Kathryn Seaton
MONTANA LEGAL SERVICES ASSOCIATION
616 Helena Avenue, Suite 100
Helena, MT 59601
Phone: 406-442-9830
Fax: 406-442-9817
kseaton@mtlsa.org

Michael G. Black, Esq.
BECK, AMSDEN & STALPES PLLC
1946 Stadium Drive, Suite 1
Bozeman, MT 59715
Tel: (406) 586-8700
Fax: (406) 586-8960
mike@becklawyers.com

Attorneys for Defendant Alden Big Man

UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA

BIG HORN COUNTY ELECTRIC COOPERATIVE, INC., Plaintiff, v. ALDEN BIG MAN, *et al.*, Defendants.	Case No. 17-cv-00065-SPW-TJC **MEMORANDUM OF DEFENDANT ALDEN BIG MAN IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendant Alden Big Man, by and through counsel, and submits this Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (Doc. 83).

INTRODUCTION

Defendant Alden Big Man ("Big Man") previously filed a Motion for Summary Judgment with supporting materials (Docs. 84-86). Big Man opposes the Motion for Summary Judgment filed by Plaintiff Big Horn County Electric Cooperative, Inc. ("BHCEC"), based mainly on the pending dispositive motions filed by Defendants. Big Man is simply a litigant in Crow Tribal Court seeking to enforce his rights under Crow law, not a tribal officer or tribal official. Therefore, Big Man defers to and joins Tribal Defendants' arguments regarding jurisdictional issues, and refers the Court to their Motion for Summary Judgment and supporting materials filed on November 22, 2019 (*i.e.*, Docs. 87-89), as well as any response filed by the Tribal Defendants to the present Motion.

In its briefing, BHCEC asserts only "the issues of whether the Crow Tribe has inherent sovereign authority to regulate Big Horn and whether provisions of the Title 20 Utilities exceed federal limitations upon tribal regulatory power may be resolved under Rule 56." Plaintiff's Brief (Doc. 83-4) at 4. The main issue raised against Big Man is whether forum and choice of law clauses imposed in a BHCEC "membership application" serve to divest the tribal court of jurisdiction to enforce tribal law on tribal land. Rather than grant relief sought by BHCEC, the Court should affirm the Apsaalooke Appeals Court conclusions regarding jurisdiction and refrain from addressing the merits as to enforceability of the

BHCEC "membership application" signed by Big Man, which is a non-jurisdictional question. Any issue as to viability of choice of venue and law provisions in the BHCEC "membership application" should be first addressed by the Tribal Court.

Should this Court assess the merits regarding the "membership application," this Court should find Paragraph 4 of the BHCEC "Application for Membership and for Electric Service" dated February 15, 1999 (Doc. 1-6) unenforceable. The applicable provisions of the 2001 Crow Constitution and Bylaws, the Crow Nation Law and Order Code (CLOC), BHCEC's responses to discovery, and the Declaration of Alden Big Man demonstrate the venue selection and choice of law provisions in Paragraph 4 are unenforceable.

BACKGROUND

BHCEC provided electrical service to the residence of Big Man situated on trust land located within the Crow Indian Reservation. BHCEC admits there are no treaty provisions or Acts of Congress which divest or diminish the Crow Tribe's authority to regulate business on its reservation. The Crow Tribe adopted CLOC Title 20 and the definition of "utility" includes an electric cooperative that furnishes electric service on the Crow reservation. CLOC § 20-1-101(l). BHCEC has been aware of Title 20 since 1986, and inserted the venue selection and choice of law provisions of Paragraph 4 into the "membership application" *after* Title 20

was enacted by the Crow Tribe. It is undisputed that BHCEC made no attempt to comply with tribal law when it disconnected Big Man's electrical service in January 2012.[1]

Big Man is an enrolled member of the Crow Tribe with limited education. He receives electricity from BHCEC on the Crow Reservation. When Big Man signed the BHCEC "Application for Membership and for Electric Service" dated February 15, 1999, he was not specifically aware of the meaning of Paragraph 4 might have relating to his ability to enforce his rights under tribal law in Crow Tribal Court and did not have any understanding of the purpose or effect of Paragraph 4. It was not explained to him. There are no other options for electric service at the Big Man home other than BHCEC. At the time that Big Man signed the "membership application," he did not believe he had any ability to negotiate terms -- the "membership application" was presented to him and he felt he was required to sign it, as is, if he wanted electric service at his home.

It is undisputed that Big Man filed suit in Crow Tribal Court after BHCEC disconnected Big Man's electricity service in January 2012, in the depth of winter. His complaint alleged that Crow law required a ten-day written notice of electricity termination via personal service or certified mail, which was not provided prior to

[1] The facts cited herein are based upon prior filings (Docs. 85-1 and 85-2), as referenced in Defendant Big Man's Statement of Undisputed Facts (Doc. 86) and Defendant Big Man's Statement of Undisputed Facts filed herewith.

termination, and further alleged that BHCEC did not obtain tribal regulatory approval under CLOC § 20-1-110 prior to termination. After Big Man moved for summary judgment, the Crow Tribal Court dismissed based upon lack of subject matter jurisdiction (Doc. 1-7). Big Man appealed.

The Opinion of the Apsaalooke Appeals Court ("Opinion") describes the broad jurisdictional provisions in CLOC (Doc. 1-5, pages 21-23). The Opinion then sets forth the strong public policy of the Crow Tribe regarding enforcement of Title 20 in Crow Tribal Court:

> The Crow trial court decision would place Big Man's complaint squarely in Big Horn County 13th district court. This is not logical because it would have the Crow Tribal government, its tribal members, members of other tribes, or non-tribal residents stand in line to appear before a foreign court for nonmember actions occurring within the exterior boundaries of the Crow Indian Reservation.

Opinion at page 30 (Doc. 1-5).

This Court should refrain from addressing the merits of the enforceability of the "membership application" signed by Big Man as it is not a jurisdictional question, and instead affirm the Apsaalooke Appeals Court determination that it has jurisdiction. The Crow judiciary should be permitted to assess the merits of any purported contract terms in the first instance. Should this Court get to the merits of the contract, based upon the overweening bargaining power of BHCEC in its insistence on the venue selection and choice of law provisions in Paragraph 4, as well as the strong public policy of the Crow Tribe against enforcement of these

venue selection and choice of law provisions, Big Man is entitled to partial summary judgment that these provisions are not enforceable.

ARGUMENT

The Apsaalooke Appeals Court remanded this matter to the Crow trial court for consideration of specific factual issues. As to Big Man, BHCEC has asserted that Paragraph 4 of the "membership application" must be enforced by this Court, which deprive the tribal court of jurisdiction in this dispute. This Court should decline the invitation.

A. Crow Law Expresses a Strong Policy in Favor of Tribal Court Jurisdiction. The 2001 Constitution and Bylaws of the Crow Tribe of Indians, Crow Indians Reservation, Crow Agency Montana,[2] provides in part:

> ARTICLE X — JUDICIAL BRANCH OF GOVERNMENT
>
> A Judicial Branch of the Crow Tribal Government shall consist of all courts established by the Crow Law and Order Code and in accordance with this Constitution. **The Judicial Branch shall have jurisdiction over all matters defined in the Crow Law and Order Code**.

The Crow Tribe in its sovereign capacity has adopted a clear and strong public policy that the Crow Judicial Branch shall have jurisdiction over all matters at issue under CLOC Title 20.

[2] The Crow Tribe of Indians Constitution and Bylaws are available online at http://www.crow-nsn.gov/constitutions-and-bylaws.html.

The Crow Tribe has also enacted specific laws regarding operation of the Judicial Branch. Title 3 of the Crow Law and Order Code provides that the Crow Tribal Court is a court of general jurisdiction. CLOC § 3-2-201. The code further states "[t]he laws [and] ordinances . . . of the Crow Tribe shall be the law applied in all courts established under this Title." CLOC § 3-1-104(1). Montana state law does not apply in Crow Tribal Court:

> **State laws** and federal laws not applicable to the Crow Tribe or the Crow Indian Reservation **shall not be deemed applicable law in any proceeding**, except as provided herein, **unless agreed to be applicable by the parties by stipulation *with consent of the court***, but **in no event shall they be construed to have any greater authority than the laws, ordinances, resolutions, treaties, or the traditions and customs of the Crow Tribe**.

CLOC § 3-1-104(4)(emphasis added). This tribal ordinance clearly states a strong public policy precluding application of state law in any manner that supersedes Crow tribal law and empowering the Crow Judicial Branch with the exclusive power to approve application of state law.

B. Federal Law Supports Crow Exercise of Jurisdiction. "Congress has acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams v. Lee*, 358 U.S. 217, 220 (1959). The "tribes retain considerable control over nonmember conduct on tribal land." *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997). The Supreme Court ruled six

decades ago regarding exercise of state jurisdiction over a dispute involving a Navajo tribal member on the Navajo reservation:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-566.

Williams v. Lee, 358 U.S. at 223. There is no longer any dispute about land status – Big Man's residence is situated on tribal trust land.

C. "Choice Clauses" are Unenforceable If Obtained in Violation of Public Policy. The Ninth Circuit has recognized and adopted the test in *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1 (1972) to analyze the validity of choice of forum and choice of law provisions in contracts in international contracts, which is most analogous here. *Richards v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir.1998). "A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 15 (1972). In *M/S Bremen* the Supreme Court reversed the lower court, holding that the forum selection clause should have been enforced:

> There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect. . . . Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen . . . might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.

Id. at 12-14 (footnotes omitted). *See also Gemini Technologies, Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 917 (9th Cir. 2019). Based upon *M/S Bremen*, controlling Ninth Circuit law provides "[a] forum-selection clause is invalid if . . . its incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power." *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996); *see also Portafolios v. Opengate Capital, LLC*, 769 Fed. Appx. 429 (9th Cir. 2019).

In *Richards v. Lloyd's of London*, the Court summarized: "The Supreme Court has identified three grounds for repudiating a forum selection clause: first, if the inclusion of the clause in the agreement was the product of fraud or overreaching; second, if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; and third, 'if enforcement would contravene a strong public policy of the forum in which the suit is brought.'" 135 F.3d at 1292 (citing *M/S Bremen*, 407 U.S. at 12-13).

Here, as to the first ground to establish unenforceability of the "choice" clauses as the product of overreaching or overweening bargaining power, Big Man is not well-educated, had no opportunity to negotiate the "choice" clauses, and needed to sign the application in order to obtain the basic necessity of electricity. For these reasons, both "choice" clauses are unenforceable.

As to the second ground, Big Man will be deprived of any remedy for termination of his electricity in January 2012 if the choice of law provision were enforced to preclude application of CLOC Title 20. The Crow Tribe would be stripped of its sovereign authority to regulate activity on tribal land. BHCEC is not a regulated public utility under Montana law, for example, and Big Man is therefore not protected by ARM 38.5.1410. For these reasons, the choice of law clause is unenforceable.

Finally, as to other public policy grounds, enforceability of the clauses must be read in light of the 2001 Constitution and Bylaws of the Crow Tribe, the Crow Tribe's exercise of its inherent tribal sovereignty reflected in tribal ordinances and tribal court decisions (including the Crow Appellate Court Opinion in this case). The strong public policy against enforcement of these "choice" provisions is expressed in the tribal constitution, tribal ordinances, and the Opinion.

BHCEC argues that the forum selection clause in its "membership application" is an applicable and valid waiver of tribal jurisdiction. Plaintiff's Brief (Doc. 83-4) at 23-29. BHCEC relies primarily on the *Enerplus* case from the

Eighth Circuit, which held that a forum selection clause can defeat the applicability of the tribal exhaustion doctrine, then determined the enforceability of the clause without analyzing or weighing any recognized factors against enforcement. *See Enerplus Resources (USA) Corp. v. Wilkinson*, 865 F.3d 1094, 1097 (8th Cir. 2017).

Enerplus ignored the *M/S Bremen* analysis applied in the Ninth Circuit, perhaps because its facts are so strikingly distinguishable that any effort to avoid the contractual provisions could not prevail under the *M/S Bremen* analysis. In *Enerplus*, the contractual choice provision was inserted into a settlement agreement involving litigation about mineral leases that was supported by consideration – and the dispute leading to litigation involved an alleged nearly $3 million overpayment to one of the parties to the settlement several years after the settlement was reached. *Id*. at 1095-96. Here, Big Man was left without a remedy after BHCEC terminated electricity service in January when he failed to pay a bill of a few hundred dollars.

BHCEC ignores other persuasive authority, such as *Ninigret Dev't Corp. v. Narragansett Indian Wetuomuck Hous. Auth*., 207 F.3d 21 (1st Cir. 2000). *Ninigret* held that "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 that may be contained within the four corners of an underlying contract." 207 F.3d at 33 (citing *National Farmers Union Ins. Co. v. Crow Tribe*,

471 U.S. 845, 855-57 (1985)). The *Ninigret* court's approach finds more support in Ninth Circuit law than *Enerplus*. The Ninth Circuit follows the general rule that forum selection clauses do not create subject matter jurisdiction or deprive federal courts of that jurisdiction. *Kamm v. Itex Corp*., 568 F.3d 752, 754 (9th Cir. 2009) (citing *M/S Bremen*). The existence of subject matter jurisdiction in the Ninth Circuit is a separate threshold inquiry. *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc*. 741 F.2d 273, 278 (9th Cir. 1984). *Pelleport* held that any issue enforceability of a forum selection clauses is a "substantive decision on the merits *apart* from any jurisdictional decision." *Hansen v. Blue Cross of California,* 891 F.2d 1384, 1388 (9th Cir. 1989) (quoting *Pelleport*, 741 F.2d at 276) (emphasis in original).

The *Ninigret* court actually cited to a Ninth Circuit federal district court case that held, in a tribal remedies exhaustion case, issues regarding the validity of a forum selection clause "must be resolved in the tribal court." *Ninigret*, 207 F.3d at 33 (citing *Snowbird Construction, Inc. v. United States*, 666 F. Supp. 1437, 1444 (D. Idaho. 1987)). The *Ninigret* court stressed that *Snowbird*'s holding is the logical and preferred approach to resolving forum selection clause enforceability in light of Supreme Court precedent, inherent tribal sovereignty, and comity. *Id*. The result should be no different here.

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to

judgment as a matter of law. Fed.R.Civ.P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 467, (1962); *Jung v. FMC Corp*., 755 F.2d 708, 710 (9th Cir.1985); *Loehr v. Ventura County Community College Dist*., 743 F.2d 1310, 1313 (9th Cir. 1984). BHCEC has not satisfied its burden. However, the Defendants' previously-filed summary judgment motions (Docs. 84 and 87) are well-founded and should be granted.

CONCLUSION

Based upon the foregoing points and authorities, Defendant Alden Big Man respectfully requests this Court decline BHCEC's Motion for Summary Judgment.

DATED this 10th day of January 2020.

SUBMITTED BY:

/s/ Michael G. Black
BECK AMSDEN & STALPES, PLLC
1946 Stadium Drive, Suite 1
Bozeman, MT 59715

Kathryn Seaton
MONTANA LEGAL SERVICES ASSOCIATION
616 Helena Avenue, Suite 100
Helena, MT 59601

Attorneys for Defendant Alden Big Man

CERTIFICATE OF COMPLIANCE

This brief complies with L.R. 7.1(d)(2). There are 3,003 words in this brief, excluding the caption and certificate of compliance.

DATED this 10th day of January 2020.

/s/ Michael G. Black
BECK, AMSDEN & STALPES, PLLC

Attorneys for Defendant Alden Big Man