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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

BIG HORN COUNTY ELECTRIC COOPERATIVE, INC., **Plaintiff,** **v.** **ALDEN BIG MAN, UNKNOWN MEMBERS OF THE CROW TRIBAL HEALTH BOARD, HONORABLE CHIEF JUSTICE KENNETH PITT, HONORABLE JUDGES DENNIS BEAR DON'T WALK AND MICHELLE WILSON** **Defendants.**	**Case No. CV 17-00065-SPW-TJC** **TRIBAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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BACKGROUND AND STATEMENT OF THE CASE

I. The Tribe and Its Utility Winter Disconnection Law

The Crow Tribe ("Tribe") is federally-recognized and occupies the Crow Indian Reservation ("Reservation"). *See* 84 Fed. Reg. 1,200, 1201 (Feb. 1, 2019). It is undisputed that the Tribe enacted its Utility Winter Disconnection Law, Title 20, Utilities (ECF No. 1-3). in 1986. Scheduling Order, Stipulations 3(a) (ECF No. 76).

Title 20, Section 20-1-110(2) provides in relevant part that no termination of residential electric service on the Reservation may occur between November 1 and April 1, except with specific prior approval of the Crow Tribal Health Board. It further requires notice to the utility customer in writing via personal service or certified mail ten days prior to the termination date, and notice to the Tribal Health Board of the proposed termination. Big Horn County Electric Cooperative (Big Horn) admits to being aware of the Tribe's Utility Winter Disconnection Law since its enactment. Tribal Defendants' Statement of Undisputed Material Facts ("Tribal Defs.' SUF"), No. 6.

II. The Underlying Tribal Court Action

Underlying this federal court action is a civil action brought in Crow Tribal Court by an enrolled member of the Tribe, Alden Big Man. Order, *Big Man v. Big Horn Cty. Elec. Coop., Inc.,* No. 2012-118 (Crow Tribal Ct. May 24, 2013), Ex. 5 to Compl. (ECF No. 1-7) ("Tribal Ct. Order"), Findings of Fact 1, 5, 6. Big Man

indisputably resides on tribal trust land within the Reservation, where he receives electric energy and service from Big Horn. Tribal Defs.' SUF 2 ,7. In January 2012, Big Horn indisputably disconnected Big Man's electric energy and service. Tribal Ct. Order, Findings 4 ,7; Scheduling Order 3(d).

Big Man sued Big Horn in Tribal Court for alleged violations of the Tribe's Utility Winter Disconnection Law, Section 20-1-110(2). Complaint, *Big Man v. Big Horn Cty. Elec. Coop.,* No. 12-118 (Crow Tribal Ct. May 2, 2012), ECF No. 1-2 ("Tribal Ct. Compl."). Big Man claims that any notice given by Big Horn failed to comply with the Section, and that no prior approval of the Tribal Health Board was obtained before disconnection occurred as the Section requires. Tribal Ct. Compl. at 3; Tribal Ct. Order, Finding 5.

The Tribal Court made Findings of Fact, and dismissed Big Man's claims for lack of jurisdiction. Tribal Ct. Order 9. The Tribal Court held that "the Crow Tribe is without legislative jurisdiction to adopt and enforce Title 20" over the activities and conduct of Big Horn, "and as this Court's adjudicative jurisdiction does not exceed the Crow Tribe's legislative jurisdiction, this Court is without jurisdiction over this case." *Id*. (citation omitted). The Tribal Court's ruling was based primarily on an analysis and application of the two tests for tribal civil jurisdiction over non-Indians on non-Indian fee land set forth in *Montana v. United States*, 450 U.S. 544 (1981): (1) whether the non-Indian has entered into a consensual

relationship with a tribe or tribe members; and, (2) whether the non-Indian's activities and conduct have a direct effect on the political integrity, economic security, or health and welfare of the tribe). Tribal Ct. Order 5-9. The Tribal Court was of the view that there was no consensual relationship and no direct effect sufficient to sustain tribal jurisdiction under *Montana*. Tribal Ct. Order 9.

Upon Big Man's appeal, the Apsaalooke (Crow) Appeals Court vacated, reversed, and remanded. Opinion, *Big Man v. Big Horn Cty. Elec. Coop., Inc.,* AP-2013-001 (Crow App. Ct. Apr. 15, 2017) ("Tribal App. Op."). The Tribal Appeals Court ruled that the Tribal Court "has subject matter jurisdiction over this matter." *Id.* at 35. The Tribal Appeals Court was of the view that, while further fact finding would have assisted jurisdictional determinations, there appeared to be facts sufficient to support both a consensual relationship and a direct effect under *Montana*. *Id.* at 28, 29, 31

The Tribal Appeals Court also held that, independently of and alternatively to the *Montana* tests, under cases such as *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), addressing inherent tribal sovereignty over – including the sovereign power to exclude -- non-Indians on tribal land, Big Horn presumptively "is subject to Crow tribal regulation, such as Title 20, because it entered the Crow Reservation to engage ... in commerce." Tribal App. Op. 32. The Tribal Appeals court then cited *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), as support for tribal

adjudicatory jurisdiction on tribal land as well. Having found bases for both tribal regulatory and adjudicatory jurisdiction, the Tribal Appeals Court remanded to the Tribal Court for proceedings on the "non-jurisdictional merits" of Big Man's claims against Big Horn. Tribal App. Op. 35.

III. The Proceedings in This Court Action to Date

Before any further proceedings occurred in Tribal Court, Big Horn brought this action seeking declaratory and injunctive relief on the grounds that exhaustion of tribal remedies had occurred; that the Tribe's Utility Winter Disconnection Law does not apply to Big Horn; and, that the Tribal Court lacks jurisdiction over Big Man's claims against Big Horn arising under that law. Compl., ECF No. 1. In addition to Big Man, Big Horn named as defendants Crow Tribal Appeals Court Justice and Judges and Unknown Members of the Crow Tribal Health Board (collectively, "Tribal Defendants"). *Id*.

Big Man and Tribal Defendants moved to dismiss, primarily on the ground that exhaustion of tribal remedies had not occurred. *See* Mots. to Dismiss and Brs. in Supp., ECF Nos. 31, 32, 33 and 34. Additionally and alternatively, Tribal Defendants also asserted under Rule 12(b)(1) that this Court lacks jurisdiction over Unknown Members of the Crow Tribal Health Board ("Tribal Health Board Defendants") and claims against them should be dismissed on the grounds of sovereign immunity from suit. Mot. to Dismiss and Br. in Supp., ECF Nos. 33, 34

and Reply, ECF No. 45. Tribal Defendants also moved under Rule 12(b)(6) to dismiss Tribal Health Board Defendants for failure to state a claim upon which relief can be granted. *Id*.

Following briefing, and a Magistrate's Findings and Recommendations Report (ECF No. 48), this Court denied dismissal on the ground that Big Horn appeared to have exhausted its tribal remedies. Order, ECF No. 55. This Court's Order did not address the Tribal Defendants' alternative two grounds for dismissal. Tribal Defendants then filed their Answer. Answer, ECF No. 60.

The Magistrate conducted a preliminary pretrial conference after which he issued a Scheduling Order (ECF No. 76). Under the Scheduling Order, Motions to Amend Pleadings were due on or before March 15, 2019. No party filed an amended pleading. Nor did any party disclose Liability or Damages Experts. In April 2019, Tribal Defendants filed a Motion for Judgment on the Pleadings pursuant to Rule 12(c) with respect to Tribal Health Board Defendants, which has been briefed and is pending before the Court. (ECF Nos. 78, 79, 80, 81).

SUMMARY OF ARGUMENT

Like over a dozen states, including Montana, the Tribe's Utility Winter Disconnection Law assists its elderly and disabled citizens. *See* U.S. Dep't of Health, *Seasonal Termination Protection Regulations*, https://liheapch.acf.hhs.gov/Disconnect/SeasonalDisconnect.htm (last visited Nov.

22, 2019) (table of state seasonal utility termination regulations). These laws generally require advance written notice by the utility to the customer and approval by a governmental agency before termination during the winter months. Big Horn, which is the sole provider of electric energy and service to the Reservation, has admittedly been aware of the Tribe's law since it was enacted in 1986.

In January 2012, Big Horn disconnected its electric energy and service to Big Man's residence on tribal trust land. Big Man sued Big Horn in Tribal Court alleging that Big Horn was in violation of the Tribe's Utility Winter Disconnection Law's notice and approval provisions. The Tribal Court dismissed Big Man's claims for lack of jurisdiction but the Tribal Appeals Court reversed, holding that the Tribe had regulatory and adjudicatory jurisdiction over Big Horn. Having determined that Big Horn has exhausted its tribal remedies, this Court should affirm the Tribal Appeals Court's holding.

Big Horn admits that no treaty provisions or acts of Congress divest or diminish the Tribe's inherent jurisdiction over it on tribal land. Alternatively, tribal jurisdiction may be sustained because Big Horn both has entered into a consensual relationship with the Tribe and tribe members, and, its activities and conduct directly affect the health and welfare of the Tribe.

The existence of tribal jurisdiction over Big Horn is not defeated by the forum selection clause in Big Horn's energy service Membership Application

("Application") which purport to vest jurisdiction over claims against Big Horn exclusively in state court. Rather, the validity and enforceability of that clause remain to be determined when Big Man's claims are heard on the merits in the Tribal Court.

ARGUMENT

I. This Motion's Legal Standards

A. This Court Reviews Tribal Court Legal Rulings on Tribal Jurisdiction *De Novo*, and Tribal Court Factual Findings for Clear Error

Because this Court has ruled that exhaustion of tribal remedies has occurred on the federal law issues of tribal regulatory and adjudicatory jurisdiction, Order (ECF No. 55), this Court is acting in a reviewing capacity to the Tribal Courts' decisions on those issues. *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 807 (9th Cir. 2011). This Court reviews tribal courts' legal rulings on tribal jurisdiction *de novo*, and tribal courts' factual findings underlying their jurisdictional rulings for clear error. *FMC Corp. v. Shoshone-Bannock Tribes*, No. 17-35840, 2019 WL 6042469, at *11 (9th Cir. Nov. 15, 2019) (citations omitted). Further, "because tribal courts are competent law-applying bodies, the tribal court's determination of its own jurisdiction is entitled to 'some deference,'" and this Court should be "mindful of 'the federal policy of deference to tribal courts.'" *Id*. at *10 (citations omitted).

B. Summary Judgment

Subsequent to tribal remedies exhaustion, summary judgment is an appropriate means for federal court review of tribal court federal law jurisdictional decisions. *See, e.g., Salt River Project Agric. Improvement and Power Dist. v. Lee*, No. CV-08-08028, 2013 WL 321884, at *1 (D. Ariz. Jan. 28, 2013).

"The purpose of summary judgment is to 'pierce the pleadings and assess the proof in order to see whether there is a genuine need for trial.'" *Bear Gulch Solar, LLC v. Mont. Pub. Serv. Comm'n*, 356 F. Supp. 3d 1041, 1044 (D. Mont. 2018) (citation omitted), *aff'd in part, rev'd in part on other grounds*, 775 Fed. App'x 29 (9th Cir. 2019). "Summary judgment is proper when 'the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'" *Ratcliff v. City of Red Lodge*, CV 12-79, 2016 WL 6135651, at *2 (D. Mont. Oct. 20, 2016) (citation omitted), *aff'd* 694 Fed. App'x 616 (9th Cir. 2017). "Material facts are those which may affect the outcome of the case." *Hernandez v. Skinner*, 383 F. Supp. 3d 1077, 1082 (D. Mont. 2018). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact, and may rely on "materials in the record, including depositions, documents, electronically stored information, affidavits, or declarations, stipulations … admissions, interrogatory answers, or other materials…." *Victory Processing, LLC*

v. Fox, 307 F. Supp. 3d 1109, 1112 (D. Mont. 2018), *rev'd on other grounds*, 937 F.3d 1218 (9th Cir. 2019).

II. This Court Should Affirm The Tribal Appeals Court's Rulings That The Tribe's Utility Winter Disconnection Law Applies To Big Horn And That The Tribal Court Has Jurisdiction To Hear Big Man's Claims Against Big Horn Arising Under That Law

A. Big Horn's Activities and Conduct Occurred on Tribal Trust Land, where the Tribe's Inherent Civil Jurisdiction over Non-Indian Activities and Conduct Remains Intact

"The Crow Tribe first inhabited modern-day Montana more than three centuries ago." *Herrera v. Wyoming*, 139 S. Ct. 1686, 1692 (2019) (citing *Montana*, 450 U.S. at 547). The Tribe's original 8 million acre Reservation was established by two Treaties between the Tribe and the United States, the first in 1851 and the second in 1868. *Montana*, 450 U.S. at 548 (citing the 1851Treaty of Fort Laramie, 11 Stat. 749 and the 1868 Treaty of Fort Laramie, 15 Stat. 649). Several subsequent Acts of Congress reduced the Reservation to slightly fewer than 2.3 million acres. *Id*. (citing Act of Apr. 11, 1882, ch. 74, 22 Stat. 42; Act of Mar. 3, 1891, ch. 543, 26 Stat. 1039-40; Act of Apr. 27, 1904, ch. 1623, 33 Stat. 352; Aug. 31, 1937, ch. 800, 50 Stat. 884; the Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887); and, the Act of June 4, 1920, ch. 224, 41 Stat. 751).

Federal law has long recognized the "inherent sovereign authority" of Indian tribes. *Michigan v. Bay Mills Indian Cmty*, 572 U.S. 782, 788 (2014) (internal quotation marks and citations omitted). Almost 40 years ago, it was held

unequivocally that, pursuant to that authority, this Tribe could exercise civil jurisdiction over the activities and conduct of non-Indians on "land belonging to the Tribe or held by the United States in trust for the Tribe." *Montana*, 450 U.S. at 557. The Court expressly held that the Tribe could completely prohibit non-Indians from hunting and fishing on that land, and could condition their entry to the land by charging a fee or establishing bag and creel limits. *Id*.; *accord* at 566-67 (reiterating that the Tribe can limit or forbid non-Indians from hunting and fishing "on lands still owned by or held in trust for the Tribe or its members").

In contrast to its straightforward confirmation of tribal jurisdiction on tribal land, the Court in *Montana* fashioned a more detailed test for determining whether a tribe has civil jurisdiction over non-Indian activities and conduct on non-Indian fee land. *Id*. at 565-566 (the activities or conduct must either be based on a consensual relationship between the non-Indian and the tribe or its members, or threaten or have a direct effect on the political integrity, economic security, or health or welfare of the tribe).

It is now undisputed that Big Man resides on tribal trust land, where he receives electric energy and service from Big Horn for his residence. Tribal Defendants' SUF 2, 7. Under *Montana* and other authority, the applicability of the Tribe's Utility Winter Disconnection Law to Big Horn on that land is presumed, and the Tribal Court's jurisdiction over Big Man's claims against Big Horn arising

on that land also is presumed. *See Takeda Pharms. Am., Inc. v. Connelly*, CV 14-50, 2015 WL 10985374, at *5 (D. Mont. Apr. 24, 2015) (where non-Indian conduct allegedly and indisputably occurred on tribal trust land, "[t]his fact, by itself," presumes tribal jurisdiction); *accord Walker v. Boy*, CV-19-43, 2019 WL 5700770, at *1 (D. Mont. Nov. 4, 2019) (citation omitted) (tribal jurisdiction is presumed if the events that form the basis for it occurred or were commenced on tribal territory).

In *Window Rock Unified School District. v. Reeves*, the Court, relying on *Montana*, elucidated the "long recognized two distinct frameworks for determining whether a tribe has jurisdiction over a case involving a non-tribal-member defendant." 861 F.3d 894, 898 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 648 (2018). The distinction is based on the status of the land -- on tribal land, tribal civil jurisdiction over non-Indian activities and conduct is presumed to exist, and only a specific Treaty provision or act of Congress can defeat that presumption. *Id*. On non-Indian fee land, tribal civil jurisdiction over non-Indian activities and conduct can be confirmed if one of the *Montana* tests – a consensual relationship or a direct effect – exists. *Id*.

The court in *Window Rock* explained that the presumption of tribal civil jurisdiction over non-Indian activities and conduct on tribal land is grounded in a tribe's sovereign right to exclude non-Indians from tribal land. 861 F.3d at 899;

accord Takeda Pharms., 2015 WL 10985374, at *4-5. The tribal right to exclude, recognized in cases such as *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), is a general, broad right that includes the powers to regulate and adjudicate. *Takeda Pharms.*, 2015 WL 10985374, at *5. It also includes subcomponents such as the right to place conditions on the entry by non-Indians to tribal land and on their continued presence on the land by typical regulatory means including taxes, fees, and other measures with which the tribe is entitled to require compliance. *Window Rock*, 861 F.3d at 899; *accord* at 900 (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997) (affirming that "tribes retain considerable control over *nonmember conduct on tribal land*") (emphasis added)).

The presumption of tribal civil jurisdiction over non-Indian activities and conduct on tribal land generally can be defeated only by an express provision in a Treaty or federal statute. *Window Rock*, 861 F.3d at 899-900, *citing, inter alia, Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).[1] "In interpreting the extent of

[1] As this Court has noted, under *Nevada v. Hicks*, 533 U.S. 353 (2001), certain state interests also can "mitigate" against tribal civil jurisdiction over non-Indian activities and conduct, even on tribal land. *Takeda Pharms.*, 2015 WL 10985374, at *5. As the Court in *Window Rock* explained, a competing state interest typically involves activities or conduct of a state official or an issue of enforcement of state law. 861 F.3d at 901-903. More recently, it has been emphasized that the state interests must be "significant." *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 900, 904 (9th Cir. 2019), *cert. denied*, __ U.S.L.W. ____ (U.S. Nov. 12, 2019) (No. 19-131). Here, as in *Takeda,* Big Horn's claim against tribal jurisdiction "implicates no competing [significant] state interest that would mitigate against tribal … jurisdiction." *Takeda Pharms.*, 2015 WL

any such limits, courts do not 'lightly assume that Congress … intend[ed] to undermine Indian self-government.'" *Id*. at 900 (citing *Michigan*, 572 U.S. at 790). The test is whether tribal jurisdiction has been "affirmatively limited by a specific treaty provision or federal statute." *Id*. (citation omitted).

The non-Indians in *Window Rock* argued that provisions in treaties and federal statutes specific to the tribe in that case precluded tribal jurisdiction over their activities and conduct on tribal land. 861 F.3d at 904-906. After construing the proffered provisions, the Court disagreed, and concluded that tribal jurisdiction was "at least colorable or plausible" and "not plainly lacking." *Id.* at 906 (footnote omitted).

Under this considerable precedent, as the Tribal Appeals Court recognized, the authority of the Tribe to apply its Utility Winter Disconnection Law to Big Horn's activities and conduct on tribal land is presumed. Likewise, Tribal Court jurisdiction over Big Man's claims against Big Horn, which arose on tribal land, is presumed. Significantly, unlike in *Window Rock*, Big Horn admits that there are no treaty provisions or Acts of Congress that divest or diminish the Tribe's civil jurisdiction over non-Indian activities and conduct on tribal land. Tribal Defs. SUF 5. Further, regardless of Big Horn's admission, no Treaty provisions or congressional acts in fact exist to preclude or limit the `Tribe's jurisdiction over Big

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10985374, at *5.

Horn or Big Man's claims against Big Horn. There being no disputed material facts relative to the question of the Tribe and its Court's jurisdiction over Big Horn and Big Man's claims against Big Horn as a matter of law, this Court should affirm the Tribal Appeals Court on this point by granting summary judgment to Tribal Defendants on this issue.

B. Alternatively, Tribal Jurisdiction exists Under Both The *Montana* Consensual Relationship And Direct Effect Tests

The Court in *Montana* held that

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. 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.

450 U.S. at 565-566 (citations omitted).[2] Since the Tribe's law applies to Big Horn on tribal land, and since Big Man's claims against Big Horn here arose on tribal land, this Court need not employ the *Montana* tests to affirm the Tribe's exercise of civil jurisdiction. *See Takeda Pharms.*, 2015 WL 10985374, at *5 (holding that a determination that non-Indian activities and conduct occurred on tribal land

[2] In addition to the two *Montana* tests, tribal civil jurisdiction over non-members on non-Indian fee land may be expressly authorized by federal statute or treaty. *FMC Corp.*, 2019 WL 6042469, at *12 (citations omitted).

"precludes analysis at this point as to whether either *Montana*" test provides a basis for tribal jurisdiction). Nevertheless, both *Montana* tests confirm the Tribe's regulatory and adjudicatory jurisdiction over Big Horn and Big Man's claims against Big Horn.

1. Big Horn Has A Consensual Relationships with the Tribe and Tribe members

"For purposes of determining whether a consensual relationship exists under *Montana*[]," there is no requirement that consent to tribal jurisdiction be express. *Water Wheel*, 642 F.3d at 818; *accord Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa, Inc*., 715 F.3d 1196, 1206 (9th Cir. 2013) (citation omitted), *cert denied*, 571 U.S. 1110 (2013) (under *Montana*, "tribal laws may be fairly imposed on nonmembers if the nonmember consents, either expressly or through his or her actions"). Consent may be established "under the circumstances" by a non-Indian's activities and conduct, as well as by what, based on its agreements, dealings and interactions with a tribe or tribe members, the non-Indian should reasonably expect or anticipate in terms of tribal jurisdiction. *FMC Corp.*, 2019 WL 6042469, at *13 (*quoting Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008)). In addition, the regulation imposed by the tribe must have a "nexus" to the consensual relationship itself. *Knighton*, 922 F.3d at 904 (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001)).

At the outset, Big Horn's provision of electric energy and service to Big Man

indisputably occurs pursuant to written a Membership Application (Application). Compl.at ¶s 17, 24-26. Big Horn expressly alleges that it "has [a] consensual agreement[] with" Big Man. Compl. at ¶ 25. Big Horn admits that its Applications have been recognized by courts as factors in their determinations that Big Horn has entered into consensual relationships with Tribe members under *Montana*. *E.g.*, *Big Horn Cty. Elec. Coop, Inc. v. Adams*, 53 F. Supp. 2d 1047, 1049 (D. Mont. 1999), *aff'd in part and rev'd in part*, 219 F.3d 944, 951 (9th Cir. 2000); Tribal Defs. SUF 8.

As these courts have aptly reasoned, however, it is not the Applications *per se* that constitute the consensual relationship. Rather, while the Applications are relevant to a consensual relationship determination, it is Big Horn's overall chosen undertaking to provide electric energy and service on the Reservation that is the consensual relationship. *Adams*, 53 F. Supp. 2d at 1051; *accord Adams*, 219 F.3d at 951 (Big Horn's "voluntary provision of electrical services on the Reservation … create[s] a consensual relationship").

This is established law. Many factors are determinative of consent, express or implied, to tribal jurisdiction, including: the length of time and the extent of a non-Indian's agreements, dealings or interactions with a tribe or tribe members, and whether the non-Indian was on notice of tribal laws and its subjectivity to those laws. *Water Wheel*, 642 F3d at 818. Examples of length of time found to be

sufficient to support a consensual relationship include sixteen years employment with a tribe, *Knighton*, 922 F.3d at 904; an over eight year economic development and management contract with a tribal company; *Grand Canyon*, 715 F.3d at 1206;[3] an over twenty year lease with a tribe for an economic venture, *Water Wheel*, 642 F.3d at 817-818; and, fifty years of operating a phosphate plant on a reservation, *FMC Corp*., 2019 WL 6042469, at *14.

In general, employment with a tribe, *Knighton*, 922 F.3d at 904, and commercial or economic ventures with a tribe are agreements, dealings or interactions sufficient to support a consensual relationship. *Grand Canyon*, 715 F.3d at 1206; *Water Wheel*, 642 F.3d at 817-818. Long-term high-level employment and a major commercial or economic venture with a tribe also typically impart both an awareness, either express or implied, of applicable tribal law, *FMC Corp*., 2019 WL 6042469, at *14; *Knighton*, 922 F.3d at 904; *Grand Canyon*, 715 F.3d at 1206; *Water Wheel*, 642 F.3d at 820, and a reasonable expectation or anticipation of being subject to tribal jurisdiction. *Id*.

Comparable factors are present here. Since 1940 -- almost 80 years -- Big Horn has voluntarily and continually provided electric energy and service on the

[3] *Grand Canyon* involved an issue of exhaustion of tribal remedies, not an issue of tribal jurisdiction on the merits. The standard for determining whether exhaustion is required is lower than the standard for determining whether tribal jurisdiction exists, but the consensual relationship factors are the same. *Rincon Mushroom Corp. v. Mazzetti*, 490 Fed. App'x 11, 13 (9th Cir. 2012).

Reservation to Tribe members. Compl. at ¶ 24; Big Horn's Resp. to Tribal Defs.' First Set of Interrogs., Reqs. For Admis., and Req. for Produc. of Docs. (attached hereto as Ex. 1), Interrog. No. 1. It has provided this to Big Man since February 1999, *i.e.*, over 20 years. Compl. at ¶ 26; Big Horn Resp. to Interrog. No. 16. When the Tribe's Utility Winter Disconnection Law was enacted in 1986, "approximately 60 percent of the [total] geographic area served by [Big Horn was] located on the …Reservation, … and approximately 50 percent of its members [were] …enrolled members of the … Tribe." *Harris v. Big Horn Cty. Elec. Coop., Inc.*, No. 86-223, 14 Indian Law Rep. 6023 (Crow Tribal Ct. Dec. 9, 1986). When Big Horn began providing electric energy and service to Big Man, Big Horn was providing electric energy and service to approximately "1,700 customers, both tribal and non-tribal members, … within the exterior boundaries of the … Reservation." *Adams*, 53 F. Supp. 2d at 1049. Big Horn operates its electric energy and service transmission and distribution systems throughout the Reservation pursuant to dozens of rights-of-way easements granted by the U.S. Secretary of the Interior with the consent of the Tribe pursuant to 25 U.S.C. §§ 323-328. *Adams*, 53 F. Supp. 2d at 1050; *Adams*, 219 F.3d at 948. By any standard, Big Horn's agreements, dealings, and interactions with the Tribe and Tribe members are long-standing and extensive.

The Tribe's sovereignty certainly pre-dates the inception of Big Horn's electric energy and service provision in 1940. Based on its eight decades of on-

reservation electric energy and service provision to hundreds of Tribe members alone, Big Horn "should reasonably have anticipated that [its] conduct … would fall within the Tribe's [civil] jurisdiction." *Knighton*, 922 F.3d at 904. Further, Big Horn admittedly has been aware specifically of the Tribe's Utility Winter Disconnection Law since at least 1986. Tribal Defs. SUF 6. Indeed, the very first year that the Law was enacted, Big Horn was sued in Tribal Court for non-compliance, based on facts similar to those in this case: failure to comply with, *inter alia*, the notice provisions before disconnecting the electric energy and service to a tribe member's residence on the Reservation. *Harris*, 14 Indian Law Rep. at 6023-24. In short, like the non-Indians in *FMC Corp.*, *Knighton*, *Grand Canyon*, and *Water Wheel*, Big Horn generally is "no stranger to the Tribe's governance and laws," *Knighton*, 922 F.3d at 904, and explicitly has been and is aware of the Tribe's Utility Winter Disconnection Law for over thirty years.

The Tribe's Utility Winter Disconnection Law and Big Man's claims against Big Horn under that law arise "directly out of" Big Horn's consensual relationship (the provision of electric energy and service). *Knighton*, 922 F.3d at 904. The law applies to "any person, firm or corporation, including an electric cooperative, which furnishes electric service within the Crow Reservation." Title 20 § 20-1-101 (l). The Tribe's law, like the laws of many states, governs "Termination of Electric Service" to residential customers of utilities like Big Man. *See generally*, Title 20.

The law specifies the timing and means of notice that is required before service is terminated or disconnected, particularly in the winter. *Id.* § 20-1-110. The law is more than "in the same area" as Big Horn's consensual relationship with the Tribe and Tribe members, *Knighton*, 922 F.3d at 904, and bears more than "a close nexus" to that relationship, *Water Wheel*, 642 F.3d at 817, it is point blank directed at Big Horn's activities and conduct at issue here. *See Salt River,* 2013 WL 321884, at *14-15 (tribal employment regulations have a sufficient nexus to a non-Indian's lease with a tribe to construct and operate an electrical power plant on a reservation, where the lease addresses operation of the power plant and employment of tribe members).

There being no disputed material facts relative to the question of tribal regulatory and adjudicatory jurisdiction over Big Horn under the *Montana* consensual relationship test, and all factors of that test being met, this Court should affirm the Tribal Appeals Court by granting summary judgment to the Tribal Defendants on this issue.

2. Alternatively, Big Horn's Activities and Conduct Directly Affect the Tribe's Health and Welfare

Either *Montana* test can confirm tribal civil jurisdiction. *Grand Canyon*, 715 F.3d at 1205. The second test is whether a non-Indian's activities or conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 1206 (citation omitted). The activities

and conduct at issue "must do more than injure the [Tribes], [they] must 'imperil the subsistence or welfare' of the tribal community." *FMC Corp*., 2019 WL 6042469 at *15 (citations omitted). Nevertheless, the focus for this test should not be on "abstract elements," but on "specific nonmember [activities and] conduct," and should take a functional view of the effect of the activities and conduct on the tribe. *Knighton*, 922 F.3d at 905 (citations omitted).

Theft, deprivation, or mismanagement of significant amounts of tribal property, funds, or income have been held to be activities or conduct that satisfy the direct effect test. *Knighton*, 922 F.3d at 905; *Water Wheel*, 642 F.3d at 819. Significant threats to water, forests, land and other natural resources under tribal control, including threats to resources that affect tribal cultural and religious interests, also have been held to be activities or conduct that satisfy the test. *Rincon Mushroom Corp. v. Mazzetti*, No. 09cv2330, 2017 WL 3174509, at *7-8 (S.D. Cal. July 26, 2017) (citations omitted); *Elliot v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 850 (9th Cir. 2009), *cert denied*, 558 U.S. 1024 (2009); *FMC Corp*. 2019 WL 6042469, at * 14 (citations omitted). Threats to major tribal economic interests also meet the test. *Rincon Mushroom*, 2017 WL 3174509, at *8 citation omitted); *accord Rincon Mushroom*, 490 Fed. App'x at 13; *Water Wheel*, 642 F.3d at 817. The duration of the activities and conduct also is a factor in determining a direct effect. *Knighton*, 922 F.3d at 905.

Non-Indian activities or conduct that threaten tribe members have been held to meet the direct effect test. *FMC Corp*. affirmed a tribal court of appeals' finding that a non-Indian's creation and storage of hazardous waste created an ongoing and extensive threat to the health, welfare and cultural practices of tribe members, based on the waste's presence in soil, ponds, springs, and groundwater. 2019 WL 6042469, at *9, *15. The contamination negatively affected the ecosystem, subsistence fishing, hunting and gathering, and cultural practices of tribe members. *Id*. at *9; *see also Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982) (non-Indian's on-reservation grocery store with alleged dangerous and unsanitary conditions that purportedly violated tribal building, health and safety regulations meets "health and welfare" direct effect test).

Similarly, in *St. Isidore Farm LLC v. Coeur D'Alene Tribe*, where exhaustion of tribal remedies was at issue, a non-Indian located on a reservation was allegedly dumping domestic sewage sludge (septage) into waterways from which there was no discharge. No. 2:13-CV-00274, 2013 WL 4782140, at *1 (D. Idaho Sept. 5, 2013). The tribe alleged that the septage dumping was a risk or threat to the health and welfare of tribe members who might harvest or eat wild game that grazed on land within the reservation that might be affected by the water through surface runoff and percolation of the septage into the ground water. *Id*. at *2. Based on declarations filed by both parties, the court concluded that there was sufficient

evidence that the tribe had met its burden of proof to establish a "health and welfare" direct effect, at least for purposes of requiring exhaustion. *Id*. at *7.

Big Horn's activities and conduct here similarly threaten health and welfare. The non-provision, through disconnection, termination or otherwise, of electric energy and service affects the heat, water, and lighting at residences of Tribe members like Big Man. *Harris*, 14 Indian Law Rep. at 6024. The absence of heat, water, and lighting in a residence can cause stress, illness, and death. The risks of these adverse results are higher in colder climates such as that of the Reservation, especially during the winter, *see* Plaintiff's Response to Tribal Defendants' Request for Admission No. 2, and for elderly and disabled persons. The Tribe's Utility Winter Disconnection Law is intended to prevent or lessen the risks by requiring advance notice to elderly and disabled residential customers during the winter months, and requiring the approval of the Tribal Health Board before disconnection or termination occurs. Notably, the Tribe's law is not a complete prohibition on disconnection or termination; rather, its notice and approval provisions are carefully tailored to address those most at risk when they are most at risk. Many states, including Montana, have similar utility winter shutoff and advance notice and approval provisions in their laws to protect their elderly and disabled citizens' health and welfare. *See* U.S. Dep't of Health, *State Disconnection Policies*, https://liheapch.acf.hhs.gov/Disconnect/disconnect.htm (last visited Nov.

22, 2019) (list of states with utility disconnection policies based on temperature requirements); Mont. Admin. Rs. 38.5.1410, 38.5.1411. The Montana Public Service Commission has opined expressly that these provisions are "in the interests of public health, safety, and welfare." Order No. 6696, *In Re N.W. Energy*, Docket No. D2005.9.145 (Mont. Public Serv. Comm'n Sept. 28, 2005) (copy attached hereto as Ex. 3).

The Tribe's interests are no different. Big Horn's refusal to abide by these simple, straightforward and common provisions puts the health, safety and welfare of many Tribe members at great risk, and undermines the Tribe's ability to provide for and protect its members against that great risk. Big Horn's activities and conduct thus imperil the subsistence and welfare of the tribal community. *FMC Corp.*, 2019 WL 6042469, at *15.

There being no disputed material facts relative to the question of tribal regulatory and adjudicatory jurisdiction over Big Man under the *Montana* direct effect test, and all factors of that test being met, this Court should affirm the Tribal Appeals Court by granting summary judgment to the Tribal Defendants on the issue.

III. Big Horn's Application Forum Selection Clause Neither Determines Nor Precludes Tribal Regulatory And Adjudicatory Jurisdiction Under Federal Law

Given that the issue before this Court is the existence and scope of tribal

jurisdiction, Big Horn's reliance on the forum selection clause in its Application, s*ee* Complaint at ¶s 18, 27, and 30, for its argument that tribal jurisdiction is non-existent or precluded, is misplaced. *See Ninigret Dev't Corp. v. Narragansett Indian Wetuomuck Hous. Auth*., 207 F.3d 21, 33 (1st Cir. 2000) ("the determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to forum-selection provisions"). It is well-established generally that forum-selection clauses do not create subject matter jurisdiction. *Coachella Valley Collection Serv. v. Sasser,* No. SA CV 15-0098, 2015 WL 9255538, at *2 (C.D. Cal. Dec. 18, 2015) (citation omitted); *accord Rote v. Leapfrog Online Customer Acquisition*, 3:16-CV-1435, 2017 WL 1147781, at *3 (D. Ore. Mar. 3, 2017) (citing *Ins. Corp. of Ir., LTD. v. Compaignie Des Bauxites De Guinee*, 456 U.S. 694, 702 (1982). The presence of a forum selection clause does not "obviate the need to address whether subject matter jurisdiction exist[s] in the first place[]." *Coachella Valley*, 2015 WL 9255538, at *2 (citation omitted). *A fortiori*, issues regarding the validity and enforceability of forum selection clauses are not jurisdictional.

This Court should affirm the Tribal Appeals Court's holding of tribal civil regulatory and adjudicatory jurisdiction over Big Horn on tribal land, and the Tribal Appeals Court's direction that Tribal Court proceed to entertain the "non-jurisdictional" issues pertaining to Big Man's claims against Big Horn. Tribal

App. Op. 35. The non-jurisdictional issues presumably would include consideration of any legitimate issues regarding the forum selection clause's validity and enforcement. *See Snowbird Constr. Co., Inc. v. United States*, 666 F. Supp. 1437, 1444 (D. Idaho 1987) (issue of whether tribal housing authority had requisite power under tribal law to consent to state court jurisdiction in contract with non-Indian must be resolved in tribal court); *Picayune Rancheria of Chukchansi Indians v. Rabobank*, No. 1:13–cv–00609, 2013 WL 2434705, at *4 (E. D. Cal. June 4, 2013) (forum selection clause for dispute resolution in non-tribal forum that was agreed to by tribal entity with proper advance authority of tribe to enter into such a clause may be valid and enforceable); *Water Wheel Camp Recreational Area, Inc. v. LaRance,* No. CV-08-0474, 2009 WL 3089216, at *5-8 (D. Ariz. Sept. 23, 2009), *aff'd*, 642 F.3d 802. (purported waivers by a tribe of tribal sovereign rights and authority such as waivers of tribal sovereign immunity from suit and forum selection clauses for non-tribal fora must be "clear and unmistakable"); *see also Fox Drywall and Plastering v. Sioux Falls Constr. Co.*, Civ. No. 12-4026, 2012 WL 1457183, at *10-11 (D.S.D. Apr. 26, 2012) (citing *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1 (1972) (forum selection clauses in contract with tribe must be just and reasonable, and obtained through freely bargained-for agreements negotiated at arms' length).

CONCLUSION

For the reasons set forth above, this Court should affirm the Tribal Appeals Court's holding that the Tribe has civil regulatory and adjudicatory jurisdiction over Big Horn on tribal land by granting summary judgment to the Tribal Defendants on this issue.

Respectfully submitted this 22nd day of November, 2019.

/s/ Melody L. McCoy

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(B), I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double spaced except for footnotes and for quoted and indented material, and furthermore I certify that the word count calculated by Microsoft Word for Windows is 6,453 words, excluding the caption, table of contents and authorities, exhibit list, certificates of service and compliance, which is less than the permitted 6,500 words.

/s/ Melody L. McCoy

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November, 2019, a true and correct copy of the foregoing TRIBAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT was served upon the following via the Court's electronic filing system:

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