EXHIBIT I

MANDAN, HIDATSA & ARIKARA NATION
FORT BERTHOLD RESERVATION

SUPREME COURT
NEW TOWN, NORTH DAKOTA

XTO Energy Inc., EOG Resources, WPX Energy, Marathon Oil Company, Petro-Hunt, L.L.C., HRC Operating, LLC, HRC Resources, LLC (aka Halcon), QEP Resources, Inc., Slawson ExplorationCompany, Inc., Windsor Energy Group, LLC, Kodiak Oil & Gas Corp., Gulfport Energy Corp., and Enerplus, Petitioners, v. Jolene Burr, Ted Lone Fight, Georgianna Danks, Edward S. Danks individually, and Others similarly situated on the Fort Berthold Indian Reservation, Respondents.	)	ORDER AP: 2016-002

This is an appeal from a Memorandum Opinion dated May 12, 2016. The issue raised on appeal is whether the Fort Berthold District Court erred in finding that the District Court had jurisdiction over an alleged breach of an oil and gas lease negotiated under the Indian Mineral Leasing Act (IMLA). We hereby affirm in part and reverse in part.

BACKGROUND

The Respondents filed an amended complaint with the Fort Berthold District Court on September 25, 2014 alleging that Petitioners breached existing mineral leases by failing to prevent waste of oil and gas being developed on lands subject to said leases. Petitioners filed a Motion to Dismiss alleging among other arguments that the Fort Berthold District Court lacked jurisdiction because Petitioners are non-Indian companies, federal law preempts tribal regulation of oil and gas development, and Respondents failed to exhaust administrative remedies. On May 12, 2016 the Fort Berthold District Court issued a Memorandum Opinion denying the Petitioners' Motion to Dismiss. Petitioners timely appealed to the MHA Nation Supreme Court.

Oral Arguments were held before the MHA Nation Supreme Court on May 19, 2017. All parties were present and duly represented by legal counsel.

JURISDICTION OVER PETITIONERS WHO HAVE FILED BANKRUPTCY

We address first a preliminary matter. After the District Court issued its May 12, 2016 Memorandum Opinion, Petitioner Halcon Resources Corp., including HRC Operating and HRC Resources LLC (collectively "HRC") filed a Notice of Suggestion of Bankruptcy with the District Court that HRC filed for bankruptcy and as such are entitled to an automatic stay of an action or proceeding against HRC that was filed or could have been filed before the bankruptcy proceed commenced. Generally, once a party has filed for Chapter 11 bankruptcy and pursuant to section 362(a) of the Bankruptcy Code, the party is entitled to an automatic stay of an action or proceeding against said party that was filed or could have been filed before the bankruptcy proceed commenced. 11 U.S.C. § 101 *et seq*. As the District Court did not rule on the impact of the HRC Notice, we do not address it here but include it in our remand as a matter for the District Court to address and take appropriate action.

JURISDICTION OVER NON-INDIAN PETITIONERS

The jurisdiction of the Mandan, Hidatsa & Arikara Nation (MHA Nation), court system is is governed, first and foremost, by tribal law. *Wilkinson v. Lee*, Civil No. 2010-0673 at 2 (MHA 2010). From time immemorial, the governing bodies of the MHA Nation exercised inherent sovereignty over all persons who entered the Nation's territory. That inherent sovereign authority was formally codified in the 1936 Constitution of the Three Affiliated Tribes, now known as the MHA Nation, which specifically provides for tribal jurisdiction over "all persons and all lands, including lands held in fee, within the exterior boundaris of the Fort Berthold Reservation. MHA Constitution, Art. I (as amended, 1985). Petitioners operate businesses and conduct business activities within the Reservation, and are thus subject to the Nation's legislative, executive and judicial jurisdiction.

Shortly after the creation of the United States of America, its nascent Supreme Court elected to sanction unilateral federal limitations on the inherent sovereignty of the Indigenous nations whose governmental tenure long predated the United States. *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). *Johnson* spawned a long legacy of limiting various aspects of tribal

sovereignty, but importantly, its progency have consistently recognized the pre-exising, inherent sovereign status of tribal nations.

The most infamous modern manifestation of the *Johnson* legacy, *Montana v. U.S.*, 450 U.S. 544, 565 (1981), is often cited for its "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Often overlooked is the fact that the jurisdictional question in *Montana* was framed on "the power of an Indian tribe to regulate hunting and fishing by non-Indians *on lands within its reservation owned in fee simple by non-Indians*." *Id.* at 547 (emphasis added). Even on non-Indian fee land, *Montana* recognized its precedents supported inherent tribal sovereignty over non-Indians in two circumstances now known as the *Montana* "exceptions": first, where non-Indians enter into consensual relationships with the tribe or its members, or second, where non-Indian conduct threatens or has a direct effect on the political integrity, economic security or the health or welfare of the tribe. *Id.* at 565-567

But the *Montana* rule and exceptions only applied to disputes over tribal jurisdiction where non-Indians acted on non-Indian fee land. One year after *Montana*, the U.S. Supreme Court didn't apply or even cite *Montana* in deciding inherent tribal sovereignty extended to non-Indian oil and gas companies developing tribal lands held in trust, *see Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), despite a lengthy dissent arguing among other things that *Montana* applied to deny the asserted tribal regulatory power, *see id.* at 171-172 (Stevens, J., dissenting). One year after *Merrion*, the Court confronted a state's argument that *Montana* somehow allowed the state to regulate, concurrently with the tribe, non-Indian hunting and fishing on tribal lands held in trust. *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983). In rejecting that argument, the Court made clear that *"Montana* concerned lands located within the reservation but *not* owned by the Tribe *or its members*." *Id.* at 330-331 (emphasis in original).

With only one exception, the U.S. Supreme Court decisions limiting tribal jurisdiction over non-Indians since *Montana* have addressed factual situations where the non-Indian's activity was on non-Indian fee land, or land akin to non-Indian fee land. But for that single case, it would be perfectly clear that *Montana's* rule and exceptions do not apply here, where the challenged non-Indian Petitioners' activities were all taken on Indian allotments held in trust.

Thus, under the MHA Nation's governing law, endorsed in concept by cases like *Merrion* and *Mescalaro*, Petitioners' arguments against tribal jurisdiction would fail.

The sole outlier in the U.S. Supreme Court's line of common law *Montana* cases limiting inherent tribal sovereignty over non-Indians is *Nevada v. Hicks*, 533 U.S. 353, 360 (2001), which addressed a jurisdictional dispute on an individual Indian's allotted land. *See State of Nevada v. Hicks*, 944 F.Supp 1455, 1458 (D. Nevada 1996) (noting "[a]t all relevant times, Hicks resided on his allotted land within the boundaries of the Fallon Paiute–Shoshone Colony and Reservation"), and 1461 (noting the non-Indian's activities took place "on the premises of Hicks's allotment"). In determining the importance of jurisdiction there to tribal self-government, the U.S. Supreme Court made no distinction between land owned by the Tribes themselves, and land owned merely by a single tribal member, rather it referred to Hicks' allotment simply as "tribal land." 533 U.S. at 355.[1]

Petitioners argue *Hicks* thus extended *Montana* beyond non-Indian fee lands to tribal lands. That is true, but only in the unique and narrowly constrained context presented. The question in *Hicks* was "whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation." *Id.* at 355. The primary claim made in the tribal court was that the state game warden violated the civil rights of a tribal member (later shown to have committed no state law violations) under 42 U.S.C. § 1983. The Court applied *Montana* to determine that tribal court jurisdiction over the state officer on tribal lands was not necessary to protect tribal self-government given the state's "considerable" interest in execution of process for alleged crimes outside Indian country. *Id.* at 364. But, the Court was absolutely clear that its decision went no further: "Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general." *Id.* at 358 n. 2.

So, with the exception of *Hicks*, which the Court clearly limited to its facts, there is no U.S. Supreme Court decision applying *Montana* to questions of tribal jurisdiction over non-

[1] This clearly and effectively diposes of Petitioners' repeated attempts to treat the allotted mineral leases here as *not* "tribal land," and thus more like non-Indian fee land outside the reach of tribal jurisdiction. Indeed, *Hicks* clearly conflated tribal land and Indian allotments in responding to Justice O'Connor's complaint that the majority "gives only passing consideration to the fact that … this case occurred on land owned and controlled by the Tribes," *id.* at 392 (O'Connor, J., concurring), saying "[t]o the contrary, we acknowledge that *tribal ownership* is a factor in the *Montana* analysis," *id.* at 370 (emphasis added).

Indians on tribal lands. Hence, *Montana's* rule and exceptions do not apply here, where the challenged non-Indian Petitioners' activities were all taken on Indian allotments held in trust. The District Court's jurisdiction over the Respondents' lease-contracts claims against Petitioners, therefore, is clear under binding MHA law.

Even if *Montana* applies, this case clearly falls within that case's "first exception," allowing a tribe to "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." 450 U.S at 565. *Hicks* was clear that consensual relationships with the tribe or its members should be evidenced by "…commercial dealings, contracts or other [private] arrangements." 533 U.S. at 359. In the case at hand the very nature of the dispute is a breach of contract. When a non-member enters into a mineral development contract relative to individually owned allotted lands belonging to tribal members it is clear that a consensual relationship exists between the parties. *Strate v A-1 Contractors*, 520 U.S. 438, 453 (1997), later linked tribal adjudicatory authority to tribal regulatory authority under *Montana*. As such, it is necessary to determine whether the tribe has regulatory jurisdiction over the conduct of non-Indians on individually allotted trust lands on the reservation when those non-Indians have entered into an oil and gas development lease with the individual allottees.

To begin we will look to the status of individually allotted lands and the impact on jurisdiction. As a direct result of the General Allotment Act, land within Indian Country may be owned by a tribe or by individuals. 25 U.S.C. § 334. Tribally owned lands may include trust lands, wherein the federal government holds legal title for the benefit of the tribe; restricted fee lands, wherein a tribe holds legal title subject to restrictions on alienation and encumberance; or fee lands, wherein a tribe acquired legal title to land. Individually owned lands may include allotted trust lands, wherein the federal government holds legal title for the benefit of the individual; restricted fee lands, wherein the individual holds legal title subject to restrictions on alienation and encumberance; or fee lands, wherein an individual holds title to land that is freely alienable. In the case of both tribally owned trust lands and individually allotted trust lands, mineral leases are governed by regulations found in 25 C.F.R. § 212. Indian lands are defined at 25 C.F.R. § 212.3(4) as "any lands owned by any individual Indian or Alaska Native, Indian tribe, band, nation, pueblo, community, rancheria, colony, or other tribal group which owns lands

or interest in the minerals, the title to which is held in trust by the United States or is subject to restriction against alienation imposed by the United States" For purposes of jurisdictional analysis therefore, whether land is owned by the tribe or by an individual tribal member is of little consequence so long as the land is held in trust by the United States, which is the case before us now.

The District Court made reference to *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 579 U.S. __, 136 S.Ct. 2159 (2016) in its Memorandum opinion, a then-pending case that the District Court believed would be dispositive of the jurisdiction question. *Dollar General* involved a tort claim against a non-Indian Defendant who operated a store on trust lands on the reservation. The U.S. Supreme Court affirmed the lower court decision finding that tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating conduct of nonmembers who enter into consensual relationships with a tribe or its members. There was no written opinion in the case as the decision was a 4-4 tie, hence we do not take the position that this case is dispositive to the matter of jurisdiction over non-Indians who enter into oil and gas leases with allotees. *Dollar General* does, however, strongly support the legal authority of tribes to assert civil jurisdiction over the conduct of non-Indians entering into consensual relationships with tribes and tribal members. The authority of tribes is strongest when the conduct of non-members and non-Indians occurs on tribal trust or individually allotted trust lands, as is the case here.

Based upon the foregoing, we find that the Tribe does have jurisdiction over non-Indians who enter into oil and gas leases with allotees relevant to individually allotted trust lands under the consensual relationship exception to the *Montana* general rule. This consensual relationship is evidenced by the oil and gas leases executed by and between the oil and gas companies and the individual Indian allotees.

PREEMPTION

Petitioners also attack the District Court's holding that the federal regulatory scheme for Indian country oil and gas development does not preempt its jurisdiction here. Their arguments are confusing and convoluted, mixing the analyses of cases invoking *Montana's* tribal jurisdiction rules, Congress' so-called "plenary power," the U.S. Supreme Court's so-called "implicit divestiture" authority, and actual preemption rules. Petitioners can be forgiven, in part, because they rely heavily on the U.S. Supreme Court's Indian law jurisprudence, which is hopelessly incoherent and inconsistent. The District Court thoroughly addressed the Petitioners' various arguments, many of which Petitioners iterate on appeal here, and we affirm the Court's holding that federal preemption is not a bar to tribal adjudicative jurisdiction here.

The U.S. Supreme Court has held that Article VI, clause 2 of the federal Constitution, which makes the Constitution, laws and treaties of the United States "the supreme law of the land," preempts state law and state judicial decisions to the contrary. *See Altria Group, Inc. v. Good,* 555 U.S. 70, 76 (2008). Preemption of state law is disfavored, however, because of states' sovereign independence and historic police powers, so finding Congress' clear intent and purpose in legislating on the matter is a dispositive requirement. *See Medronic, Inc. v. Lohr*, 518 U.S. 468, 485-486 (1996). Although that Court has not clearly said so, the presumption against state preemption and the requirement of clear congressional intent logically puts the burden of persuasion on the party claiming preemption of state law.

Federal preemption of state law in an entire field may be "'explicitly stated in [a] statute's language or implicitly contained in its structure and purpose.'" *Gade v. Nat'l Solid Wastes Mngmt. Ass'n,* 505 U.S. 88, 98 (1992) (*quoting Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), and other cases). Implicit field preemption is declared where federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'" or because "'the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.'" *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Preemption is also declared in a field that Congress, acting within its proper authority, has determined must be regulated by its governance exclusive of state regulation. *See Arizona v. U.S.,* 567 U.S. 387, 399 (2012).

All but two of the U.S. Supreme Court's Indian law cases applying the preemption doctrine fall within this latter category,[2] and most have held the intrusion of *state* law into Indian country preempted, even when the state law purports to reach only non-Indians.[3] *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (invalidating a state licensing law regulating the entry of non-Indians into Indian country because of federal authority to control entry into Indian country); *Williams v. Lee*, 358 U.S. 217 (1959) (holding a state court lacked jurisdiction to hear a contract suit by a non-Indian trader against an Indian buyer for a transaction that took place on-reservation because of federal regulation of Indian traders); *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685 (1965) (invalidating a state gross receipts tax on a non-Indian selling goods on-reservation because of federal regulation of Indian traders); *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980) (invalidating a state sales tax on an off-reservation non-Indian who sold goods to an Indian buyer for on-reservation use because of federal regulation of Indian traders); *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980) (invalidating state motor gross receipts and fuel taxes on a non-Indian logging company doing business on an Indian reservation because of federal regulation of Indian timber harvesting); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (invalidating state game laws on non-Indians hunting and fishing on-reservation because of federal management of reservation game resources).

There are two separate justifications offered by the federal Supreme Court for preempting state law in Indian country. One is that like immigration, *see Arizona*, 567 U.S. at 394-395, Indian affairs implicate explicit federal Constitutional authority and uniquely federal interests, *see, e.g., United States v. Wheeler*, 435 U.S. 313, 318 (asserting it is "undisputed" that under the Constitution Congress has "all-encompassing federal [Indian affairs] power" or "plenary authority to legislate for the Indians in all matters"), *and Montana v. Blackfeet Tribe of Indians*,

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[2] See the discussion below on the two federal Supreme Court decisions applying preemption analysis to tribal rather than state law.

[3] We are aware of an anomalous federal Supreme Court decision on preemption of state law. In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), that Court held a state tax on non-Indian oil and gas development on an Indian reservation created by Executive Order was not preempted by the 1938 federal Act. *Cotton Petroleum*, though, was decided in the unique contexts of Executive Order Indian reservations, and intergovernmental taxation, and the Court's decision relied heavily on its recognition that the intergovernmental tax immunity doctrine, which previously was used to protect the federal government and tribes from state taxation, had been "thoroughly repudiated" by modern case law. *Id.* at 174.

471 U.S. 759, 764 (1985) ("[t]he Constitution vests the Federal Government with exclusive authority over relations with Indian tribes"). The second justification is the continuing inherent sovereignty of Indian tribes that predates the existence of the United States: "tribal sovereignty may not be ignored and we do not necessarily apply those standards of preemption that have emerged in other areas of the law," *Bracker*, 448 U.S. at 143, but instead "employ[]a pre-emption analysis that is informed by historical notions of tribal sovereignty, *id.* at 142. Thus, inherent tribal sovereignty forms an important "backdrop against which the applicable treaties and federal statutes must be read" in the federal Court's pre-emption analysis. *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 172 (1973).

This case, of course, does not posit the question whether the State of North Dakota may regulate Petitioners' oil and gas development of tribal allottee minerals, or whether its courts may hear lease-contract cases involving such development. We note the U.S. Supreme Court preemption of state law cases above, though, to frame our inquiry into Petitioners' various arguments that federal regulation of tribal allottee oil and gas development within Indian country preempts *tribal* regulation of such development activities (and any corollary tribal adjudicative authority over it).[4] We approach the issue keeping in mind the federal Supreme Court's repeated emphases of two themes—broad federal authority over Indian affairs, and the continuing inherent sovereignty of Indian tribes—as well as, importantly, their interrelationship. While that interrelationship is complex and potentially confusing, *see, e.g., United States v. Lara*, 541 U.S.

[4] We also observe, from a strictly textualist perspective, there is no constitutional basis for using the federal preemption doctrine to test the limits of tribal sovereignty. Unlike Article I, Section 2, Clause 3, which apportions state representatives and national taxes "excluding Indians not taxed," the Fourteenth Amendment, Section 2, which repeats the "Indians not taxed" phrase, and Article I, Section 8, which delegates to Congress the power to regulate commerce "with the Indian tribes," the federal Constitution's Supremacy Clause is specifically directed at states and does not mention Indians or tribes: it makes the federal Constitution, treaties and federal laws "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Art. VI, cl. 2.* Without acknowledging that omission, the U.S. Supreme Court has applied federal preemption analysis in only two tribal sovereignty cases, which we discuss below. Practically speaking, there is no need to apply federal preemption in these cases as that Court has made clear it reads the so-called Indian Commerce Clause as supporting a "plenary" federal power capable of limiting tribal sovereignty, *cf. United States v. Kagama*, 118 U.S. 375 (1886) (upholding the imposition of federal criminal law to Indian on Indian crimes committed within their reservation), or much more commonly that Court simply invokes the so-called "implicit divestiture" doctrine, *Wheeler*, 435 U.S. at 326, it created to decide for itself what it believes are appropriate and inappropriate exercises of tribal sovereignty, *see, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (finding tribal criminal sovereignty over non-Indian crimes inside Indian country implicitly divested as "inconsistent with [tribes' domestic, dependent] status").

193, 214-215 (2004) (Thomas, J., concurring) (opining that the concepts of plenary federal authority over Indian affairs and the inherent sovereignty of tribes seem "largely incompatible"), just last term the U.S. Supreme Court stated that it "has held firm and fast to the view that Congress's power over Indian affairs does nothing to gainsay the profound importance of the tribes' pre-existing sovereignty," *Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863, 1873 n.5 (2016). Felix Cohen, then an Associate Solicitor of the Department of the Interior who later became the preeminent Indian law scholar, stated the concept more succinctly: "[Tribal] powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty [self-government] are vested in the Indian tribes…." Felix S. Cohen, Handbook of Federal Indian Law 123 (U.S. Dept. Interior 1941).

Largely ignoring that fundamental principle of tribal sovereignty, and how Congress' federal Indian power has often been used to support it (as demonstrated by the various state law preemption cases), some Petitioners argue the IMLA and its implementing regulations create a comprehensive regulatory scheme for developing Indian country mineral resources that preempts tribal courts from adjudging lease-contract disputes between tribal citizens and their non-Indian lessees over such development. Some Petitioners argue *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), supports their assertion of implied field preemption.

Neztsosie is one of the two U.S. Supreme Court decisions expressly applying the preemption doctrine to tribal sovereignty. There, tribal citizens brought tort claims in tribal court against a non-Indian energy company for injuries and wrongful deaths caused by on-reservation uranium mining. The company sought protection in federal court arguing federal law preempted tribal court jurisdiction, but the lower federal courts required the company first exhaust its remedies in tribal court. The U.S. Supreme Court remanded for a determination whether the tribal tort claims constituted "public liability actions" under the Price Anderson Act. The reason was that the Act, which Congress passed in response to the multitude of state and federal cases brought after the Three Mile Island nuclear reactor meltdown, contained an "unusual preemption provision" that "expressed an unmistakable preference for a federal forum, at the behest of the defending party." *Id.* at 484. Hence, the U.S. Supreme Court reasoned, there would no need for tribal court exhaustion if the tribal tort claims were in fact "public liability actions" under the Price Anderson Act. *Id.* at 485-487.

Petitioners concede the IMLA contains no explicit preemption provision demonstrating Congress' preference for federal court adjudication of Indian allottee oil and gas lease disputes. They point to nothing in the Act, its legislative history or its implementing regulations approaching the explicit preemptive language or mechanisms of the Price Anderson Act. Indeed, the U.S. Supreme Court characterized the Price Anderson Act as a kind of "'complete preemption,'" *id.* at 484 n.6 (*quoting Caterpillar Inc. v. Williams* 482 U.S. 386, 393 (1987), that is "'extraordinary,'" *id.*, and "'rare,'" *id.* at 485 n.7.

In this context, the lack of clear congressional intent is critical because its requirement implements the national policy of respecting inherent tribal sovereignty, manifested since the founding of the country. *See, e.g., Worcester v. Georgia*, 31 U.S. 515, 56-57 (1832) (laws from the "commencement of our government . . . treat [tribes] as nations [and] respect their rights"); *Cherokee Nation v. Georgia*, 30 U.S. 1, 13, 16 (1831) (tribes are "domestic dependent nations," and "have been uniformly treated as a state from the settlement of our country"). The clear intent rule also implements democratic norms of consent in the face of unconstrained federal power. *See* Richard Collins, *Indian Consent to American Government*, 31 Ariz. L. Rev. 365 (1989). The United States was founded on the principle of government by consent of the governed. Declaration of Independence ¶ 2 (1776). Yet tribal nations and their citizens were deemed outside the U.S. body politic when the Constitution was adopted and could not consent to its terms. Until the twentieth century, moreover, tribal Indians were not citizens of the United States, and could not vote in state or federal elections. Initially, tribal consent to federal power was achieved through treaties, but Congress ended treaty-making in 1871, 16 Stat. 544, 566 (1871), and did not universalize Indian citizenship until 1924, 3 Stat. 253 (1924). In the interim, Congress assumed vast "plenary power" over Native peoples, unbound by treaty rights or even the constitutional review accorded other laws. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

From the beginning, however, courts subjected exercises of plenary power to the clear intent rule. *See Worcester*, 31 U.S. at 555 (stating that had the treaty been intended to remove tribal self-governance "it would have been openly avowed"); Ex Parte *Crow Dog*, 109 U.S. 556, 572 (1883) (asserting federal jurisdiction over reservations "requires a clear expression of the intention of congress"); *United States v. Celestine*, 215 U.S. 278, 290-91 (1909) (stating that allotment act must "be construed in the interest of the Indian" and "it cannot be said to be clear

that Congress intended" end of guardianship). The U.S. Supreme Court has continued this tradition in the modern era, recognizing that "[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2032 (2014) (requiring "clear" and "unequivocal" congressional intent to abrogate tribal sovereign immunity); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) (noting "proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent"); *Nebraska v. Parker*, 136 S.Ct. 1072, 1078-79 (2016) (demanding "clear" and "unequivocal" congressional intent for diminishment). Indeed, in its only preemption of tribal law case other than Neztsosie, the U.S. Supreme Court applied a "clear indications" test to find Congress had not implicitly preempted tribal regulation of non-Indian oil and gas development companies. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 153 (1982).

Finding no clear congressional intent to preempt tribal court jurisdiction over lease-contract disputes involving allottee oil and gas development in the ILMA, Petitioners fall back on implicit preemption, arguing federal regulation of Indian country oil and gas development is "comprehensive," and therefore completely preempts tribal regulation in the field. That claim is easier to assert than to demonstrate since the U.S. Supreme Court has never described an objective test for determining whether a federal regulatory scheme is preemptively comprehensive. "Ordinarily, the mere existence of a federal regulatory or enforcement scheme, even [a] detailed [one], does not by itself imply pre-emption of state remedies."*English v. General Elec. Co.,* 496 U.S. 72, 87 (1990). Whatever the contours of the question may be, *Merrion* and three other contemporary cases effectively disposes of Petitioners' field preemption argument.

In *Merrion*, non-Indian mineral development companies leased tribal lands from the Secretary of the Interior through the very same IMLA program at issue here. Some years later, the Tribe enacted a tax for severing and removing oil and gas from tribal lands. The companies sought an injunction in federal court, arguing (among other things) the tribal tax was implicitly preempted by the Act's regulatory scheme. The Court began by noting that a "'proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.'" *Id.* at 150 (*quoting*

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978). No clear negative indications were argued or cited. Instead, the Court noted both a statutory proviso[5] saving the right of tribes to lease lands for mining under tribal law approved by the Secretary of the Interior, *Merrion*, 455 U.S. at 151, and an administrative regulation[6] allowing tribal leasing laws to supersede the federal regulations with Secretarial approval, *id. at* 151 n.15. Thus, finding no congressional intent to preempt tribal oil and gas regulation, the Court rejected the companies' implicit preemption argument.

The other three contemporary cases followed *Merrion* just a few years later. *Montana v. Blackfeet Tribe of* Indians, 471 U.S. 759 (1985), was a typical Indian law preemption case, using the preemption doctrine to invalidate state taxes on tribal royalty income from Indian country oil and gas development. There, the U.S. Supreme Court characterized the IMLA as "comprehensive legislation." *Id.* at 763. Similarly, in *Kerr McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 199 (1985), that Court referred to the federal government's regulations issued under the IMLA as "comprehensive." Nonetheless, that Court rejected the argument of non-Indian oil and gas companies that the Tribe could not impose additional requirements upon them—there, Possessory and Business taxes—without the prior approval of the Department of the Interior. Just a few years later, the Court faced another Indian law preemption argument, holding that the IMLA did not preempt a state tax on non-Indian oil and gas development on an Indian reservation created by Executive Order. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

Taken together, *Merrion, Blackfeet Tribe, Kerr McGee* and *Cotton Petroleum* make clear that federal regulation of Indian country oil and gas development is extensive but is not exclusive[7] of all local law. It sometimes preempts state law in the arena, but not always. Federal

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[5] The Court cited 25 U.S.C.A. § 396b (1934), which specified that the tribal law was to conform to a number of specified provisions in the Indian Mineral Leasing Act. *See Merrion*, 455 U.S. at 151. The savings proviso is still good law, although its current versions drops the specific requirement of conformity with the specified provisions. *See* 25 U.S.C.A. § 396b (2017).

[6] The Court cited 25 CFR § 171.29 (1980). That provision also remains good law, but was subsequently recodified at 25 CFR § 211.29.

[7] Finding no assistance from the U.S. Supreme Court's preemption cases, Petitioners beseech us to follow *Rainbow Resources, Inc. v. Calf Looking*, 521 F.Supp. 682 (D. Mont. 1981), the single federal court decision holding no tribal jurisdiction over an oil lease dispute (not involving wasted gas or royalties). In addition to its result, Petitioners find solace in and seize upon the court's comment that Congress granted "exclusive authority" over Indian oil and gas development to the Secretary of the Department of the Interior. Unfortunately, that conclusion is one of three sentences in the single paragraph that might

regulation did not preempt tribal law in the only case decided by the federal Supreme Court on the subject, nor did it require federal approval for additional tribal legal requirements on non-Indian oil and gas developers. For these reasons, we hold that the existing federal regulatory scheme for development of allottee oil and gas resources does not occupy the field to the point where tribal court jurisdiction over lease-contract disputes in the area is preempted.[8]

Petitioners' finally argue that tribal court jurisdiction over these oil and gas lease contracts is implicitly preempted because it would interfere with federal regulation of oil and gas development. In contrast to field preemption cases, the U.S. Supreme Court sometimes decides Congress impliedly or implicitly preempted state law on a particular issue within a field where state law is otherwise not preempted. *See Gade v. Nat'l Solid Wastes Mngmt. Ass'n,* 505 U.S. 88, 98 (1992). In those cases, its inquiry focuses on whether a challenged state law on the particular issue either conflicts with federal law, so that the regulated party cannot comply with both, *see Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or stands as obstacle to accomplishing the purpose of the federal law, *see Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

Some Petitioners' arguments here include only general assertions, without analysis, that tribal adjudication of allottee oil and gas lease-contract disputes would conflict with theIMLA's national goal of uniformity. The U.S. Supreme Court rejected a similar generic argument in

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generously be called analysis on the issue. Worse, the court relied on the wrong doctrine to support it. The court used *Santa Clara v. Martinez*, 436 U.S. 49 (1978), which addressed the question whether Congress intended to waive tribal sovereign immunity in passing the Indian Civil Rights Act, so that federal courts could hear challenges to exercises of tribal governmental power. But the issue in *Rainbow Resources* wasn't whether Congress' Indian mineral legislation waived tribal sovereign immunity thus allowing suits against tribes, but whether the Tribe's inherent sovereignty included judicial jurisdiction to enjoin a non-Indian oil lessee who wished to remove its drilling equipment from the property of an Indian lessor who objected. The *Rainbow Resources* court unwittingly conflated the doctrines of tribal sovereign immunity and tribal sovereignty, leading it to start with the question of tribal court jurisdiction but end its "analysis" with a conviction that Congress' Indian mineral legislation implicitly authorized *federal* jurisdiction for "injunctive relief relating to the enforcement of the regulations" promulgated under the federal statutes. If what it meant by that conclusion was that federal courts have power to enjoin exercises of tribal sovereignty, the U.S. Supreme Court made clear its claim to that power at least as early as 1823 in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

[8] Lower court decisions finding federal court jurisdiction over disputes involving the federal regulatory scheme do not undermine this conclusion. Other than *Rainbow Resources*, none of the cases cited by Petitioners addressed or decided the question of whether federal court jurisdiction was exclusive. See *Coosewoon v. Meridian Oil Company*, 25 F.3d 920 (10th Cir. 1994); *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984); *Comstock Oil & Gas Inc. v. Alabama And Coushatta Indian Tribes of* Texas, 261 F.3d 567 (5th Cir. 2001).

Merrion, where the non-Indian developers asserted tribal taxation would conflict with national energy policies. The Court there noted the developers cited no federal statute restricting tribal taxation, nor did they explain how existing state taxation didn't also conflict with national policy. 455 U.S. at 151-152. That offers a relevant parallel here; in *Poafpybitty v. Skelly Oil Company*, 390 U.S. 365 (1968), that Court sanctioned suit in state court by individual Indian allottees against oil company lessees for the very same resource waste at issue here. Petitioners never explain why state court jurisdiction over the claims at issue here would not similarly conflict with national energy polices.

Some Petitioners' make a more specific preemption assertion: that tribal adjudication of allottee oil and gas lease-contract disputes would conflict with the Bureau of Land Management's (BLM) regulation of those leases, and the developers' activities under them. Petitioners offer no analysis supporting their position of inconsistent operational standards, inconsistent liabilities, and even a surprising claim of potential double liability. Presumably, Petitioners envision a scenario where the BLM decides that no royalties are owed for their extensive flaring of natural gas, but a tribal court decides payment is due.

As noted above, the BLM's regulations for oil and gas development on Indian lands are extensive. Indeed, the very issue presented here—the relationship between the flaring of natural gas from and royalty obligations under development leases—is specifically addressed in the federal regulatory scheme. But unlike some regulatory questions that are undoubtedly complex, the regulatory requirement relevant here is simple and straightforward: mineral lessees are required to pay royalties for gas lost or wasted through their operational negligence. *See, e.g.,* 43 C.F.R. § 3162.7–1(d) (2017) (requiring that an "operator conduct operations in such a manner as to prevent avoidable loss of oil and gas [and shall] be liable for royalty payments on oil or gas lost or wasted … when such loss or waste is due to negligence on the part of the operator"); 43 C.F.R. § 3179.4 (2017) (defining "excess flared gas" as "[a]voidably lost"); 43 C.F.R. § 3179.5(a) (2017) (providing royalties are due on all "avoidably lost" gas); 25 C.F.R. § 211.47 (2017) (providing lessees must "[e]xercise diligence in … operating wells … in a good and workmanlike manner in accordance with approved methods and practices …, [having] due regard for the prevention of waste of oil or gas"); and NTL-4A.I (1980) (providing "[n]o royalty obligation shall accrue on any produced gas … flared with the [Area Oil and Gas] Supervisor's prior authorization … [or that] the Supervisor determines has been unavoidably lost"). The stock

language contained in the Bureau of Indian Affairs' standard tribal mineral lease form, Form 5—5432, attached as Exhibit B to the Respondents' Supplemental Brief, specifically incorporates all of the Department of the Interior's Indian mineral leasing regulations then in force or adopted thereafter, *see* 3(g), and echoes the regulations' central requirement of non-negligent operations to avoid wasted oil and gas in section 3(f), entitled "Diligence, prevention of waste."

So, the applicable federal regulations seek the same goal as the ultimate disposition of Respondents' claim: royalty payments for any gas avoidably lost. Resolution of that claim requires a determination of whether the current rates of natural gas flaring by the Petitioners constitutes negligent waste, and thus imposes upon them a contractual duty to pay royalties on the lost gas. There is no intrinsic reason why a tribal court determination (or for that matter, a state court determination, *see Poafpybitty*, 390 U.S. 365) would conflict with federal regulations or stand as an obstacle to their accomplishment. Hence, there is no conflict preemption here, and the District Court correctly held its jurisdiction was not preempted by the simple existence of a federal regulatory scheme covering the same activities at issue in this case.

We can imagine and appreciate, however, the concern that may have motivated Petitioners to challenge the District Court's jurisdiction here: it is conceivable that the District Court could decide the current rates of natural gas flaring by Petitioners constitutes negligent waste, thus obliging them to pay the Respondents royalties, whereas the BLM Area Supervisor might decide that same flaring is unavoidable loss, meaning no royalty is owed. No party has argued or cited an existing Supervisory authorization or determination on the issue, so a District Court decision either way would not conflict with the regulator's decision. Courts are frequently called upon to decide questions implicating administrative agency regulatory programs in situations where the agency hasn't opined on the particular matter at hand. Nonetheless, because this regulatory regime also presents the unique context of the federal government's role as trustee for tribal and allottee mineral owners, we believe that exercising our discretion to let the Supervisor have the first opportunity to consider the question, bringing to bear on it his superior experience and expertise with the technical aspects of the subject matter, is the more appropriate approach here as we discuss in the exhaustion of administrative remedies section below.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Respondents' complaint alleged the Petitioners breached mineral leases executed by the parties under the IMLA. 25 U.S.C. § 396. As indicate above, the IMLA establishes a consistent system of leasing procedures that apply to mineral leases in Indian lands. For oil and gas leases negotiated and executed under the IMLA, Bureau of Indian Affairs Mineral Development Leasing regulations apply. Those regulations are applicable to leases and permits issued by the BIA for the purpose of developing minerals on Indian lands. 25 C.F.R. §§ 200-227. Indian lands are defined as "lands owned by any individual Indian or Alaska Native, Indian tribe, band, nation, pueblo, community, Rancheria, colony, or other tribal groups which owns the lands or interest in the minerals, the title to which is held in trust by the United States…." 25 C.F.R. § 212.3; 43 C.F.R. § 3160. The BLM is responsible for the supervision and regulation of activities associated with these oil and gas leases or permits issued by the BIA in accordance with the IMLA. 43 C.F.R. § 3160. The IMLA and the regulations mentioned herein do not preclude tribal jurisdiction but rather afford a measure of supervisory and regulatory authority to federal agencies for the negotiation of oil and gas leases as well as the on reservation development of such minerals.

Petitioners reflexively argue that Respondents' claim, which alleges a breach of oil and gas leases is premature for failure to exhaust administrative remedies available under the BLM regulatory scheme. In 1946, Congress enacted the Administrative Procedure Act, 5 U.S.C. §§ 511-599 (1946), to standardize federal administrative procedure and ensure judicial review of agency actions. Generally speaking a private party can be forced to exhaust administrative remedies only if required to do so by statute or if the agency rules both require exhaustion of agency appeals and make the original decision inoperative pending appeal. 5 U.S.C. § 704 (1970). Petitioners cite to no provision of the IMLA or the BLM regulations that require exhaustion. Nor is this an APA case, so section 704 does not apply.

Even before the APA was enacted, the U.S. Supreme Court suggested federal courts had the discretion to require administrative exhaustion. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Parties' claims that implicate administrative regulatory schemes raise policy concerns that caution against judicial decision before agency action. Exhaustion may be required because it serves the twin purposes of protecting administrative agency

authority and promoting judicial efficiency. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). The doctrine is grounded in the courts' respect for Congress' decision to place in the agency the primary responsibility for determining the particular trajectory of the regulatory programs it was charged with implementing, rather than the courts. *Id.* Exhaustion can also facililtate eventual judicial review by compiling an administrative record, especially in complex or technical areas. *Id.* (omitting citations). Nonetheless, there are instances where exhaustion is inappropriate, including prejudice to subsequent judicial review, inadequate administrative remedies, and agency bias. *Id.* at 146-149. In addition, if resort to administrative remedies is futile or would serve no purpose but delay, then exhaustion is not required. *See Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1, 13 (1999) (omitting citations).

This is an issue of first impression for our Court. While Petitioners make no effort to convince us of the merits of adopting the doctrine, we believe it is appropriate to require Respondents to exhaust their administrative remedies with the BLM. The reasons listed by the U.S. Supreme Court are logical, although they have less force for us since the BLM is not a tribal agency, and has not been delegated authority for program administrative by the MHA Tribal Business Council. Yet, the BLM is the agency within the Department of the Interior charged with the responsibility of administering and supervising mineral development on all Indian lands including matters concerning royalties. 25 C.F.R. Part 200; 43 C.F.R. Part 4. Decisions regarding waste resulting from flaring activities under oil and gas leases and any damages resulting from waste in the form of unpaid royalties would come within such supervisory authority. Hence, all of the claims made by the Respondents fall within the regulatory authority of the U.S. Department of Interior, Bureau of Land Management, although such regulatory authority may not be exclusive. *Id.*

Whether looking to the regulations applied by the BLM to flaring activities or to applicable tribal or state regulations, it is clear that the goal of governmental regulations in this area are to prevent waste, protect the rights of property owners and establish administrative procedures for enforcement. It is also clear that comprehensive regulatory schemes are in place, including administrative procedures and remedies for property owners who want to challenge the flaring activities of oil and gas companies within Indian Country. As the federal agency tasked with the supervision and oversight of oil and gas leases executed under the IMLA, the BLM has established administrative procedures and regulations that should be followed before a private

party seeks judicial review of a decision rendered by the BLM. Additionally, the Office of Hearings and Appeals provides two principal components as forums for administrative review, including: 1) Appeals Division consisting of the Interior Board of Land Appeals which serves as the final step for most BLM agency challenges; and 2) Hearings Division consisting of Administrative Law Judges assigned to conduct administrative hearings where laws or regulations permit.

The BLM has procedures in place for property owners to follow should they believe that they are being damaged due to waste, a fact acknowledged by the Respondents' and the lower court. Citing futility, the District Court dispensed with the exhaustion of administrative remedies doctrine despite this acknowledgement of applicable administrative process. The District Court found that an exception to the exhaustion of administrative remedies doctrine existed based upon its assumption that the BLM would not be responsive to complaints of the property owners. On this point we disagree. It is not sufficient to simply assume the regulatory agency will not be responsive. If the agency refuses to act, or makes errors in the interpretation and application of regulations, then the property owners can seek judicial review for appropriate relief. According to the lower court record and the filings in this case, it does not appear the Respondents have filed any complaint with the BLM or other regulatory agency. The District Court relied, in error, upon a resolution by Tribal Council establishing a tribal regulatory scheme applicable to flaring on tribal lands to assume futility.

As stated this court is not convinced that the BLM regulatory authority pertaining to flaring is exclusive; however the record is not clear as to the applicability of any existing tribal regulations to flaring activities on privately owned Indian lands. The Respondents in this case should seek a determination from the BLM prior to seeking judicial review. Because the Tribe doesn't manage the leases of individual allottees, it appears tribal administrative remedies are not available at present. Under the existing Tribal Resolution No. 13-070-VJB it appears that any penalty for violating the Resolution would simply result in civil penalties being owed to the Tribe; no provision in the Tribal Resolution provides Respondents with a remedy for royalties. Under existing tribal regulations it also does not appear that the tribal agency has authority to order the companies like the Petitioners to pay royalties on the wasted gas associated with oil and gas leases between private parties. The record does not reflect that any efforts were made by Respondents to seek an administrative remedy or determination regarding allegations of waste.

CONCLUSION

The Court hereby concludes that the Tribal District Court does have jurisdiction over contractual disputes between non-Indian Petitioners and tribal member allotees on the reservation under oil and gas leases. However, judicial review is premature at this juncture because Respondents have not exhausted their administrative remedies. While we concur with the lower court's opinion on jurisdiction, we find the lower court erred as a matter of procedural `law in finding that exhaustion of administrative remedies was not required. It is imperative to the development of the record to first determine whether waste occurred as a result of the Petitioners' flaring activities. A determination regarding waste due to flaring is an administrative matter that should first be determined by the administrative agency designated to supervise such conduct under the oil and gas leases executed under the authority of the IMLA. Once a determination is made with respect to the alleged waste, any matters regarding royalties owed or not owed to the Respondents may be addressed. If a determination is made by the designated administrative agency that waste occurred and Respondents were not compensated, only then can it be argued that a breach of the oil and gas lease has occurred.

The Memorandum Opinion issued by the District Court on May 12, 2016 is hereby affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Dated this 3rd day of October, 2017

MICHELLE RIVARD PARKS
CHIEF JUSTICE
MHA NATION SUPREME COURT

R. JAMES MAXSON
JUSTICE
MHA NATION SUPREME COURT

JAMES M. GRIJALVA
JUSTICE
MHA NATION SUPREME COURT