EXHIBIT B

THREE AFFILIATED TRIBES

FORT BERTHOLD INDIAN RESERVATION

IN DISTRICT COURT

NEW TOWN, NORTH DAKOTA

Civ 2014-0048

JOLENE BURR, TED LONE FIGHT, GEORGIANNA DANKS, EDWARD S. DANKS, INDIVIDUALLY AND OTHERS SIMILARLY SITUATED ON THE FORT BERTHOLD INDIAN RESERVATION,

Plaintiffs,

v.

XTO ENERGY INC., EOG RESOURCES, WPX ENERGY, MARATHON OIL COMPANY, PETRO-HUNT, LLC, HRC OPERATING, LLC, HRC RESOURCES, LLC, (A/K/A HALCON), QEP RESOURCES, INC., WINDSOR ENERGY GROUP, LLC, KODIAK OIL & GAS CORP., AND ENERPLUS,

Defendants.

MEMORANDUM OPINION

BACKGROUND

Plaintiffs in this case assert claims and seek damages against defendant oil and gas producers relating to alleged improper flaring of natural gas associated with the development and production of oil wells located within the exterior boundaries Fort Berthold Indian Reservation (Reservation). Generally, flaring is the burning of flammable gas to protect against the dangers of over-pressuring equipment. When petroleum crude is extracted and produced from oil wells, raw natural gas associated with oil is brought to the surface as well. Where pipelines or other gas transportation infrastructure are lacking, amounts of gas are commonly flared as waste or

unusable gas.

Resolution No. 13-070-VJB, was passed by the Tribal Business Council of the Three Affiliated Tribes (TAT) on May 13, 2013. The reason for the passage was because "(t)he Bureau of Land Management (BLM) has failed to adequately enforce NTL-4a 'Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases; Royalty or Compensation for Oil and Gas Lost which covers the flaring of gas.'" Plaintiffs are not basing their claim for relief on this Resolution, but it is cited here to show that the Tribal Business Council has deemed flaring to be of concern on the Reservation.

Plaintiffs, on September 25, 2014, amended their complaint to allege that they are enrolled members of the TAT owning mineral interests within the exterior boundary of the Reservation and entered into oil and gas leases with defendants. The leases entered into are form leases promulgated by the Department of Interior, contain identical terms, and are common to all parties. The term of the lease that gives rise to plaintiffs' claims is found at paragraph 3 (f). This provision requires lessees, such as defendants, "to exercise reasonable diligence in drilling and operating wells for oil and gas on the lands covered hereby, while such products can be secured in paying quantities, to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land... ." Plaintiffs contend that their amended complaint intends to allege a contract action against defendants. The complaint does not seek to prohibit flaring which, according to defendant lessees could result in lessees ceasing all oil production.

PLAINTIFFS' REPRESENTATION OF OTHERS

Plaintiffs' complaint seeks to bring the action on behalf of "others similarly situated."

This proceeding has never been certified as a class action. Until certification has taken place, plaintiffs can only bring the action on behalf of themselves. Moreover, plaintiffs have no authority to bring any action on behalf of the Tribe. Hackford v. Babby, 14 F3d 1457, 1465-1466 (10th Cir. 1994); Wind River Alliance v. Rocky Mountain Regional Director, 52 IBIA 224, 229-230 (2010). The Tribe's corporate charter adopted pursuant to 25 USC 477 contains no provision that authorizes Tribal members to sue on behalf of the Tribe. This action has been pending for months, if the Tribe had desired to join the lawsuit, it would have been done before the present time. Whether to bring an action in court invokes a plethora of policy considerations that can only be determined by the Tribal Council and to allow otherwise would create a dangerous precedent. Additionally, the second amended complaint in this action infers that plaintiffs are all enrolled members ("plaintiffs include enrolled members"). To the extent that any of the plaintiffs in this case are non-Indians, this court has no civil jurisdiction over actions by non-Indians against non-Indians. Montana v. United States, 450 U.S. 544, 564-565 (1981) ("the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers)"; Strate v. A-1 Contractors, 520 U.S. 438, 445, 457 (1997), affirming A-1 Contractors v. Strate, 76 F3d 930, 940 (8th Cir. 1996) ("distinctively non-tribal in nature).

MOTION TO DISMISS STANDARDS AND CLAIM ASSERTED

In examining facial challenges to jurisdiction on a motion to dismiss, the court is required to construe the complaint liberally, accepting all uncontroverted, well pleaded factual allegations as true, and view all reasonable inferences in plaintiffs' favor. Scheuer v. Rhodes, 416 U.S. 232, 234-237 (1974); Tandon v. Captain's Cove Marina of Bridgeport, Inc., 752 F3d 239, 243 (2nd Cir. 2014). The Court views the allegations of the complaint as a whole. The adequacy of the

complaint will be tested under the "short and plain" statement standard as sharpened by the "plausability" benchwork established in Bell Atlantic v. Twombly, 550 U.S. 544, 556-557 (2007). On a substantive challenge to jurisdiction, the Court can weigh the evidence and find the facts, so long as the fact-finding does not involve the merits of the dispute. Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006). Plaintiff must establish jurisdiction by a preponderance of the evidence, Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992), although the burden is not a heavy one. Musson Theatrical, Inc. v. Federal Exp. Corp., 89 F3d 1244, 1248 (6th Cir. 1996).

Applying the above principles, the complaint alleges that plaintiffs have "entered into oil and gas mining leases" with one or more of the defendants. This satisfies plaintiffs' burden at this stage of the proceeding to allege a contract with defendants.

FAILURE TO JOIN THE UNITED STATES

Defendants' maintain that the Court is lacking jurisdiction because the United States is not joined as a party. The same issue arose in Poafpybitty v. Skelly Oil Company, 390 U.S. 365 (1968), involving a dispute over an oil and gas lease held by defendant oil company on reservation land held in trust by the United States for the benefit of plaintiff Indians. Plaintiffs in that case alleged that the defendant oil company failed to retain and market natural gas being produced by the wells at issue, thereby depriving them of royalties. The Oklahoma Supreme Court affirmed the lower court dismissal of the action on the ground that plaintiffs were precluded from suing based upon the trustee status of the United States and by regulations promulgated by the Secretary of the Interior to control oil and gas on restricted Indian land. The United States Supreme Court disagreed.

In deciding whether the plaintiff Indians as owners, or the United States as trustee of the

allotted lands, was the proper party to bring suit, the Court began its analysis by first acknowledging that under the General Allotment Act of 1887, land allotted to individual Indians was to be held by the United States in trust for the sole use and benefit of the Indian allottees. The Court recognized that this relationship was intended primarily to protect against the alienation of allotted lands.

However, the Court found that "these restrictions on the Indian's control of his land are mere incidents of the promises made by the United State in various treaties to protect Indian land and have no effect on the Indian's capacity to institute the court action necessary to protect his property." Id. at 368-69. "In order to fulfill these national promises to safeguard Indian land and at the same time 'to prepare the Indians to take their place as independent qualified members of the modern body politic', the allotment system was created with the Indians receiving ownership rights in the land while the United States retained the power to scrutinize the various transactions by which the Indian might be separated from that property." Id. at 369 (citing Board of County Comm'rs. of Creek County v. Seber, 318 U.S. 705, 715 (1943); Squire v. Capoeman, 351 U.S. 1, 9 (1956)).

The Court concluded that "[t]his dual purpose of the allotment system would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect the allotment." Id. In reaching this conclusion, the Court cited previous decisions which "recognize[d] capacity in a restricted Indian to sue or defend actions in his own behalf subject only to the right of the Government to intervene." Id. at 371. (citing Heckman v. United States, 224 U.S. 413 (1912)). As such, "the right of the United States to institute a suit to protect the allotment did not diminish the Indian's right to sue on his own behalf." Id. at 370 (citing Creek

Nation v. United States, 318 U.S. 629 (1943)). The Court ultimately concluded that the trust relationship existing between the Indians and the United States Government, "do[es] not prevent the Indian landowner, like other property owners, from maintaining suits appropriate to the protection of his rights." Id. at 372.

Having concluded that the status of the United States as trustee of allotted Indian lands did not preclude the plaintiff Indians from bringing suit on their own behalf to vindicate their rights as lessors, the Court next turned to the question of whether the terms of the oil and gas lease or the regulations promulgated by federal agencies prevented the plaintiff Indians from seeking judicial relief for an alleged impairment of their interests under the lease. This question is similar to the one being made here by defendants that the action in this Court is precluded by Federal statutes and regulations.

After examining various regulations promulgated by the Secretary of the Interior over oil and gas operations on Indian lands, the Court concluded, as defendants repeatedly point out in their briefs here, that "the United States has exercised its supervisory authority over oil and gas leases in considerable detail." Id. at 373. Nevertheless, the Court held that "we find nothing in this regulatory scheme which would preclude [plaintiff Indians] from seeking judicial relief for an alleged violation of the lease." Id. "The existence of the power of the United States to sue upon a violation of the lease no more diminishes the right of the Indian to maintain an action to protect that lease than the general power of the United States to safeguard an allotment affected the capacity of the Indian to protect that allotment." Id at 373-374.

The Court further stated, that the Department of Interior "is faced with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon

thousands of scattered Indian allotments. In some cases the adequate fulfillment of trust responsibilities on these allotments would undoubtedly involve administrative costs running many times the income value of the property." Id. at 374 (citing H.R.Rep. No. 2503, 82d Cong., 2d Sess., 23 (1952)). "Recognizing these administrative burdens and realizing that the Indian's right to sue should not depend on the good judgment or zeal of the government attorney, the United States has indicated its support of [plaintiff Indians'] position that Indians have a capacity to sue under the oil and gas lease." Id. (citing a Memorandum for the United States as amicus curiae).

The lesson of Poafpybitty is that Indians, despite their unique relationship with the United States Government, have the same right as any other property owner to bring an action to protect their property and to vindicate their rights under oil and gas leases relating to that property. Poafbynitty is directly analogous to the instant action, controls on the indispensability issue, and is instructive on the preemption issue. Under Poafpybitty, the United States is not an indispensable party to this action and plaintiffs may sue on their own behalf.

JURISDICTION OVER NON-INDIAN DEFENDANTS

Although Montana v. United States, 450 U.S. 544, 564-565 (1981), established a presumption that tribal jurisdiction does not extend to the activities of non-members, such as all defendants in this case, it carved out an exception to this rule where non-members, as here, enter into consensual relationships with the Tribe or its members. 450 U.S. 565-566. And, it is true that a Tribe's adjudicative jurisdiction cannot exceed its legislative jurisdiction. Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997); Nevada v. Hicks, 533 U.S. 353, 357-358 (2001). Clearly the Tribe has jurisdiction to entertain contractual actions between Tribal members and non-

members who consensually agree to do business on trust lands within the exterior boundaries of the TAT. Dollar General Corporation v. Mississippi Band of Choctaw Indians, No 13-1496, involving whether a tribal court would ever have jurisdiction over non-Indians is pending and being decided by the Supreme Court of the United States. Until that case is decided, this Court must decide this case on the basis of Montana v. United States and its progeny.

PREMPTION

The most difficult aspect of jurisdiction in this case is raised by the claim of defendants that preemption prohibits Tribal court from hearing and deciding the present case.

Preemption is based on Article VI, Clause 2 of the United States Constitution, referred to as the Supremacy Clause, which provides that the Constitution, laws, and treaties of the United States Constitution "shall be the supreme law of the land" and that the judges in every state shall be bound thereby, anything in the Constitution or laws of the United States to the contrary notwithstanding. Altria Group v. Good, 555 U.S. 70, 76 (2008), citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981). Preemption as pertains to tribal governments is most often utilized to bar application of state law to Indian County, the first case being Worcester v. Georgia, 31 U.S. 515, 561-562 (1832), based on application of the Supremacy Clause, broad federal legislative authority over Indian matters, and treaties reserving tribal self government free from state interference.

Preemption has two touchstones. Wyeth v. Levine, 555 U.S. 555, 565 (2009). The first one is the purpose of Congress. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963). The second one is historic police powers are not to be superceded by a Federal act unless that was the clear and manifest purpose of Congress. Lohr,

518 U.S. 485 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). When the text under review is susceptible of more than one reading, courts ordinarily "accept the reading that disfavors preemption." Altria Group, 555 U.S 70, citing Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005). See Executive Order 13132, August 4, 1999, 65 Fed. Reg. 43, 255-August 10, 1999, Section 4. Special Requirements for Preemption ("Agencies shall construe...a Federal statute to preempt State law only where the statute contains an express preemption provision or there is other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute)." Under Executive Order 13131 (c), regulatory preemption is to be restricted to the minimum level necessary to achieve the objectives of the statute, and under (d) and (e), when conflict is a possibility the State should be consulted to avoid any conflict and be given the right to participate in adjudication or rulemaking.

Preemption intent is reflected "through a statute's express language or through its structure or purpose." See Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Express preemption occurs only when a federal statute explicitly confirms Congress's intention to preempt state law. English v. General Electric Co., 496 U.S. 72 (1990). And if such an expression is made, it does not immediately end the inquiry because the question of the substance and scope of displacement of State law still remains. Altria Group, 555 U.S. 70. Implied preemption occurs either by field preemption or conflict preemption. Massachusetts Ass'n. of HMOs v. Ruthardt, 194 F3d 176, 179 (1st Cir. 1999). Field preemption is inferred if a federal regulatory scheme is so pervasive as to "occupy the field" in that area of the law. Gade v. National Solid Waste Mgmt. Ass'n., 505 U.S. 88, 98 (1992). Conflict preemption arises when it

is impossible to comply with both state and federal law or when the state law is an obstacle to the achievement of Congress's discernible objectives. Florida Lime & Avocade Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963) (actual conflict); Gade v. National Solid Waste Mgmt. Ass'n., 505 U.S. 88, 98 (1992); Crosby v. National Foreign Trade Council, 530 U.S. 363, 372-373 (2000) (obstacle).

It seems reasonably clear that the Indian Mineral Leasing Act, 25 USC 396a-396g, does not preclude, by preemption or otherwise, all tribal authority to regulate mineral leases. The Supreme Court addressed the argument in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). The petitioners in Merrion opposed a severance tax imposed by the tribe on certain oil and gas leases. The petitioners argued that the Omnibus Indian Mineral Leasing Act preempted regulation of the leases by the tribe, and, therefore, the tribe did not have authority to impose a severance tax. The Supreme Court disagreed. The Court held that the Act did not preempt tribal regulation and it did not prevent the tribe from imposing the tax. Id. at 150. The inescapable result of Merrion, and Southland Royalty Co. v. Navajo Tribe, 715 F2d 486 (10th Cir. 1983), is that the Omnibus Indian Mineral Leasing Act does not preempt all tribal attempts to regulate mineral leases.

Defendants' position on preemption is made by each defendant and all of their arguments subsumed thoroughly and meticulously in the July 30, 2014, memorandum of law in support of the motion to dismiss the complaint filed by EOG Resources, Inc., at pages 11 to 35. First, a review of the arguments reflects no language stating that exclusive jurisdiction is vested in an administrative proceeding under the Department of Interior or in federal court or that Tribal court jurisdiction is barred. There is no express preemption. Second, allowing Tribal members to

maintain a breach of contract action under Tribal law based on loss of royalties because of flaring does not make it impossible to follow federal law on the subject or create an obstacle to Congress's discernible objectives. Indeed, 30 USC 1732 (a) permits cooperative agreements with tribes "to carry out inspection, auditing, investigation, or enforcement" of oil and gas extraction on Indian trust lands. Nothing in the present lawsuit has anything to due with effecting title to trust lands and no termination of leases is requested, either one of which would lie solely and exclusively with the Secretary of Interior.

Defendants make a number of arguments supporting their position that a breach of contract for royalties cannot be maintained here. First, they argue that only the Secretary can collect royalties. That may be true as to royalties easily computed under the lease, but royalties lost because of improper flaring stand in a different position because the amounts lost are uncertain, remain to be calculated, and are objected to being paid by defendants. Any royalties due can be ordered by the Court to be paid to the Secretary for proper distribution to those entitled, including communitized interest holders, as opposed to the plaintiffs directly. Second, it is argued that the lease does not provide for application of tribal law. The lease does, however, require the lessee to exercise reasonable diligence, carry on in a good and workmanlike manner in accordance with approved methods and practice, and prevent waste. There is nothing in the lease saying that enforcement of this provision cannot be maintained in Tribal court. All three of the terms should have the same meaning and elements in whatever Court or administrative body an enforcement action is brought and do not differ significantly from 43 CFR 3162.7-1 (d) (duty to prevent avoidable loss, duty to pay royalties when avoidable loss incurs due to negligence or violation of regulations, orders, or citations). Defendants cite NTL-4A dealing with

compensation due for avoidably lost oil and gas and when flaring can occur. Any standards set forth presumably reflect industry standards which would be considered as the prevailing standard in this Court. Contrary to the position of defendants, it is not a foregone conclusion that contrary determinations on loss and royalties will be determined under different standards. Third, the complaint in this case does not allege or seek penalties or punitive damages so it makes no difference that only the Secretary can pursue penalty damages.

Defendants cite several cases applying traditional preemption analysis. While one of these cases involved a dispute over oil and gas operations on Indian lands (Coosewoon), none addressed the question of tribal court jurisdiction, much less applied traditional preemption analysis to the determination of that question. See Coosewoon v. Meridian Oil Co., 25 F.3d 920 (10th Cir. 1994) (addressed traditional preemption analysis involving the interplay between conflicting state and federal laws where plaintiff Indians brought a state court action claiming violation of Oklahoma state law regarding payment of oil and gas royalties, holding "given the pervasive federal regulation concerning Indian oil and gas leases ..., Plaintiffs' state law cause of action ... is preempted."); Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) (addressed traditional preemption analysis involving the interplay between conflicting state and federal laws, holding that federal regulations promulgated by the Federal Home Loan Bank Board as empowered by the Home Owners' Loan Act have no less preemptive effect than federal statutes.); Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) (addressed traditional preemption analysis involving the interplay between conflicting state and federal laws, holding that Georgia common law regarding design defects was not preempted by the National Traffic and Motor Vehicle Safety Act under either express or implied preemption); and Maryland v.

Louisiana, 451 U.S. 725 (1981) (addressed traditional preemption analysis involving the interplay between conflicting state and federal laws, holding that a Louisiana tax on natural gas entering the state was preempted by the Natural Gas Act under conflict preemption).

Two other cases are cited by defendants which have no bearing upon the application of traditional preemption analysis to the question of tribal court jurisdiction. Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985), addressed tribal jurisdictional authority in the context of a Navajo tribal tax imposed on oil and gas operations on Indian lands holding that while the Secretary of the Interior has issued comprehensive regulations governing the operation of oil and gas leases, approval of the Secretary was not required for the tribe to impose taxes on oil and gas operations. Pawnee v. United States, 830 F.2d 187 (Fed.Cir. 1987), addressed the fiduciary relationship between the Secretary of the Interior and Indian lessors under oil and gas leases holding that the Secretary does owe the Indian lessors a fiduciary duty, but ultimately holding that the plaintiff class of Indians failed to state a claim for breach of that duty.

Gaming World Int'l., Ltd. v. White Earth Chippewa Tribe, 317 F3d 840 (8th Cir. 2003), involved whether the plaintiffs there could assert federal court jurisdiction, not whether federal court jurisdiction was exclusive. The Eighth Circuit found that state, not tribal law, was preempted because of the far reaching federal regulatory scheme. Indeed, the Eighth Circuit found that tribal court had to be exhausted, meaning that the Eighth Circuit was not finding that the tribal court had no jurisdiction despite the far reaching federal regulations in the area. El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999), involved an action in the Navajo Tribal Court seeking damages for exposure injuries resulting from defendant's uranium operations. Defendants maintained that plaintiffs' claims were assertions of claims under the Price-Anderson

Act, which specifically provided for exclusive federal jurisdiction, and that tribal jurisdiction was not required to be exhausted. No such provision requiring other than tribal jurisdiction exists in this case.

A number of additional cases are cited for the proposition that federal courts have exclusive jurisdiction over disputes concerning areas of extensive federal regulation. In reality, each case addresses the question of the availability, not the exclusivity, of federal court jurisdiction. See Rainbow Resources, Inc. v. Calf Looking, 521 F. Supp. 682, 684 (D. Mont. 1981), holding, as in Gaming World, that questions involving federal agency regulation of oil and gas operations on Indian land were sufficient to invoke federal question jurisdiction stating that "Congress has made clear its intention, that in the area of oil and gas leases on Indian land, ... [federal court jurisdiction] is permissible;" Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma, 725 F.2d 572 (10th Cir. 1984), a case that did not involve the determination of tribal court jurisdiction, but rather, like Gaming World, involved the question of whether federal court jurisdiction was available under federal question jurisdiction in the context of claims of sovereign immunity, held that because the case implicated the federal regulatory scheme governing oil and gas operations on Indian land, federal questions were presented sufficient to invoke federal court jurisdiction; Superior Oil Co. v. United States, 798 F.2d 1324 (10th Cir. 1968), held, as in Gaming World, that federal question jurisdiction exists where the question is whether a tribal court has exceeded the limits of its jurisdiction, but ultimately holding that the doctrine of tribal court exhaustion required that the issue be first litigated in tribal court.

Rainbow Resources, Inc. v. Calf Looking, 521 F.Supp. 682 (D. Mont. 1981), was a suit against a tribal judge who prevented removal of equipment from a dry well when the lease

incorporated federal regulations allowing removal after authorization from the Geological Survey which had been secured. The unique facts of Rainbow Resources, not present in this case, has resulted in it being distinguished by other courts. Comstock Oil & Gas, Inc. v. Alabama & Coushatta Tribes, 78 F.Supp. 2d 589, 592 (E.D. Tex. 1999); Superior Oil Co. v. Merrit, 619 F.Supp. 526, 530 (D. Utah 1985) ("Superior, on the other hand is not trying to establish its rights under federal law. It is only trying to protect its rights under its leases... .)"; Superior Oil Co. v. United States, 605 F.Supp. 674, 681 n. 4 (D. Utah 1985)("That case (Rainbow Resources) involved a tribal judge's attempt to join an action that a federal regulation required.)"

Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458 (8th Cir. 1993), addressed preemption in the context of tribal sovereign immunity, holding that the Hazardous Materials Transportation Act, like the Price-Anderson Act discussed in El Paso Natural Gas Co., contained a unique preemption clause specifically applying to Indian tribes, thus overcoming the presumption that "[t]ribal courts presumptively exercise civil jurisdiction over the activities of non-Indians on reservation lands unless affirmatively limited by a specific treaty provision or federal statute." Iowa Mut. Ins. Co. v. LaPlainte, 480 U.S. 9, 18 (1987). There is no provision in this case similar to the one in Northern States requiring jurisdiction in a forum other than tribal court.

None of the cases cited by defendants precludes jurisdiction in this Court on a straight-forward contract action like the one presented by plaintiffs' complaint. Preemption is not a bar to this Court's jurisdiction over this action.

EXHAUSTION

Lastly, defendants argue that plaintiffs are required to exhaust administrative remedies

provided under 25 CFR Part 2 and 43 CFR Part 4. The doctrine of exhaustion of administrative remedies is not a strict jurisdictional requirement, but rather a flexible concept tailored to the circumstances of each particular case. South Dakota v. Andrus, 614 F2d 1190, 1192 n. 1 (8th Cir. 1980). Except where exhaustion of administrative remedies is required by statute, not the case here, administrative remedies need not be pursued if the litigant's interest in judicial review outweighs the government's in the efficiency or administrative autonomy that exhaustion is designed to further. Fort Berthold Land and Livestock Ass'n. v. Anderson, 361 F.Supp.2d 1045, 1057 (D. N.D. 2005). Where administrative appeal would be futile and little more than a formality, exhaustion of administrative remedies will not be required. Sioux Valley Hospital v. Bowen, 792 F2d 715, 724 (8th Cir. 1986). Optional, Coteau Properties v. Department of Interior, 53 F3d 1466, 1471 (8th Cir. 1995), or non-prescribed, Pourier v. South Dakota Department of Revenue, 778 NW2d 602, 2010 SD 10 ¶ 13, administrative remedies are not required to be exhausted.

No law of the TAT has been cited requiring exhaustion before bringing the present action. Nothing in TAT Resolution No. 13-070-VJB, Regulation of Flaring of Gas, Imposition of Tax, Payment of Royalties and Other Purposes, requires exhaustion. Moreover, that Resolution does not require administrative action but states that the "MHA Nation Energy Department may enforce" the rule. This element of discretion shows that any remedy provided in the Resolution is speculative. There is nothing in the Resolution authorizing a private party to compel action by the Energy Department.

Administrative remedies available in other jurisdictions, whether the Bureau of Indian Affairs, Bureau of Land Management, or State of North Dakota, are at best optional remedies not

required to be exhausted before proceeding in this Court. While federal administrative remedies may be required to be exhausted before actions in federal court, there is no requirement that they be exhausted before proceeding in this Court. While the remedies of North Dakota may be available against non-Indians, it is doubtful whether North Dakota can apply its laws to leases of trust land located within the exterior boundaries of the Reservation entered into by Indian lessors.

The reason TAT adopted Resolution No. 13-070-VJB was because of the lack of enforcement of flaring by the Bureau of Land Management. It appears that it would be futile to require exhaustion of remedies available through the Bureau of Indian Affairs or Bureau of Reclamation because neither agency appears to have undertaken any satisfactory enforcement action to this point. Futility is an exception to the exhaustion requirement.

CONCLUSION

For all the above reasons, the motions to dismiss by the defendants are denied and this action shall proceed to final resolution.

Dated May 12, 2016.

Terry L. Pechota
Special Judge
Three Affiliated Tribes

ATTEST:

Janice M. S. Herman
Clerk of Courts

FORT BERTHOLD DISTRICT COURT THREE AFFILIATED TRIBES SEAL NEW TOWN, NORTH DAKOTA