IN THE UNITED STATES DISTRICT COURT

DISTRICT OF COLORADO

Civil Action No. 12-CV-00313-LTB

FARMER OIL AND GAS PROPERTIES, LLC,
an Arizona limited liability company,

Plaintiff,

v.

SOUTHERN UTE INDIAN TRIBE,

Defendant

TRIBE'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION PURSUANT TO FED. R. CIV. P. 12(b)(1)

Defendant Southern Ute Indian Tribe ("Tribe"), by and through its counsel, hereby moves to dismiss this action for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Specifically, the Tribe has not waived its sovereign immunity from suit in this action and, in the absence of such a waiver, the Court lacks jurisdiction to proceed. Further, Plaintiff's claims do not present a federal question, and subject matter jurisdiction does not exist under 28 U.S.C. § 1331 or otherwise. In support of this motion, the Tribe provides the following.

Summary

In effect, Plaintiff Farmer Oil and Gas Properties, LLC, seeks to quiet title to oil and gas minerals in an 80-acre tract conveyed to the Tribe in a private deed in 1946, subject to a terminable reservation of the oil and gas estate. First Amended Complaint for Declaratory Relief

at 14, Prayer for Relief (B) (Feb. 17, 2012) [Doc. 9] ("First Amended Complaint"). Although the 80-acre tract was originally patented under the Coal Lands Act of 1910, this controversy is unrelated to the issue adjudicated in *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999), which addressed whether coal estates reserved in federal patents under the 1909 and 1910 Coal Lands Acts included coalbed methane gas ("CBM") within their scope. *See id.* (upholding Judge Babcock's trial court decision that CBM was not reserved in federal patents issued under the Coal Lands Acts (*Southern Ute Indian Tribe v. Amoco Prod. Co.*, 874 F. Supp. 1142 (D. Colo. 1995)). Notwithstanding the fundamental difference between this case and *Amoco*, Plaintiff presents this dispute as being governed by *Amoco's* determination of the scope of federal coal estate reservations under the Coal Lands Acts and by the provisions of a settlement agreement, dated June 29, 1993, entered into between the Tribe and Palo Petroleum, Inc. in the *Amoco* proceedings ("Palo Settlement Agreement"). First Amended Complaint at 2, ¶7; at 6-8, ¶¶24-31, 35; at 10, ¶43; at 12-13, ¶¶51, 54-55; First Amended Complaint Exhibit 1 [Doc. 9-1].

By cloaking its case in the Palo Settlement Agreement, Plaintiff attempts to bypass the jurisdictional impediments to: (i) suing an Indian tribe without its consent and (ii) quieting title to oil and gas minerals in the absence of a federal question. Unlike what happened in *Amoco*, where the Tribe initiated the suit to determine the scope of federal coal reservations, here the Tribe has not waived its tribal sovereign immunity to litigate the legal question of oil and gas ownership under the Tribe's private deed. Without a "clear" waiver of the Tribe's immunity from suit, the Court lacks jurisdiction to proceed. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991). Further, because Plaintiff's claims are

unrelated to the Coal Lands Acts considered in *Amoco*, there is no federal question to support subject matter jurisdiction under 28 U.S.C. § 1331. Nor does *Amoco* ancillary jurisdiction exist under the terms of the Palo Settlement Agreement that might otherwise permit this matter to proceed if the Tribe had breached obligations under that court approved settlement. *See, e.g.*, *Peacock v. Thomas*, 516 U.S. 349, 355 (1996) ("[T]here is insufficient factual dependence between the claims raised in [the] first and second suits to justify extension of ancillary jurisdiction . . . in this second proceeding."); *see also* 28 U.S.C. § 1367 ("[I]n any civil action over which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of the same case and controversy." (emphasis added)).

I. Background

As addressed in detail in the *Amoco* trial court decision, the Tribe occupies a reservation in southwestern Colorado ("Reservation") that is "a checkerboard of different types of ownership interests" including lands owned by the United States in trust for the Tribe, interests held by the Tribe in its own name, and interests held in fee by non-Indians. *Amoco*, 874 F. Supp. at 1147-51. The principal dispute underlying this case involves oil and gas mineral ownership in an 80-acre tract located in the S/2SW/4 of Section 35, Township 33 North, Range 11 West, N.M.P.M., La Plata County, Colorado ("80-Acre Tract"). First Amended Complaint at 1, ¶1; at 3, ¶¶8, 11, at 4-5, ¶¶13-18, at 11-12, ¶¶47-50.

A. The Tribe's Oil and Gas Leases.

Without question, the Tribe beneficially owns the surface of the entire 640-acres in Section 35 and the subsurface associated with all of the N/2 (320 acres), the SE/4 (160 acres),

and the N/2SW/4 (80 acres) of that section. In exercising its mineral ownership rights, the Tribe has issued oil and gas mineral leases, approved by the Department of the Interior under federal law, to all of its lands in Section 35 other than the 80-Acre Tract. For example, on September 17, 1971, the Department of the Interior approved a tribal lease granting oil and gas leasehold interests to 1400 acres of the Tribe's lands, including the oil and gas rights to 240 acres located in the SE/4 and the N/2SW/4 of Section 35. Lease No. MOO-C-1420-0842 (approved Sept. 17, 1971), Attachment 1 to Affidavit of Diana F. Olguin (March 23, 2012), attached hereto as Exhibit 1 ("Olguin Affidavit"). As part of a separate lease of 2040 acres, the Tribe also leased the oil and gas minerals in the N/2 of the Section 35. Lease No. 14-20-151-59A (approved Aug. 17, 1954), Olguin Affidavit ¶4. The Tribe's lessees or their successors have drilled wells on the tribally leased lands and have for many years produced CBM from two separate wells located on the tribally leased trust tracts in Section 35. Olguin Affidavit ¶5.

B. Disposition of the 80-Acre Tract

While there is no dispute that the Tribe owns the lands in Section 35 where the two producing CBM wells are located, ownership of the oil and gas estate underlying the 80-Acre Tract is not settled. This land was originally part of a homestead patent issued under the Coal Lands Act of 1910, which transferred to the patentee, Lewis H. Underwood, the surface and the oil and gas estate, but reserved the coal estate to the United States. Patent to Lewis H. Underwood (July 11, 1916), Attachment 2 to Olguin Affidavit. On May 27, 1946, the presumed successors to patentee Underwood, issued a warranty deed to John C. Cameron covering approximately 2,440 acres of land in tracts scattered throughout two governmental townships within the Southern Ute Indian Reservation. Warranty Deed from Raymond D. Farmer and

Olive M. Farmer, his wife, and Laura R. Farmer, a widow, ("Farmers") to John C. Cameron (May 27, 1946), Attachment 3 to Olguin Affidavit ("Farmer-to-Cameron Deed"); First Amended Complaint at ¶¶ 13-15. Through that instrument, the Farmers conveyed the 80-Acre Tract, along with other described lands, to Mr. Cameron.

The Farmer-to-Cameron Deed also purported to reserve the minerals, including oil and gas, under the described and non-contiguous properties "for a period of twenty years at which time such reservations shall terminate unless such minerals are being produced from said land at the end of twenty years, in which event said reservations shall continue during production." Farmer-to-Cameron Deed. As recognized by Plaintiff, although the Farmers purported to reserve the oil and gas minerals under all of the tracts listed in the Farmer-to-Cameron Deed, the Farmers did not own the oil and gas minerals under certain of those tracts. First Amended Complaint at ¶15. Assuming, however, that the Farmers owned the 80-Acre Tract at the time of conveyance, they transferred ownership of the surface, but reserved a defeasible interest in the oil and gas estate in the 80-Acre Tract under the Farmer-to-Cameron Deed.

Approximately one month following the Farmer-to-Cameron transaction, as the first part of a land exchange, John C. Cameron and Olive E. Cameron, his wife, issued a warranty deed to "the United States of America in trust for the Southern Ute Tribe," which purported to transfer all tracts described in the Farmer-to-Cameron Deed without reservation and without mention of the Farmers' prior mineral reservations. Warranty Deed from John C. Cameron and Olive E. Cameron to United States of America in trust for the Southern Ute Tribe (July 8, 1946), Attachment 4 to Olguin Affidavit ("Cameron-to-USA Deed"); First Amended Complaint at ¶18. In consideration for the Cameron-to-USA Deed, the United States then deeded approximately

1,400 acres of tribal trust land to the Camerons, who, incidentally, almost immediately sold most of the exchanged property to the County of La Plata and the City of Durango for use as a regional airport. Patent to John C. Cameron and Olive E. Cameron (Jan. 6, 1947), Olguin Affidavit ¶10; Warranty Deed from John C. Cameron and Olive E. Cameron to The Board of County Commissioners of the La Plata County, Colorado and the City of Durango, Colorado (Jan. 14, 1947), Olguin Affidavit ¶11.

Plaintiff asserts that it has succeeded to "an undivided 78.5714286% terminable mineral interest in the oil and gas estate" in the 80-Acre Tract and that the Farmers "perpetuated by production of oil and/or gas" the term mineral reservations contained in the Farmer-to-Cameron Deed. First Amended Complaint at ¶¶ 16, 17. The Tribe does not concede that the Farmers have "perpetuated" the term mineral reservation applicable to the 80-Acre Tract; more importantly, however, the Tribe has not consented to litigate that question in this case.

II. The Tribe has not waived its sovereign immunity from suit.

"'[A]n Indian Tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."' *C & L Enters., Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 416 (2001) (quoting *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998)). "[A] tribe's waiver of its immunity must be clear." *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) (citing *C & L Enters., Inc.*, 523 U.S. at 418). "Tribal sovereign immunity is a matter of subject matter jurisdiction, *see Fletcher v. United States*, 116 F.3d 1315, 1323-24 (10th Cir. 1997), which may be challenged by a motion to dismiss under Fed.R.Civ.P. 12(b)(1), *see Holt v. United States*, 46 F.3d 1000, 1002-3 (10th Cir.

1995)." *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297 (10th Cir. 2001). Plaintiff has the burden of showing that the Tribe has clearly consented to this action as part of its burden of establishing subject matter jurisdiction. *See Jimi Dev. Corp v. Ute Mountain Ute Indian Tribe*, 930 F. Supp. 493, 495 (D. Colo. 1996).

A. The Tribe's filing of *Amoco* did not constitute a waiver of immunity for this action.

Plaintiff asserts that, because the Tribe filed the *Amoco* case, and because the 80-Acre Tract was included among the approximately 200,000 acres involved in that defendant class action construing the scope of federal coal reservations, the Tribe has "waived any claim of sovereign immunity regarding the ownership" of the 80-Acre Tract, including Plaintiff's claims of oil and gas ownership resulting from the Farmer-to-Cameron Deed reservations. First Amended Complaint at ¶ 2.

The Tribe vehemently disagrees that its commencement of the *Amoco* case in 1991 constituted a waiver of its sovereign immunity so that any unnamed defendant class member or successor could then or forever-after sue the Tribe over non-class action-related ownership questions affecting lands involved in the litigation. In *Amoco*, the Tribe's quiet title requests were limited to its "beneficial interest in the coal" and to all "constituent, inherent and integral components" of reserved coal and not to oil and gas estates as a separate matter. *See Southern Ute Indian Tribe v. Amoco Prod. Co.*, Case No. 91-B-2273, First Amended Complaint at 16, Prayers 2, 3 *per* Order (May 20, 1993). Plaintiff's position that the Tribe implicitly waived its immunity to non-coal estate litigation not only ignores the nature of the Tribe's claims in the *Amoco* case, but also disregards the limitations addressed in the Court's certification of a defendant class. *See Southern Ute Indian Tribe v. Amoco Prod. Co.*, Case No. 91-B-2273, Case

Management Order No. 1 (April 24, 1992). Those limitations restricted class adjudication to narrowly tailored legal issues related to the Coal Lands Acts common to all of the thousands of unnamed defendants. As directed by the Court in its *Amoco* Case Management Order No. 1:

> 3. This action shall be maintained as a class action on behalf of the Certified Class solely as to (a) the determination of ownership of coalbed methane located in or near coal reserved by the United States in patents issued under the Act of March 3, 1909, Ch. 270, 35 Stat. 844 (codified as 30 U.S.C. § 81) or under the Coal Lands Act of 1910, Ch. 318, 336 Stat. 583 (codified as 30 U.S.C. §§ 83-85) for lands located within the exterior boundaries of the Southern Ute Indian Reservation and the right to explore for or develop coalbed methane underlying such lands to the extent, if any, such right is relevant to the ownership of the coalbed methane ("Class Action Claim") and (b) the existence and applicability of the defenses of statutes of limitation, and estoppel, waiver, contractual limitations, consent, promissory estoppel, acquiescence, ratification, laches and good faith, to the extent that such defenses are or may be generally applicable to the class and to the extent they are based on the acts or omissions of the Tribe or its agents, employees or representatives ("Class Action Defenses").

See id. at ¶ 3 (emphasis added). The Court expressly stayed the filing by the defendants of any claims, crossclaims, or counterclaims or the assertion of any individual defenses "based upon the facts of their particular situation." *Id.* at ¶ 6. This stay was never lifted.

The pleadings in *Amoco* did not address, nor was any party to the case permitted to address, ownership claims arising outside of the context of the Coal Lands Acts and the patents issued under those statutes. Indeed, Judge Babcock's opinion succinctly described the case as follows:

> The central question in this case is whether Congress included CBM gas in its reservation to the United States of the "coal" under the Coal Lands Acts of 1909 and 1910. I hold that, as a matter of law, Congress' reservation of coal in the Unites States in 1909 and 1910 did not include reservation of CBM gas. Consequently title to CBM gas in the lands at issue here was conveyed by the United States in patents issued to homesteaders under the 1909 and 1910 Acts upon surplus lands on the Tribe's reservation. Accordingly, the Tribe acquired no

> title to the CBM gas when, in 1938, under authority of the IRA [Indian Reorganization Act] the United States restored coal to the Tribe.

Amoco, 874 F. Supp. at 1152. Since the conclusion of the *Amoco* case on March 22, 2000, the Tribe has done nothing to dishonor or disobey the Supreme Court's decision upholding Judge Babcock's ruling. That litigation simply did not extend to individual claims or disputes arising under title documents issued years after the 1938 order of restoration referenced above in Judge Babcock's decision. *See Order of Restoration,* 3 FED. REG. 1425 (Sept. 14, 1938). Most importantly for this case, however, the Tribe has not consented to be sued by unnamed *Amoco* class defendants regarding such subsequent title disputes.

B. Plaintiff has not identified any breach of a tribal obligation under the Palo Settlement Agreement.

While the Tribe readily acknowledges that, as part of the Palo Settlement Agreement, it expressly waived its sovereign immunity so that the Court could interpret and enforce the terms of the settlement, that immunity waiver extends only to matters within the scope of that settlement. *See* First Amended Complaint Exhibit 1 [Doc. 9-1], Palo Settlement Agreement at 12, ¶11.02. Plaintiff appears to suggest that the Palo Settlement Agreement featured both the Tribe's acceptance of Plaintiff's construction of the Farmer-to-Cameron Deed reservations and the Tribe's commitment to communitize the tribally leased lands in Section 35 with the Plaintiff's claimed interests in the 80-Acre Tract. *Id.* at ¶¶ 7, 11, 24-28, 31-35, 42-43, 51, 54-55, Prayer for Relief (C). Nowhere in the Palo Settlement Agreement or its Ratification did the Tribe validate Plaintiff's claims under the Farmer-to-Cameron Deed. Nowhere in the Settlement Agreement did the Tribe agree to communitize the 80 Acre-Tract with other lands in Section 35.

Because Plaintiff invokes the interpretation and enforcement provisions of the Palo

Settlement Agreement, however, it would appear necessary for the Court to review the Palo Settlement Agreement to determine if those matters are addressed and, accordingly, if the Tribe has clearly waived its sovereign immunity from this suit. *See, e.g., King v. United States*, 53 F. Supp.2d 1056, 1064 (D. Colo. 1999) ("[Court] has wide discretion to consider affidavits, documents, and even hold limited evidentiary hearing . . . [i]n deciding whether sovereign immunity has been waived . . . ."), *aff'd in part, rev'd in part*, 301 F.3d 1270 (10th Cir. 1999).

III. The Palo Settlement Agreement Does Not Address Plaintiff's Claims

The Palo Settlement Agreement, like several other court-approved settlement agreements entered into with defendant oil and gas companies during the early stages of the *Amoco* litigation, insulated Palo Petroleum, Inc. ("Palo") from the risk that the Tribe could obtain a favorable decision that CBM was held by the Tribe, as owner of the coal estate, rather than by the owner of the oil and gas estate. *See* First Amended Complaint Exhibit 1 [Doc. 9-1], Palo Settlement Agreement at 1, Recitals ("WHEREAS, in the Litigation a non-appealable judicial determination could be rendered that establishes that ownership of Coalbed Methane is attributable to the Tribe's coal estate rather than to the private oil and gas estate . . . ."). The settlement acknowledged that Palo had obtained or "intends to acquire" certain oil and gas leasehold interests from private lessors or operating companies, defined in the agreement as "Prior Interest Owners," on specific lands identified on attached "Appendices I or IA." *Id.* As explained more fully below, however, Palo never did acquire a leasehold interest on the 80-Acre Tract. The agreement had three key elements: (i) a grant to the Tribe and release of Palo; (ii) a form Minerals Agreement from the Tribe to Palo that would become operative if the Tribe

prevailed on CBM ownership/patent reservation question; and (iii) a ratification mechanism permitting Prior Interest Owners to avoid specific damage claims pending the outcome of the Class Action Claim.

As to the first component, in exchange for Palo's commitment to convey to the Tribe a five percent overriding royalty interest in Palo's private leasehold interests, the Tribe agreed to release Palo from all claims the Tribe had or could have asserted contesting Palo's CBM exploration and development rights under those private leasehold interests. *Id.* at 4-6, ¶¶ 5.01, 6.01-6.04. The parties recognized that as to some lands, including the 80-Acre Tract, Palo did not possess an oil and gas leasehold interest, but rather intended to acquire such interests "pursuant to agreements in effect as of the date" of the settlement, in which event Palo would subsequently convey an overriding royalty interest to the Tribe "effective retroactively to the effective date" of the settlement agreement. *Id.* at 5, ¶ 6.01 ("Any interest so acquired shall be deemed to be an Interest for purposes of this Agreement."). The Tribe, however, specifically reserved the right to continue to litigate the CBM ownership question against "any Prior Interest Owner in the Lands." *Id.* at 5, ¶6.01.

Recognizing that the Tribe would continue to litigate the CBM ownership/patent reservation question against Palo's Prior Interest Owners, the second major aspect of the Palo Settlement Agreement addressed how Palo would be treated if the Tribe prevailed against the Palo's Prior Interest Owners. Specifically, in that event, Articles VII and VIII of the Palo Settlement Agreement committed the Tribe to grant a substitute lease ("Minerals Agreement") to Palo, the negotiated form of which was attached as Appendix II, which would replace on a go-forward basis the earlier, ineffective lease agreements granted by Palo's Prior Interest Owners.

The third major feature of the Palo Settlement Agreement was the opportunity for Palo's Prior Interest Owners to ratify the agreement. In addition to seeking a declaration that its ownership of coal deposits included CBM, the Tribe also demanded damages from defendant oil and gas lessors (Prior Interest Owners) for asserted trespass to the Tribe's coal deposits and conversion of the Tribe's coal resources, as well as payments for unpaid tribal severance taxes. *See Southern Ute Indian Tribe v. Amoco Prod. Co.*, Case No. 91-B-2273, First Amended Complaint at 10-13, First through Ninth Claims for Relief *per* Order (May 20, 1993). By ratifying the settlement agreement, Prior Interest Owners would be relieved of the Tribe's monetary compensation claims; however, the relief afforded ratifying Prior Interest Owners under the Palo Settlement Agreement was temporally limited in nature. Upon ratification by a "Prior Interest Owner holding or claiming an interest in the Lands in which Palo owns an Interest," the Tribe agreed to not pursue any action "to recover, retroactively or otherwise, royalties or severance taxes received or attributable to production of Coalbed Methane from such Lands" for time periods prior to the date of a definitive ruling in the Tribe's favor, "if any." First Amended Complaint Exhibit 1 [Doc. 9-1], Palo Settlement Agreement at 10, ¶9.01.

A. Because Palo never acquired an oil and gas lease to the 80-Acre Tract, the settlement never affected the 80-Acre Tract.

Although Plaintiff relies heavily on the Palo Settlement Agreement and its ratification mechanism as a basis for this case, the provisions related to Prior Interest Owners do not support the Court's jurisdiction. As an initial matter, the scope of the Palo Settlement Agreement related only to Palo's leasehold interests in the affected lands and the Prior Interest Owners' asserted title to the extent such title supported Palo's leasehold interests. *See id.* at 1, Recital ("such lands

being more fully described on Appendices I and IA attached hereto (to the extent of Palo's Interest therein, the "Lands")" (emphasis added). In confirming that the Palo Settlement Agreement did not extend to other claimed interests in the same properties, Section 3.01 of the Palo Settlement Agreement provided:

> 3.01 This Agreement affects only the Interests of Palo, and the interests of parties ratifying this Agreement in accordance with Section 9.01 and 9.02, in the Lands, rights appurtenant thereto and personal property and fixtures attributable thereto.

Significantly, when the Palo Settlement Agreement was approved by the parties and the Court, the only interest that Palo possessed with respect to the 80-Acre Tract was a top lease interest obtained through thirteen separate, but substantively identical instruments issued by the Farmer family members. *See, e.g.*, Oil and Gas Lease from Olive M. Farmer Revocable Trust, Roger J. Bolan, Trustee to Palo Petroleum, Inc. dated February 1, 1991, recorded at Rec. No. 610903, La Plata County, Colorado on May 31, 1991, Attachment 5 to Olguin Affidavit ("Palo Top Lease"). By the express terms of the Palo Top Lease (and the identical terms of the other twelve Farmer family top leases), the instrument had no effect as an oil and gas lease at the time it was signed. Rather, the Farmers and Palo agreed as follows:

> Notwithstanding anything to the contrary contained herein, this lease . . . shall be effective when (i) that certain Oil and Gas Lease dated June 7, 1951 . . . to Paul F. Catterson, as Lessee . . . (the "Existing Lease"), expires or is terminated and (ii) a Communitization Agreement covering the S/2 of Section 35-33N-11W, La Plata County, Colorado is approved by the Department of Interior and the Southern Ute Tribe . . . . It is understood between Lessor and Lessee that this lease is a top lease. If the Existing Lease should not expire or be terminated, then this lease shall not go into effect, and any obligations set forth herein by Lessee shall be relieved.

Id., Palo Top Lease Exhibit A (emphasis added). Thus, when the Palo Settlement Agreement was entered into, Palo had no interest in the Farmers' claimed interests in CBM. Moreover, Palo never did acquire any interest in the 80-Acre Tract, but rather the Palo Top Lease was ultimately released by Palo's successor, without the conditions for its effectiveness as an oil and gas lease having ever been satisfied. Release of Oil and Gas Leases by BP America Production Company dated May18, 2009, recorded at Rec. No. 997315, La Plata County, Colorado on June 4, 2009, Attachment 6 to Olguin Affidavit ("Release of Palo Top Lease"). Since Palo's Top Lease never evolved into an Interest in Lands, the Settlement Agreement had no effect on the 80-Acre Tract.

Because Palo did not even purport to own an Interest in the 80-Acre Tract, Palo had not drilled any CBM wells on and had obtained no production from the 80-Acre Tract. Consequently, assuming for sake of argument that the Farmers had then owned the oil and gas estate on the 80-Acre Tract, Palo activities had not exposed the Farmers to any tribal compensation claims related to the 80-Acre Tract addressable through ratification of the settlement agreement. Further, because it did not have an effective lease, Palo could not then grant the Tribe an overriding royalty interest in the 80-Acre Tract. Had Palo's Top Lease later become effective as a lease, however, then Palo would have been obligated to grant the Tribe an overriding royalty interest within ten calendar days of its receipt of leasehold rights. Palo Settlement Agreement at 4, ¶5.01. Regardless of these intricacies, on April 28, 1994, one of the thirteen Farmer family member grantors of the Palo Top Lease, the trustee to the Olive M. Farmer Trust, executed a Palo Settlement Agreement Ratification form already bearing the signatures of the Tribe's Chairman and Palo's president. First Amended Complaint Exhibit 2 [Doc. 9-1], Ratification by Olive M. Farmer Trust ("Ratification").

B. Nothing in the Palo Settlement Agreement grants the Tribe's consent to communitize the 80-Acre Tract.

Clearly, nothing in the Palo Settlement Agreement obligated the Tribe to consent to communitize its other acreage in Section 35 with the 80-Acre Tract. Section 8.07 of the Palo Settlement Agreement, which specifically addressed the 80-Acre Tract, reveals the parties' understanding of the status of production being obtained from S/2 of Section 35 at the time. First Amended Complaint Exhibit 1 [Doc. 9-1], Palo Settlement Agreement at 10, ¶ 8.07. That section provides as follows:

> 8.07 Palo [under a tribal lease] operates the Palo Southern Ute 35-1 Well, presently located on a 240-acre unit. In the event that certain adjacent 80-acre tract (described on Appendix I) is communitized into said unit, the Tribe agrees that such tract shall be subject to this Settlement Agreement to the extent of Palo's interest therein.

See id. (emphasis added). Because Palo did not yet possess (and would never possess) an interest in the 80-Acre Tract, the Plaintiff's oil and gas lessee under its then-Existing Lease referenced in the Palo Top Lease – not Palo and not the Tribe – was responsible to the Plaintiff for securing such communitization or otherwise protecting the Plaintiff from drainage (assuming that Plaintiff owned the oil and gas estate at that time). Because no communitization agreement was ever consummated, however, the Palo Settlement Agreement expressly never took effect as to the 80-Acre Tract. Ultimately, of course, the Tribe did not receive a "definitive ruling" in its favor, but rather lost the Class Action Claim, which would have rendered moot any obligations the Tribe might otherwise have owed the Plaintiff under the Ratification had Palo ever obtained an interest in the 80-Acre Tract.

In sum, because Plaintiff seeks relief in this case that goes well beyond anything contemplated or addressed in the *Amoco* case, the Tribe's filing of *Amoco* did not constitute a waiver of tribal sovereign immunity for this action. Further, the terms of the Palo Settlement Agreement and the Ratification confirm that the Tribe's consent to legal actions in this Court to interpret and enforce the Palo Settlement Agreement should not be construed as a clear waiver of immunity for this lawsuit.

IV. Plaintiff's Claims do not present a federal question.

Although Plaintiff alleges that this case presents a federal question under 28 U.S.C. § 1331, this "dispute over ownership" does not arise under the Constitution, laws or treaties of the United States. First Amended Complaint at 3, ¶11. Rather, the ownership question turns on construction of defeasible, term mineral reservations in a private deed. Farmer-to-Cameron Deed, Attachment 4 to Olguin Affidavit; First Amended Complaint at 4-5, ¶¶13-17. The fact that the United States originally patented the 80-Acre Tract to Mr. Underwood under the Coal Lands Act of 1910 (30 U.S.C. §§ 83-85) is inconsequential to this dispute since neither the Plaintiff nor the Tribe claims any oil and gas ownership interest in the 80-Acre Tract's by virtue of coal ownership. Further, the *Amoco* decisions of this Court and the Supreme Court provide no jurisdictional basis for Plaintiff's First Claim For Relief or Second Claim For Relief because those decisions dealt exclusively with construing the Coal Lands Acts, which are not at issue in this case. Accordingly, any indirect connection between the Coal Lands Act of 1910 and this dispute regarding private deed construction is simply too remote to support federal question jurisdiction.

Additionally, Plaintiff points to the Palo Settlement Agreement and Ratification as the source of a federal question (First Amended Complaint at 3, ¶11); however, where no federal statute or constitutional provision is at issue, jurisdiction for enforcement actions related to settlements may be more appropriately considered in the context of a court's ancillary jurisdiction. *See, e.g., Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994) (dismissing action to enforce settlement agreement as beyond ancillary jurisdiction of federal trial court). As reiterated by the Court in *Kokkonen*:

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . . which is not to be expanded by judicial decree . . . . It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkonen, 511 U.S. at 377 (citations omitted); *see also Fulton Nat. Bank of Atlanta v. Hozier*, 267 U.S. 276, 280 (1925) ("[N]o controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit.").

While a unanimous *Kokkonen* Court concluded that ancillary jurisdiction did not exist in that case, the Court also observed:

> The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.

See id., 511 U.S. at 381 (Scalia, J.). Indeed, as jointly requested by the Tribe, Palo, and the Landowners Coalseam Committee, the Court's order dismissing Palo expressly approved the

Palo Settlement Agreement and incorporated the agreement "as part of this Order." Order at 2, *Southern Ute Indian Tribe v. Amoco Prod. Co.*, Civil Action No. 91-B-2273 (Aug. 6, 1993). Further, the Tribe and Palo expressly agreed that "to the extent the parties can so provide, original and exclusive jurisdiction . . . over all matters of interpretation or enforcement of this Agreement" would rest with this Court. Thus, based on the terms of the Palo Settlement Agreement and the Court's incorporation of those terms as part of its order dismissing Palo, the Court's ancillary jurisdiction could be invoked if this case raised genuine issues of enforcement of the settlement agreement terms.

Here, however, Plaintiff, has not identified any specific provision of the Palo Settlement Agreement or the Ratification that has been breached by the Tribe or that requires interpretation by the Court. Rather, Plaintiff wishfully asserts, without identifying any specific provision of the Palo Settlement Agreement or Ratification, that the Tribe agreed in those documents to communitize the S/2 of Section 35. First Amended Complaint at 13, ¶54. Plaintiff's conclusionary pleading, however, is not sufficient to sustain subject matter jurisdiction, even over Plaintiff's Third Claim for Relief, where it is clear that nowhere in those documents did the Tribe commit to communitize the S/2 of Section 35. Further, even if there were provisions in the Palo Settlement Agreement that could reasonably be construed as a grant such tribal consent for communitization, such consent would not effectuate communitization because of the separate federal approval that would still be required after consideration of the Tribe's best interests. *See* 25 C.F.R. § 211.28(a). In any event, since Palo's Top Lease terminated prior to Palo ever obtaining an Interest in the 80-Acre Tract, the Settlement Agreement never became operative as to the 80-Acre Tract.

Fundamentally, and regardless of Plaintiff's clever bootstrapping, the central issue in this lawsuit is a simple ownership dispute arising under the terms of private deeds. Even if ancillary jurisdiction could be invoked, this Court should decline to exercise jurisdiction because the private ownership issues substantially predominate over any other issues in this case. *See* 28 U.S.C. § 1367(c) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (2) the claim substantially predominates over the claim or claims over which the court has original jurisdiction . . .").

Conclusion

The Tribe has not consented to be sued in this action and is immune from suit. Because this dispute involves private deeds, not at issue in the *Amoco* case, and because Plaintiff's claims do not implicate any obligation of the Tribe under the provision of the Palo Settlement Agreement or the Ratification, the Court lacks federal question jurisdiction and ancillary jurisdiction to entertain Plaintiffs First Amended Complaint. According, the Tribe respectfully requests that the Court enter an order dismissing this case under Fed. R. Civ. P. 12(b)(1).

Respectfully submitted this 23rd day of March, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 2012, a true and correct copy of the foregoing **TRIBE'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION PURSUANT TO FED. R. CIV. P. 12(b)(1)** was filed with the Clerk of the United States District Court and served on the following persons using the CM/ECF System:

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