IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

Kodiak Oil & Gas (USA) Inc., Plaintiff, vs. Jolene Burr, Ted Lone Fight, Georgianna Danks, Edward S. Danks, and Judge Mary Seaworth, in her capacity as the Chief Judge of the Fort Berthold District Court, Defendants.	Case No. 4:14-cv-085 **SPECIALLY APPEARING DEFENDANT JUDGE MARY SEAWORTH'S MEMORANDUM IN SUPPORT OF RENEWED MOTION TO DISMISS**

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Pursuant to the Federal Rules of Civil Procedure (FRCP) 12(b)(1), (6) and (7), Defendant Judge Mary Seaworth, by and through Fredericks Peebles & Morgan LLP, hereby submit this Memorandum in Support of Motion to Dismiss. In support of the Motion, Judge Seaworth states as follows:

INTRODUCTION

Plaintiff Kodiak Oil and Gas (hereinafter Kodiak) is a company engaged in oil and gas production on trust land located within the boundaries of the Fort Berthold Indian Reservation.[1] It entered into consensual contracts with numerous tribal members for production of oil and gas from those tribal members' on-Reservation trust lands. Some of those tribal members then brought suit in the MHA Court against Kodiak for breaches of those contracts.

The Tribal Court complaint is expressly limited to a claim based upon these on-Reservation contracts, and under the current procedural posture, this Court is required to conclusively assume as fact that Kodiak entered into the alleged contracts with tribal members, that it extracted gas from the tribal members' on-Reservation trust lands, and that Kodiak then breached its contractual duty to pay the tribal members for gas that it extracted.

Kodiak responded by bringing this plainly misguided or disingenuous federal court suit. Its current suit is wholly dependent on an argument that there is not even a colorable claim that the Tribe's Court has jurisdiction over the breach of contract action filed by tribal members related to Kodiak's breach of a contract. But under well-established law, not only is there at least a colorable

[1] EOG Resources recently filed a motion to consolidate its related suit with the present suit, and a motion for preliminary injunction. The tribal officers will be filing a motion to dismiss EOG Resources' claims in the near future.

claim (which is all that must be shown in this pre-exhaustion suit) but the Tribe's Court plainly has jurisdiction.

While this Court should not need to go further than Kodiak's obvious failure to exhaust tribal court remedies, Kodiak's suit also suffers from multiple other independent flaws. To bring a suit against a government officer in his or her official capacity, a plaintiff must plead and prove an applicable waiver or exception to sovereign immunity. Kodiak has brought suit against the Tribal Trial Court's Chief Judge, but has not alleged and cannot allege any facts which would provide the required waiver or exception to sovereign immunity.

Kodiak seeks to have this Court give declaratory and injunctive relief with respect to "tribal governance of Kodiak's alleged conduct involving flaring of gas on [the Fort Berthold Indian Reservation,]" without having exhausted tribal administrative remedies and without having the Tribe, the party whose governance it seeks to diminish, as a party to the suit.

DISCUSSIONS OF FACTS

Facts regarding the *Montana* Rule.

Kodiak makes a frivolous, conclusory allegation that the MHA Court does not have a colorable claim of jurisdiction under the *Montana* Rule. The Tribe's Court actually very plainly has jurisdiction under *Montana*.

There are two *Montana* exceptions.[2]

For the first *Montana* exception, the most relevant facts are that the complaint filed in the MHA Court is expressly limited to a contract claim by tribal members who are the owners or beneficial owners of gas which is being extracted from trust lands on the Reservation; and that

[2] Kodiak brought a facial challenge to the complaint filed in the MHA Court, and the facts regarding that facial challenge are those alleged in the complaint filed in the MHA Court.

Kodiak is breaching its contracts with Tribal Court plaintiffs because Kodiak is failing to pay for gas that it agreed, by contracts, to pay for. The contracts to pay for that gas are expressly tied to on-Reservation trust lands. The Tribal Court complaint seeks remedies solely for breach of the on-Reservation contracts between Kodiak and tribal members. Those facts bring the case within the very core of the first *Montana* exception. This is not even a difficult case.

The facts for purposes of the second *Montana* exception include a colorable claim of tribal jurisdiction based upon environmental and health risks. The MHA Nation's resolution related to flaring, Dkt. 16-1, is based upon the Tribe's governmental finding that gas flaring contributes to air pollution on the Reservation. Additionally, Tribal Court defendants allege that Kodiak's illegal activities are causing adverse health effects and air pollution. Development of the facts necessary to determine if the scope of the alleged harm is sufficient to create Tribal Court jurisdiction under the second *Montana* exception will take substantial court time and effort by the Tribal Court parties. That record is not yet developed, but there is a colorable claim of jurisdiction under the second *Montana* exception.

Facts regarding why the MHA Tribe is a necessary and indispensable party to this suit.

The relief Kodiak seeks is really from the Three Affiliated Tribes of the Fort Berthold Indian Reservation ("Tribes") in the form of relief from enforcement of a lawful tribal ordinance and exercise of civil regulatory jurisdiction over Kodiak. Kodiak asks this Court to issue declaratory and injunctive relief with respect to "tribal governance of Kodiak's alleged conduct

involving flaring of gas on [the Fort Berthold Indian Reservation,]" Dkts. 1, ¶33; 17, ¶41 (emphasis added).[3]

Facts regarding Judge Seaworth's immunity from suit.

Kodiak sued Fort Berthold District Court Judge Mary Seaworth solely in her governmental capacity as the Chief Judge of the MHA Trial Court. Therefore Kodiak is required to plead and to prove a waiver or exception to the Tribe's sovereign immunity. It does not allege, and could not prove, facts which meet its burden. Its sole allegation against Judge Swenson is that a lawsuit was filed in the Tribe's Court against Kodiak by Jolene Burr, Ted Lone Fight, Georgianna Danks, and Edward S. Danks. Judge Seaworth is not the judge assigned to the suit against Kodiak, nor has she issued any substantive orders or held any hearings in the case. Therefore Kodiak does not allege and cannot allege that Judge Seaworth has done anything improper, merely that she is a judge in a court in which a case was filed.

Further, while Kodiak is seeking to challenge the MHA government's regulatory and administrative authority over gas flaring, Kodiak does not allege, and would have no basis to allege, that Judge Seaworth has any role in tribal governance of gas flaring.

Facts regarding lack of conflict between tribal, state, and federal regulation of gas flaring.

Kodiak seeks an injunction against Judge Seaworth based upon a conclusory allegation that it "faces irreparable injury in the form of conflicting federal and tribal regulation, potential litigation under conflicting standards in different courts, interference with and uncertainty in business decision-making, and litigation delay and expense." *Complaint for Declaratory and*

[3] In its thorough opinions, the MHA Court of Appeals painstakingly discussed why there is currently no conflict between and federal and tribal decisions and why there likely never will be. Dkt. 29-9.

Injunctive Relief ("Complaint") ¶32. But it does not allege any facts in support of this allegation either.

The reason Kodiak does not identify a conflict is that there is no conflict. In fact, the Tribe's Appellate Court eliminated any current allegation of conflict when it held that the Tribe's Trial Court should delay ruling on the Tribal Court contract claim to give the federal agency the opportunity to issue a decision on federal law issues that Kodiak claims are related to the contract action pending in the Tribe's Court. Dkt. 29-9 at 17-19. It is inexplicable and inexcusable that after Kodiak won that large victory in the tribal forum, it now returns to this Court, still without having exhausted tribal court remedies and without having exhausted the federal administrative remedies discussed in the tribal appellate court decision.

Additionally, the Tribe's statutes regarding gas flaring copy the substance of the North Dakota laws regarding gas flaring which existed at the time that the Tribe adopted its own laws. *Compare* Three Affiliated Tribes Resolution 13-070, Dkt. 16-1, with N.D. Stat. Ch. 38-08-06.457 2013). The State of North Dakota has expressly agreed that "An oil and gas well that is drilled and completed during this agreement is subject to applicable federal, tribal and state regulations. Oil and Gas Tax Agreement between the Three Affiliated Tribes and State of North Dakota ¶H.3.c. (superseding prior similar tax agreements) Dkt. 16-2. It is therefore doubtful that there would be any conflict; but for current purposes, the relevant point is that Kodiak has not even alleged a conflict applicable to the facts of the present matter.

Nor has Kodiak exhausted the tribal administrative remedies that are available to it. The Tribe's laws expressly provide for administrative exemption from the Tribe's gas flaring laws upon a showing that preventing flaring at the well is not economically feasible. Kodiak does not

allege that it has applied for any flaring exemption as provided for in Three Affiliated Tribes Resolution 13-070, Dkt. 16-1.

Because the Tribe's Court is deferring action to permit the federal agency to issue a decision and because Kodiak has not exhausted the available tribal administrative remedies based upon a claim of alleged supreme federal law, Kodiak plainly lacks a basis for an allegation that the Tribe's Court has violated any federal law or issued any decision which is contrary to federal law.

ARGUMENT

I. MOTION TO DISMISS STANDARD

A. MOTION TO DISMISS UNDER FRCP 12(B)(1)

A motion to dismiss pursuant to Rule 12(b)(1) of the FRCP challenges a court's subject matter jurisdiction. It is fundamental that Kodiak bears the burden of establishing subject matter jurisdiction. *Kokkenen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears," *A-Z Int'l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (citations and quotations omitted).

In considering a factual attack in a motion to dismiss under Rule 12(b)(1), the court is not limited to the facts pled in the federal court complaint, but can and should weigh evidence and determine facts in order to satisfy itself as to its power to hear the case. *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990).

B. MOTION TO DISMISS UNDER FRCP 12(B)(6)

A motion to dismiss pursuant to Rule 12(b)(6) of the FRCP is a challenge to the grounds "entitl[ing him] to relief," and plaintiff's complaint must contain more than labels, conclusions, and formulaic recitations of the elements of a cause of action in order to survive such challenge. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

C. MOTION TO DISMISS UNDER FRCP 12(B)(7)

Under FRCP 12(b)(7), a complaint must be dismissed if it fails to join an indispensable party under FRCP 19. FRCP 12(b)(7). Courts must consider (1) whether a party is "necessary" under Rule 19(a). This inquiry involves whether the court can accord "'complete relief' … among existing parties" or "whether the absent party has a 'legally protected interest' in the subject of the suit" that will be impaired or impeded. *Shermoen v. United States*, 982 F.2d 1312, 1317-18 (9th Cir. 1992). The Court must next determine (2) whether the necessary party can be joined, and if it cannot be joined, (3) whether that party is indispensable such that in "equity and good conscience," the case must be dismissed. *Id.* This inquiry is "'a practical one and fact specific,'" and considers prejudice to the existing and absent parties. *Id.* at 1317 (*quoting Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); FRCP 19(b)).

II. KODIAK FAILED TO EXHAUST TRIBAL REMEDIES

The first issue the Court must address is whether this action should be dismissed for lack of jurisdiction for failure to exhaust tribal remedies.

In this matter, Kodiak's sole claim for federal jurisdiction is that, it alleges, this case presents an issue of whether the Tribe's Court has exceeded federally imposed limitations on tribal court jurisdiction, and that such an allegation presents a federal question under 28 U.S.C. § 1331. It is wrong. While it is conceivable that there could be a federal question at some later date, there is not currently a federal question.

Tribal Courts have the following indisputable jurisdiction over non-Indians:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana v. United States, 450 U.S. 544, 565-66 (1981). With regard to natural resources, the Department of the Interior Solicitor opined that "a tribe may, among other things, regulate and perhaps proscribe uses of natural resources, including water, over which it has regulatory jurisdiction." 1995 DEP SO LEXIS 5, 15-16 (DEP SO 1995). (citing *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989)). Like water, oil and gas are natural resources. In *Solicitor Opinion M-36983*, the Department of the Interior described an "[Indian] Nation's sovereign power to regulate the water use of those within its jurisdiction…as a form of 'ownership' in much the same way that the individual states claim ownership of natural resources." *Id.* at 16-21. "A tribe's sovereign power to regulate reservation resources continues to exist unless divested by Congress". *Id.* (citing *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *Felix S. Cohen's Handbook of Federal Indian Law* 230-32 (1982 ed.)). When, as here, a case has been filed in a Tribe's Court based upon an assertion that the Tribe's Court has jurisdiction, a federal district court cannot proceed with a suit challenging the Tribal Court's jurisdiction until the Tribal Court has fully and finally reviewed and ruled upon the jurisdiction question:

> Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge….Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).

It is settled law that civil jurisdiction over tribal-related activities on trust land presumptively lies in the tribal courts, *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1299 (8th Cir. 1994), and "exhaustion is required before such a claim may be entertained by a federal court." *Nat'l Farmers Union*, 471 U.S. at 857 (emphasis added).

See also, Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Federal policy . . . directs a federal court to stay its hand."); *Krempel v. Prairie Island Indian Community*, 125 F.3d 621 (8th Cir. 1997); *Burlington N. RR Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991) ("[P]roper respect . . . requires" tribal remedy exhaustion.) (emphasis added) (citing *LaPlante*).

Not only is exhaustion of tribal court remedies mandated by Supreme Court precedent, but it is also decreed by the clear weight of authority from the Eighth Circuit Court of Appeals. In *Duncan Energy*, the Court held that *National Farmers Union* and *LaPlante* require exhaustion of tribal court remedies before a case may be considered by a federal district court. 27 F.3d at 1300. In so holding, the Court cited *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993) (recognizing tribal court authority under tribal constitution to exercise jurisdiction over non-Indian operators of liquor establishments on fee-patented land in cities within reservation, and therefore tribal remedies must be exhausted prior to the exercise of jurisdiction by a federal district court); *United States ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273, 1276 (8th Cir. 1987) ("A federal court should stay its hand until tribal remedies are exhausted and the tribal court has had a full opportunity to determine its own jurisdiction."); *Nw. S.D. Prod. Credit Ass'n v. Smith*, 784 F.2d 323 (8th Cir. 1986) (holding that tribal court is the appropriate forum to decide its jurisdictional reach in the first instance).

In fact, most circuits considering this issue have concluded that *National Farmers Union* and *LaPlante* "established an inflexible bar to considering the merits of a petition by the federal court, and therefore requiring that a petition be dismissed when it appears that there has been a failure to exhaust [tribal remedies]," *Smith v. Moffet*, 947 F.2d 442, 445 (10th Cir. 1991), and that the "requirement of exhaustion of tribal remedies is not discretionary, it is mandatory. If deference is called for, the district court may not relieve the parties from exhausting tribal remedies."

Crawford v. Genuine Auto Parts, Co., 947 F.2d 1405, 1407 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992). Finally, disputes arising on the reservation, as this one did, that raise questions of tribal law and jurisdiction, as this one does, must first be addressed in the tribal court. *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986).

The tribal court exhaustion requirement applies even in cases where tribal court jurisdiction is not clearly established by the complaint. Instead, in cases where even a "colorable question" of tribal court jurisdiction exists, principles of comity require that the federal court abstain and require the plaintiff to exhaust Tribal Court remedies. *Stock West Corp. v. Taylor*, 964 F.2d 912, 920-21 (9th Cir. 1992).

The Court in *National Farmers Union* went on to explain that:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

Id. at 855-56. While not foreclosing the possibility that the issue of a tribal court's jurisdiction over non-Indians could become a federal question at some point, the *National Farmers Union* court decreed that the "careful examination" described above is the prerequisite to that federal question being presented. But in the present case, Kodiak has not sought or obtained a merits decision by the MHA courts regarding tribal court jurisdiction. Therefore, there is no Tribal Court action exceeding federally imposed limits on Tribal Court jurisdiction, there is no record for purposes of federal review, and there is no federal question upon which to base jurisdiction at this time.

This rule, known as the exhaustion rule, is based upon "the Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mutual Ins. Co.* 480 U.S. at 14;

id. at 19 ("tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development"); *Duncan Energy Co.* 27 F.3d at 1299; *Weeks Constr., Inc.*, 797 F.2d 668.

One of the primary purposes of exhaustion is to permit a tribal court to develop the factual record from which legal conclusions concerning jurisdiction can flow. *Iowa Mutual Ins. Co.*, 480 U.S. at 19. Once a Tribal Court has created a factual record and issued a ruling based upon it, a party can seek federal review of the Tribal Court's decision on the federal law issues related to jurisdiction. "[O]n review, the district court must first examine the Tribal Court's determination of its own jurisdiction. . . . "[I] n making its analysis, the district court should review the Tribal Court's findings of fact under a deferential, clearly erroneous standard." *Duncan Energy Co.*, 27 F.3d at 1300 (citing *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990)) (emphasis added).

The first federal appellate court to reach the issue, the Ninth Circuit, explained that "[T]he *Farmers Union* Court contemplated that tribal courts would develop the factual record in order to serve the "orderly administration of justice in the federal court." *FMC*, 905 F.2d at 1313. All federal courts which have reached the issue, including the Eighth Circuit Court, have adopted the Ninth Circuit's analysis on this issue of law. *Duncan Energy Co.*, 27 F.3d at 1300 (citing *FMC*); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996) (citing *FMC*).

The only possible federal question is whether the Tribal Court has exceeded its lawful jurisdiction based upon the *Montana* test. Complaint ¶9. Under *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990), Judge Seaworth challenges Kodiak's claim of jurisdiction both on the pleadings and, if Kodiak were to survive that challenge, then on the facts.

The first *Montana* exception applies where a party has entered into a consensual relationship with the Tribe or its members. *Montana*, 450 U.S. at 565-66. Kodiak has entered into such consensual relationships, and the Tribal Court complaint is expressly limited to contract claims by tribal members stemming from oil/gas contracts for trust lands.

To apply the first *Montana* exception, we must also know whether the alleged acts occurred on land owned by the United States in trust for the Tribe/tribal members (in which case the Tribe's Court retains "*plenary*" jurisdiction over non-members, *Plains Commerce Bank v. Long Family Land & Cattle*, 554 U.S. 316, 335 (2008)) or whether the alleged acts occurred on fee land (where the Tribe does not have plenary jurisdiction but does retain significant jurisdiction over non-members under *Montana*). *Id.* at 335 (referring to "the critical importance of land status to the jurisdictional analysis"). Again, the Tribal Court complaint is expressly limited to lands over which the Tribe has plenary jurisdiction.

Here, Kodiak makes a mere conclusory allegation that the first *Montana* exception does not apply, but the facts bringing the matter within the first *Montana* exception appear to be undisputed. In any case, the facts which bring this matter within the core of the first *Montana* exception must be accepted by this Court as undisputed for current purposes.

Kodiak similarly makes a conclusory assertion that the second *Montana* exception does not apply, but it does not make any factual allegation in support of that bald assertion. As discussed below, the second *Montana* exception applies where the alleged "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66.

In their tribal court complaint, Tribal Court Plaintiffs alleged a more than colorable claim that its claim under the second *Montana* exception, and the tribal court litigants have not created

the necessary tribal court record upon which the Tribe's Court could decide whether the matter comes within the second *Montana* exception. To apply the second *Montana* exception, the Tribal Court will need to have detailed facts regarding the extent of its gas flaring and how that impacts the Tribe or its members. These are all facts which require development, and under applicable law that development must occur in the Tribe' Court, and only thereafter can there be review in this Court.

This Court should dismiss Kodiak's *Complaint* as Kodiak wholly failed to exhaust its tribal court remedies. Federal courts may not exercise jurisdiction in an action against a tribal defendant until the plaintiff exhausts tribal court remedies. *Iowa Mutual*, 480 U.S. at 18; *National Farmers*, 471 U.S. 845. It is inappropriate to address the application of tribal law governing oil and gas flaring activity on the Fort Berthold Indian Reservation before giving the Tribal Court the opportunity to decide such issues, as the question depends upon interpretations of tribal law, including the interpretation of a Resolution of the governing body of the Three Affiliated Tribes of the Fort Berthold Indian Reservation entitled, *Regulation of Flaring of Gas, Imposition of Tax, Payment of Royalties and Other Purposes* as that Resolution pertains to Kodiak's activities on the Reservation. *Stock West, supra*, 964 F.2d at 920 (9th Cir. 1992); *accord Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 992 (8th Cir. 1999).

III. THE COURT LACKS SUBJECT MATTER JURISDICTION AS TO DEFENDANT SEAWORTH AND THE THREE AFFILIATED TRIBES BECAUSE THEY ARE CLOAKED WITH SOVEREIGN IMMUNITY

Tribal sovereign immunity is a matter of subject matter jurisdiction which can be challenged in a motion to dismiss for lack of subject matter jurisdiction. Fed. R, Civ. P. Rule 12(b)(1). *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000) (citing *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995)). It is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation; rather it

presents a pure jurisdictional question. Waivers of tribal sovereign immunity are strictly construed, and there is a strong presumption against them. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). This immunity is so powerful that Courts have held there can be no "waiver of tribal immunity based on policy concerns, or perceived inequities arising from the assertion of immunity, or the unique context of a case." *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989), *rev'd on other grounds*, *C & L Enters., Inc.* 532 U.S. 411, 418 (2001) (citations omitted).

Indian tribes enjoy the same immunity from suit enjoyed by sovereign powers and are "subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Oklahoma Tax Comm. v. Citizen Band of Potawatomi Indian Tribe*, 498 US. 505, 509 (1991). "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose," and "to relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (citations omitted). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. Testan*, 424 U.S. 392, 399 (1976)(quoting *United States v. King*, 395 U.S. 1, 4 (1969); *Sac and Fox Nation v. Hon. Orvan J. Hanson, Jr. et al.*, 47 F.3d 1061 (10th Cir. 1995)).

A suit is against the sovereign if "the judgment would expend itself on the public treasury or domain, or interfere with the public administration… or if the effect of the judgment would be "to restrain the government from action, or to compel it to act." *Coggeshall Develop. Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir. 1989). There exist, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). "However, to come within this 'special relief'

exception a claimant must allege and prove that the officer has acted outside the scope of his authority." *Coggeshall*, 884 F.2d at 3 (citing *Larson*, 337 U.S. at 690). A suit will fail, as one against the sovereign, even if it is claimed the officer acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *Johnson v. Matthews*, 539 F.2d 1111, 1124 (8th Cir. 1976). Here as discussed in detail above, Kodiak has not alleged any acts by Judge Seaworth outside the scope of her powers and in fact has not alleged that she has done anything wrong.

A lawsuit against officials acting within their official capacity is nothing more than a claim against the entity. *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985); *Epps v. Duke Univ., Inc*. 447 S.E.2d 444, 447; *Mullis v. Sechrest*, 495 S.E.2d 721, 725 (1998). Immunity from suit for a tribe also applies to tribal officials. *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002), *cert. den.*, 236 U.S. 939 (2002). Sovereign immunity even extends to sub-entities or enterprises of a tribe. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008).

Tribal sovereign immunity extends to individual officers of a tribe named as parties:

> It is clear that a plaintiff may not avoid the operation of tribal immunity by suing tribal officials; "the interest in preserving the inherent right of self-government in Indian tribes is equally strong when suit is brought against individual officers of the tribal organization as when brought against the tribe itself." Accordingly, a tribe's immunity generally immunizes tribal officials from claims made against them in their official capacities…. The general bar against official-capacity claims, however, does not mean that tribal officials are immunized from individual capacity suits arising of actions they took in their official capacities, as the district court held…. Rather, it means that tribal officials are immunized from suits brought against them because of their official capacities – that is because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe.

Native Am. Distrib. at 1296 (footnote and citations omitted).

Where a suit is brought against the agent or official of a sovereign, to determine whether sovereign immunity bars the suit, we ask whether the sovereign "is the real, substantial party in interest." *Id.* at 1296 (quoting *Frazier v. Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001)). Such answer "turns on the relief sought by the plaintiffs." *Id.* at 1297. The rule is "relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Id.* (quoting *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984)).

The Supreme Court has expressly rejected the application of equitable considerations in the context of tribal sovereign immunity. *Three Affiliates Tribes v. Wold Eng'g*, 476 U.S. 877, 893 (1986) ("the perceived inequity of not allowing suit against an Indian tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances.")(internal citation omitted). Thus "the requirements that a waiver of tribal immunity be 'clear' and unequivocally expressed' is not a requirement that may be flexibly applied or even disregarded based upon the parties or the specific facts involved." *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998).

Placing this case in the oil and gas context does not alter the analysis. Here, there was no unequivocal waiver of sovereign immunity. Nothing in the Tribes' Constitution waived sovereign immunity for the causes set forth in Kodiaks' *Complaint*. MHA Constitution, Dkt. 16-3. Nothing in the Tribal Resolution entitled, *Regulation of Flaring of Gas, Imposition of Tax, Payment of Royalties and Other Purposes* waives tribal sovereign immunity.

In this case Kodiak has not brought any claim against the MHA Nation, nor could it. There is simply no applicable waiver of the MHA Nation's sovereign immunity.

Kodiak seeks to evade that fatal flaw by including claims against Fort Berthold District Court Judge Mary Seaworth in her official capacity. However, what is clear from the *Complaint*

is Kodiak wants relief from the imposition of the tribal law including the Resolution entitled, *Regulation of Flaring of Gas, Imposition of Tax, Payment of Royalties and Other Purposes*. *Complaint* at ¶¶ 14-15. Such relief would clearly be against the Tribes. Accordingly, Kodiak's pleading device of suing Judge Seaworth in her official capacity should be soundly rejected.

Additionally, for Kodiak to bring a claim against Judge Seaworth in her official capacity, Kodiak would have to plead and prove a waiver or exception to the Tribe's sovereign immunity protections which otherwise extend to Judge Seaworth. Here Kodiak makes a conclusory allegation against Judge Seaworth, but: 1) Judge Seaworth has not taken any action related to the Tribal Court suit, and therefore has not taken any action outside the scope of her authority; and 2) Judge Seaworth is not the Tribe's administrative or legislative body with authority over gas flaring. Kodiak cannot randomly pick a tribal officer to sue: even if *Ex Parte Young* applies to tribes, Kodiak would have to pick an officer who is alleged to have violated federal law. It has not and cannot allege that Judge Seaworth has violated federal law, and its misguided decision to sue Judge Seaworth therefore must be dismissed based upon sovereign immunity.

IV. THIS CASE MUST BE DISMISSED WITH PREJUDICE BECAUSE KODIAK HAS FAILED TO JOIN THE THREE AFFILIATED TRIBES, WHICH IS A NECESSARY AND INDISPENSABLE PARTY THAT CANNOT BE JOINED BECAUSE OF SOVEREIGN IMMUNITY.

A. THE THREE AFFILIATED TRIBES IS A NECESSARY PARTY

The framework for determining whether a party is necessary is FRCP 19. An absent party is necessary under FRCP 19(a) if any one of the following factors are met: (1) the party "claim[s] an interest relative to the subject of the action and is so situated that the disposition of the action in the [party's] absence may … as a practical matter impair or impede the [party's] ability to protect that interest;" or (2) the court cannot, without the absent party, accord complete relief among the existing parties; or (3) an existing party is left subject to a substantial risk of incurring multiple or

inconsistent obligations in the absent party is not joined. FRCP 19(a). If just one of these criteria are satisfied, the Three Affiliated Tribes is a necessary party.

"Rule 19, by its plain language, does not require that the absent party to actually possess an interest; it only requires the movant to show that the absent party claims an interest relating to the subject of the action." *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001) (citing *Shermoen*, 982 F.2d at 1318 and *David v. United States*, 192 F.3d 951 (10th Cir. 1999)). "Consequently, Rule 19 excludes only those claimed interests that are 'patently frivolous.'" *Id.* "It is the party's claim of a protectable interest that makes its presence necessary." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d. 1015, 1024 (9th Cir. 2002)(emphasis added)(citing *Shermoen v. U.S.*, 982 F.2d 1312, 1317 (9th Cir. 1992), *cert. denied*, 590 U.S. 903 (1993)).

In the present case, the Three Affiliated Tribes claim a sovereign interest relating to the subject of the action, its interest in enforcing the Tribal Resolution entitled, *Regulation of Flaring of Gas, Imposition of Tax, Payment of Royalties and Other Purposes* and is so situated that the disposition of the action in the Tribes' absence may as a practical matter impair or impede the Tribes' ability to protect that interest. The Tribes have a legally protectable interest in the outcome of this case including the Tribes' ability to execute or impose tribal law on parties such a Kodiak that are engaged in activity regulated by tribal law including the regulation of gas flaring, an activity that, left unregulated, adversely affects the environment and the health and safety of Reservation residents.

Attacks on the Tribes' ability to regulate activity on the Reservation and challenges to the Tribes' ability to impose its laws on reservation activity is paramount to the Tribes.

B. THE THREE AFFILIATED TRIBES ENJOY SOVEREIGN IMMUNITY AND CANNOT BE JOINED

Although the Three Affiliated Tribes is a necessary party under FRCP 19(a), it cannot be joined as a party because it enjoys tribal sovereign immunity which has not been waived. *Shermoen*, 982 F.2d at 1318 (Even if a tribe is a required party, it cannot be involuntarily joined "due to [the tribe's] sovereign immunity." Because the Tribes cannot be joined, the court must determine if the Tribes is indispensable to the lawsuit under the FRCP 19(b) factors.

C. THE THREE AFFILIATED TRIBES IS AN INDISPENSABLE PARTY

The Tribes is an indispensable party if, "in equity and good conscience," the court should not allow the action to proceed in its absence. FRCP 19(b); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d. 1015, 1024 (9th Cir. 2002). The courts balance four factors in making the indispensability determination: (1) prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum. *Kescoli v. Babbitt*, 101 F.3d 1304, 1310-1311 (9th Cir. 1996). "If the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *Kescoli*, 101 F.3d at 1311; *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991). "In many cases in which we have found that an Indian tribe is an indispensable party, tribal sovereign immunity has required dismissal of the case." *Peabody W. Coal Co.*, 400 F.3d at 781 (citing *Dawavendewa*, 276 F.3d at 1163); *Am. Greyhound Racing, Inc.*, 305 F.3d at 1027.

1. First Indispensability Factor: Prejudice to any party or to the absent party.

In *American Greyhound*, the Court examined FRCP 19(b) and the Court held that "the first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration

that made a party necessary under Rule 19(a): a protectable interest that will be impaired or impeded by the party's absence." *Am. Greyhound*, 305 F.3d at 1024-25 (citing *Dawavendewa v. Salt River Project Ag. Improvement Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002) and *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991)).

Furthermore, "plaintiffs may not do indirectly what they cannot do directly. Kodiaks cannot get relief from [defendants] that implicates the interests of parties with sovereign immunity." *Timbisha*, 2003 WL 25897083 at 6 (E.D. Cal.) (citing *Pit River Home & Agr.Coop. Ass'n v. United States*, 30 F.3d at 1088, 1097-1103 (9th Cir. 1994).

In this case, it would be prejudicial to proceed without the Tribes because a central issue in this case is whether Kodiak is subject to the Tribes' civil regulations as set forth in the Tribes' flaring resolution and whether the Tribal Court has jurisdiction to civilly adjudicate Kodiak's activities under the Tribal regulation. Thus, the Tribes would be prejudiced if the case were to proceed in its absence.

2. Second Indispensability Factor: The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided.

With respect to the second factor, courts have generally found that where tribal interests are at stake, any decision adverse to the Tribes, no matter how it is framed, will be prejudicial. *Pit River Home*, 30 F.3d at 1102. Accordingly, relief cannot usually be shaped to minimize the prejudice. This is especially so where the Tribes' ability to adequately govern its affairs is implicated. *E.g., Lucero*, 788 F. Supp. at 1183; *Village of Hotvela Traditional Elders v. IHS*, 1 F. Supp. 2d 1022, 1030 (D.Ariz. 1997), *aff'd*, 141 F.3d 1182 (9th Cir. 1998), *cert. denied*, 525 U.S. 1107 (1999); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460-61 (9th Cir. 1994). Similarly, because judgments are not binding on tribal entities, courts have been more willing to find that

adequate relief cannot be afforded without the tribal party's joinder. *Pit River Home*, 30 F.3d at 1102; *Lucero*, 788 F. Supp. at 1133; *Davis v. United States*, 199 F. Supp. 2d, 1164, 1177 (W.D. Okla. 2002).

It is impossible to shape relief or provide other measures that will lessen or avoid prejudice against the interests of the Tribes. The relief requested in Kodiak's Complaint is for a declaration that the Fort Berthold District Court does not have jurisdiction over the tribal court lawsuit against Kodiak and for an injunction prohibiting defendant Judge Mary Seaworth in her official capacity from entertaining or adjudicating claims against Kodiak in the tribal court lawsuit. A suit that asks a federal court to diminish the exercise of the Tribes' sovereign power within its boundaries is inherently prejudicial, and there is no way to shape relief to avoid affecting the Tribes' sovereign interest.

3. Third Indispensability Factor: Whether a judgment rendered in the person's absence will be adequate.

This lawsuit seeks to prohibit a lawsuit from proceeding against Kodiak in Fort Berthold District Court because Kodiak challenges the application of tribal law to its on-reservation oil and gas activities and, in fact, challenges the validity of tribal law in the first instance. Any type of injunctive relief in the Tribes' absence would result in the above-described prejudice to the Tribes. In any event, the adequacy factor "cannot be given dispositive weight when the efficacy of the judgment would be at the cost of the absent parties' rights to participate in litigation that critically affects their interests." *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765,777 (D.C. Cir. 1986).

4. Fourth Indispensability Factor, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

Rule 19(b)'s fourth factor requires the court to consider whether there is another adequate forum available to the plaintiffs. In this case there is such a forum, and a case is currently pending

in the Fort Berthold District Court. It is this forum where Kodiak could challenge the Tribal Court's jurisdiction and the application of tribal law to its on-reservation oil and gas activities. Regardless, the existence of an alternative forum is not dispositive and, usually, the case will be dismissed if the other factors weigh in favor of finding the party indispensable. In *Pit River Home*, the circuit court noted that the "lack of an alternative forum does not automatically prevent dismissal of a suit," 30 F.3d at 1102 (citing *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990)). Indeed, the lack of an alternative forum "is a common consequence of sovereign immunity, and the Tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *Am. Greyhound*, 305 F.3d at 1025. This conclusion recognizes Congress's broad authority over Indian matters and the long-standing policy of protecting tribal sovereignty and immunity from suit. *Pit River*, 30 F.3d at 1103; *Quileute*, 18 F.3d at 1460-61. In this regard, the court in *American Greyhound* stated that:

> Some courts have held that sovereign immunity forecloses in favor of the Tribes the entire balancing process under Rule 19(b), but we have continued to follow the four-factor process even with immune Tribes. With regard to the fourth factor, however, we have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs. We conclude, therefore, that inequity and good conscience this action cannot proceed.

305 F.3d at 1025 (citations omitted).

All four FRCP 19(b) factors weigh in favor of a finding that the Three Affiliated Tribes is an indispensable party to this action.

CONCLUSION

Kodiak seeks to prohibit the Three Affiliated Tribes from imposing tribal law on Kodiak's on-reservation oil and gas activity. Kodiak further seeks to have the Fort Berthold District Court Judge enjoined from exercising her official duties in a pending lawsuit, in a suit to which she is not even assigned. In essence, this lawsuit could result in the invalidation or modification of one

of the Tribes' laws and its governmental authority over on-reservation oil and gas activity. The court must dismiss the Complaint for failure to exhaust tribal remedies; because the claims come squarely within MHA Court jurisdiction under the *Montana* Rule, and because the Tribes is a necessary and indispensable party that cannot be joined because it is cloaked with sovereign immunity; and because Defendant Judge Mary Seaworth is also cloaked with sovereign immunity.

Respectfully submitted this 1st day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 2018, I electronically filed the foregoing **SPECIALLY APPEARING DEFENDANT JUDGE MARY SEAWORTH'S MEMORANDUM IN SUPPORT OF RENEWED MOTION TO DISMISS** with the Clerk of the Court via the ECF filing system, which will send notification of such filing to all parties of record.

/s/Ashley Klinglesmith
Ashley Klinglesmith, Legal Assistant