

APPENDIX 1

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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA, WESTERN DIVISION**

WESTERN ENERGY ALLIANCE,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE
INTERIOR, SALLY JEWELL, in her official
Capacity as Secretary of the United States
Department of the Interior; BUREAU OF
INDIAN AFFAIRS; and MICHAEL S.
BLACK, in his official Capacity as Director
of the Bureau of Indian Affairs,

Defendants.

**SPECIAL APPEARANCE AND ANSWER
OF THE INTERVENOR THREE
AFFILIATED TRIBES**

Case No. 16-cv-00050-DLH-CSM

Judge Daniel L. Hovland
Magistrate Judge Charles S. Miller, Jr.

Proposed Intervenor Three Affiliated Tribes of the Fort Berthold Reservation (Tribe), by and through its undersigned counsel, conditionally submits this Answer to plaintiff's complaint as follows:

1. Paragraph 1 is a legal assertion which requires to no answer. To the extent an answer is required, it is denied.

2. Paragraph 2 is a legal assertion which requires to no answer. To the extent an answer is required, it is denied.
3. Paragraph 3 is a legal assertion which requires to no answer. To the extent an answer is required, it is denied.
4. Paragraph 4 is a legal assertion which requires to no answer. To the extent an answer is required, it is denied.
5. The Tribes lack sufficient knowledge to admit or deny Paragraph 5, and therefore deny the same.
6. Paragraph 6 is a legal assertion which requires to no answer. To the extent an answer is required, it is denied.
7. The Tribe admits that Sally Jewel (misspelled in paragraph 7 of the complaint) is the Secretary. The scope of her responsibility is a legal assertion to which admission or denial is not required. To the extent an answer is required, it is denied.
8. Paragraph 8 is a legal assertion which requires to no answer. To the extent an answer is required, it is denied.
9. The Tribe admits that Michael S. Black is the Director of the BIA. The scope of his responsibility is a legal assertion to which admission or denial is not required. To the extent an answer is required, it is denied.
10. Paragraph 8 is a legal assertion which requires to no answer. To the extent an answer is required, it is denied.
11. The Tribe lacks sufficient knowledge to admit or deny the factual assertion in paragraph 11, and therefore deny the same; and the remainder of the paragraph is a legal assertion to

which no answer is required. To the extent an answer is required, the Tribe denies paragraph 11.

12. Paragraph 12 is a legal assertion which requires to no answer. To the extent an answer is required, it is denied.

13. Paragraph 13 is a legal assertion which requires to no answer. To the extent an answer is required, it is denied.

14. Paragraph 14 is a legal assertion which requires to no answer. To the extent an answer is required, it is denied.

15. Paragraph 15 is admitted.

16. Paragraph 8 is a statement of opinion and/or a legal assertion which requires to no answer. To the extent an answer is required, it is denied.

17. Paragraph 8 is a statement of opinion or legal assertion which requires to no answer. To the extent an answer is required, it is denied.

18. Paragraph 18 contains statements of opinion for which no answer is required and statements for which the Tribe lacks sufficient knowledge to admit or deny, and therefore the Tribe denies paragraph 18.

19. The Tribe admits paragraph 19

20. The Tribe lacks sufficient knowledge to admit or deny paragraph 20 and therefore denies the same.

21. The Tribe lacks sufficient knowledge to admit or deny paragraph 21 and therefore denies the same.

22. The Tribe admits that paragraph 22 as of the time the complaint was filed, but notes it is no longer accurate.

23. Paragraphs 23 to 53 either re-allege prior paragraphs or are allegations of law, for which admission or denial is not required. To the extent admission or denial is required, the Tribe denies the allegations

24. The Tribe denies that any of the requested relief should be granted.

AFFIRMATIVE DEFENSES

1. The Complaint should be dismissed because the plaintiff lacks standing. Plaintiff is not within the zone of interest the Right of Way statutes were designed to protect. The Right of way statutes cited in plaintiff's complaint, 25 U.S.C. §§ 323-328 were passed for the benefit of Indian tribes, not private parties. The Secretary's regulations that plaintiff challenges were promulgated as part of the United States trust responsibility to Indian Tribes, and plaintiff lacks standing to interfere with the federal tribal relationship. *See eg., Rosebud Sioux Tribe. v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002), *San Xavier Development Authority v. Charles*, 237 F.3d 1149 (9th Cir. 2011) and *Hollywood Mobil Estates, Ltd. v. Seminole Tribe of Florida*, 641 F.3d 1259 (11th Cir. 2011); *United States v. Pan Am. Mgmt. Co.*, 616 F. Supp. 1200, 1208 (D. Minn. 1985), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986).

2. The Complaint should be dismissed because the plaintiff failed to join the Tribe as a necessary party, and because the Tribe is an indispensable party who cannot be joined because the Tribe enjoys sovereign immunity from suit which it has not waived. *Pembina Treaty Committee v. Lujan*, 980 F.2d 543, 546 (8th Cir. 1992); *Lamplot v. Heineman*, 2006 U.S. Dist. LEXIS 89479, *18-23, 2006 WL 3454837 (D. Neb. Nov. 29, 2006); *Keskoli v. Babbitt*, 101 F.3d 1304, 1309-10, 1311 (9th Cir. 1996); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458 (9th Cir. 1994).

Respectfully submitted this ____ day of _____, 2016.

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/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of April, 2016, I electronically filed the foregoing, **SPECIAL APPEARANCE AND ANSWER OF THE INTERVENOR THREE AFFILIATED TRIBES**, with the Clerk of the Court using the CM/ECF System which will send notification of such filing to all parties of record as follows:

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/s/

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