UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

Kodiak Oil & Gas (USA) Inc., now known as Whiting Resources Corporation, and HRC Operating, LLC Plaintiffs, vs. Jolene Burr, Ted Lone Fight, Georgianna Danks, Edward S. Danks, and Judge Mary Seaworth in her capacity as the Acting Chief Judge of the Fort Berthold District Court, Defendants.	)	Civil No. 4:14-cv-00085-DLH-CSM

HRC OPERATING LLC'S RESPONSE IN OPPOSITION TO JUDGE MARY SEAWORTH'S MOTION TO DISMISS

HRC Operating, LLC ("HRC") hereby submits this memorandum in opposition to Specially Appearing Defendant Judge Mary Seaworth's Motion to Dismiss the Complaint of HRC Operating and its Memorandum in Support, Docs. 52 and 53.

INTRODUCTION

Since the arguments and analysis provided by Judge Seaworth in her motion to dismiss Kodiak's[1] complaint, Doc. 45, are also contained in Judge Seaworth's motion to dismiss HRC's complaint, Doc. 53, HRC references and incorporates Kodiak's response brief, Doc. 55, as if fully set forth herein, and submits further arguments in opposition to Judge Seaworth's motion as follows.

[1] Kodiak Oil & Gas (USA), Inc., now known as Whiting Resources Corporation ("Kodiak").

This federal action is brought to determine whether the Fort Berthold District Court has jurisdiction to enforce or contradict regulations of the Secretory of the Interior governing oil and gas operations on federal Indian lands. *See* Doc. 17-1, p. 9, ¶ 3(g). It does not.

Judge Mary Seaworth was named in this suit solely in her official capacity as the Chief Judge of the Tribal Court unlawfully exercising jurisdiction over HRC and others. This action seeks only declaratory and injunctive relief to terminate the Tribal Court lawsuit and the Tribal Court's unlawful exercise of jurisdiction.

FACTUAL BACKGROUND

The background contained in Kodiak's *Memorandum in Support of Kodiak's Motion for Preliminary Injunction* and supporting papers, Docs. 29-30, HRC's *Brief in Support of Motion to Intervene*, Doc. 37, and Kodiak's *Response to Renewed Motion to Dismiss by Defendant Judge Mary Seaworth*, Doc. 55, provide an accounting of the facts and procedural history relevant to this motion. HRC incorporates those summaries here.

ARGUMENT

The argument section of Kodiak's *Response to Renewed Motion to Dismiss by Defendant Judge Mary Seaworth*, Doc. 55, pp. 3-19, provides adequate arguments in response to the erroneous positions advanced by Judge Seaworth. HRC, therefore, references and incorporates Kodiak's arguments as if set forth herein as if they were asserted by HRC itself. In addition, HRC provides the following analysis.

A. The Tribe's Flaring Resolution is Not at Issue.

Judge Seaworth confuses the issues, arguing that the Tribe's flaring regulation is the crux of the underlying Tribal Court lawsuit. It is not. As Kodiak pointed out, Jolene Burr, *et al*.'s Second Amended Complaint in the Tribal Court lawsuit does not even mention the Tribal flaring

regulation, Three Affiliated Tribes Resolution 13-070 (Doc. 16-1), let alone state a claim based upon it. *See* Doc. 17-1, pp. 12-15. In Burr *et al.'s* own words:

> In February, **Plaintiffs filed a Complaint in Tribal Court, alleging violations of the Tribal Council Resolution on the part of Defendants**. Several Defendants responded with the Motions to Dismiss that are now before the Court. The voluminous Motions made a multitude of arguments for dismissal, including generally: lack of standing, preemption, lack of subject matter jurisdiction, failure to exhaust administrative remedies, and failure to join indispensable parties.
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> In conjunction with the instant Response to Defendants' Motions, Plaintiffs move the Court for leave to amend their Complaint in order to clarify the dispute at hand and focus the claims alleged. **Plaintiffs' Second Amended Complaint makes it clear that the instant action is a contract dispute, pure and simple**.

Doc. 17-2, pp. 3-4 (emphasis added).

While Burr *et al.*'s description of their lawsuit does not change the fact that federal laws and regulations dispose of their case, these changes do demonstrate that Resolution 13-070 (Doc. 16-1) is not the basis of their claims. Consequently, Judge Seaworth's repeated arguments concerning Resolution 13-070 having bearing on the present dispute should be disregarded. No party is seeking to enforce jurisdiction under Resolution 13-070.[2] The only issue here is whether the Fort Berthold District Court has jurisdiction to consider and enforce regulations of the Secretary of the Interior relative to oil and gas operations on federal Indian lands. *See* Doc. 17-1, p. 9, ¶ 3(g). It does not.[3]

[2] Though there would be no tribal jurisdiction even if the resolution were at issue, given that oil and gas leasing, exploration, and production activities on federal Indian lands (including flaring and the payment of royalties) are governed by federal laws.

[3] Judge Seaworth also makes a confusing argument concerning Sol. Op. M-36983 regarding the regulation of water. First, Judge Seaworth cited to the wrong solicitor opinion. Sol. Op. M-36983 deals with revisions of the continental shelf oil and gas leasing program. *See* Sol. Op. M-36983. The correct document is Sol. Op. M-36982. Second, Sol. Op. M-36982 has nothing to do with the issues in this suit. In fact, Sol. Op. M-36982 was issued to answer a particular water rights issue under a particular federal statute, for a particular group of allottees, and a particular tribe.

B. Exhaustion of Tribal Remedies is Not an Issue.

Judge Seaworth makes the confusing argument that HRC failed to exhaust tribal remedies. *See* Doc. 53, pp. 12-18. Not only is Judge Seaworth wrong on the procedural posture of the dispute, she is also wrong on the applicable law, *see* Doc. 55, pp. 8-13, and she remains stuck on the irrelevant issue of the Tribes' regulations regarding flaring. As stated above, Resolution 13-070 is not at issue in the underlying Tribal Court lawsuit. *See* Doc. 17-1, pp. 12-15; Doc. 17-2, pp. 3-4.

Additionally, tribal exhaustion is not necessary here because jurisdiction in the tribal court is plainly lacking and tribal exhaustion would only waste time. *See* Doc. 55, pp. 8-13. The United States Supreme Court has stated that principles of tribal exhaustion are merely "prudential, nonjurisdictional" and "a matter of comity." *Strate v. A-1 Contractors*, 520 U.S. 438, 439, 117 S. Ct. 1404, 1406, 137 L. Ed. 2d 66. Federal courts need not refrain from assuming jurisdiction based on tribal exhaustion when (1) it is plain that no federal statute provides for Tribal Court jurisdiction and neither Montana exception applies, (2) a tribal court has no colorable claim to jurisdiction, or (3) the jurisdiction is being asserted for improper purposes. *See Burlington Northern v. Red Wolf*, 196 F.3d 1059 (9th Cir. 2000) (also citing *Strate*, 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661).

> This memorandum is in response to questions that have arisen regarding the interpretation of the Southern Arizona Water Rights Settlement Act (SAWRSA), Pub. L. No. 96-293, Title ID, 96 Stat. 1274 (1982). In order to proceed with the implementation of SAWRSA, the Department requires legal guidance on the nature of the rights in, and authority over, settlement water enjoyed by certain allottees of San Xavier District (allottees) and the Tohono O'odham Nation (Nation).

Sol. Op. 26982. It has nothing to do with oil and gas regulations promulgated by the Secretary of Interior specific to non-Indians operating on Indian land. Those standards are governed by 30 C.F.R. § 221, *et seq*. and 43 C.F.R. § 3179.1 *et seq.*

Moreover, the central purpose of the tribal exhaustion policy is to allow tribal courts an opportunity to first decide their jurisdiction, before federal courts determine the issue with finality. *Strate*, 520 U.S. at 438. Here, the MHA Supreme Court has already issued a decision on the Tribal Court's jurisdiction and stated definitively that tribal jurisdiction exists, which satisfied this rule of comity. *See* Doc. 29-9.

C. Sovereign Immunity is Irrelevant.

Judge Seaworth argues that she is cloaked in sovereign immunity and, thus, the action to enjoin unlawful tribal jurisdiction cannot be brought against Judge Seaworth, as if tribal courts can exercise unlawful jurisdiction over non-Indians without scrutiny. *See* Doc. 53, pp. 18-22. Noticeably absent from Judge Seaworth's argument is any case where a tribal judge or official is sued for injunctive relief from an unlawful exercise of jurisdiction, *see generally id.*, which is the only authority that would be on point. In stark contrast to Judge Seaworth's approach, Kodiak advanced on-point cases that actually concern enjoining tribal officials, acting in their official capacities, from enforcing tribal regulations or exercising jurisdiction over non-members. *See* Doc. 55, pp. 13-15. HRC requests that this Court apply the correct law, as detailed by Kodiak.

D. The Three Affiliated Tribes is Not a Necessary and Indispensable Party.

Judge Seaworth argues that the Three Affiliated Tribes must be added to the present suit because, according to Judge Seaworth, Tribal Resolution 13-070 is at the heart of this case. This misreading of Plaintiffs' claims permeates Judge Seaworth's arguments:

> Tribe has a legally protectable interest in the outcome of this case including the Tribe's ability to execute or impose tribal law on parties such as HRC that are engaged in **activity regulated by tribal law** including gas flaring, an activity that, left unregulated, adversely affects the environment and the health and safety of Reservation residents.

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> In this case, it would be prejudicial to proceed without the Tribe because a central issue in this case is whether HRC is **subject to the Tribe's civil regulations as set forth in the MHA Flaring Resolution** and whether the Tribal Court has jurisdiction to civilly adjudicate HRC's activities under the tribal regulation.
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> ***
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> This lawsuit seeks to prohibit a lawsuit from proceeding against HRC in the Tribal Court because **HRC 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.**
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> Rule 19(b)'s fourth factor requires the Court to consider whether there is another adequate forum available to Plaintiffs. In this case there is such a forum, and a case is currently pending in the Tribal Court. It is this forum where HRC could challenge the Tribal Court's jurisdiction and **the application of tribal law to its on-reservation oil and gas activities**.

Doc. 53, pp. 22-27. Once again, Judge Seaworth's arguments are based on the incorrect premise that Tribal Resolution 13-070 is at issue in the underlying Tribal Court lawsuit. It is not. *See* Doc. 17-1, pp. 12-15; Doc. 17-2, pp. 3-4. Moreover, even if the Tribal Resolution were are issue, it would not follow that the Tribes are a necessary party; such a position is akin to arguing that Congress is a necessary party whenever a statute is challenged in court. For these, and other reasons, all of Judge Seaworth's arguments concerning the need to have the Tribes named as a party can be easily cast aside. *See* Doc. 55, pp. 18-19.

The only issue is whether the Fort Berthold District Court has jurisdiction to consider and enforce any and all regulations of the Secretory of the Interior relative to oil and gas mining leases on allotted Indian lands, against non-Indians. *See* Doc. 17-1, p. 9, ¶ 3(g). The Tribes are not necessary to determine this issue because it is exclusively determined by federal law.

E. The Federal Government has Exclusive Jurisdiction over Federally-Approved Oil and Gas Operations and Flaring Issues on Federal Indian Land.

HRC references and incorporates its discussion regarding the exclusivity of federal jurisdiction as if fully set forth herein, Doc. 59, pp. 3-13, with the following highlights.

Federal jurisdiction, not tribal jurisdiction, exists under 28 U.S.C. § 1331 when an action requires resolution of an issue of federal law. *Nevada v. Hicks*, 533 U.S. 353, 354, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (holding that tribal court lacked jurisdiction over federal civil rights claim). Under *Hicks*, "[t]he historical and constitutional assumption of state-court jurisdiction over federal law cases is completely missing with respect to tribal courts." Indeed, the only time tribal courts may exercise jurisdiction over federal questions is when "statutes proclaim tribal-court jurisdiction over certain questions of federal law." *Id.* at 367. Here, there is no federal statute proclaiming tribal jurisdiction, and there exists no right to circumvent the federal agencies with exclusive jurisdiction over these issues.

With regard to trust or allotted lands, the BIA has promulgated specific regulations which address the leasing, sale, and surrender of oil, gas, and other minerals. *See* 25 U.S.C. § 396a-g; 25 C.F.R. § 211.1, *et seq*. Thus, in the context of oil and gas leasing, "federal regulations and statutes governing tribal oil and gas leases are adequate to invoke federal question jurisdiction." *Comstock v. Alabama and Coushatta Indian Tribes*, 226 F.3d 567 (5th Cir. 2001); *see also Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572, 575-76 (10th Cir. 1984) (holding that federal jurisdiction arises by the express terms of the Indian lease which states the lease is subject to the regulations of the Secretary of Interior); *Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director*, BIA, 24 IBIA 169, 177, 1993 WL 373801, at *5–6 (finding that leases "approved on behalf of an Indian or Indian tribe by the Secretary of Interior in his fiduciary capacity," invoke questions of federal law). In light of the holding in *Hicks*, the import of these

decisions is that disputes relating to oil and gas production on federal Indian lands, since they involve federal questions, are subject to the exclusive jurisdiction of the federal agencies, whose decisions are reviewable only by the federal courts.

Indeed, anticipating the reasoning set forth in *Hicks*, at least one federal court has held that the Secretary of the Interior and the United States District Courts have exclusive jurisdiction over oil and gas operations involving allotted Indian trust lands. *Rainbow Res., Inc. v. Calf Looking*, 521 F. Supp. 682, 683 (D. Mont. 1981).

The federal statutory scheme for tribal oil and gas leasing likewise illustrates that the issues presented in the Second Amended Complaint in the Tribal Court lawsuit (Doc. 17-1) are governed by federal law and subject to resolution through federal administrative processes. Full federal oversight was intended by Congress when it passed the relevant mineral leasing acts. *Comstock*, 261 F.3d at 573 (citing the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108, The Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, and stating that federal jurisdiction is "beyond question" based on the extensive regulatory scheme involved in the administration of oil and gas leases on tribal lands). In fact, the central purpose of the Mineral Leasing Act of 1938 and the Indian Mineral Development Act of 1982 was to establish national uniformity in the oil and gas leasing procedures relating to federal Indian lands. *See* S. Rep. No. 985, 75th Cong., 1st Sess., 2 (1937); *Superior Oil Co. v. United States*, 798 F.2d 1324, 1328 (10th Cir. 1986).

Because the federal government holds legal title, and acts as guardian to trust and allotted Indian lands, federal law, not tribal law, governs these federal oil and gas issues. *See e.g., United States v. Creek Nation*, 295 U.S. 103, 109, 55 S. Ct. 681, 684, 79 L. Ed. 1331 (1935) (finding that the "tribe was a dependent Indian community under the guardianship of the United States"); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415, 100 S. Ct. 2716, 2740–41, 65 L. Ed. 2d 844

(1980) (stating the courts must "recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs"). Based on these statutes, the Department of the Interior has promulgated an extensive and comprehensive scheme regulating all aspects of federal oil and gas operations on Indian land. *See, e.g.*, 25 C.F.R. Parts 211, 212, 214; 43 C.F.R. Part 3160, §§ 3161.4, 3161.2. This federal regulatory scheme specifically addresses the issues upon which Defendants appear to base their claims – namely, flaring and the obligation to pay federal royalties. *See Defendants' Second Amended Complaint*, Doc. 17-1.

Based on the authority granted under the Mineral Leasing Act of 1938 and the Indian Mineral Development Act of 1982, the Department of the Interior promulgated an extensive and comprehensive scheme, including regulations, Onshore Oil and Gas Orders, and NTLs governing all aspects of oil and gas operations on federal Indian lands. *See* 25 C.F.R. Parts 211, 212, 214; 43 C.F.R. Part 3160, §§ 3161.4, 3161.2; 25 U.S.C. §§ 396a through 396g; *see also Comstock*, 261 F.3d at 573. At the time Defendants filed their lawsuit with the Tribal Court, this scheme included the following flaring standards set forth in NTL-4A, Doc. 1-3. Under NTL-4A, the federal government, not the Tribal Court, was to determine when compensation is due, and flaring was subject to the discretion of the Department of the Interior based on circumstances surrounding each individual well. Protecting the federal government's exclusive control over these regulations reduces the risk of inconsistent standards and conflicting decisions from multiple government entities. It also protects oil and gas operators from double liability.

Since the filing of the Second Amended Complaint in the Tribal Court lawsuit, NTL-4A has been replaced with other federal regulations. *See* 43 C.F.R. § 3179.1 *et seq.* (effective January 17, 2017). Like the old standard under NTL-4A, however, these federal regulations fully govern the issues raised in Defendants' Second Amended Complaint. *See* 43 C.F.R. § 3179.1 *et seq.*

(effective January 17, 2017). The new federal regulations govern all aspects of flaring on federal Indian lands, including when flaring is allowed, 43 C.F.R. §§ 3179.7 through 3179.9, when flaring may be considered "unavoidable loss", 43 C.F.R. § 3179.4, specific reporting requirements for operators, 43 C.F.R. § 3179.9, and the time frames when oil and gas operators may flare under specific exemptions. *See, e.g.*, 43 C.F.R. § 3179.8; 81 FR 83008-01. These federal regulations, and their underlying statutes, demonstrate that the federal government, through its agencies, holds full authority and exclusive jurisdiction to govern every aspect of Defendants' claims, which are asserted under leases subject to these regulations and which seek payment royalties on flared gas.

Indeed, it is well settled that issues involving payment of Indian royalties fall under the exclusive jurisdiction of the federal government:

> Given all the Federal statutes dealing with mineral governance, leasing, exploration, operations, and production on Federal and Indian lands, **Congress clearly intended to occupy the field of royalty management and payment of royalty obligations to the United States**. Indeed, with respect to the management and collection of royalties, when Congress enacted FOGRMA, this statute included a wholesale restructuring of Federal oil and gas royalty management.

w&t Offshore, Inc., Appellant, MMS-10-0020-OCS (July 20, 2012) (emphasis added) (followed by a direct quote of 30 U.S.C. § 1702(b)); *Bhp Billiton Petroleum (Americas) Inc., Appellant*, ONRR-11-0015-OCS (Oct. 26, 2012) (same); *Merit Energy Co., Appellant*, MMS-10-0061-OCS (Sept. 10, 2013) (same).

Nowhere does the law allow circumvention of the federal government to bring a private action in Tribal Court for the payment of federal Indian royalties. Thus, the Tribal Court lacks jurisdiction over Second Amended Complaint (Doc. 17-1) filed in the Tribal Court lawsuit and should be enjoined from exercising any further faux jurisdiction. Judge Seaworth's argument to the contrary should be disregarded.

CONCLUSION

For the foregoing reasons, HRC requests that this Court deny Judge Seaworth's Motion to Dismiss the Complaint of HRC Operating, Doc. 52.

Dated this 9th day of March, 2018.

/s/ Paul J. Forster
JOHN W. MORRISON (#03502)
jmorrison@crowleyfleck.com
PAUL J. FORSTER (ND # 07398)
pforster@crowleyfleck.com
JOSHUA B. COOK (ND #07067)
jcook@crowleyfleck.com
CROWLEY FLECK PLLP
100 West Broadway, Suite 250
P.O. Box 2798
Bismarck, North Dakota 58502
(701) 223-6585

THOMPSON & KNIGHT LLP
Gregory S. Meece (*pro hac vice* pending)
gregory.meece@tklaw.com
333 Clay St., Ste. 3300
Houston, TX 77002
(713) 217-2847

ATTORNEYS FOR HRC OPERATING, LLC