216, 1225 (10th Cir. 2002)).

After holding an evidentiary hearing on March 2, 9 and 16, 2012,[7] the District Court issued an Order on April 17, 2012 denying Encana's Motion for Preliminary Injunction on the basis that Encana did not have a reasonable

[6] In his January 27, 2012 Order, Defendant continued to assert the ability to impose multiple lengthy, costly proceedings on Encana including a jury trial on the Estate's claims and a second phase bench trial on the Tribes' claims in intervention. [APP-65-70].

[7] [APP-2341-2779].

probability of success on the merits because it had not exhausted its Tribal Court remedies. [APP-2313-2334]. On that same date, the District Court also issued an Order granting Judge St. Clair's Motion to Dismiss without prejudice and directed Encana to return to Tribal Court for further proceedings as a matter of comity. [APP-2335-2236].

In finding that Encana must endure two trials on the merits in Tribal Court before Encana could seek relief in federal court, the District Court concluded that "the examination of whether the Tribal Court has the power to exercise civil subject-matter jurisdiction, even as here, over a non-Indian, must occur in the first instance, **from start to finish, in Tribal Court**, **to which we now defer**." [APP-2331 (emphasis supplied)]. With this holding, the District Court impermissibly expands the prudential "tribal court exhaustion doctrine" articulated by the United States Supreme Court in *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9 (1987), and requires that *even the exceptions to the rule* crafted by the Supreme Court must be litigated first in a tribal court without jurisdiction.

Without ever stating how or why there is any colorable claim of Tribal Court jurisdiction over Encana for an accident that occurred on federal public lands outside the Wind River Indian Reservation, the District Court

concluded that Encana must exhaust every possible Tribal Court procedure – including a jury trial (on the Estate's claims), a bench trial (on the Tribes' claims in intervention), and corresponding Tribal appeals – *before* it is allowed to challenge, in federal court, the Tribal Court's asserted jurisdiction. This despite the fact the Court of Appeals for the Wind River Indian Reservation has said that Tribal appellate review is never available before a trial on the merits.

The exhaustion doctrine – as a rule of comity – is not a jurisdictional prerequisite for federal court review. And it does not require a party to suffer the loss of the very federal right it seeks to protect. If the District Court's ruling is affirmed, this Circuit would endorse a new rule: that to *exercise* its federal right to avoid wrongful tribal court trials and appeals, a non-Indian litigant *must first suffer the loss* of this right. *Crowe & Dunlevy*, 640 F.3d at 1156; *Rolling Frito-Lay Sales LP v. Stover*, 2012 WL 252938, *6 (D. Ariz. Jan. 26, 2012) (unpublished) ("public interest is not advanced by having a court that lacks jurisdiction determine a party's legal rights"). The Supreme Court has never suggested such a policy, nor has this or any other Circuit, and for good reason.

No further Tribal Court exhaustion is required under the Supreme Court's precedents. No precedent requires more of Encana in Tribal Court

than the robust summary judgment proceedings that took place. And even if the Supreme Court's case law requires that Encana proceed through two trials in a jurisdictionless Tribal Court before it can be deemed to have exhausted its tribal remedies – which it does not – the futility exception to the exhaustion doctrine applies in this case and the District Court erred in failing to consider it. As explained below, the Tribes lack regulatory authority over non-Indians with respect to activities occurring on lands where the Tribes have lost their landowners' right to exclude non-members. *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993); *Hornell Brewing Co. v. Rosebud Sioux Tribe*, 133 F.3d 1087, 1091 (8th Cir. 1998).

This Circuit should clarify that non-Indians are entitled to challenge a tribal court's asserted jurisdiction *before* having to suffer the loss of the very federal right they seek to enforce. Accordingly, the Orders of the District Court should be reversed. This case should be remanded for trial on Encana's Complaint for a permanent injunction against Judge St. Clair.

STATEMENT OF FACTS

Encana is a Delaware corporation with its principal place of business in Denver, Colorado. [APP-6]. Encana is the lessee of record for various mineral leases situated in the Wind River basin, both within and outside the boundaries of the Wind River Indian Reservation. [APP-2399]. Encana's

predecessor entered into lease number W-024513 with the BLM in 1953 (the "Lease"). [APP-2419].

A. The Underlying Off-Reservation Single-Vehicle Accident.

On January 1, 2009, Jeremy Jorgenson ("Jorgenson") reported to work as a floor-hand for DHS Drilling Company ("DHS"), a company engaged to provide contract drilling services for Encana with DHS Rig No. 17. [APP-7]. Rig No. 17 was in operation at an Encana well governed by the Lease, known as Tribal Muddy Ridge 19-24B-M ("Well No. 19-24"), located at Township 4 North, Range 3 East in Section 19 of Fremont County, Wyoming. [APP-7; 2394-2396; 2420; 2550-2552]. Several hours after reporting to work at Well No. 19-24, Jorgenson and DHS co-employee Larry Brown surreptitiously drank a fifth of Black Velvet whiskey. Jorgenson became intoxicated (.19 BAC), then left the work site in his personal automobile despite unsuccessful attempts by on-site DHS colleagues to stop him from driving. [APP-8]. After driving less than one mile from the work site, Jorgenson lost control of his vehicle, wrecked, and was ejected, resulting in his death. [APP-8; 2396-2399; 2420].

Tunnel Hill Road, the road Jorgenson traveled when he left the work site, is a public road owned by the United States Bureau of Reclamation but maintained by Fremont County, Wyoming pursuant to a decades-old

agreement between those two governmental entities. [APP-2398; 2420; 2643]. Jorgenson's vehicle and body came to rest approximately 40 feet from Tunnel Hill Road, on Bureau of Reclamation lands in Township 4 North, Range 3 East, Section 30. [APP-2552-2553; 2642]. Only non-Indian governmental entities – namely, the Fremont County Sheriff's Office, the Wyoming Highway Patrol, and the Fremont County Coroner – responded to the accident scene. [APP-8]. All of the relevant events concerning the accident occurred on lands not owned or controlled by the Tribes in any way.

B. The Tribes Lack Jurisdiction Over These Lands.

In fact, the Tribes have been without jurisdiction over the situs of the alleged tortious activities for more than 100 years. Township 4 North, Range 3 East is not part of the Wind River Indian Reservation. [APP-10-19; 2627; 2633; 2646]. Rather, it is part of a federal enclave over which the Tribes have no authority.

The story of the Tribes' loss began in 1902, when Congress passed the 1902 Act (32 Stat. 388), authorizing the Secretary of the Interior to take all steps necessary to site, develop and construct reclamation projects throughout the West, including in Wyoming. [APP-1971-1973]. Thereafter, the 1905 Act (33 Stat. 1016) accomplished a huge land cession from the

Tribes to the United States: "Indians belonging to the Wind River Reservation ... do hereby cede, grant and relinquish to the United States, all right, title, and interest which they may have to all the lands" within a large defined geographic area, including Township 4 North, Range 3 East, Sections 19 and 30 of Fremont County. [APP-1975-1981]. This land cession was common and consistent with federal policy at the time to open up significant tracts of land on Indian reservations for disposal to non-Indians or for disposal as public lands, often public lands dedicated to public works, particularly reclamation projects. [APP-2613-2620]. The 1905 Act established specific timeframes and prices for the disposal of the ceded lands by the United States. [APP-1975-1981; 2599; 2610-2612].

C. Congress Creates the Riverton Reclamation Project and Its Boundary.

Thereafter, following much survey and engineering work pursuant to the 1902 Act, the Secretary of the Interior issued an order on September 27, 1918 withdrawing a large section of the 1905 Act lands (then being held by the United States for various disposal) from the public domain and dedicating it to the Riverton Reclamation Project. [APP-2618-2619; 2647-2649]. Township 4 North, Range 3 East, Sections 19 and 30 of Fremont County were among the lands withdrawn by the Secretary and dedicated to the Riverton Reclamation Project. [APP-2060-2081; 2440; 2619; 2647-

2649].

Soon, the Bureau of Reclamation's construction activities commenced, at a cost of hundreds of thousands, and later many millions, of dollars to irrigate the Riverton area. [APP-359-397]. The expansive public works – ditches, canals, dams, pipelines – that became part of the Riverton Reclamation Project spanned more than 50 years in the making. *Id*.

Coordinate with its reclamation construction efforts, the United States continued its disposal of the 1905 Act lands over a period of many years. [APP-2613-2620]. Eventually, the United States concluded that much of that land was not attractive for disposal and thus restored to Indian trust status various lands within the 1905 Act ceded area that had not been disposed of (by sale to non-Indians, leasing, etc.). [APP-2620-2622; 2650-2652]. Importantly, however, the "1939 Act" (58 Stat. 1128) *expressly excluded* from such restoration efforts any lands – including Township 4 North, Range 3 East, Sections 19 and 30 of Fremont County – that were "within any reclamation project heretofore authorized within the diminished or ceded portions of the reservation." [APP-2652].

The "1953 Act" (67 Stat. 592) established the perimeter boundary of the Riverton Reclamation Project, Fremont County, Wyoming and set out Township 4 North, Range 3 East, Sections 19 and 30 as within 316 station

points specifically described in the Act as forming the geographic boundary of the Riverton Reclamation Project. [APP-1493; 2060-2081; 2547-2550; 2623]. The 1953 Act provided $1,009,500 to the Tribes as compensation "for terminating and extinguishing all of the right, title, estate, and interest, including minerals, gas and oil, of said Indian tribes and their members of, in and to the lands, interests in lands, and any and all past and future damages arising out of the cession to the United States, pursuant to the Act of March 3, 1905, (33 Stat. 1016) of that part of the former Wind River Indian Reservation," including Township 4 North, Range 3 East, Sections 19 and 30, and provided the Tribes further compensation for extinguishment of the mineral estate by providing them with 90 percent of the mineral leasing proceeds. [APP-1493; 2060-2081; 2087-2090].

Just after the 1953 Act had declared all the Tribes' surface and subsurface rights in the Riverton Reclamation Project area wholly extinguished, on November 17, 1953, Encana's predecessor entered into the Lease with the BLM. [APP-2419].

Soon after passage of the 1953 Act, the Tribes became dissatisfied with its compensation formula for the mineral estate cession. [APP-1541-1547; 2087-2090; 2116-2118; 2628-2629]. This was because leases entered into after the 1953 Act were authorized by the 1920 Mineral Leasing Act, 30

U.S.C. § 181, *et. seq.*, governing federal public lands. [APP-2119]. The "1920 Act" does not require competitive bidding or bonuses. [APP-2116-2118]. After passage of the 1953 Act, the Tribes asserted they were receiving much less money from leases made pursuant to the 1920 Act than they would under the available Indian mineral leasing authorities. [APP-1541-1547; 2116-2118; 2628-2629].

The Tribes' dissatisfaction with the 1953 Act's payment formula precipitated the "1958 Act" (72 Stat. 935), whereby Congress declared that the mineral estate associated with the Riverton Reclamation Project lands to which all right, title and interest of the Tribes had been extinguished by the 1953 Act, was now to be taken into trust by the United States for the benefit of the Tribes and any mineral lease thereon was to be made pursuant to the Indian Mineral Leasing Act of 1938. [APP-1539-1547; 2114-2120; 2628-2629]. The legislative history of the 1958 Act explains that the change was made to address the fact that 1920 Act leases were made without competitive bidding and without bonuses, and thus leasing under the Indian Mineral Leasing Act of 1938 was expected to yield a larger return for the Tribes. [APP-2114-2120].

Congress recognized that its change of the applicable leasing terms effectuated in the 1958 Act was changing the goalposts for industry, so

Congress specifically left in place leases like the Lease, which had been issued prior to 1958, and declared that they should continue under the 1920 Act. [APP-268; 1539-1547; 1880-1881; 2111-2112; 2119]. Therefore, the Lease has remained a 1920 Act lease.

D. The Riverton Reclamation Project Lands Remain Withdrawn.

The Riverton Reclamation Project lands remain withdrawn, as they have been since 1905. [APP-2087-2088]. In 1992, the Secretary of the Interior published notice that 45,059.53 acres of lands withdrawn by the Secretarial Order of Sept. 27, 1918 would be continued for an additional 50 years pursuant to the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714. [APP-2128-2132]. Township 4 North, Range 3 East, Section 19, and Section 30, of Fremont County are specifically identified in the Secretary's notice as a continuing withdrawal for reclamation purposes. [APP-2130]. Thus, it is the announced intention of the United States to continue to hold Township 4 North, Range 3 East, Sections 19 and 30 of Fremont County as withdrawn until at least 2042. [APP-2128-2132].

It is undisputed: Jorgenson's single-vehicle accident occurred on Riverton Reclamation Project lands ceded by the Tribes in the 1905 Act, withdrawn by the Secretary's 1918 Order, dedicated as a federal enclave by the 1953 Act, and, with the Secretary's 1992 notice, that remain withdrawn.

Maps in evidence illustrate this clearly. [APP-2639; 2641].

E. All Parties Extensively Briefed Subject-Matter Jurisdiction in Tribal Court.

Despite this clear history that Township 4 North, Range 3 East, Sections 19 and 30 of Fremont County are not Indian Country, and after initially pursuing a wrongful death action against only DHS for many months, the Estate sued Encana in Tribal Court on October 19, 2009. [APP-75; 2441]. From the outset of the Tribal Court action, Encana maintained that the exercise of jurisdiction by Judge St. Clair was prohibited by federal law. [APP-94-174; 2441]. Nevertheless, acting in good faith and with respect for the Tribal Court, Encana proceeded to exhaust its Tribal Court remedies, and provided the Tribal Court the full opportunity to reach the proper decision with respect to subject-matter jurisdiction, including through Encana's submission of extensive briefs and unrefuted expert evidence.[8]

[8] David Geible, the Property Mapping Specialist in the Fremont County Assessor's Office in Lander, Wyoming, testified by affidavit that: "The subject oil and gas well is located on lands owned by the United States of America, specifically the Bureau of Reclamation in the Department of the Interior. The subject oil and gas well is outside the exterior boundaries of the Wind River Indian Reservation." [APP.-1196-1197]. Geible further testified that "Tunnel Hill Road [at the site of Jorgenson's automobile accident] is operated, maintained, and controlled by the Fremont County Road and Bridge Department, and has been for more than twenty-five years. It is not a Tribal road. Tunnel Hill Road is physically located on land owned by the United States of America, Department of the Interior, Bureau of

On December 10, 2009, Encana submitted a Motion to Dismiss for Lack of Subject-Matter Jurisdiction in the Tribal Court action. [APP-98-125]. The Tribal Court denied Encana's Motion to Dismiss on May 20, 2010. [APP-1147-1151]. On December 1, 2010, Encana filed a Motion for Summary Judgment Based on Lack of Subject-Matter Jurisdiction, accompanied by unrefuted expert affidavits. [APP-127-148].[9] DHS filed its own motion for summary judgment on the jurisdiction issue, together with many supporting materials. [APP-188-210]. Encana submitted abundant facts and law to the Tribal Court demonstrating that this case is squarely within the bright-line rule established by *Bourland*, namely, that the tribal

---

Reclamation. It is not physically situated on Tribal Trust land, and it is not physically situated within the exterior boundaries of the Wind River Indian Reservation." [APP-1197]. He continued: "The accident site is not located on Tribal Trust lands. The accident site is not located within the exterior boundaries of the Wind River Indian Reservation. Mr. Jorgenson's path of travel from the well location to the accident site did not pass through any Tribal Trust lands or into any land within the exterior boundaries of the Wind River Indian Reservation." *Id*.

[9] In addition to the evidence from David Geible, Encana also submitted the affidavit testimony of Richard Inberg (who also testified in the proceedings before the District Court). In Tribal Court, Mr. Inberg, a professional land surveyor with more than 50 years' experience, testified as follows about his own survey of the site and review of numerous land documents: "It is my conclusion that the [subject well], Tunnel Hill Road between the well site and the accident site, and the accident site, are all on Bureau of Reclamation land and therefore not part of the Wind River Indian Reservation. All of these features are located outside the boundaries of the Wind River Indian Reservation." [APP-1223; 2562-2563; 2565-2567].

loss of a landowner's right to exclude non-members – such as that effectuated by the 1905 Act – extinguishes any formerly attendant tribal regulatory authority with respect to the land. [APP-1194-1198; 1219-1240; 1930-1933]. Following extensive briefing by all parties, including the Tribes and the Estate,[10] and after the Tribal Court vacated the evidentiary

[10] The Northern Arapaho Tribe submitted a 172-page Memorandum and 24 exhibits – consisting of more than 100 hundred pages of maps, leases, letters, agreements and other historical material – in support of its argument that the Tribal Court had subject matter jurisdiction. [APP-1654-1830]. The Estate filed its own Memorandum, and the Eastern Shoshone Tribe filed a 35-page Memorandum, each in support of the Tribal Court's jurisdiction. [APP-1830-1865]. Encana and DHS each filed extensive opening memoranda, and reply briefs, on the Tribal Court's subject-matter jurisdiction. [APP-126-174; 191-237].

On September 27, 2011, the Tribal Court concluded that "an evidentiary hearing [on jurisdiction] will not materially assist the Court in considering [summary judgment on jurisdiction]," and gave the parties until October 7, 2011, to "submit additional documentary materials addressing the substantive issues raised as to jurisdiction." [APP-1403-1406].

Then, the Northern Arapaho Tribe filed 44 pages of proposed *Findings of Fact and Conclusions of Law Regarding Jurisdiction*, together with six more exhibits containing 35 pages of affidavits, maps, and Congressional record excerpts. The Northern Arapaho Tribe asked the Tribal Court to take judicial notice of the record in the case *In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, 753 P.2d 76 (Wyo. 1988), *affirmed by Wyoming v. United States*, 492 U.S. 406 (1989), and the Tribal Court took judicial notice of that record "to the extent the Court may find such materials relevant." [APP-1405]. Encana submitted its own detailed *Findings of Fact and Conclusions of Law on the Tribal Court's Jurisdiction*. Long before it issued its December 20, 2011 *Order Concerning Jurisdiction*, **the Tribal Court found that "All parties have fully briefed this [Tribal Court jurisdiction] issue."** [APP-1404].

hearing it previously set to consider its own jurisdiction, the Tribal Court denied Encana's Motion for Summary Judgment on December 20, 2011. [APP-45-63]. In that order, Judge St. Clair never mentioned Encana's unrefuted expert affidavits. Encana earlier sought Tribal appellate review of the Tribal Court's orders, including previous rulings by Judge St. Clair on Encana's various summary judgment motions (including subject-matter jurisdiction) – all of which were denied by the Court of Appeals of the Wind River Indian Reservation. [APP-71-72; 1074; 1106-1117].

On January 5, 2012, the Estate asked the Tribal Court to set a trial date. [APP-88-90]. As a result, on January 27, 2012, Judge St. Clair issued an Order Setting Scheduling Conference in which he evinced his intent to subject Encana to a panoply of additional Tribal Court proceedings, including a jury trial and a subsequent "second phase bench trial" on the Tribes' claims in intervention. [APP-66-68].

Encana filed its Complaint on February 6, 2012 seeking: (1) a judicial declaration that Judge St. Clair's assertion of jurisdiction over Encana is unlawful and in violation of federal law, and (2) relief in the form of a preliminary injunction to prevent irreparable harm to Encana. [APP-4-41]. On February 10, 2012, Encana filed its Motion for Preliminary Injunction with the District Court in which Encana requested the District Court to

enjoin further Tribal Court proceedings to prevent the irreparable harm caused by the improper imposition of two lengthy and costly trials in a forum lacking jurisdiction. [APP-1010-1027].

The District Court held an evidentiary hearing on Encana's Motion for Preliminary Injunction on March 2, 9, and 16, 2012. [APP-2341-2779]. On April 17, 2012, the District Court entered its Order Denying Preliminary Injunction and its Order Granting Defendant's Motion to Dismiss Without Prejudice. [APP-2313-2336]. Encana filed its Notice of Appeal with this Court on May 2, 2012.

SUMMARY OF THE ARGUMENT

The District Court's denial of injunctive relief necessary to protect Encana from the Tribal Court's wrongful and protracted exercise of subject-matter jurisdiction, and subsequent dismissal of the action, constitute reversible error. The District Court's expansion of the comity-based tribal exhaustion doctrine is mistaken and violates Encana's federal right to seek review of improper tribal court jurisdiction, and requires that Encana suffer the loss of the very right it seeks to protect. The District Court's ruling amounts to an impermissible jurisdictional prerequisite and is inconsistent with the straightforward "opportunity" to review subject-matter jurisdiction that the Supreme Court has stated should be afforded to tribal courts as a

prudential matter of comity.

The District Court's Orders require Encana to endure two separate Tribal Court trials on the merits and subsequent appeals to the tribal appellate body which will not entertain any interlocutory challenge to the Tribal Court's decision denying Encana's motion for summary judgment. In determining that Encana had not adequately exhausted its Tribal Court remedies, the District Court reasoned that *Iowa Mutual* requires a tribal appellate body to rule on the issue of jurisdiction before exhaustion can be satisfied. The District Court's reliance on *Iowa Mutual* is misplaced because neither *Iowa Mutual* nor subsequent cases have involved circumstances where the tribal court has decided ***through summary judgment*** that the tribal court may exercise subject-matter jurisdiction, and interlocutory review of that determination is denied. Neither *National Farmers* nor *Iowa Mutual*, nor other reported exhaustion cases, has addressed circumstances even approaching the extensive "opportunity" presented to the Tribal Court here which included extensive summary judgment filings, compilation of detailed and unrefuted expert testimony, and multi-year efforts within the Tribal Court system to obtain a "final and binding" order on subject-matter jurisdiction.[11] [APP-45-63].

[11] Encana is not arguing for a new litmus test. Rather, Encana recognizes

The tribal court exhaustion doctrine requires that a tribal forum be given an adequate "opportunity" to determine the scope and extent of its subject-matter jurisdiction over a non-Indian. Tribal court exhaustion was satisfied because Encana provided the Tribal Court with the opportunity to decide its authority in the first instance, availing itself of all available Tribal Court mechanisms to address subject-matter jurisdiction. Thus, the Tribal Court had a substantive and meaningful opportunity to decide the scope of its sovereign authority. *National Farmers* and *Iowa Mutual* require nothing more.

Iowa Mutual and its progeny, furthermore, involve cases where the controversies arose on Indian land, unlike this case, where ***all*** the operative facts arose outside Indian Country. Requiring exhaustion in this case would not advance the policies underpinning comity and the exhaustion doctrine, and would serve no purpose other than to foster judicial waste and deprive Encana its rights afforded under federal law.

This Court should also reverse the District Court's Orders on the

---

that summary judgment proceedings might not always be enough to satisfy the comity-based exhaustion concerns, but Encana submits the robust summary judgment proceedings before the Tribal Court here – with hundreds of pages of briefing and expert evidence, with arguments submitted to the court over the span of ten months, and with the Tribal Court's own resulting 20-page order on subject-matter jurisdiction – surely do.

separate basis that the District Court failed to evaluate the exceptions to the tribal court exhaustion doctrine established by the Supreme Court. The District Court did not consider the substantial and dispositive evidence presented by Encana that established the applicability of certain exceptions. Although Encana submitted voluminous evidence demonstrating that none of the operative events underlying the claims against Encana took place on the Wind River Indian Reservation or in Indian Country – and therefore requiring exhaustion would serve no purpose other than delay[12] – the District Court's Orders do not fully analyze this evidence and reach the unwarranted conclusion that the "consensual relationship" factor set forth in *Montana v. United States*, 450 U.S. 544 (1980) supports the jurisdiction of the Tribal Court. In so holding, the District Court overlooked the controlling Supreme Court cases that strictly curtail tribes' civil regulatory and adjudicatory authority over non-Indians. *Bourland*, 508 U.S. at 691; *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997); *Plains Commerce Bank*, 554 U.S. at 323.

[12] [APP-2582-2636; 2646-2686].

ARGUMENT

I. THE DISTRICT COURT ERRED IN ITS UNPRECEDENTED AND IMPERMISSIBLE EXPANSION OF THE COMITY-BASED DOCTRINE OF TRIBAL COURT EXHAUSTION.

The tribal exhaustion doctrine requires that a tribal court be afforded "the first opportunity to evaluate the factual and legal bases for the challenge"[13] to its jurisdiction before a party may contest the tribal court's jurisdiction in federal court. The District Court's Orders, however, misinterpret the scope and purpose of the doctrine of tribal court exhaustion, expanding it from a prudential accommodation of "opportunity" and transforming it into an unbending requirement for the completion of Tribal Court jury and bench trials and Tribal appeals. The District Court's expansion of the exhaustion doctrine, where literally no other federal court has gone before, means that a party must "first suffer the loss of the very right for which it seeks protection (to be free of tribal jurisdiction) before [being afforded] an opportunity to protect its right." *Rolling Frito-Lay Sales LP*, 2012 WL 252938 at *1. The Supreme Court has stated that exhaustion is not required where, as here, it is clear that the Tribal Court lacks jurisdiction (because of the express jurisdictional prohibition occasioned by

[13] *Nat'l Farmers,* 471 U.S. at 856.

Bourland and the Tribes' 1905 cession of Sections 19 and 30). *Nevada v. Hicks,* 533 U.S. 353, 369 (2001).

A. Standard of Review.

Although this Court reviews a dismissal for failure to exhaust under an abuse-of-discretion standard, the proper scope of the tribal court exhaustion doctrine's application is a matter of law which this Court reviews *de novo*. *See Enlow*, 134 F.3d at 994. "Thus, if the district court exceeded the scope of the rule, then the district court necessarily abused its discretion in dismissing for failure to exhaust." *Id*.

B. *Iowa Mutual* Is Distinguishable from the Present Circumstances and Supports Encana's Exhaustion.

The District Court relied principally on *Iowa Mutual* in concluding that Encana had not exhausted its Tribal Court remedies. In particular, the District Court concluded that *Iowa Mutual* directs that exhaustion cannot be satisfied until a tribal court of appeals actually rules on the issue of tribal court jurisdiction, and that Encana had not met "this clear Supreme Court instruction." [APP-2319]. This is mistaken. *Iowa Mutual* fully supports the conclusion that Encana has adequately exhausted its Tribal Court remedies.

In determining that Encana had not exhausted, the District Court looked no further than *Iowa Mutual*, which, in the District Court's opinion,

"has marked similarities to the instant case." [APP-2318]. These "similarities" enumerated by the District Court were that: (1) "[t]here, just as here, a non-Indian plaintiff (Iowa Mutual) went to federal court after receiving an initial determination from a tribal court that it had subject-matter jurisdiction based on the Tribe's ability to regulate the conduct of non-Indians who chose to engage in commercial relations with reservation Indians," and (2) "as here, the tribal court system there did not allow for interlocutory appeals, so in order to get appellate review of the jurisdictional determination, Iowa Mutual found it would have to fully try the case before appealing the issue to the Tribal Supreme Court." [APP-2319]. Based on these "similarities," the District Court concluded that the *Iowa Mutual* decision – which held that Iowa Mutual had not exhausted its tribal remedies because it had not yet obtained appellate review by the Blackfeet Indian Tribe Court of Appeals – compelled the conclusion that Encana had also not yet exhausted its tribal remedies. [APP-2320].

Contrary to the District Court's conclusions, *Iowa Mutual* does not have marked similarities to the instant case, but rather, is distinguishable in two decisive respects. First, *Iowa Mutual* has a direct nexus to Indian land. 480 U.S. at 11. Indeed, it was undisputed in *Iowa Mutual* that the events at issue all took place on land located within the Blackfeet Indian Reservation,

and that the underlying case was one between tribal members, in fact, between family members. *See id*. Here, in contrast, all operative events took place on public roads maintained by Fremont County and on federal public lands. Unlike *Iowa Mutual*, rules of comity do not apply where all the events at issue occurred on non-Indian land. *See Bourland*, 508 U.S. at 691 (holding tribe lacked regulatory authority over lands withdrawn and dedicated to federal public works, despite the fact the tribe retained mineral rights, hunting access, and other land rights); *Hornell Brewing*, 133 F.3d at 1091 (rejecting tribal effort to regulate non-Indian conduct outside Indian Country); *McDonald's Corp. v. Crazythunder*, (Case No. 06-CV-180J, D. Wyo. 2004; [APP-1421]) (unpublished) (holding that, if a parcel of land "is not within the boundaries of the Reservation, there is no argument that the Tribal Court could have jurisdiction").[14]

The *Iowa Mutual* Court emphasized the significance of the quintessentially intra-tribal character of *Iowa Mutual* in its analysis:

- "We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government… This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members ***and their territory*** …" (*Id*. at 14) (citations omitted; emphasis added);
- [U]nconditional access to the federal forum would place it in

[14] *See* discussion, *infra*, Section II.B.

direct competition with the tribal courts, thereby impairing the latter's authority ***over reservation affairs***." (*Id*. at 16) (emphasis added);

- "Tribal authority over the activities of non-Indians ***on reservation lands*** is an important part of tribal sovereignty." (*Id*. at 18) (emphasis added).

Similarly, because the events at issue in *Iowa Mutual* indisputably took place on reservation lands, Iowa Mutual did not invoke any exceptions to the exhaustion requirement, as Encana does here, but merely questioned "tribal court jurisdiction over outsiders." *Id*. at 19 n.12. That the present action took place on federally-owned land over which the Tribes have no civil regulatory or adjudicatory authority[15] is therefore a significant distinguishing factor between this case and *Iowa Mutual*, and must be heeded in a proper exhaustion analysis.

A second critical distinction is that *Iowa Mutual* arose in the context of a motion to dismiss filed at the inception of the action. In particular, upon Iowa Mutual's motion to dismiss the claims of members of the Blackfeet Indian Tribe against it in tribal court, and upon the plaintiffs' amendment of their complaint to allege facts from which jurisdiction could be determined, the tribal court concluded that it would have jurisdiction over the suit. 480

[15] *Strate*, 520 U.S. at 453 ("As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding").

U.S. at 12. Here, in contrast, the action has advanced far beyond the pleading stage in the Tribal Court, and the Tribal Court ruled on its subject-matter jurisdiction not upon a cursory motion to dismiss, but after considering extensive summary judgment briefing and materials regarding its jurisdiction. Indeed, Encana acted in good faith in the Tribal Court action, and provided the Tribal Court the fullest opportunity to reach a proper decision with respect to subject-matter jurisdiction. Unlike in *Iowa Mutual*, sufficient "respect" has been afforded to the tribal forum here (*see Strate*, 520 U.S. at 451), so exhaustion has been satisfied. Contrary to the insurance company's approach in *Iowa Mutual* – filing a unsubstantiated motion to dismiss and depriving the tribal court of the courtesy to even rule upon it before seeking relief in federal court – Encana's efforts, hallmarked by very extensive briefing and substantial testimony, are the very definition of "opportunity" the Supreme Court stated it intended to preserve for tribal courts in *National Farmers* and *Iowa Mutual*.

C. Where a Tribal Forum Affords No Right to Interlocutory Review, a Tribal Court's Summary Adjudication Regarding Its Jurisdiction Constitutes an Adequate "Opportunity" for the Tribal Court to Determine Its Jurisdiction.

The exhaustion doctrine requires that a tribal forum be given an adequate "opportunity" to determine the existence of its jurisdiction over a non-Indian. *Iowa Mutual*, 480 U.S. at 11. Judge St. Clair was afforded the

fullest opportunity to determine the Tribal Court's jurisdiction over Encana given the extensive summary judgment submissions and presentation of unrefuted expert testimony. Indeed, Encana has done more than any prior litigant involved in the reported tribal exhaustion jurisprudence to present evidence and argument about the lack of subject-matter jurisdiction in Tribal Court. Having created a voluminous record in Tribal Court demonstrating the Tribal Court's lack of subject-matter jurisdiction, Encana need not also be forced to endure two bifurcated trials on the merits and other inappropriate assertions of jurisdiction by the Tribal Court before Encana is deemed to have satisfied the comity-based exhaustion doctrine.

The District Court held that Encana had not established a substantial likelihood of success needed to warrant injunctive relief because Encana had not exhausted its Tribal Court remedies. Specifically, the District Court found exhaustion incomplete because "Encana's jurisdictional challenge has not yet reached the tribal appellate court." [APP-2320]. However, where a tribal appellate court provides no right to interlocutory review, summary judgment adjudication should be the limit of what is required to constitute an "adequate opportunity" for the tribal court system to address its subject-matter jurisdiction.

Indeed, as set forth more fully in Section I.D. below, none of the cases

on which the District Court relied in deeming actual tribal appellate review necessary for exhaustion involved circumstances where the tribal court had ruled on its jurisdiction through summary judgment. To the contrary, cases requiring tribal appellate review were in relative infancy compared to this action, relating only to filed, but not yet ruled upon, motions to dismiss. Cases addressing such a markedly different procedural posture, and such a vast difference in the non-Indian and tribal resources and time devoted to addressing subject-matter jurisdiction at those different procedural stages of litigation, should not be forced to apply to a case where the tribal court has developed an extensive and detailed record that was years in the making.

When appellate review is unavailable due to actions or rules of the tribal court itself, tribal appellate review cannot be used to hold a party hostage for an unauthorized trial in the tribal court. *Tunica-Biloxi Indians of La. v. Pecot*, 351 F.Supp.2d 519 (W.D. La. 2004).[16] The *Tunica-Biloxi* court

[16] There, the tribe filed a lawsuit for damages resulting from mold contamination in a hotel addition to the tribe's casino. The tribe also filed a state court petition (which was later removed to federal court) seeking a declaratory judgment that the tribal court had exclusive subject-matter jurisdiction over the dispute. *Id*. The tribal court ruled that it had subject-matter jurisdiction, but refused to certify the ruling as appealable to the tribal appellate court. The defendants applied for extraordinary writs to the tribal appellate court to review the tribal trial court's ruling on jurisdiction. *Id*. at 522. The tribal appellate court entertained oral arguments on the matter, then found it "ha[d] jurisdiction to entertain the writ application" and

held that an adequate opportunity for tribal court appellate review is not necessarily synonymous with actual review: "The only issue at question in this case is whether the tribal appellate court had 'the opportunity to review the determinations of the lower tribal courts.'" *Id*.at 524 (quoting *Iowa Mut.*, 480 U.S. at 17). "Not only did it have the opportunity to review the determination of the tribal trial court, the appellate court actually reviewed that determination." *Id*. Significantly, the district court further explained that "the tribal court system has been given a full opportunity to determine subject-matter jurisdiction [because] [t]he tribal court had the opportunity to certify its determination as appealable, but chose not to do so." *Id*. According to *Tunica-Biloxi*, "[t]ribal courts cannot circumvent this court's authority and obligation to determine tribal court jurisdiction by conducting an unauthorized trial for an estimated four to six weeks." *Id*.

Tunica-Biloxi makes clear that a tribal court need only be given an

---

"examine[] the proceedings in the lower court." *Id*. Effectively affirming the lower court, the tribal court of appeals held that the tribal court did not abuse its discretion in holding that it had jurisdiction over the matter, but reserved for "another day" the issue of whether the tribal court's definition of "reservation" would "stand the test of appellate review as to correctness …." *Id*. The non-Indian defendants then sought summary judgment in the federal court regarding the tribal court's lack of subject-matter jurisdiction. The plaintiffs argued that the defendants had failed to exhaust their tribal remedies. The district court disagreed, holding that the tribal appellate court had a full ***opportunity*** to determine its own jurisdiction. *Id*. at 524.

adequate and meaningful ***opportunity*** to determine its own jurisdiction over a non-Indian for exhaustion to be satisfied; actual review by a tribal appellate body is not necessary where the tribal appellate court has been given and rejected an opportunity to review the tribal trial court's determination and an adequate record has been developed in the trial court. Because Encana sought tribal appellate review of Judge St. Clair's jurisdictional determination, but the Tribal appellate court declined Encana's request, the Tribal appellate body has been afforded an "adequate opportunity" to review the jurisdictional issue. *Accord Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1217 (9th Cir. 2007) ("Ford will be deemed to have exhausted its tribal remedies once the Navajo Nation Supreme Court either resolves the jurisdictional issue or denies a petition for discretionary interlocutory review").

It stands to reason that a tribal appellate body's denial of interlocutory review cannot be used to keep non-Indians in the tribal court system for years on end and thwart the authority of the federal courts to determine whether the exhaustion doctrine has been satisfied or if an exception to the doctrine applies. Tribal exhaustion is prudential; it "is required as a matter of comity, not as a jurisdictional prerequisite." *Strate*, 520 U.S. at 451. Comity, however, "does not require deference to a court which has no

jurisdiction." *Rolling Frito-Lay Sales*, 2012 WL 252938 at *5.

In this case, any applicable comity concerns have already been satisfied, and requiring Encana to endure two separate trials on the merits and subsequent Tribal appeals does nothing to further advance any of the "comity concerns" recognized by *National Farmers*: (1) furthering Congressional policy of supporting tribal self-government; (2) promoting the orderly administration of justice by allowing a full record to be developed in the tribal court; and (3) obtaining the benefit of tribal expertise if further review becomes necessary. *Nat'l Farmers*, 471 U.S. at 856-57; *see also Texaco, Inc. v. Zah*, 5 F.3d 1374, 1377-1378 (10th Cir. 1993) (noting propriety of exhaustion depends on a case-by-case examination of the comity factors). First, in no way is tribal self-government supported by requiring exhaustion where all of the operative events underlying the claims against Encana took place on federally-owned, off-Reservation land. *See Zah*, 5 F.3d at 1378 (when the dispute "involves non-Indian activity occurring outside the reservation … the policies behind the tribal exhaustion doctrine are not so obviously served"). Second, a full record has already been developed in the Tribal Court in light of the years this action has been pending in Tribal Court, and the extensive summary judgment submissions considered by Defendant. Finally, tribal expertise plays no role in federal

and state claims brought against a non-Indian arising **off** the reservation. *See Johnson v. Harrah's Kan. Casino Corp*., 2006 WL 463138, *10 (D. Kan. Feb. 23, 2006) (unpublished). These well-established comity factors, therefore, do not require exhaustion, and the District Court's failure to consider them constitutes reversible error. *See Zah*, 5 F.3d at 1378 (vacating and remanding district court's dismissal because district court did not examine comity factors articulated in *National Farmers*).

Nor does the District Court's misinterpretation of the tribal exhaustion doctrine further any of the doctrine's other aims. "One of the main purposes of the exhaustion requirement … is the principle of judicial economy." *Krempel v. Prairie Island Indian Community*, 125 F.3d 621, 623 (8th Cir. 1997). But requiring two full-fledged trials on the merits, in addition to a subsequent appeal, in a forum which clearly lacks jurisdiction, subverts any notion of judicial economy and is wasteful.[17]

[17] Like the tribal court exhaustion doctrine, the first-to-file doctrine, which directs that a second-filed action based on the same facts as a prior pending action in a separate jurisdiction be held in abatement, is also based on the doctrine of comity. Notably, cases addressing the first-to-file doctrine overwhelmingly recognize the inherent wastefulness of duplicative trials. *See, e.g., Cessna Aircraft Co. v. Brown,* 348 F.2d 689, 692 (10th Cir. 1965) (duplicative litigation would lead "to the wastefulness of time, energy and money"); *Charlotte-Mecklenburg Hosp. Auth. v. Facility Wizard Software, Inc*., 2008 WL 5115281, *1 (W.D. N.C. Dec. 4, 2008) (unpublished) (noting that for two separate courts to supervise "what promises to be lengthy and

The parties' extensive summary judgment submissions in Tribal Court are more than adequate to meet the letter and spirit of the tribal court exhaustion doctrine. The doctrine of comity cannot be stretched to require two full Tribal Court trials and subsequent Tribal appellate proceedings before Encana may assert its right to be protected from the Tribal Court's unlawful assertion of subject-matter jurisdiction. The Tribal Court was given an adequate and meaningful opportunity to determine its jurisdiction. That the Tribal appellate body refuses to review the Tribal Court's jurisdictional determination should not preclude satisfaction of the exhaustion doctrine under these particular circumstances.

D. The Supreme Court's Tribal Exhaustion Jurisprudence Does Not Require That Non-Indian Litigants Endure More Than Summary Judgment Proceedings.

The District Court erred in grafting procedural requirements on to *National Farmers* and *Iowa Mutual* that simply do not exist in the Supreme Court's opinions. Instead, those cases stand for the proposition that the

---

complicated discovery and subsequent trial proceedings would be the epitome of judicial waste"); *Transunion Corp. v. Pepsico, Inc.*, 811 F.2d 127, 129 (2d Cir. 1987) (public interest factors favored dismissal of second-filed action where subjecting parties to two trials would result in "unwarranted waste of judicial resources"); *Fischer & Porter Co. v. Moorco Int'l Inc.*, 869 F.Supp. 323, 325 (E.D. Pa. 1994) (first-filed rule is intended to avoid waste involved in duplicative suits and delay in providing prompt administration of justice).

tribal court must initially review its own subject-matter jurisdiction.[18] The District Court interpreted the exhaustion doctrine as containing a requirement that a tribal appellate body must review subject-matter jurisdiction ***prior*** to ***any*** federal court review, even if the Tribes' procedural rules dictate that such review cannot occur until after the challenging party has endured the loss of its rights. This expansion of the exhaustion doctrine is not supported by the Supreme Court's opinions, or law of this or any other Circuit.

In *National Farmers* and *Iowa Mutual*, the Supreme Court held that failure to appear in tribal court or reliance upon cursory motions to dismiss is not "enough" for exhaustion of tribal remedies. Neither refusal to participate in tribal court proceedings at all nor refusal to wait for a tribal court to rule upon a motion to dismiss is "enough" to afford the tribal court a substantive opportunity to address its subject-matter jurisdiction. But no known federal court opinion – other than the District Court's – has concluded that the kind of robust "opportunity" for review of tribal court jurisdiction presented to the Tribal Court here, is not "enough" to satisfy the tribal exhaustion doctrine. Affirming the District Court's ruling does not

[18] This is the case, of course, unless one of the exceptions to the exhaustion doctrine applies.

square with the principles articulated in *National Farmers* and *Iowa Mutual*.

1. National Farmers.

In *National Farmers*, Leroy Sage, a child member of the Crow Tribe, was struck by a motorcycle in the Lodge Grass Elementary School parking lot. 471 U.S. at 847. The school was within the boundaries of the Crow Reservation, but was a public school located on land owned by the State of Montana. *Id*. Sage's guardian filed an action on his behalf in the Crow Tribal Court, and the school district failed to respond. *Id*. at 847-848. The tribal court entered a default judgment for the plaintiff. *Id*. The defendant's insurance company, instead of attempting to set aside the tribal court's default judgment or otherwise appealing within the tribal court system, filed an action in federal court arguing that the tribal court lacked jurisdiction over it. *Id*.

The Supreme Court first held that the federal courts had jurisdiction to hear the case: "The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law ...." *Id*. at 852. The Court then held that the non-Indian defendants had to exhaust their remedies in tribal court before challenging the tribal court's jurisdiction. *Id*. at 857.

2. Iowa Mutual.

In *Iowa Mutual*, the Supreme Court affirmed that federal courts should, as a matter of comity, require defendants to exhaust their tribal court remedies in a case in which the tribal court defendant filed in federal court on grounds of diversity jurisdiction. 480 U.S. at 16-17. But there, a member of the Blackfeet Indian Tribe, LaPlante, was injured during his employment at a ranch owned by an unincorporated business entity in turn owned by Blackfeet tribal members (LaPlante's in-laws) and located on the Blackfeet Indian Reservation. 480 U.S. at 11. LaPlante sued in tribal court seeking damages against the ranch (his in-laws) for negligence and the non-Indian insurer for insurance bad faith. *Id*. The insurer filed a cursory motion to dismiss for lack of subject-matter jurisdiction and for failure to properly allege tribal court jurisdiction. *Id*. at 12. The tribal court granted the insurer's motion to dismiss, but allowed LaPlante leave to file an amended complaint to attempt to properly allege tribal court jurisdiction. *Id*.

Rather than respect the tribal court's ability to adjudicate the sufficiency of subject-matter jurisdiction allegations in the amended complaint, the insurer filed a federal court declaratory judgment action seeking to circumvent any further tribal court analysis of subject-matter

jurisdiction. *Id*. The *Iowa Mutual* Court found that end-run impermissible for the same policy reasons it announced in *National Farmers*. 480 U.S. at 14. No such end-run occurred here, where Encana exhaustively litigated jurisdiction in Tribal Court through the summary judgment phase, and where no interlocutory appeal was available according to the Tribal appellate court.

3. *Policy Concerns.*

As noted above, the Supreme Court suggested that its tribal court exhaustion doctrine was motivated by three federal policy concerns: (1) to further the Congressional policy of supporting tribal self-government; (2) to promote the orderly administration of justice; and (3) to obtain the benefits of tribal expertise. *Nat'l Farmers*, 471 U.S. at 856. These policies are either inapplicable or fulfilled in this case.

First, there is no issue of self-government here. The Tribes are seeking to govern a non-Indian with respect to its activities on federal public lands pursuant to a federal mineral lease. The issues here, therefore, are about the Tribes' efforts to ***govern others*** whereas both *National Farmers* and *Iowa Mutual* involved protecting tribal courts' ability to adjudicate intra-tribal tort cases. The non-Indian nexus in both *National Farmers* and *Iowa Mutual* was the presence of non-Indian insurers who tried to evade tribal court proceedings altogether, failing to appear (*National Farmers*) or

failing to wait for the tribal court to actually substantively address subject-matter jurisdiction (*Iowa Mutual*).

Second, litigation of the same issues in two different forums cannot advance the orderly administration of justice. Requiring a non-Indian to endure multiple trials on the merits in a Tribal Court without jurisdiction before seeking federal review can only lead to the wasteful duplication of resources.

Third, Judge St. Clair had abundant evidence before him on the subject-matter jurisdiction question and he considered it for a period of one year. Defendant's December 20, 2011 Order stresses that it provides closure on subject-matter jurisdiction: "**This ruling is final and binding on the parties**." [APP-63 (emphasis added)]. The other regular three Tribal Court judges (serving under Chief Judge St. Clair) constitute the Tribal Court of Appeals. That body has already concluded it will not review any summary judgment determination by Judge St. Clair until after trial on the merits. [APP-71-72]. Encana could not present any additional evidence in Tribal Court to further press its case on subject-matter jurisdiction. Judge St. Clair has made clear his order is final and he will not reconsider it or consider any additional evidence. [APP-63]. No more Tribal expertise will inform the District Court's review of the Tribal Court's subject-matter jurisdiction.

E. *Iowa Mutual* Supports Encana's Request for Federal Review of Tribal Court Jurisdiction at This Juncture.

Iowa Mutual supports Encana's exhaustion of tribal remedies. The Supreme Court explained that "tribal appellate courts must have the *opportunity* to review the determinations of the lower tribal courts." *Iowa Mutual*, 480 U.S. at 19 (emphasis added). As explained above, the Tribal appellate court was afforded – and declined – that opportunity. *Iowa Mutual* also recognizes that exhaustion is "analogous to principles of abstention articulated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976)." *Id.* at 16 n.8. The doctrine of comity/abstention, however, must be interpreted narrowly in light of the "virtually unflagging obligation of federal courts to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817.

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY FAILING ADEQUATELY TO CONSIDER EVIDENCE THAT EXCEPTIONS TO THE TRIBAL COURT EXHAUSTION DOCTRINE ARE APPLICABLE.

The District Court's failure to sufficiently analyze the evidence and arguments regarding the Tribal Court's clear lack of jurisdiction over Encana also constitutes reversible error. Where a tribal court clearly lacks jurisdiction over a non-Indian, the non-Indian's "probability of success on the merits is without question." *Crowe & Dunlevy*, 640 F.3d at 1158. In the

proceedings below, Encana presented ample evidence demonstrating that the Tribal Court lacks jurisdiction over the claims against Encana, so that the exhaustion requirement "would serve no purpose other than delay." *Hicks*, 533 U.S. at 369. The District Court, however, did not even consider the evidence submitted by Encana, summarily concluding instead that the "consensual relationship" exception to the presumption against tribal jurisdiction articulated in *Montana* provided jurisdiction to the Tribal Court. [APP-2323-2326].

National Farmers requires that the District Court **must** adequately consider the ***exceptions*** to the tribal court exhaustion doctrine before concluding that exhaustion is required. Although tribal courts are given the opportunity, as a matter of comity, to determine the existence and extent of their jurisdiction over non-Indians, the District Court **must** decide whether any of the ***exceptions*** to the exhaustion doctrine apply in the first instance. *See Zah*, 5 F.3d at 1378 ("we must depend upon the district courts to examine assiduously the *National Farmers* factors in determining whether comity requires the parties to exhaust their tribal remedies before presenting their dispute to the federal courts"); *Marathon Oil Co. v. Johnston*, 2004 WL 4960751, *2 (D. Wyo. 2004) [APP-2260-2280] (unpublished) ("the Court must first determine whether any of the four exceptions to the tribal

exhaustion doctrine apply…"); *Reservation Tel. Coop. v. Three Affiliated Tribes*, 76 F.3d 181, 184 (8th Cir. 1996) (noting that tribal forums may determine jurisdiction "[b]arring the presence of one of [the] exceptions" to exhaustion). The District Court's Orders, however, require the *Tribal Court* to adjudicate whether an exception to tribal exhaustion applies. This elevates a prudential doctrine to a jurisdictional prerequisite.

A. Standard of Review.

The District Court's failure to analyze the evidence demonstrating the applicability of exceptions to the tribal court exhaustion doctrine warrants the reversal of the District Court's Orders, which are subject to this Court's *de novo* review. *See Zah*, 5 F.3d at 1376.

B. The District Court Erred by Failing to Address Evidence that the Tribes Clearly Lacked Civil Adjudicatory Jurisdiction over Encana.

As a prudential tool, the tribal court exhaustion doctrine is not without exception. Exhaustion is not required where, as here, it is "clear that the tribal court lacks jurisdiction," (because of an express jurisdictional prohibition) such that "the exhaustion requirement would serve no purpose other than delay." *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006).[19]

[19] The exhaustion requirement is subject to the following exceptions: (1)

It is **presumed** that tribal courts lack jurisdiction over non-Indians and tribal efforts to regulate nonmembers are likewise "presumptively invalid." *Plains Commerce Bank*, 554 U.S. 316, 330 (2008) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)); *Rolling Frito-Lay*, 2012 WL 252938 at *3; *see also Bourland*, 508 U.S. at 691. This is so because while tribes have authority to exercise civil jurisdiction over their own members, "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564 (citations omitted). Generally, therefore, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id*. at 565. Indeed, to this day the Supreme Court has "never held that a tribal court had

---

"where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,'" *Nat'l Farmers Union*, 471 U.S. at 857 n.21; (2) "where the [tribal court] action is patently violative of express jurisdictional prohibitions," *id*.; (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction," *id*.; (4) "[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by [the main rule established in *Montana*, 450 U.S. 544]," *Strate*, 520 U.S. at 459 n.14; or (5) it is otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirement "'would serve no purpose other than delay.'" *Hicks*, 533 U.S. at 369 (internal citation omitted).

jurisdiction over a non-member defendant." *Hicks*, 533 U.S. at 358 n.2.[20] In this case, "[n]either *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*." *Hornell Brewing*, 133 F.3d at 1091 (emphasis in original).

The Supreme Court has provided clear direction about how tribal court jurisdiction must be evaluated in light of the land realities of a particular case. In *National Farmers*, the Court outlined the approach that should be taken to answer whether tribal remedies have been exhausted:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of

[20] The strong presumption against tribal jurisdiction over non-Indians has been repeatedly reinforced since the Supreme Court first extended its implicit divestiture jurisprudence to the civil context in *Montana* in 1981:

> The Court's most recent pronouncement leaves no ambiguity. The Court said that "tribes do not as a general matter, possess authority over non-Indians who come within their borders," *Plains*, 554 U.S. at 328, 128 S.Ct. at 2718, and that "the general rule [of *Montana* ...] restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simply by non-Indians." *Id*. at 328, 128 S.Ct. at 2719 … If there were any doubt about this, the Court then relied on *Montana*'s general proposition to state that "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are "presumptively invalid." *Id*. at 330, 128 S.Ct. at 2720.

Rolling Frito-Lay, 2012 WL 252938 at *3 (quoting *Plains Commerce Bank*).

> tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

471 U.S. at 855-856. Encana presented exactly such detailed – and unrefuted – evidence of the Tribes' Reservation history, relevant statutes and Executive Branch policy to the District Court in the proceedings below.

During the March 2, 9 and 16 hearings before the District Court, Encana established that the Tribes lack civil regulatory authority over Township 4 North, Range 3 East, Sections 19 and 30 in Fremont County, Wyoming, and that, as a result, Judge St. Clair lacks corresponding adjudicatory authority. *Strate*, 520 U.S. at 453. In particular, Encana presented days of evidence that: Sections 19 and 30 are within the 1905 Act area; the 1905 Act diminished the Wind River Indian Reservation; Sections 19 and 30 were withdrawn for the Riverton Reclamation Project by order of the Secretary of Interior in 1918 and those lands remain withdrawn today; neither the 1953 Act nor the 1958 Act confer any jurisdiction upon the Tribes; and the Lease does not confer jurisdiction upon the Tribes because the Lease was entered into pursuant to authority governing mineral leasing on federal public lands, after the federal government had compensated the Tribes for the land ceded in the 1905 Act and after Sections 19 and 30 had

been dedicated to public reclamation use by the Secretary of the Interior.[21] [APP-1874-1943; 2709-2727; 2752-2759]. Thus, because none of the operative events took place in Indian Country, Supreme Court precedent precludes the Tribal Court's assertion of jurisdiction over Encana as a matter of law.

The District Court failed to address this threshold jurisdictional issue. Although the District Court's Order Denying Preliminary Injunction acknowledges Encana's "fact-intensive arguments" regarding the Tribal Court's lack of civil regulatory authority over the land on which the operative events occurred, the District Court did not evaluate the evidence, concluding without analysis that "these complex, particularity-driven arguments would not seem to indicate the extreme circumstances indicating the clear lack of tribal court jurisdiction needed to subvert the tribal

[21] Encana also established that even if the Tribes' beneficial ownership of the mineral estate did somehow restore the pre-1905 Act status of the lands (which it did not), the fact that the lands were earlier opened would still defeat the Tribes' assertion of jurisdiction over Encana, because under *Bourland* once Congress opens up reservation land to non-Indians, the transfer destroys once and for all any preexisting Indian rights to regulatory control of the land. Thus, even if the Reservation boundaries had not changed as a result of the 1905, 1953 and 1958 Acts, the Riverton Reclamation Project's alienation from the Tribes, by virtue of the Interior Secretary's continuing 1918 withdrawal order, creates an express jurisdictional prohibition that excuses Encana from the exhaustion doctrine entirely.

exhaustion doctrine …" [APP-2329-2330]. The District Court further held that Tribal Court jurisdiction was not clearly lacking based on the fact that the parties "hotly and thoughtfully contested" civil adjudicatory jurisdiction. [APP-2331]. That is, the District Court held that "the lengthy and rigorous argument had on the jurisdictional issue at the extended hearing on the matter," or the complexities of the arguments regarding jurisdiction, were indicators of the existence of Tribal Court jurisdiction. [APP-2331]. Encana respectfully submits that all challenges to tribal court jurisdiction necessarily involve "disputes," and, taken to its logical conclusion, the District Court's reasoning would automatically confer jurisdiction upon a tribal court whenever that jurisdiction is questioned.

Moreover, the District Court's Orders ignore the controlling Supreme Court case strictly confining tribal authority over non-Indians where the tribe has lost its inherent power to exclude non-members: *Bourland*, 508 U.S. 679.[22] It is undisputed that the Tribes lost their landowners' right to exclude non-members at Township 4 North, Range 3 East of Fremont County with the 1905 Act, according to the evidence carefully presented to the District Court by Encana. [APP-2341-2779]. This loss of exclusionary

[22] The District Court also ignored other authorities important in this line: *Strate*, 520 U.S. 438, *Atkinson Trading*, 532 U.S. 64, *Hicks*, 533 U.S. 353 and *Plains Commerce Bank*, 554 U.S. 316.

power is substantially identical to that the Supreme Court found dispositive of the corresponding loss of civil regulatory power in *Bourland*. The Tribes' beneficial interest in the subsurface mineral estate cannot overcome *Bourland*. The fact that the Tribes receive mineral leasing proceeds does not grant them any jurisdiction. *Osage Nation v. Irby*, 597 F.3d 1117, 1125 (10th Cir. 2010).

Nothing in the federal law allows the Tribes' beneficial interest in the underlying minerals to morph the Tribes into civil regulators over nonmembers' surface activities to extract those minerals.[23] It is the United States – not the Tribes – which entered into the Lease.[24] It is the United States – not the Tribes – which owns the surface to Sections 19 and 30. It is the United States – not the Tribes – which allowed Encana's entry and continues to condition that entry in all legal respects.[25] The Tribes have no

---

[23] Correspondingly, the Tribal Court lacks civil adjudicatory authority with respect to those activities. *Strate*, 520 U.S. at 453.

[24] *See Shoshone Indian Tribe of the Wind River Indian Reservation v. United States*, 672 F.3d 1021 (Fed. Cir. 2012) (holding that parties could not convert lease issued pursuant to one federal statute into lease issued pursuant to another federal statute so as to change the parties or terms of the lease).

[25] The BLM is the lessor of the Lease. [APP-268]. Only the BLM has authority to permit Encana to access the well site and to drill Well No. 19-24 and only the BLM can bring an ejectment or breach of lease action against Encana. *See* Onshore Oil and Gas Order No. 1, 72 Fed. Reg. 10328 (Mar. 7, 2007); 43 C.F.R. § 3000.0-5(e) (defining *Authorized Officer*); 43 C.F.R. Ch.

power to regulate surface activities on this federal surface, on this federal lease, and the Tribes lack any concomitant power to exclude Encana, the mineral lessee, from exercising its leasehold rights. *See Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1361 (Fed. Cir. 1998) (Indian tribes have no "veto" power over access to federal mineral interests).

With the 1905, 1953, and 1958 Acts, and the withdrawals for public use effected by the Secretary's 1918 Order, Congress has "broadly opened up those lands for public use" and thereby "eliminated the [Tribes'] power to exclude non-Indians from those lands, and with that the incidental regulatory [and adjudicatory] jurisdiction formerly enjoyed by the [Tribes]." *Bourland*, 508 U.S. at 689. *Montana* "unequivocally stated" that when Congress broadly opened up treaty reservation land to non-Indians – as the 1905 Act and ensuing Riverton Reclamation Project legislation did here – "**the effect of the transfer is the destruction of pre-existing Indian rights to regulatory [and adjudicatory] control**." *Bourland*, 508 U.S. at 691

II, Part 3161.2– Onshore Oil and Gas Operation (allowing the "Authorized Representative" of the Secretary of the Interior "to approve, inspect and regulate the operations that are subject to regulations in this part" and "to require compliance with lease terms" and "to require that all operations be conducted in a manner which protects … life and property"). The Secretary's power has not been delegated to the Tribes. Indeed, it is doubtful that the Secretary could delegate federal power vested in him by the Constitution of the United States to entities that are necessarily outside the Constitution, like the Tribes.

(emphasis supplied). Simply put, the law of the land is that tribal "[r]egulatory authority goes hand in hand with the power to exclude." *Bourland*, 508 U.S. at 691.

The District Court's failure to consider the evidence before it, and to acknowledge this controlling legal authority on the issue of tribal jurisdiction, requires the reversal of the Orders. *See Amoco Oil Co. v. Rainbow Snow*, 748 F.2d 556, 558-559 (10th Cir. 1984); *Mass. Ass'n of Older Americans v. Sharp*, 700 F.2d 749, 752 (1st Cir. 1983); *Evans v. Harnett County Bd. of Educ.*, 684 F.2d 304, 307 (4th Cir. 1982). Because the Tribes lack regulatory authority, and correspondingly the Tribal Court lacks adjudicatory authority, the tribal exhaustion doctrine does not apply. *Strate*, 520 U.S. at 459 n.14.

C. The District Court Erred by Failing to Consider the Supreme Court's Jurisprudence Strictly Confining the Inherent Exclusionary – and Here Coordinate Civil Regulatory and Civil Adjudicatory – Powers of Non-Federal Sovereigns.

The Supreme Court has stated unequivocally that tribes lack the authority to regulate non-Indians' activities on lands over which the tribe cannot "assert a landowner's right to exclude[.]." *Strate*, 520 U.S. at 456; *Montana*, 450 U.S. at 557; *Bourland*, 508 U.S. at 691. The loss of the landowners' right to exclude non-members with the 1905 Act permanently

dissolved whatever inherent authority the Tribes otherwise had over Sections 19 and 30. Justice Scalia explained this central tenet of *Bourland*, with no Justices dissenting, in *Hicks*:

> In [*Bourland*], we were again confronted with a tribe's attempt to regulate hunting and fishing by nonmembers on lands located within the boundaries of the tribe's reservation, but not owned by the tribe. In *Bourland*, the United States had acquired the land at issue from the Tribe under the Flood Control Act and the Cheyenne River Act. *Id*. at 689-690. We concluded that these congressional enactments deprived the Tribe of "any former right of absolute and exclusive use and occupation of the conveyed lands." *Id*. at 689.

Hicks, 533 U.S. at 390.

These themes have been repeatedly addressed by the Supreme Court. *See Atkinson Trading*, 523 U.S. at 653 (holding that an Indian tribe's sovereign civil regulatory authority "whatever its derivation – reaches no further than tribal land"); *Plains Commerce Bank*, 554 U.S. at 333 ("Tellingly, with only 'one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers *on non-Indian land*'") (emphasis in original, quoting *Hicks*). Indeed, the Supreme Court's recent ruling in *Arizona v. United States*, 567 U.S. __ (2012) confirms that any sovereign's inherent power to exclude is inextricably tied to its ability to control the underlying lands. *See* Slip Opinion of Scalia, J. at 1. In his detailed tracing of the genesis and history of sovereigns' right to

exclude in his analysis of Arizona's immigration law, Justice Scalia wrote that "a sovereign … has the inherent power to exclude persons from *its* territory … That power to exclude has long been recognized as inherent in sovereignty." *Id*. (emphasis supplied). If the land is outside of *its* territory, the sovereign has no inherent power to exclude. That is exactly the holding of *Bourland*, which controls with equal force here. 508 U.S. at 692.

Moreover, the central thrust of *Bourland* is routinely applied in the context of automobile accidents occurring on public roads – such as Jorgenson's – unless the particular tribe involved has retained some specific right to exclude in granting the right-of-way for that road. *Strate*, 520 U.S. at 465; *EXC, Inc. v. Jensen*, 2012 WL 3264526, *8 (D. Ariz. Aug. 9, 2012) (unpublished) (no tribal court jurisdiction over automobile accident tort claims against touring company where accident occurred on public highway allowing access across Navajo Nation to a federal water project).

The bright-line rule enunciated in *Bourland* excuses any exhaustion requirement. Moreover, no federal grant provides for Tribal governance with respect to Sections 19 and 30. No federal law establishes any authority for the Tribes' exercise of civil regulatory authority with respect to Sections 19 and 30, which remain federal public lands utilized in federal public works. Indeed, there is no indication in any federal law or legislative history

that evinces any intention by the United States to cede any of its dominion over the Riverton Reclamation Project to the Tribes. Under *Strate*, then, exhaustion is not required. 520 U.S. at 459 n.14; *see EXC*, 2012 WL 3264526 at *7 (holding tribal regulatory authority "cannot encompass the stretch of land maintained as part of [public] highway because the [tribe's] right to occupy and exclude does not extend to that stretch of land," thus there could be no tribal adjudicatory authority over automobile accident occurring thereon, despite alleged tortfeasor's subjugation to tribal licensing).

D. The District Court Erred by Failing Adequately to Address the *Montana* Exceptions to Tribal Court Jurisdiction.

The District Court erred in finding that *Montana* provides a basis for Defendant's authority over Encana. *Montana* sets forth two narrow exceptions to the general rule that Indian tribes lack civil jurisdiction over non-members on tribal lands. 450 U.S at 565-66. Neither exception applies to this case.

Encana has never expressly consented to Tribal Court jurisdiction for off-Reservation activities, and such consent cannot be inferred from Encana's willingness to comply with tribal policies or receive governmental services from the Tribal government with respect to on-Reservation activities. *See Atkinson Trading*, 532 U.S. at 655 (non-Indian's use of tribal

emergency response services and compliance with tribal licensing regime were insufficient to satisfy *Montana's* "consensual relationship" factor). Consent alone is not enough to trigger the first *Montana* exception; instead, "the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 554 U.S. at 337. Encana's payment of severance taxes and licensing fees cannot be deemed consent to jurisdiction for ***off***-Reservation activities; "[a] nonmember's consensual relationship in one area … does not trigger tribal authority in another – it is not 'in for a penny, in for a Pound.'" *Atkinson Trading*, 532 U.S. at 656 (citation omitted).

Nor does the second *Montana* exception – permitting the exercise of tribal civil jurisdiction over non-Indians where the non-Indians' "conduct" jeopardizes the "political integrity, the economic security, or the health or welfare of the tribe" – justify Judge St. Clair's continued exercise of civil adjudicatory authority over Encana. *See Montana*, 450 U.S. at 566. To be subject to Tribal Court jurisdiction under this exception, Encana's alleged conduct must "imperil the subsistence" of the tribal community. *Plains Commerce Bank*, 554 U.S. at 341; *see also Atkinson Trading*, 532 U.S. at 657-58 n.12 ("unless the drain of the nonmember's conduct upon tribal

services and resources is so severe" that it actually imperils the political integrity of the tribe, "there can be no assertion of civil authority beyond tribal lands"). Such extreme circumstances are certainly absent here. Far from "draining" tribal resources and services, all the relevant events took place ***outside*** the Reservation on federal public lands. No Tribal services were provided to investigate Jorgenson's accident, no Tribal services were provided at Well No. 19-24, and Encana's operation of a gas well on federal public lands does not "imperil the existence" of either Tribe. Thus, neither of the *Montana* factors applies in the instant case.

In spite of the narrowness of the *Montana* exceptions, the District Court mistakenly held that *Montana*'s "consensual relationship" exception conferred colorable jurisdiction on the Tribal Court based on the District Court's previous holding in *DHS Drilling Co. v. Estate of Jeremy Jorgenson* that DHS had entered into a consensual relationship with the Tribes sufficient to trigger jurisdiction. In particular, the District Court stated that because "both suits equally contemplate this Court taking jurisdiction from the Tribal Court," the prior *DHS Drilling* action and the present action were subject to "a functionally identical exhaustion analysis." [APP-2324]. "Accordingly," the District Court held, "we are bound by the evaluation of the potential for tribal court jurisdiction that we made pursuant to our

exhaustion analysis in *DHS*." [APP-2325].

In so holding, the District Court abandoned its obligation to conduct its own independent analysis of whether either *Montana* factor applied to create tribal jurisdiction over Encana itself, instead of over a separate entity with whom Encana had contracted. It is unclear whether the District Court made this finding on the basis of collateral estoppel or because the Court did not differentiate the "opportunity" for the Tribal Court to determine its own jurisdiction in the earlier *DHS Drilling* case as compared to Encana's action brought roughly two and a half years later. Either way, the District Court erred.

The doctrine of collateral estoppel – which requires that: (1) the issue previously decided is identical with the one presented in the action in question; (2) the prior action has been finally adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication; and (4) the party against whom the doctrine is invoked had a full and fair opportunity to litigate the issue in the prior action[26] – is inapplicable because, at a minimum, Encana, who was not a party to the 2009 *DHS Drilling* action, had no full and fair opportunity to litigate the issue of the Tribal Court's jurisdiction over DHS.

[26] *See Dodge v. Cotter Corp.*, 203 F.3d 1190, 1198 (10th Cir. 2000).

Likewise, the *DHS Drilling* case is no comparison. In its August 2009 case, DHS sought federal court review without allowing the Tribal Court to rule on its pending motion to dismiss, mirroring the cursory tribal court evasion efforts the Supreme Court rejected in *Iowa Mutual*. Unlike DHS, Encana afforded the Tribal Court ample "opportunity" to determine its own jurisdiction with extensive argument and evidence.

Thus, the District Court's *Montana* analysis misses the mark and cannot cure the Court's substantive errors in improperly imposing specific procedural requirements not found in the Supreme Court's comity-based exhaustion jurisprudence and in failing to consider the evidence of the exceptions to the exhaustion doctrine.

CONCLUSION

To challenge the ability of Judge St. Clair to exercise subject-matter jurisdiction over it, Encana had to do one of two things: (1) exhaust tribal court remedies within the meaning of Supreme Court and Tenth Circuit precedent; or 2) establish that one of the exceptions to the tribal court exhaustion doctrine applies. Encana did both and the District Court erred in declining to review Judge St. Clair's jurisdiction in the proceedings below.

Even if the Supreme Court's precedents were understood in the expansive manner in which they were interpreted by the District Court, the

exceptions to the tribal court exhaustion doctrine cannot be ignored as they were in the underlying proceedings. Indeed, where, as here, there is an "absence of any compelling argument establishing tribal court jurisdiction" over a non-Indian, "the exhaustion requirement would serve no purpose, and there is no need to require further tribal court litigation before the exercise of federal jurisdiction . . ." *Crowe & Dunlevy*, 640 F.3d at 1153.

Not only is there a lack of a compelling argument to establish Tribal Court jurisdiction in this instance, Encana has submitted unrefuted expert evidence of the express jurisdictional prohibition against Tribal Court jurisdiction arising from the Tribes' 1905 loss of their landowners' right to exclude non-members with respect to Sections 19 and 30. Under *Bourland*, whatever regulatory authority the Tribes may have once had at Sections 19 and 30 has been gone from the Tribes since 1905 because of the 1905 Act. Tribal regulation of those lands, therefore, is not inherent and the Tribal Court lacks any corresponding jurisdiction.

As noted in *Plains Commerce Bank*, subjecting non-Indians to the jurisdiction of a tribal court without their consent would subject them to an entity outside the Constitution. 554 U.S. at 336-338. "Government with the consent of the governed is everything in America." *Rolling Frito-Lay*, 2012 WL 252938 at *3. Federal law does not require that non-Indians be

subjected to tribal court proceedings related to their federally-authorized activities on federal public lands not part of an Indian reservation. Nothing about Encana's fundamentally federal activities on the Riverton Reclamation Project places Encana under the control of a tribal court system outside the Constitution. Accordingly, Encana requests the Court to REVERSE the District Court's Order denying Encana's Motion for Preliminary Injunction, to REVERSE the District Court's Order of Dismissal, and to order a trial on Encana's Complaint for Permanent Injunction.

ORAL ARGUMENT STATEMENT

Encana requests oral argument because this case requires consideration of important policy concerns relating to the implementation of the comity-based tool established by the United States Supreme Court in the mid 1980s – the tribal exhaustion doctrine. This case will also require review of the significant restraints the Supreme Court has enunciated that strictly confine tribal authority over non-Indians since the time the Court first recognized the tribal exhaustion doctrine.

Encana has done more than any prior litigant involved in this Court's tribal exhaustion jurisprudence to present evidence and argument in Tribal Court about the Tribal Court's lack of subject-matter jurisdiction. Encana seeks to clarify that the tribal exhaustion doctrine does not require any more

than the level of meaningful opportunity to fully consider subject-matter jurisdiction issues that Defendant enjoyed in this case through Encana's extensive summary judgment briefing and presentation of unrefuted expert testimony. Encana also seeks protection of this Court's firm ruling in *Crowe & Dunlevy:* federal rights deserve to be protected in federal courts. 640 F.3d at 1156.

Encana also appeals the District Court's error in reasoning that there is any legal significance to the fact that the parties "hotly and thoughtfully contested" Defendant's civil adjudicatory jurisdiction. [APP-2331]. The District Court failed to consider the unrefuted evidence before it that the Tribal Court did not have jurisdiction over Encana and that exceptions to the tribal exhaustion doctrine applied.

Encana asserts that oral argument will be useful to the Court in considering both the policy issues and array of important United States Supreme Court precedents implicated by this appeal.

DATED this 20th day of August 2012.

ENCANA OIL & GAS (USA) INC.,

s/Jennifer H. Weddle

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

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

Attorneys for Encana Oil & Gas (USA) Inc.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing **APPELLANT'S OPENING BRIEF**:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) the ECF submission is an exact copy of the hard documents filed with the Clerk;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Macafee Antivirus 8.0, and according to the program, are free of viruses.

Dated this 20th day of August 2012.

GREENBERG TRAURIG, LLP

s/ Jennifer H. Weddle

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the following OPENING BRIEF was filed with the Clerk of the Court via the CM/ECF System, hand delivered to the Court, and served upon counsel via electronic transmission this 20th day of August 2012.

Kimberly D. Varilek
EASTERN SHOSHONE TRIBE
OFFICE OF ATTORNEY GENERAL
3 Ethette Road, Suite 21
P.O. Box 538
Fort Washakie, WY 82514
kvarilekesag@gmail.com

☒ CM/ECF Electronic Transmission
☐ Fax
☐ Overnight Delivery
☐ U. S. Mail

Brian W. Chestnut
Joshua Osborne-Klein
Richard M. Berley
ZIONTZ CHESTNUT VARNELL BERLEY & SLONIM
2101 4th Avenue, Ste. 1230
Seattle, WA 98121
bchestnut@zcvbs.com
joshok@zcvbs.com
rberley@zcvbs.com

☒ CM/ECF Electronic Transmission
☐ Fax
☐ Overnight Delivery
☐ U. S. Mail

s/ *Jennifer H. Weddle*

10th Cir. R. 28.2(A)(1) Attachments

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

ENCANA OIL & GAS (USA) INC.,
a Delaware corporation,

Plaintiff,

v.

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

Defendant.

Case No. 12-CV-27-J

ORDER DENYING PRELIMINARY INJUNCTION

THIS MATTER came before the Court by the *Motion for Preliminary Injunction* (Doc. 12) filed by Plaintiff Encana Oil & Gas, Inc. ("Encana"). Defendant John St. Clair, Chief Judge of the Shoshone and Arapaho Tribal Court, timely responded with *Memorandum of Defendant John St. Clair in Opposition to Motion for Preliminary Injunction* (Doc. 30), and Encana promptly replied. Shortly thereafter, this Court granted *Estate of Jeremy Jorgenson Motion to Intervene* (Doc. 34), admitting the Estate of Jeremy Jorgenson ("the Estate") to the case as Defendant-Intervenor. The Estate promptly filed *Opposition of Intervenor Estate of Jeremy Jorgenson to Motion for Preliminary Injunction* (Doc. 46). This Court, having carefully

considered the arguments, the pleadings of record and the applicable law, and being fully advised, finds as follows:

Background

Encana here seeks a preliminary injunction preventing John St. Clair from continuing to assert civil adjudicatory jurisdiction, in his capacity as Chief Judge of the Shoshone and Arapaho Tribal Court ("Tribal Court"), over a wrongful death suit that the Estate brought in that court against Encana. The suit seeks redress for the tragic death of Jeremy Jorgenson, a Shoshone tribal member who was killed in a car crash several miles from the oil rig where he had been working and where he had allegedly consumed alcohol furnished by his fellow employees. The rig was operating on one of Encana's wells pursuant to a contract between Encana and Jorgenson's employer, DHS Drilling Company, which Encana had retained to perform drilling services there.

In this Court, Encana argues that the Tribal Court cannot properly exercise jurisdiction over it because Encana is a non-Indian and all the operative events occurred outside federally-recognized Indian country, either on a public road owned by the United States Bureau of Reclamation and maintained by Fremont County, Wyoming (where Jorgenson was driving when he crashed), or on a federal enclave of lands where Encana was present pursuant to a federal oil and gas lease from the United States Bureau of Land Management (where Jorgenson was working just prior to the crash). Even if this federal enclave were within Indian country, Encana furthers, its unrelated consensual dealings with the Tribes would be legally insufficient to trigger

tribal jurisdiction. Nor does the matter implicate the Tribes' political integrity, economic security or health and welfare such as might enable tribal jurisdiction, Encana concludes.

Judge St. Clair rejoins that delving into these jurisdictional particularities at this stage is unwarranted. Rather, Encana's motion for a preliminary injunction should be evaluated with respect to the requisites of this extraordinary measure of relief, starting with the sine qua non of irreparable harm, he argues. However, Encana cannot show that it is being irreparably harmed by the exercise of tribal jurisdiction because the Tribal Court has issued an order unequivocally staying all proceedings in the case, he points out. As such, until this Court rules on whether continued proceedings in the Tribal Court are proper, Encana will not have to spend any more time or money there, he explains. Further weighing against a preliminary injunction is the fact that Encana is substantially unlikely to prevail on the merits, Judge St. Clair argues, for it has failed to exhaust tribal remedies before taking its claims to federal court, as the Supreme Court of the United States has repeatedly required.

Standard

"A preliminary injunction is an extraordinary remedy, the exception rather than the rule. *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984). Because it constitutes drastic relief to be provided with caution, a preliminary injunction should be granted only in cases where the necessity for it is clearly established." *U.S. ex rel. Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enterprise Management Consultants, Inc.*, 883 F.2d 886, 888-89 (10th Cir. 1989) (internal citation omitted); *accord Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("It

frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion.") (quoting 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948, pp. 129–130 (2d ed.1995)).

In order to gain a preliminary injunction in the Tenth Circuit, a movant must establish: "(1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest." *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001); *accord Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1231 (10th Cir. 2005). Three types of preliminary injunctions are historically disfavored, and thus "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *cert. granted sub nom Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 544 U.S. 973 (2005)); *see also Pacific Frontier*, 414 F.3d at 1231. These are "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could

recover at the conclusion of a full trial on the merits." *Id.* (citing *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098-99 (10th Cir. 1991)).[1]

Discussion

Turning to the requirements for a preliminary injunction as provided in *Kikumura v. Hurley*, we begin with whether Plaintiff Encana has shown "a substantial likelihood of success on the merits of the case." 242 F.3d at 955. Encana brought this suit against Defendant Judge St. Clair in his official capacity as Chief Judge of the Tribal Court in the style of *Ex Parte Young*, seeking to enjoin the Judge's continued exercise of tribal jurisdiction over Encana, in alleged violation of federal law. 209 U.S. 123 (1908). Encana's likelihood of success on the merits is thus the likelihood this Court will find that by continuing to preside over the case against Encana at this stage, Judge St. Clair is violating federal law.

As this Court set out in *Encana Oil & Gas Inc. v. Charles Whitlock et al.*, "[w]here a colorable claim of jurisdiction in the tribal court exists, exhaustion of tribal court remedies is ordinarily required and the federal court should defer to the exercise of its jurisdiction." Order Granting Defendant's Motion to Dismiss, Doc. 26 at 2, No. 09-CV-124-J (D. Wyo. 2009). Indeed, this Court has generally found that it has little choice but to defer to extant proceedings

[1] *O Centro Espirita* clarifies that while the Tenth Circuit en banc reconsidered *SCFC ILC*, it upheld the ruling that "if a movant seeks a preliminary injunction that falls into one of the three categories identified in *SCFC ILC*, the movant must satisfy a heightened burden"; it only overturned "that part of *SCFC ILC* which describes the showing the movant must make in such situations as 'heavily and compellingly.'" 389 F.3d at 975 (quoting *SCFC ILC*, 936 F.2d at 1098).

in tribal court given the unequivocal directive of the Tenth Circuit in *Tillet v. Lujan* that "a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies." 931 F.2d 636, 640 (10th Cir. 1991); *accord U.S. v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996); *Marathon Oil Co. v. Johnston*, 2004 WL 4960751, *2 (D. Wyo. 2004). The *Tillet* court's further instruction that "federal courts should not entertain a challenge to the jurisdiction of a tribal court until tribal court remedies have been exhausted" is also particularly applicable here. 931 F.2d at 640 (quoting *Tillet v. Hodel*, 730 F.Supp. 381, 384 (W.D. Okl. 1990)).

What constitutes adequate exhaustion has been addressed at length by the Supreme Court of the United States. "At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts," the high Court directed in *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 19 (1987). *Iowa Mutual* has marked similarities to the instant case. There, just as here, a non-Indian plaintiff (Iowa Mutual) went to federal court after receiving an initial determination from a tribal court that it had subject matter jurisdiction based on the Tribe's ability to regulate the conduct of non-Indians who chose to engage in commercial relations with reservation Indians.[2] *Id.* at 12.

[2] Here, the Tribal Court denied Encana's *Motion for Summary Judgment For Lack of Subject Matter Jurisdiction* in its December 20, 2011 *Order of Court Regarding Jurisdiction* (Doc. 30-6). While Encana asserts that this "is a final order that may not be appealed and thus constitute [sic] the Tribal Court's final word on subject-matter jurisdiction" (Doc. 12 at 4-5), Judge St.

Again as here, the tribal court system there did not allow for interlocutory appeals, so in order to get appellate review of the jurisdictional determination, Iowa Mutual found it would have to fully try the case before appealing the issue to the Tribal Supreme Court.[3] *Id.* at 12, 17. Acknowledging this, the United States Supreme Court nonetheless held that Iowa Mutual had failed to exhaust its tribal remedies as required before proceeding to federal court: "Iowa Mutual has not yet obtained appellate review, as provided by the Tribal Code, ch. 1, § 5. Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene." *Id.* at 17.

Despite this clear Supreme Court instruction, Encana still argues that while it has not yet obtained tribal appellate review, it has met the exhaustion requirement under recent Tenth Circuit case law. Citing *Enlow v. Moore*, 134 F.3d 993 (10th Cir. 1998), Encana asserts that tribal remedies are sufficiently exhausted when a tribal court rules on its subject matter jurisdiction over a non-Indian, which happened here when Defendant Judge St. Clair issued his *Order of Court Regarding Jurisdiction*, Encana says. (Doc. 30-6.) This vague recap of the holding in

---

Clair contends that so far, "the Tribal Court has held only that plaintiffs [in that case, the Estate and the Tribes] have made a *prima facie* showing that either Encana's consensual relationships with the Tribes and tribal members, or the Tribes' substantial health and safety concerns, supports tribal court jurisdiction under *United States v. Montana*, 450 U.S. 544 (1981)." (Doc. 30 at 7.) As such, "developments at the trial court level could lead to Encana revisiting this issue before the Tribal Court," Judge St. Clair urges, to say nothing of the full range of appellate remedies available to Encana once the trial court has reached a judgment. (*Id.*)

[3] Footnote 4 *infra* discusses more fully the jurisdiction of the Shoshone and Arapaho Court of Appeals as pertains to this case.

Enlow glosses over the issue of appellate review, however, a point which the *Enlow* court was anything but vague on, and in fact held critical to its exhaustion finding:

> Although . . . the determination of whether tribal courts have subject matter jurisdiction over non-Indians in civil cases should be conducted in the first instance in the Tribal Court itself, the record before us makes clear that the highest court of the Muscogee (Creek) Nation did in fact make such a determination. The Supreme Court of the Muscogee (Creek) Nation *held* that the tribal court had jurisdiction over the boundary dispute. . . . By this language we conclude that the highest tribal court had the opportunity to review the determinations of the lower tribal court, thus exhausting Enlow's tribal court remedies.

134 F.3d 993, 995-96 (internal citations omitted). Exhaustion was thus unequivocally complete in *Enlow*; here, it is unequivocal that Encana's jurisdictional challenge has not yet reached the tribal appellate court, and thus the "minimum" exhaustion requirement that "tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts," has not been fulfilled. *Iowa Mutual*, 480 U.S. at 19.[4]

Encana's reliance on *Crowe & Dunlevy, P.C. v. Stidham* is similarly inapt. 640 F.3d 1140 (10th Cir. 2011). In *Crowe*, the plaintiff argued that exhaustion on the jurisdictional issue

[4] Although Encana imparts by footnote in its reply brief that "the Shoshone and Arapaho Court of Appeals had the opportunity to address subject-matter jurisdiction . . . and it determined not to do so" (Doc. 36 at 4) —a reference to the Shoshone and Arapaho Court of Appeals' denial of Encana's application to file an appeal on the jurisdictional issue—this must be viewed in light of the Law and Order Code of the Shoshone and Arapaho Tribes, which only gives the Shoshone and Arapaho Court of Appeals jurisdiction to hear appeals from final orders or judgments, and indeed only provides for aggrieved parties to file appeals from final orders or judgments. S&A LOC, Sections 15-1-2, 5. As such, this Court cannot find that the Shoshone and Arapaho Court of Appeals had "the opportunity to review the determination[] of the lower tribal court[]" in any meaningful sense, especially given the genesis of this language in *Iowa Mutual*, which, as discussed above, mandated full appellate review in the context of a tribal court system which had the same policy against interlocutory review. *Iowa Mutual*, 480 U.S. at 19.

was complete because the Tribal Supreme Court had issued an order denying a petition for rehearing which re-raised a jurisdictional challenge. *Id.* at 1149. The order was a summary denial, however, and did not make clear whether the court had specifically ruled on the jurisdictional issue or had based its decision on other grounds. *Id.* at 1149-50. Distinguishing the situation from *Enlow*, the federal court opined:

> In [the *Enlow*] case, unlike the present one, the Muscogee Supreme Court not only had the opportunity to review the landowner's jurisdictional claim, but also clearly exercised that opportunity by squarely holding that tribal jurisdiction was proper over the dispute and the non-Indian party. *Enlow* does not address whether the tribal exhaustion rule may be satisfied where, as here, the tribal court *had an opportunity to pass on its jurisdiction but failed expressly to do so*.

Id. at 1150 (emphasis added). The *Crowe* court thus found that *Enlow* did not control because the ambiguous order left equally ambiguous the issue of adequate exhaustion. *Id.*

In the instant case, the prospect of exhaustion is even less likely. Encana argues that it has effectively achieved exhaustion via the two years it has been in Tribal Court on the case, the hundreds of pages of briefing and copious testimony it has provided and the fact that it applied for appellate review of the jurisdictional issue, although this application was denied. But these dubious indicia of appellate review (if they might even be called that) fall short of even those in *Crowe*—where the Court of Appeals at least constructively reviewed the jurisdictional issue since it denied a petition that centrally raised it—let alone those in *Enlow*. Indeed, the Shoshone and Arapaho Court of Appeals did not review the jurisdictional issue at all here, nor could it

have, since it only has jurisdiction to review final orders and judgments, as discussed above and in footnote. S&A LOC, Section 15-1-2.

Encana has thus failed to adequately exhaust its tribal remedies. However, as Encana suggests, because it is a "prudential rule based on comity, the exhaustion rule is not without exception." *Crowe*, 640 F.3d at 1150. The Tenth Circuit has recently delineated the full list of such exceptions:

> (1) where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) where the tribal court action is patently violative of express jurisdictional prohibitions; (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction; (4) when it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by the main rule established in *Montana v. United States*; or (5) it is otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay.[5]

[5] The fourth and fifth exceptions are not always treated as distinct. Rather, the fifth appears to have grown out of the fourth in the Supreme Court's rationale in *Nevada v. Hicks* that "[t]hough [the fourth] exception [] is technically inapplicable, the reasoning behind it is not. Since it is clear . . . that tribal courts lack jurisdiction [here], adherence to the tribal exhaustion requirement . . . would serve no purpose other than delay, and is therefore unnecessary." 533 U.S. 353, 369 (2001) (internal citation omitted). The *Hicks* Court thus applied the fourth exception in this case about the potential for tribal jurisdiction over state executive officials despite the fact that the main rule in *Montana v. United States*, 450 U.S. 544 (1981)—the traditional basis for the fourth exception—was irrelevant. In *Burrell v. Armijo*, the Tenth Circuit interpreted this to add a new fifth exception to the exhaustion rule, as represented in the list in the text above. 456 F.3d 1159, 1168 (10th Cir. 2006). However, more recently, in *Crowe*, the Tenth Circuit took a different approach, explaining: "Relevant here, exhaustion is not required if it is clear that the tribal court lacks jurisdiction, such that the exhaustion requirement would serve no purpose other than delay. [Plaintiff] Crowe was not a party in the tribal court action and is not an Indian entity. There is a presumption against tribal civil jurisdiction over non-Indians under *Montana v. United States* [450 U.S. 544] . . . ." 640 F.3d at 1150 (internal citations omitted). The *Crowe* court thus applies the fifth exception, worded just as it was in *Burrell*, while justifying the tribal court's clear lack of jurisdiction with the reasoning in *Montana*, as underlies the traditional fourth

Burrell v. Armijo, 456 F.3d 1159, 1168 (10th Cir. 2006) (internal citations and alterations omitted). Notwithstanding the above discussion of the exhaustion requirement, then, exhaustion is not in fact necessary in any of these situations. Encana's briefs implicate the third and the fourth/fifth[6] of the above exceptions, to which we now turn.

Beginning with the latter, Encana insists that "the lack of Tribal Court jurisdiction over Encana could not be more clear" because the relevant events occurred off the reservation and even if they could be interpreted otherwise, there is a presumption from *Montana v. United States*, 450 U.S. 544 (1981), against tribal jurisdiction over non-Indians. (Doc. 12 at 8.) Encana furthers that *Montana*'s two exceptions to this presumption are also plainly inapplicable.[7] This Court must disagree.

---

exception. It thus seems to have changed its reading of *Hicks* from adding a fifth exception to simply broadening the fourth exception. Following this lead, this Court treats the fourth and fifth exceptions as generally interchangeable in directing that exhaustion is not required when it is clear that a tribal court lacks jurisdiction, either due to *Montana* or on some other basis, and thus exhaustion would only delay the inevitable procession of the case to federal court.

[6] See footnote 5 *supra*.

[7] To reprise the main rule from *Montana*: Absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation. 450 U.S. at 564-65. The two exceptions to this rule inhere in the *Montana* Court's instruction that: "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66 (internal citations omitted). These are referred to as the "consensual relationship" and "inherent sovereignty" exceptions.

In *DHS Drilling Company v. Estate of Jeremy Jorgenson*, we addressed a situation that could not be more similar to the instant case and found that the "consensual relationship" exception could certainly obtain. Order Granting Defendants' Motion to Dismiss, Doc. 23 at 11, No. 09-CV-200-J (D. Wyo. 2010) (hereafter "*DHS*, Doc. 23 at ___"). Indeed, *DHS* dealt with the exact same facts as those underlying this case—the tragic death of Jeremy Jorgenson, as discussed above, who was employed by DHS Drilling Company, the plaintiff in *DHS* and the contractor Encana retained to drill its wells, including the well where Jorgenson worked. As such, the wrongful death action in Tribal Court at issue here comprises both Encana and DHS as co-defendants.[8]

While Encana currently seeks from this Court a preliminary injunction against Judge St. Clair, however, DHS already came to this Court in 2009 requesting declaratory relief and a writ of prohibition against tribal jurisdiction.[9] Nonetheless, since both suits equally contemplate this Court taking jurisdiction from the Tribal Court, it is evident that both require a functionally identical exhaustion analysis. Moreover, as Judge St. Clair highlights, the fact that Encana had contracted with DHS for DHS to extract oil from the well on which Jorgenson was working means that Encana was in privity with DHS for the operative events underlying *DHS* and this

[8] While the Estate brought suit against DHS first and then several months later against Encana, these cases were consolidated in the Tribal Court on April 9, 2010. It is unclear why they were brought separately.

[9] These separate suits would appear to be accounted for by the fact that the Estate's cases against Encana and DHS were not yet consolidated in Tribal Court when DHS came to this Court with its complaint in August 2009.

case. Accordingly, this Court finds that we are bound by the evaluation of the potential for tribal court jurisdiction that we made pursuant to our exhaustion analysis in *DHS*.

In that case, DHS argued, just as Encana does here, that the fourth exception to the tribal exhaustion rule applied such that requiring exhaustion would serve no other end than delay. *DHS*, Doc. 23 at 6. This Court found differently, however, noting that "DHS has minimized important particularities in this case and overlooked the instruction concerning tribal authority over non-members laid out in *Montana v. United States*, 450 U.S. 544 (1980)." *DHS*, Doc. 23 at 7. Specifically, under *Montana*, a "tribe may [still] regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements," we pointed out. *Id.* (quoting *Montana*, 450 U.S. at 565). We thus determined that "the on-going consensual business relationship between DHS and the Shoshone and Arapaho Tribes," implicated the "consensual relationship" exception to the main *Montana* rule that Indian Tribes lack civil authority over nonmembers, which could well substantiate tribal jurisdiction over DHS. *Id.* at 7-10.

To this end, we cited the lease with the Tribes pursuant to which DHS extracted oil (as noted in *DHS*, the lease was actually between the Tribes and Encana, which in turn had employed DHS, *see id.* at 2 n.1), the business license DHS obtained whereby it agreed to conduct business on the Wind River Reservation in compliance with Reservation laws, the fee DHS paid to the Tribal Employment Rights Office ("TERO") in order to get this license, DHS' registration

with TERO, DHS' participation in an annual agreement to follow certain TERO-approved employment practices, DHS' signage of the TERO Compliance Plan of Operations requiring DHS to abide by the Shoshone and Arapaho Tribes' Title X – Tribal Employment Rights Code, and finally, a check made out by DHS to the Tribes for over $50,000 in drilling proceeds. *Id.* at 7-8. We went on to acknowledge that as DHS insisted, for the "consensual relationship" exception to apply, there must be a sufficient nexus between the consensual relationship and the underlying civil action; however, we found that "the facts of this case seem to suit such a nexus." *Id.* at 9. This was because the consensual relationship at issue, *i.e.*, the abovementioned business agreements between DHS and the Tribes, directly pertained to DHS' development of tribal energy resources, which directly occasioned Jorgenson's work for DHS and hence the Estate's allegations that DHS' employment practices led to Jorgenson's death. *Id.* at 10. This rounded out our conclusion that because the "consensual relationship" exception appeared to attach, tribal jurisdiction was not clearly absent and so the fourth exception to the tribal exhaustion rule did not apply. *Id.* at 11.

Returning to the instant case, we accordingly find that the fourth/fifth exception does not apply here, either. Indeed, even aside from Encana's privity with DHS, rendering DHS' above-discussed consensual relationship with the Tribes applicable to Encana, we further find merit in the Estate's contention that "Encana has even more significant relationships with the Tribes [than DHS] in that it pays both severance tax and royalty payments to the Tribes, in addition to TERO and licensing fees." (Doc. 46 at 13.)

While DHS raised only the fourth exception, in this case, Encana would seem to raise the third, as well.[9] As stated in *Burrell*, this exception provides that the exhaustion of tribal remedies may be omitted if it "would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction." 456 F.3d at 1168 (quoting *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 857 n.21 (1985)). In *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (10th Cir. 1992), the Tenth Circuit described this as a "narrow exception to the exhaustion requirement," warranted in rare situations such as the one in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, where non-Indians who were effectively denied an egress from their property by a tribal road closure brought their claims to tribal court but were refused access to that forum. 623 F.2d 682, 685 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981). Noting that the plaintiffs would otherwise have no forum in which to air their claims of constitutional violation, the federal court there took jurisdiction. *Id.*

Dry Creek Lodge is clearly nothing like the instant case, in which the Tribal Court actively seeks to provide a forum for the dispute. Further, the terms of the third exception, as

[9] In its reply brief, Encana states: "it is clear that the Tribal Court 'has no jurisdiction, [and thus] exhaustion would serve no purpose other than delay' (which is known as the futility doctrine) and the exceptions to exhaustion would apply." (Doc. 36 at 5 (quoting *Rolling Frito-Lay Sales LP v. Stover*, 2012 WL 252938, *1 (D. Ariz 2012).) However, this is not the futility doctrine, which more logically describes the third exception, *viz.*, "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction." *Burrell*, 456 F.3d at 1168 (quoting *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 857 n.21 (1985)). Encana thus seems to have reprised the fourth/fifth exception and called it the futility doctrine. We assume this was simply a mix-up and go on to consider the third (futility) exception anyway, in order to ensure completeness.

quoted above from *Burrell*, are clearly inapplicable here as well: there *is* "an adequate opportunity [for Encana] to challenge the tribal court's jurisdiction"—in the Shoshone and Arapaho Court of Appeals after Judge St. Clair renders a judgment. 456 F.3d at 1168. Moreover, as mentioned above in footnote, Judge St. Clair urges that the jurisdictional issue may yet even be revisited in the trial court, which so far has only held that the Estate made a *prima facie* showing of tribal court jurisdiction.

Encana's reference to "Defendant's unwavering view regarding his authority over Encana" (Doc. 12 at 2) and Encana's assertion that "[d]espite the substantial body of federal law supporting . . . lack of subject-matter jurisdiction presented by Encana to Defendant in briefing over several years, Defendant has evinced his total refusal to accept the limitations imposed on tribal jurisdiction by federal law" (Doc. 12 at 4), might also be construed as part of Encana's futility argument. Notably, these claims sound much like the futility argument raised in *McDonald's Corp v. Irene Crazythunder et al.*, a case heard by this Court in which the non-Indian plaintiff insisted that "in light of the formal legal position taken by the Tribes and Tribal Court in numerous legal proceedings, it is impossible to imagine that the Tribal Court . . . will change [its] position if this case is remanded to the Tribal Court for further proceedings." Order Denying Motion to Dismiss, Doc. 49 at 12, No. 06-CV-180-J (D. Wyo. 2007) (quoting Plaintiff's Response to Motion to Dismiss, Doc. 21 at 25-26). As we instructed the plaintiff there, and as applies with equal force here, however, "speculative futility is not enough to justify federal jurisdiction." *Id.* (quoting *Bank of Oklahoma*, 972 F.2d at 1170). Rather, a "tribal remedy must

be shown to be nonexistent by an actual attempt before a federal court will have jurisdiction." *White v. Pueblo of San Juan*, 728 F.2d 1307, 1313 (10th Cir. 1984). Encana's firm belief that pursuing this case in the tribal court system will be futile does not constitute an actual attempt (and certainly not a completion of that attempt) to resolve the jurisdictional issue there. The third exception to the tribal exhaustion rule thus does not apply here.

Having addressed and found unavailing Encana's arguments for exception to the tribal exhaustion rule, this Court is convinced that the rule should govern here. As we began our discussion, "where a colorable claim of jurisdiction in the tribal court exists, exhaustion of tribal court remedies is ordinarily required and the federal court should defer to the exercise of its jurisdiction." Order Granting Defendant's Motion to Dismiss, Doc. 26 at 2, *Encana v. Whitlock*, No. 09-CV-124-J (D. Wyo. 2009). This statement warrants reiteration because despite (or, stated another way, because of) Encana's painstaking assessment of the multi-factor jurisdictional question, as evinced in both its detailed briefs and well-researched presentation at oral argument, Encana seems to overlook it.

In support of its position that the Tribal Court clearly lacks jurisdiction, Encana has made fact-intensive arguments regarding the extent of the extinguishment of Indian title to surface and subsurface lands on the Wind River Reservation by what has been referred to as "the 1953 Act"; whether Congress restored some or all of the aforesaid subsurface rights to the Tribes by what has been called "the 1958 Act"; whether, if it did, "the 1958 Act" altered the regulatory regime specifically governing the lease on which the rig where Jorgenson worked was located; the

relevance of what has been called "the 1938 Act" to that lease; the degree to which the Riverton Reclamation Project lands were ceded by the Indians in 1905, 1918, and possibly thereafter, and the degree to which they may have been later restored to tribal trust; whether the Tribes' beneficial ownership of subsurface rights has any impact on tribal regulatory jurisdiction of overlying lands under *Osage Nation v. Irby*, 597 F.3d 1117, 1125 (10th Cir. 2010); and the degree to which the Riverton Reclamation Project lands may be considered "broadly opened up . . . for public use" under *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993), so as to curtail the Tribes' power to exclude and to regulate the activities of non-Indians thereon; to provide an inexhaustive list.

In short, these complex, particularity-driven arguments would not seem to indicate the extreme circumstances indicating the clear lack of tribal court jurisdiction needed to subvert the tribal exhaustion rule, an impression that is only amplified by considering Judge St. Clair's own perspective on these issues, carefully supported with reference to legislative history, contemporaneous understandings and subsequent federal agency actions, in addition to his own jurisdictional arguments including those relating to the application of the two *Montana* exceptions. The Estate, too, has presented a wealth of evidence and argument in favor of tribal jurisdiction in this case, notably highlighting that in previous litigation, Encana itself even described the lease where Jorgenson's rig was located as within the exterior boundaries of the Wind River Reservation. At oral argument, the Estate also brought the mineral dominance rule to bear on the discernment of rights and extinguishments in this case.

With this array of complex considerations in mind, this Court is convinced that the issue of tribal jurisdiction is anything but clear in this matter, for nearly every contributing factor, factual and legal, is hotly and thoughtfully contested between the parties.[10] Accordingly, the examination of whether the Tribal Court has the power to exercise civil subject matter jurisdiction, even as here, over a non-Indian, must occur in the first instance, from start to finish, in the Tribal Court, to which we now defer. *See National Farmers Union*, 471 U.S. at 857 and *Iowa Mutual*, 480 U.S. at 19. As we explained in *DHS*, this serves "Congress' strong interest in promoting tribal sovereignty, including the development of tribal courts." Doc. 23 at 5 (quoting *Smith v. Moffett*, 947 F.2d 441, 444 (10th Cir. 1991)). "[B]y allowing a full record to be developed in the Tribal Court," it also promotes "the orderly administration of justice in the federal court," if it is to later receive the case. *National Farmers Union*, 471 U.S. at 856.

Having thus determined that exhaustion has not been, and yet must be, completed here, this Court can say with certainty that Defendant Judge St. Clair is not violating federal law by continuing to preside over the case against Encana at this stage. In fact, our finding urges the Tribal Court to retain and develop this case until the jurisdictional issue can be reviewed by the

[10] While in this opinion, we most pointedly focused on the potential for tribal court jurisdiction under *Montana*'s "consensual relationship" exception, this is merely one lens through which it can be seen that tribal jurisdiction is not plainly lacking here. Indeed, another might simply be observing the lengthy and rigorous argument had on the jurisdictional issue at the extended hearing on the matter, or the complexities of any of the other arguments mentioned above.

Shoshone and Arapaho Court of Appeals.[12] Accordingly, Encana does not possess "a substantial likelihood of success on the merits" as needed to satisfy the first criterion for a preliminary injunction. *Kikumura*, 242 F.3d at 955.

Because each of the above-listed four criteria (discussed in "Standard") must be satisfied to warrant a preliminary injunction, we decline to analyze the latter three in depth; regardless of Encana's showing on these grounds, it cannot carry the burden required to merit extraordinary relief.[13] This said, it may be worth briefly addressing the second criterion, "irreparable injury to the movant if the preliminary injunction is denied," *id.*, since this is often thought of as the defining feature of this kind of relief. *See* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1, p. 139 (2d ed. 1995) ("Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits is made.")

While Encana initially argued it would be irreparably harmed by the continued exercise of tribal jurisdiction because such would force it to spend time and money that it would never get back defending itself in the wrong forum, once Judge St. Clair issued his *Order of Court Staying Proceedings* (Doc. 30-1) on February 17, 2012, this potential for harm was effectively abated.

---

[12] Once the appeal is decided, exhaustion will be complete and Encana can return to federal court and appeal the jurisdictional issue here if it so chooses.

[13] We also need not consider whether the injunction Encana here requests would need to meet the heightened scrutiny counseled by *SCFC ILC, Inc. v. Visa USA, Inc.* in certain cases, although on the face of the matter this seems likely. 936 F.2d at 1098-99.

Encana thus revised its position, instead pressing the theory that the continued exercise of tribal jurisdiction would irreparably harm it by violating its "established 'federal right to be protected against the unlawful exercise of Tribal Court judicial power.'" *Crowe*, 640 F.3d at 1156 (quoting *MacArthur v. San Juan Cnty.*, 309 F.3d 1216, 1225 (10th Cir. 2002)). This Court agrees that a court's unlawful exercise of jurisdiction over a litigant may constitute *per se* irreparable harm. *See Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1998) (holding that the Kiowa Tribe had shown irreparable harm as a matter of law because, *inter alia*, "the Tribe should not be compelled 'to expend time and effort on litigation in a court that does not have jurisdiction over them'") (quoting *Seneca-Cayuga Tribe of Oklahoma v. State of Okl. ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989)). Nonetheless, Encana's contention in this regard is still without merit because the exercise of tribal judicial power over Encana is not unlawful, but rather required at this stage by the tribal exhaustion rule. As such, it is the proper exercise of federal law, not the unlawful exercise of tribal jurisdiction, which keeps Encana in the Tribal Court until exhaustion is complete.

Conclusion

For the foregoing reasons, it is hereby ORDERED that Encana's *Motion for Preliminary Injunction* (Doc. 12) shall be and the same is DENIED.

Dated this 17th day of April, 2012.

Alan B. Johnson
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

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

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITHOUT PREJUDICE

THIS MATTER came before the Court by the *Motion of Defendant John St. Clair to Dismiss for Failure to Exhaust Tribal Remedies and Memorandum in Support* (Doc. 37). Plaintiff Encana Oil & Gas, Inc. ("Encana") timely responded. In between, this Court granted *Estate of Jeremy Jorgenson Motion to Intervene* (Doc. 34), admitting the Estate of Jeremy Jorgenson ("the Estate") to the case as Defendant-Intervenor. The Estate then filed *Motion of Intervenor Estate of Jeremy Jorgenson to Dismiss for Failure to Exhaust Tribal Court Remedies or in the Alternative to Stay Proceedings* (Doc. 63), to which Encana also responded.

This Court, having carefully considered the arguments, the pleadings of record and the applicable law, and being fully advised, finds that dismissal without prejudice is warranted in this case for the same reasons set out in this Court's *Order Denying Preliminary Injunction* (Doc. 70). As the Tenth Circuit has stated and this Court has reiterated, "[a] federal action may be abated or dismissed without prejudice to enable pursuit of tribal remedies," which is what we do here. *United States v. Chuska Dev. Corp.*, 55 F.3d 1491, 1492 (10th Cir. 1995) (citing *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985)); *accord Marathon Oil Co. v. Johnston*, 2004 WL 4960751, *2 (D. Wyo. 2004).

Accordingly, it is hereby ORDERED that *Motion of Defendant John St. Clair to Dismiss for Failure to Exhaust Tribal Remedies and Memorandum in Support* (Doc. 37) shall be and the same is GRANTED.

Dated this 17th day of April, 2012.

Alan B. Johnson
United States District Judge