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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, GREAT FALLS DIVISION

Glacier Electric Cooperative, Inc., Brian Elliott, Willard Hjartarson, Jim Newman, Darrol Berkram, Zita Bremner, Miles Lewis, Dave Losing, and James Taylor, in their official capacities as directors of Glacier Electric Cooperative, Inc., and Dan Brewer, in his official capacity as Interim General Manager of Glacier Electric Cooperative, Inc., Plaintiffs, v.	**CAUSE NO. 4:14-CV-00075-BMM** **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF RULE 60(b) MOTION**

Floyd "Bob" Gervais, James Kittson, Scott Smith, Emerald "Beep" Grant, Suzie Murray, Tashina McNabb, William Guardipee, Fred Guardipee, Heather Juneau, Joseph Arrowtop, William Wetzel, Troy Wilson, Melissa Gervais, Wilfred DeRoche, Georgia Matt, Rodney "Minnow" Gervais, Ralph Johnson, Mike Kittson, Kathy Broere, Lenore Matt, Evie Birdrattler, Rodney Gervais, Duane Ladd, Marcella Birdrattler, Tom Gervais, Jim Gervais, Marlene Matt, Wilfred DeRoche, Titus Upham, John DeRoche, Carl Evans, Jeri J. Elliott, Dennis Juneau, Teri Ann DeRoche, Paul McEvers, Patricia Calflooking, Tony Carlson, Sarah Calf Boss Ribs, Kathy Gervais, Marcella Green, Ellen Burdeau, Randy Augare, Robert Wagner, Kenny Walter, Honey Davis, Anna Horn, Cherlyl Gervais, Anita Potts, Therese Salois, Faith Gervais, and the Honorable Chief Judge Dave Gordon,	)
Defendants.	)

Plaintiffs properly and timely filed their Rule 60(b) Motion. A party is permitted to seek relief from a court order that contains errors within a reasonable time but not more than one year after the order is entered. The arguments set forth in Plaintiffs' Rule 60(b) Motion were not previously raised because they stem from the Court's April 24, 2015 Order ("Order"), which was issued after the briefing on Defendants' motion to dismiss was completed. Plaintiffs respectfully submit that the Order relies on inapplicable case law, does not give effect to the Blackfeet Tribal Code, does not take into account Defendants' allegations in the Tribal Court

lawsuit or due process considerations when applying the *Montana* exceptions, and does not apply a specific standard of review to Defendants' motion to dismiss. Defendants have not substantively addressed these issues or pointed out why these issues should not be addressed. For these reasons, Plaintiffs respectfully request the Court grant their Rule 60(b) motion.

I. Plaintiffs' Motion Was Properly Filed Pursuant to Rule 60(b)(1).

Plaintiffs' Motion was made pursuant to Fed. R. Civ. P. 60(b)(1), which allows a party to seek relief from a court order that contains substantive errors of law. *See Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999). Defendants claim that Plaintiffs only may file a Rule 60(b) motion if they establish the existence of extraordinary circumstances which prevented or rendered them unable to prosecute an appeal. However, this ignores the plain language of Rule 60 and Ninth Circuit precedent. Rule 60 contains no such prerequisite and only requires that a Rule 60(b)(1) motion be made "within a reasonable time" and "not more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1). Additionally, the Ninth Circuit has made clear that the basis for a Rule 60(b) motion is to allow a district court to correct an error. *See Gila River Ranch, Inc. v. U.S.*, 368 F.2d 354, 357 (9th Cir. 1966).

Plaintiffs' Rule 60 motion is proper because it seeks relief from those parts of the Court's Order that Plaintiffs respectfully submit are mistaken. Because an order denying a motion made under Rule 60(b) is final and appealable (*see Jeff D. v. Kempthorne*, 365 F.3d 844, 850 (9th Cir. 2004)), Defendants' argument that Plaintiffs were required to appeal the Order does not make sense. The propriety of a Rule 60(b) motion is unrelated to filing an appeal and such motion is permitted regardless of whether an appeal is filed. Plaintiffs timely filed their Rule 60(b) motion within a reasonable time and not more than one year after the Order. Accordingly, contrary to Defendants' claim, Plaintiffs' motion is proper.

Defendants' reliance on *Plotkin v. Pacific Tel. & Tel. Co.*, 688 F.2d 1291 (9th Cir. 1982) is misplaced. In *Plotkin*, the district court denied a preliminary injunction requested by the plaintiffs, finding that they failed to exhaust their available administrative remedies. *Id.* at 1292. The plaintiffs appealed that ruling and, while the appeal was pending, the district court granted the defendant's motion for summary judgment, finding that even if the plaintiffs were not required to exhaust their administrative remedies, they would not be entitled to the relief they sought. *Id.* The plaintiffs did not appeal the order granting summary judgment, which addressed the merits of the case. *Id.* The Ninth Circuit reversed the district court's first order and found that exhaustion of administrative remedies was not required and remanded the case to the district court for further

proceedings. *Id.* One of the plaintiffs then moved the district court for an order vacating the order granting summary judgment in favor of the defendant. *Id.* The district court denied the motion, finding that the plaintiff's voluntary decision not to appeal the entry of summary judgment on the merits precluded relief under Rule 60(b). *Id.* The Ninth Circuit affirmed.

Unlike *Plotkin*, in this case, the Court dismissed Plaintiffs' Complaint without prejudice for failure to exhaust tribal court remedies, but the order did not address the merits of the case. *See* Doc. 10. Additionally, the Blackfeet Tribal Court did not issue its order finding that it had jurisdiction over the matter until May 26, 2015. *See* Doc. 13-1. Therefore, by the time Plaintiffs learned that the Tribal Court was asserting jurisdiction over them, the time for appeal had passed. If the Tribal Court found it did not have jurisdiction over Plaintiffs, this Court's Order would have been moot. None of these facts were present in *Plotkin*.

Further, Ninth Circuit cases decided after *Plotkin* specifically have determined that a party may file a Rule 60(b)(1) motion seeking relief from a court order that contains substantive errors of law without making any reference to an appeal. As explained by the Ninth Circuit:

> The circuits are split as to whether errors of law may be corrected under Rule 60 motions. . . . The law in this circuit is that errors of law are cognizable under Rule 60(b).

Liberty Mut. Ins. Co. v. EEOC, 691 F.2d 438, 441 (9th Cir. 1982); *see also Kingvision*, 168 F.3d at 350. Plaintiffs' Rule 60(b) motion is properly before the Court and, because Plaintiffs respectfully submit that the Order contains mistakes of law and fact, Plaintiffs' motion should be granted.

II. The Order's Reference To Inapplicable Legal Precedent Became Apparent Only After The Order Was Issued.

The matter of *Grand Canyon Skywalk Development v. Sa Nyu Wa, Inc.*, 715 F.3d 1196 (9th Cir. 2013) significantly influenced the conclusion that Defendants' motion to dismiss was proper. (Doc. 10). Defendants did not cite to or analyze *Grand Canyon* in their motion to dismiss and supporting brief. *See* Doc. 3. As a result, Plaintiffs did not address or distinguish the case in their response brief. *See* Doc. 6. Defendants also did not mention or discuss *Grand Canyon* in their reply brief. *See* Doc. 9. As such, Plaintiffs did not reasonably anticipate that the Order would cite and rely on *Grand Canyon*. Therefore, contrary to Defendants' claim, Plaintiffs are not alleging that Rule 60(b)(1) is satisfied because they did not argue the irrelevancy of *Grand Canyon* in their briefing. Instead, as set forth in Plaintiffs' Rule 60(b) Motion, Plaintiffs respectfully contend that *Grand Canyon* is distinguishable from this case and does not support granting Defendants' motion to dismiss. *See* Doc. 13, pp. 6-9. Rule 60(b)(1) specifically contemplates seeking relief from a court order that contains substantive errors of law and, therefore,

Plaintiffs properly raised this argument in their Rule 60(b) motion. *See Liberty Mut. Ins. Co.*, 691 F.3d at 441; *Kingvision*, 168 F.3d at 350.

Significantly, Defendants do not dispute the differences between *Grand Canyon* and this case, including that the conduct at issue in the lawsuit they filed in Tribal Court did not occur on tribal land, Glacier Electric's rights-of-way do not interfere with the Tribe's ability to exclude Glacier Electric from the reservation, and Glacier Electric did not reasonably anticipate being subjected to the Tribe's jurisdiction. *See* Doc. 13, pp. 8-9. Defendants also do not explain why, given these differences, *Grand Canyon* is applicable to this case. Because *Grand Canyon* is distinguishable from this case and Defendants have failed to argue otherwise, the Court should grant Plaintiffs' Rule 60(b) Motion.

III. Plaintiffs' Rule 60(b) Motion Does Not Present Previously Raised Arguments.

A. Federal law does not change the fact that the Blackfeet Tribal Code does not permit jurisdiction over Plaintiffs.

Contrary to Defendants' claim, the Blackfeet Tribal Court did not address whether Blackfeet tribal law allows for tribal jurisdiction over Plaintiffs. *See* Doc. 13-1. Instead, the Tribal Court focused on federal cases cited by this Court, including *Grand Canyon*, to find tribal jurisdiction existed over Plaintiffs because of the Blackfeet Tribe's inherent authority to exclude individuals from tribal land.

(*Id.* at pp. 3-4). The Tribal Court also considered and found both *Montana* exceptions were satisfied. (*Id.* at pp. 4-5).

Although the Order concluded that "[i]t does not appear that the Cooperative Members possess a colorable claim of tribal court jurisdiction based on the membership status of the parties" (Doc. 10 at p. 6), the Order continued to analyze jurisdiction under federal law. The analysis should have ended once it was determined that the Blackfeet Tribal Code does not allow jurisdiction over Plaintiffs. Federal case law cannot and does not create tribal jurisdiction when the Tribe's own law indicates there is no jurisdiction. *See Twin City Constr. Co. of Fargo v. Turtle Mt. Band of Chippewa Indians*, 911 F.2d 137, 138 (8th Cir. 1990) (noting that the Eighth Circuit applied tribal code when determining whether the tribal court had jurisdiction); *see also* Charles J. Hyland, *The Tribal Court: Where Does It Fit?*, J. Kan. B. Ass'n, Oct. 1996, at 14, 15 (noting the first place to look when attempting to determine whether a matter should be in tribal court is the tribe's code); Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. Pitt. L. Rev. 1, 46 n.198 (1993) (noting that in determining whether a tribal court has jurisdiction, the tribe's own constitution, law code, case law and customary law

must be considered).[1] Plaintiffs could not have previously raised this argument because Plaintiffs did not know the Order would analyze tribal jurisdiction under federal law after finding no colorable claim of tribal court jurisdiction existed under Blackfeet Tribal Code. As a result, this issue was properly raised in Plaintiffs' Rule 60(b) Motion. Because the Blackfeet Tribal Code does not allow for tribal jurisdiction over Plaintiffs and federal law does not change this, Plaintiffs' Rule 60(b) motion should be granted.

B. The *Montana* exceptions are not satisfied.

While Defendants claim that the *Montana* exceptions are satisfied due to the alleged consensual relationship between the parties and the potential impact of the relationship on the health and welfare of the Blackfeet tribal members, Defendants do not provide any factual support for this claim. Defendants also failed to substantively address the arguments made by Plaintiffs in their Rule 60(b) Motion as to why the *Montana* exceptions are not met.

The first *Montana* exception is not satisfied. Defendants do not explain how the lawsuit they filed in Tribal Court is related to any consensual commercial

[1] Many tribal codes now contain broad provisions related to civil adjudicatory jurisdiction and, therefore, tribal law rarely constitutes a barrier to tribal jurisdiction over non-Indians. *See e.g.*, Crow Law and Order Code, 3-2-201 (stating that the Tribal Court is a court of general jurisdiction that can exercise jurisdictional authority which has not otherwise been abrogated by the United States Supreme Court or by legislation by the United States Congress); Confederated Salish and Kootenai Tribal Code 1-2-104 (stating that the Tribal Court may exercise civil jurisdiction to the fullest extent possible, not inconsistent with federal law).

contacts between Defendants and Glacier Electric when (1) none of the alleged service agreements are at issue in the lawsuit and (2) the lawsuit centers on Glacier Electric's by-laws and the alleged actions of Glacier Electric's directors – both of which are unrelated to the actual provision of services to Defendants.

Further, Defendants do not explain how the Tribal Court can regulate Glacier Electric's conduct and property located outside the exterior boundaries of the Blackfeet Reservation in light of the well-established legal principle that jurisdiction of tribal courts does not extend beyond tribal boundaries. *See Phillip Morris USA, Inc. v. King Mt. Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009) ("[T]ribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries"). It is fundamentally unfair and a violation of due process to subject Glacier Electric to tribal jurisdiction when it has done nothing to submit to that jurisdiction and did not reasonably anticipate that its conduct and property outside the Reservation would be subject to such jurisdiction. *See Walden v. Fiore*, 134 S. Ct. 1115 (2014). Because the allegations contained in the lawsuit filed by Defendants in Tribal Court extend to Glacier Electric's conduct and property located outside the Reservation, the Tribal Court does not have jurisdiction.

Finally, just as the Crow Tribal Court found, the first *Montana* exception is not satisfied when the lawsuit has nothing to do with the Tribe's right of self-

government and right to control internal relations between the Tribe and its members. *See* Ex. 1, Crow Tribal Court Order, p. 8. Here, in the lawsuit filed in Tribal Court, Defendants seek to (1) override and disregard Glacier Electric's bylaws governing the distribution of Glacier Electric's membership list, voting, the conduct of elections, and election of judges, (2) control how and when Glacier Electric collects payments for services provided to members, (3) control the sale of Glacier Electric property, (4) control the compensation of the Trustees, and (5) amend Glacier Electric's bylaws. *See* Doc. 1-2. None of what Defendants seek affect the Tribe's self-governance or control of internal relations and, therefore, the Tribal Court has no jurisdiction over the case.

The second *Montana* exception is also not satisfied. As explained by the United States Supreme Court:

> The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' "conduct" menaces the "political integrity, the economic security, or the health or welfare of the tribe." . . . The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community. . . . One commentator has noted that "[t]he elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences."

Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 341 (2008). Defendants have made no allegation that the regulation of Plaintiffs' conduct, business, and property is necessary due to circumstances that imperil the subsistence of the tribal community or to avert catastrophic consequences. Just

like the Crow Tribal Court determined that Big Horn County Electric Cooperative, Inc.'s decision to disconnect electrical services and energy to an enrolled member of the Crow Tribe for non-payment did not involve catastrophic consequences, the same is true here. *See* Ex. 1. Accordingly, the Tribal Court does not have jurisdiction over Plaintiffs based on the second *Montana* exception.

C. Even though the Order addresses tribal court exhaustion, it should have set forth the standard it applied and the allegations and/or facts it relied on.

The Order stated that Defendants' motion to dismiss based on failure to exhaust tribal court remedies was made pursuant to Fed. R. Civ. P. 12(b)(1). *See* Doc. 10, p. 1. A claim can be challenged under Rule 12(b)(1) for lack of subject matter jurisdiction both facially and factually. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). The facial or factual standards apply regardless of what argument is made in support of the Rule 12(b)(1) motion.

According to Defendants, the standard of review only applies to certain arguments made in a Rule 12(b)(1) motion. This position, however, is unsupported. Rule 12(b)(1) makes no such distinction. And, the Ninth Circuit has found that it is necessary to identify and properly apply either the facial or factual standard to a motion to dismiss under Rule 12(b)(1) without indicating these standards only apply to certain arguments. *See Lambright v. Ryan*, 698 F.3d 808, 817 (9th Cir. 2012) (stating that a court errs when it fails to apply the correct legal

standard); *Towery v. Ryan*, 673 F.3d 933, 940 (9th Cir. 2012) (stating that a court errs when its fails to identify and apply the correct legal rule to the relief requested); *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1224 (9th Cir. 2000) (finding that the district court erred because it failed to apply the correct legal standard).

Because Defendants did not identify whether their motion was a facial or factual challenge, Plaintiffs do not know whether Defendants were relying on allegations or facts to argue there was a colorable claim for tribal jurisdiction. Plaintiffs are entitled to know what allegations or facts allegedly subject them to tribal jurisdiction and because Defendants failed to identify those, Plaintiffs' Rule 60(b) Motion should be granted.

IV. Defendants Are Not Entitled To Costs and Fees.

Defendants claim they are entitled to costs and fees because the Court, on its own initiative, can impose sanctions pursuant to Fed. R. Civ. P. 11. (Doc. 14, p. 12). Defendants are not entitled to costs and fees because there has been no violation of Rule 11 and in any event, Defendants have not properly requested costs and fees under Rule 11.

Rule 11 imposes a duty on attorneys to certify by their signature that a pleading, written motion, or other paper is not being presented for any improper purpose, is warranted by existing law, and has evidentiary support. *See* Fed. R.

Civ. P. 11(b). "Rule 11 is an extraordinary remedy, one to be exercised with extreme caution." *Operating Eng'rs Pension Trust v. A–C Co.*, 859 F.2d 1336, 1345 (9th Cir.1988). It should be reserved for "rare and exceptional case[s] where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose." *Id.* at 1344. "Rule 11 must not be construed so as to conflict with the primary duty of an attorney to represent his or her client zealously." *Id.* Rule 11 is also "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." *Id.* The fact that Plaintiffs' Rule 60(b) Motion seeks relief from the Order does not support finding a violation of Rule 11. Plaintiffs' Rule 60(b) Motion does not violate Rule 11 because it relies on existing law and factual evidence to point out errors of law and fact. Accordingly, sanctions are not warranted in this case.

Further, while Defendants claim the Court, on its own initiative, can impose sanctions under Rule 11, in effect Defendants are requesting that the Court impose sanctions. Where, as here, a party requests sanctions, the party must make a motion for sanctions separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). *See* Fed. R. Civ. P. 11(c)(2). Rule 11 also provides for a mandatory 21 day safe-harbor period before a motion for sanctions is filed with the court. *Id.* The movant serves the allegedly offending party with a filing-ready motion as notice that it plans to seek sanctions. *Id.* After

21 days, if the offending party has not withdrawn the filing, the movant may file the Rule 11 motion with the court. *Id.* This period is meant to give litigants an opportunity to remedy any alleged misconduct before sanctions are imposed. *See Truesdell v. S. California Permanente Med. Grp.*, 293 F.3d 1146, 1151–52 (9th Cir. 2002). Defendants did not make a separate motion for sanctions or serve any type of document on Plaintiffs indicating they planned to move for sanctions under Rule 11. Therefore, Defendants' request for sanctions is improper and should be denied.

CONCLUSION

Plaintiffs filed the instant action based on the fundamental concern that the scope of the pending action in the Blackfoot Tribal Court essentially seeks to undermine the ability of cooperative members to conduct the business of Glacier Electric because the Tribal Court action affects conduct and property without regard to whether the conduct occurs on, or the property is located on, tribal lands. For all of the foregoing reasons set forth in this Brief, Plaintiffs respectfully request that the Court grant their Rule 60(b) Motion.

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Dated this 11th day of September, 2015.

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/s/ Kelsey Bunkers

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2) of the United States Local Rules, I certify that this Brief is limited to 3,245 words, excluding caption and certificates of service and compliance, printed in at least 14 points and is double spaced, except for footnotes and indented quotations.

DATED this 11th day of September, 2015.

/s/ Kelsey Bunkers

IN THE CROW TRIBAL CIVIL COURT
IN AND FOR THE CROW INDIAN RESERVATION
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ALDEN BIG MAN, Plaintiff, v. BIG HORN COUNTY ELECTRIC COOPERATIVE, INC., a Montana Corporation, Defendant.	**CIVIL CASE NO. 2012-118** **ORDER**

This case came before the Court for oral argument upon Plaintiff's Motion for Summary Judgment. After considering arguments made by the attorneys for the parties, both written and oral, together with the allegations set forth in the Complaint, the Answer to said Complaint, the affirmative defenses set forth therein, the attached exhibits, and affidavit filed herein, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff is an enrolled member of the Crow Tribe of Indians and a member of the Defendant Big Horn County Electric Cooperative, Inc.

2. Defendant is a not for profit rural electric cooperative, incorporated under the laws of the State of Montana contained in the "Rural Electric and Telephone Cooperative Act", M.C.A. § 35-18-101, which delivers electric services and energy

to its members in southern Montana and northern Wyoming, including the Crow Indian Reservation.

3. A commercial relationship exists between Plaintiff and Defendant by virtue of a written membership agreement. The relationship is limited to on-premises delivery of electrical service to Plaintiff's residence on the Crow Indian Reservation and Plaintiff's obligation to pay for the service.

4. After notice of disconnect for non-payment, Defendant disconnected Plaintiff's electrical service on January 26, 2012.

5. Plaintiff filed a Complaint alleging, as his cause of action, that Defendant terminated Plaintiff's electrical service in violation of Crow law contained in Title 20 of the Crow Law and Order Code, which states: "During the period of November 1st to April 1st . . . no termination of residential service may take place." Additionally, Plaintiff alleged no termination may take place during these winter months "except with specific approval of the board" [Crow Tribal Health Board] Crow Law and Order Code § 20-1-110(2).

6. Plaintiff's Complaint requests award of damages and attorney fees.

7. Defendant answered the Complaint denying factual representations made by Plaintiff but admitted disconnecting Plaintiff's electrical service on January 26, 2012, rather than January 24, 2012, as Plaintiff alleged.

8. Defendant raised numerous affirmative defenses in its Answer, including assertion this Court lacked jurisdiction over Defendant's conduct in connection with the commercial relationship between it and Plaintiff as a member of the electric cooperative.

9. Plaintiff filed a Motion for Summary Judgment contending the criteria

governing entry of summary judgment were satisfied by Defendant's acknowledgment of disconnect of Plaintiff's electrical service at a time prohibited by tribal law. Cognizant of the affirmative defense of lack of jurisdiction lodged by Defendant, Plaintiff acknowledged the necessity to address tribal jurisdiction over Defendant. A case decided over 26 years ago, *Harris v. Big Horn County Electric Cooperative*, No. 86-223 (Crow Tr. Ct. Dec. 9, 1986), was cited and relied upon by Plaintiff as authority for tribal court jurisdiction based upon consensual relationships between the tribe and its members and Defendant and a finding that delivery of power has a direct effect on the health and safety of the tribe and its members.

10. Defendant responded citing numerous federal cases, decided after the tribal court decision in the *Harris* case, addressing tribal authority over nonmember activities and conduct.

From the foregoing Findings of Fact the Court makes the following conclusions of law requiring denial of Plaintiff's Motion for Summary Judgment:

CONCLUSIONS OF LAW

1. The Rules of Civil Procedure set forth in the Crow Law and Order Code require this Court to use the provisions of Rule 56 of the Federal Rules of Civil Procedure in conjunction with the Motion for Summary Judgment filed by Plaintiff.

Defendant objected to Plaintiff's Motion for Summary Judgment referencing Federal Rule 56(2) to support its argument that the fact the Crow Tribe adopted Title 20 of the Tribal Code, prohibiting disconnect of tribal members' electrical service between November 1 and April 1, was not by itself admissible evidence of its enforceability as against Defendant.

2. Defendant's jurisdictional challenge requires the Court to engage in a

particularized analysis of the facts and federal case law defining the extent of tribal governmental power over the activities of nonmembers. *Nat. Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

3. The federal principles which govern tribal civil jurisdiction over nonmembers were set out in *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 [8 Indian L. Rep. 1005] (1981), and that decision remains the "'pathmarking case' on the subject." *Nevada v. Hicks*, 533 U.S. at 358, 121 S. Ct. 2304 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 445, 117 S. Ct. 1404, 137 L. Ed. 2d 661 [24 Indian L. Rep. 1015] (1997)). In *Montana*, the Supreme Court concluded that the Crow Tribe lacked regulatory power to prohibit hunting and fishing by nonmembers on non Indian fee land within the reservation because "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." 450 U.S. at 564, 101 S. Ct. 1245. As a general matter, the Court held, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565, 101 S. Ct. 1245.

4. Although the issue in the *Montana* case was about tribal regulatory authority over nonmember fee land within the reservation, *Montana*, 450 U.S. at 547, 101 S. Ct. 1245, *Montana's* analytic framework now sets the outer limits of tribal civil jurisdiction – both regulatory and adjudicatory – over nonmember activities on tribal trust and nonmember fee land. The Supreme Court held in *Strate v. A-1 Contractors* that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate*, 520 U.S. at 453, 117 S. Ct. 1404. Tribal court jurisdiction thus "turns upon whether the actions at

issue in the litigation are regulable by the tribe." *Hicks*, 533 U.S. at 367 n.8, 121 S. Ct. 2304.

The threshold question with respect to the tribe's power to regulate Defendant's activities, extinguishing Plaintiff's wintertime payment requirement associated with Plaintiff's commercial relationship with Defendant, is whether the standards established in *Montana*, and reaffirmed in *Strate* with respect to both regulatory and adjudicatory inherent authority determinations, govern.

5. The United States Supreme Court in *Hicks* indicated that "*Montana* applies to both Indian and non-Indian land." *Hicks* at 360, 121 S. Ct. 2304; *see also id.* at 387, 121 S. Ct. 2304 (O'Connor, J., concurring in part) ("Today, the Court finally resolves that *Montana v. United States*, governs a tribe's civil jurisdiction over nonmembers regardless of land ownership.") (citation omitted); *MacArthur v. San Juan County*, 497 F.3d 1057, 1069-70 [34 Indian L. Rep. 2190] (10th Cir. 2007).

Therefore, Defendant's delivery of electricity to Plaintiff's residence on trust land may not be relied upon alone to provide the basis for exercise of tribal authority, whether regulatory or adjudicatory, over Defendant.

APPLICATION OF MONTANA STANDARDS

For the reasons discussed above, Plaintiff must prove one of the *Montana* exceptions to; (a) rebut the presumptive absence of tribal civil authority over Defendant's enforcement of the terms of the membership agreement with Plaintiff or, alternatively, (b) to establish the Crow Tribe's power to enforce Title 20 regulations as against Defendant. Plaintiff has not carried this burden.

THE FIRST EXCEPTION

The first exception provides that "tribes 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." *Montana* 445 U.S. at 565.

Here, two "relationships" require consideration to determine the first exception application: First, the relationship between Plaintiff and Defendant as set forth in Plaintiff's membership agreement. Plaintiff's Complaint is not based upon that commercial relationship or violation of the terms thereof whether by Plaintiff or Defendant. Instead, Plaintiff's Complaint is based solely upon the second relationship, that which would exist as between Defendant and the Crow Tribe upon enforcement of the tribe's Title 20 regulatory provision. The effect of the later relationship would indeed eliminate "a continuing consensual" relationship between Plaintiff and Defendant of the type contemplated by *Montana's* first exception. See: *Burlington N. R.R. v. Red Wolf*, 196 F.3d 1059, 1064 (9th Cir. 1999). None exists if one party , here Plaintiff, need not perform contractual obligations.

Tribal regulatory authority is derived from traditional power, to exclude persons from the reservation, from which the tribe may set conditions on a nonmember's right of entry. See, e.g., *Hicks*, 533 U.S. at 359, 121 S. Ct. 2304 (*Montana* and *Strate* concern "tribal authority to regulate nonmembers activities on land"). Thus, the Tribe's Title 20 regulation, strictly applied would result in lack of nexus between a predicate relationship (between Plaintiff and Defendant) and the regulation's intended application.

In support of the first *Montana* exception giving tribal jurisdiction over "activities" of nonmembers, the Supreme Court in *Montana* cited four cases. The first, *Williams v. Lee, supra*, involved a tribal court suit brought by a non-Indian

over a contract dispute arising from a sale of goods to a tribal member on the reservation. The other three cases involved taxes associated with reservation based "activities" in which the tribe had an interest in the subject matter; (1) grazing livestock on trust land, (2) activities on trust land, and (3) severance tax on trust mineral production. In each tax case, the Court concluded the non-Indians' right to engage in the "activities" on the reservation were conditioned upon payment of the tax. In other words, regulatory authority, in the form of taxation, flows directly from a tribe's power to exclude i.e. deny the non-Indian the right to engage in the reservation based activity unless the condition, payment of tax, is satisfied.

Again, in each tax case cited as containing the type of consensual relationships giving rise to tribal regulatory authority, under *Montana's* first exception, the tax directly related not only to the relationship giving rise to the consent, (tax on cattle grazing, cigarette sales, and tribal permit tax on privilege to do business on reservation land) but also the nonmember's decision to enter into the arrangement with fair notice of the tax (regulation).

Here, Defendant has for generations constructed permanent infrastructure "to encourage the use of . . . electric power . . . to facilitate the extension of these modern conveniences to sparsely settled Indian areas." See, 25 CFR § 169-22(c) at 469. Defendant has engaged the tribe and its members in the benefits from cooperative membership and use of utility facilities without prior expectation or notice of regulation of the Title 20 type, nor notice the tribe reserved a gatekeeping right to exclude Defendant from the reservation. Thus, this case is about whether the tribe may deny Defendant the right to deliver electric service to tribal

cooperative members unless Defendant agrees to the non-disconnect provisions of Title 20. The Supreme Court has indicated tribal jurisdiction depends upon what non-Indians "reasonably" should "anticipate" from their dealings with a tribe or its members in connection with activities on a reservation. *Plains Commerce Bank*, 554 U.S. at 337, 128 S. Ct. 2709.

Here, there is no contract dispute between Plaintiff and Defendant as in *Williams v. Lee*, nor voluntary submission to tribal court jurisdiction as in that case. This case involves tribal interference in the contractual relations between Plaintiff and Defendant which have nothing whatsoever to do with the tribe's right of self-government and right to control internal relations between the tribe and its members. See, *Hicks, supra*, at 361, 121 S. Ct. 2304. (Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.)

Given the nature and extent of Defendant's longstanding presence on the Crow Reservation, placed there without fair notice of tribal regulation as found in Title 20, the Court finds the Crow Tribe has no power to exclude as the basis for enforcing tribal regulation over Defendant's activities. *Montana's* first exception does not apply.

THE SECOND EXCEPTION

Though Plaintiff's brief alleges the regulation "is designed to protect the health and safety of elderly and disabled tribal members . . . ," (Plaintiff's Brief p. 3.) the second *Montana* exception does not apply here. The United States Supreme Court, in the *Plains Commerce Bank* case, clarified its limited application stating:

> The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' "conduct" menaces the "political integrity, the

> economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566, 101 S. Ct. 1245. The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community. *Ibid.* One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences." *Cohen* § 4.02[3][c], at 232, n.220.

35 ILR at 1017.

No allegation has been made that regulation of Defendant is necessitated by circumstances involving possible catastrophic consequences. As none exists, *Montana's* second exception is inapplicable.

ORDER

The Court concludes the Crow Tribe is without legislative jurisdiction to adopt and enforce Title 20 regulation over the activities of Defendant and as this Court's adjudicative jurisdiction does not exceed the Crow Tribe's legislative jurisdiction, (*Strate*, 520 U.S. at 4537), this Court is without jurisdiction over this case and the Plaintiff's Complaint must be dismissed, and, It Is So Ordered.

Dated this 24th day of May, 2013.

CROW TRIBAL COURT SEAL COURT CROW AGENCY MONTANA

TRIBAL JUDGE

CERTIFICATE OF SERVICE

This is to certify that the foregoing Order was duly served by first class mail, postage prepaid, this 24th day of May, 2013, upon the following interested parties:

Joe Hardgrave, Attorney
Montana Legal Services Association
2442 1st Avenue North
Billings MT 59101

James E. Torske
Attorney at Law
314 North Custer Avenue
Hardin MT 59034

By: Sydney J Eastman

IN THE CROW TRIBAL CIVIL COURT
IN AND FOR THE CROW INDIAN RESERVATION
P.O. BOX 489; CROW AGENCY, MONTANA 59022
(406) 638-7400, FAX (406) 638-7415

CERTIFICATE OF MAILING

CIVIL CASE NO. **12-118**

I, **Sydney J Eastman,** in the position of **Civil Court Clerk** in the CROW TRIBAL COURT System do hereby verify a true and accurate copy of the **NOTICE OF ORDER** was sent to the following addresses:

Joe Hardgrave
Attorney at Law
Montana Legal Services Association
2442 First Ave. North
Billings, Montana 59101

James E. Torske
Attorney at Law
314 North Custer Ave.
Hardin, Montana 59034

Notice was placed in the mail depository in the UNITED STATES POST OFFICE at Crow Agency, Montana on the **6th** day of **May, 2013.**

Sydney J Eastman
Clerk of Court, Crow Tribal Court

(SEAL)