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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' RESPONSE BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

OTHER AUTHORITIES

INTRODUCTION

All parties have moved this Court for summary judgment on the issues of the Crow Tribe's (Tribe) inherent regulatory authority law over Big Horn County Electric Cooperative (Big Horn), and the Tribe's inherent adjudicatory authority over Tribe member Alden Big Man's claims pending in Tribal Court against Big Horn. ECF Nos. 83, 83-4, 84, 85, 87 and 88. Pursuant to L. R. 7.1(d)(1)(B), and this Court's Order of December 9, 2019 (ECF No. 96), Tribal Defendants file this Response in Opposition to Big Horn's summary judgment motion.

ARGUMENT

I. The Tribe's Utility Winter Disconnection Law Applies To Big Horn On Tribal Trust Land, And Big Horn Ignores The Controlling Law For Determining That Issue

A. There are no Non-Tribal Trust Land Jurisdictional Issues

Since filing its Complaint, Big Horn has admitted that Big Man resides on tribal trust land, where Big Man's claims against Big Horn arise. Tribal Defendants' Tribal Defs.' Statement of Undisputed Facts (TD SUF), ECF No. 89 ¶¶ 2, 7. Thus, the sole issue for summary judgment in this case is whether the Tribe's inherent regulatory and adjudicatory authority, under its Utility Winter Disconnection Law, extends to Big Horn's activities and conduct occurring on tribal trust land. Big Horn ignores its own significant factual admission and attempts to broaden the jurisdictional issue before the Court by arguing that the Tribe lacks regulatory and

adjudicatory jurisdiction over its activities and conduct generally throughout the entire Reservation. This broadening is improper and unnecessary.

In general, courts should not expand the legal issues and facts at issue in a case. *Katzman v. Helen of Troy Texas Corp.*, No. 1:2012cv04220, 2012 WL 3831745, at *3 (S.D. N.Y. Aug. 28, 2012). This includes declining invitations by parties to expand the issues beyond those presented by the facts of a case. *In re Fialkowski*, 483 B.R. 590, 591 (W.D. N.Y. 2012). These general rules have particular import to post-pleading stipulated or undisputed facts and pre-trial motions. *See United States v. Scott*, No. 1:09–CR–98, 2011 WL 2413821, at *11 n.4 (N.D. Ind. June 10, 2011), *aff'd*, 731 F.3d 659 (7th Cir. 2013), *cert. denied*, 572 U.S. 1053 (2014) (where party's argument in motion to suppress raises issue extending beyond the parties' stipulated facts, "the Court will not issue a ruling on it"); *Phillips Co. v. S. Pacific Rail Corp.*, 902 F. Supp. 1310, 1312 (D. Col. 1995), *aff'd*, 97 F.3d 1375 (10th Cir. 1996), *cert. denied*, 521 U.S. 1104 (1997) (in motion for judgment on the pleadings heard as a motion for summary judgment, court need not address claim based on factual issues beyond the undisputed facts in the case).

These rules derive from the basic tenet that a court should not, even at a party's invitation, decide issues that are unnecessary to the resolution of issues actually before it. *Smith v. Salt River Project Agric. Improvement and Power Dist.*, 109 F.3d 586, 596 (9th Cir. 1997) (declining to reach issue unnecessary to

resolution of case); *Magyar v. Tucson Unified Sch. Dist.*, 958 F. Supp. 1423, 1432 (D. Ariz. 1997) (where no set of facts before the court justifies expanding its analysis, court declines party's invitation to address issues unnecessary to reach in a case); *Akgun v. Boeing Co.*, No. C89–1319D, 1990 WL 112609, at *2 (W.D. Wash. June 7, 1990) on motion to dismiss, court decides narrow question actually before it, rather than issue broadly characterized and briefed by party)

Remarkably, none of Big Horn's summary judgment filings (motion, brief, and statement of facts) acknowledge its post-Complaint and pre-motion admission that Big Man resides on tribal trust land. Rather than accepting and addressing this important, and largely determinative, material fact, Big Horn argues that the issue before this Court is the Tribe's regulatory and adjudicatory authority over Big Horn generally throughout the Reservation, without limitation to the now undisputed fact that Big Horn's activities and conduct at issue in this case occurred on tribal trust land. *See, e.g.*, Big Horn Summ. J. Mot. at 2, ECF No. 83 ("Defendants have no jurisdiction, whether acting pursuant to the legislative or adjudicatory authority of the Crow Tribe, to interfere, directly, or indirectly, whether through official proceedings or otherwise, with Plaintiff's business practices, rates, rules, policies, and operations within the Crow Reservation or elsewhere"); Big Horn Br., ECF No. 83-4 at 4 ("Big Horn's position has been, in the tribal court proceedings, as here, that the Crow tribe has neither legislative nor adjudicatory authority over Big

Horn"); *id*. at 7 (at issue [is] whether the Crow Tribe has 'inherent sovereignty' to adopt a tribal law prohibiting certain defined non-member activities and conduct within the Crow Reservation"); *id*. at 11-12 (discussing Treaty and statutory provisions applicable to non-tribal trust land).[1] But the issue in this case is limited to tribal jurisdiction on tribal trust land.

Big Horn's point that the Tribal Appeals Court's holding is not limited to tribal trust land is unavailing. Big Horn SJ Br. at 3, 9. The Tribal Courts did not have the benefit of the now undisputed fact that Big Man resides on tribal trust land where Big Man's claims against Big Horn arose. For Big Horn to act in this Court as if that fact, determined by its own admission, has not been established or is irrelevant, is preposterous. This Court should decline to expand or reach issues beyond and unnecessary to those actually before the Court based on undisputed facts.

B. Tribal Civil Jurisdiction Over Big Horn on Tribal Trust Land is Presumed, and Big Horn has not and cannot Defeat that Presumption

Big Horn does not address the numerous applicable Ninth Circuit cases that distinguish the test for tribal civil jurisdiction over non-Indian activities and conduct on tribal trust land, from the test for that jurisdiction over those activities and

[1] Only in the very last sentence of its Brief does Big Horn make a reference to this case not involving "fee land," Big Horn SJ Br. at 23, but that single reference, while accurate, does not negate its multiple arguments otherwise.

conduct on non-Indian fee land. That distinction is critical.

In particular, *Window Rock Unified School District. v. Reeves* articulates that the Ninth Circuit has "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 first framework falls under "the right to exclude, which generally applies to nonmember conduct on tribal land." *Id*. The second falls under the tests "articulated in *Montana v. United States*, 450 U.S. 544 (1981), which generally apply to nonmember conduct on non-tribal land." *Id*. (internal citation simplified). As *Window Rock* states, *Montana* did not eliminate the first framework, and made clear that the framework distinction is based on land status. *Window Rock*, 861 F.3d at 898-999

Under *Montana*, 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. 450 U.S. at 557. On non-Indian fee land, tribal civil jurisdiction over non-Indian activities and conduct can be confirmed if one of the tests set forth in *Montana* – a consensual relationship or a direct effect – exists. *Id*. at 565-566 (explaining that 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).

A host of other Ninth Circuit cases adhere to this distinction. Where non-Indian activities and conduct occur on non-Indian fee land, the consensual relationship and direct effect tests are used to determine the existence and scope of tribal civil jurisdiction. *See, e.g., FMC Corp. v. Shoshone Bannock Tribes*, 942 F.3d 916 (2019); *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298 (9th Cir. 2013).

On tribal land, the Ninth Circuit applies the presumption of tribal jurisdiction in the first instance, and then may apply the *Montana* tests as an alternative basis for tribal jurisdiction. *See, e.g.*, *Water Wheel Camp Recreational Area, Inc. v. LaRance,* 642 F.3d 802 (9th Cir. 2011) (expressly stating that the *Montana* tests "do[] not apply to this case" arising on tribal land, but nevertheless "briefly explain[ing] why, even if *Montana* applied, the tribe would have subject matter jurisdiction"); *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa, Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013), *cert denied*, 571 U.S. 1110 (2013) ("[T]his case is not *Montana* … [which] considered tribal jurisdiction over nonmember activities on *non-Indian* land, *held in fee simple* within the reservation. The land underlying this case is federal Indian land held in trust for the . . . . Tribe. Even if *Montana* applied, either of its two recognized [tests] could also provide for tribal jurisdiction in this case") (emphasis in original; internal citation omitted); *Window Rock*, 861 F.3d at

900-01 (applying only the presumption to determine tribal jurisdiction over non-Indian activities and conduct occurring on tribal land).

This Court similarly abides by the distinction. *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); *Walker v. Boy*, CV-19-43, 2019 WL 5700770, at *2 (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).

Big Horn does not cite any of these cases, let alone attempt to distinguish them. Instead, Big Horn relies on *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), and the portion of *Montana* that dealt with non-Indian fee land, to argue that tribes generally lack civil jurisdiction over non-Indians. *See* Big Horn SJ Br. at 6 ("The Montana [sic] Court articulated the oft-quoted general rule that the 'inherent powers of an Indian tribe do not extend to the activities of non-members of the tribe' except under two narrowly applied exceptions . . . *Strate* admonishes that 'tribal jurisdictional over the conduct of nonmembers exists only in limited circumstances.'").

This reliance is misplaced and belied by the cases themselves. While

Montana fashioned the consensual relationship and direct effect tests, it did so only for determining tribal jurisdiction over non-Indians activities and conduct occurring on non-Indian fee land. 450 U.S. at 566-67. Contrary to Big Horn's insinuation otherwise, Big Horn SJ Br. at 9, *Montana* involved both non-Indian fee land and tribal trust land, and *Montana* unequivocally upheld the civil jurisdiction of this Tribe over non-Indians "on land belonging to the Tribe or held in trust for the Tribe." *Id*. at 557. Similarly, *Strate* involved a state highway right-of-way, held by the Court to be "the equivalent of non-Indian fee land." 520 U.S. at 454. *Strate* found that Congress generally had divested tribal civil jurisdiction over on that land, and found that neither *Montana* test confirmed tribal jurisdiction in that case. *Strate* nevertheless "readily" and unanimously affirmed, in the same paragraph, that "tribes retain considerable control over nonmember conduct on tribal land." *Id*. (citing *Montana*, 450 U.S. at 557). Big Horn's other cited case, *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1014 (1998), followed *Strate* in holding that a state highway right-of-way is the equivalent of non-Indian fee land at least for purposes of tribal civil jurisdiction over non-Indian activities and conduct occurring on the highway.[2]

[2] Big Horn also cites *County of Lewis v. Allen*,163 F.3d 509 (9th Cir. 1997) (*en banc*), for the proposition that the *Montana* tests apply to determine tribal civil jurisdiction over non-Indians on tribal trust land. *Lewis County*'s holding of lack of tribal jurisdiction however, turned on a law enforcement agreement between a tribe and a county, from which the Ninth Circuit determined that the tribe had

Plains Commerce also involved non-Indian fee land, not tribal trust land. 554 U.S. at 320. A majority of the Court in *Plains Commerce* found that the tribe lacked regulatory and adjudicatory jurisdiction over non-Indian activities and conduct related to the sale of non-Indian fee land within its reservation. *Id*. But as *Window Rock* aptly states, *Plains Commerce* "does not control" cases in which the non-Indian activities and conduct "occur[] on tribal land." *Window Rock*, 861 F.3d at 901 n.7. The Ninth Circuit has rejected arguments similar to Big Horn's, that the *Montana* tests apply to non-Indian activities and conduct occurring on tribal land, other than as an alternative basis by which tribal jurisdiction may be affirmed.

This Court likewise maintains the land status distinction for determining tribal civil jurisdiction over non-Indians. *Takeda Pharmaceuticals* describes *Water Wheel* as holding that there is no need to consider the *Montana* tests "where the non-member activity occurred on tribal land." *Takeda Pharms.*, 2015 WL 10985374, at *4 (citation omitted). It also notes that, like *Water Wheel*, the claims to tribal jurisdiction in *Grand Canyon* "stemmed from [non-Indian] conduct that took place on tribal land." *Id*. at *5 (citation omitted). *Takeda Pharmaceuticals* concludes by stating that the Tribe's jurisdiction over a non-Indian in that case, at

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ceded its right to exclude the non-Indians in that case – county law enforcement officers -- from tribal land. 163 F.2d at 514. Tribes' right to exclude is part of the test for determining tribal jurisdiction on tribal land, not non-Indian fee land. *Window Rock*, 861 F.3d at 899. *Lewis County* then went on to determine whether tribal jurisdiction in that case could be confirmed under the *Montana* tests, and the Court concluded that it could not. *Id*. at 514-16.

least for exhaustion of tribal remedies purposes, is "colorable ... based on the alleged conduct [occurring] on tribal trust land . . . [and that] [t]his determination precludes analysis at this point as to whether either *Montana* [test also] provides a colorable basis for [tribal] jurisdiction." *Id*. (citation omitted).

Walker, also a tribal remedies exhaustion case, applies the same analysis. 2019 WL 57007700, at *1. The Court first determined where the claims for tribal jurisdiction arose, in recognition of the rule that tribal jurisdiction is colorable or presumed if the events occurred or arose on tribal land. *Id*. In contrast, colorable tribal jurisdiction generally does not exist if the claims are based on events that occurred "off tribal land," but jurisdiction may be confirmed under either *Montana* test. *Id*. at *2 (citing *Montana*, 450 U.S. 544; *Window Rock*, 861 F.3d at 898).

Because Big Horn fails to acknowledge the presumption of tribal civil jurisdiction over non-Indian activities and conduct on tribal land, it also does not address the implications of its own admission that no treaty or federal statue divests or diminishes the Tribe's inherent jurisdiction over its trust land. *See* TD SUF ¶ 5. Generally, only express treaty or statutory provisions can defeat the presumption. *Window Rock*, 861 F.3d at 899-900 (*citing, inter alia, Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987)). "In interpreting the extent of any such limits, courts do not 'lightly assume that Congress . . . intend[s] to undermine Indian self-government.'" *Id*. at 900 (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782,

790 (2014)). The test is whether tribal jurisdiction has been "affirmatively limited by a specific treaty provision or federal statute." *Id*. (citation omitted).

In lieu of this test, which it cannot meet, Big Horn argues that tribal jurisdiction is lacking as a matter of federal common law. *See* Big Horn Summ. J. Mot. at 2 (the Tribe's authority to regulate "Plaintiff is constrained by general principals [sic] of federal common law of inherent tribal sovereignty"); *accord* Big Horn SJ Br. at 6 ("*Montana* expresses the federal common law concerning the Crow Tribe's authority").[3] But defeat by common law is not the applicable test, and as Tribal Defendants have argued and Big Horn admits, no Treaty provisions or congressional acts in fact exist to preclude or limit the Tribe's jurisdiction over Big Horn or Big Man's claims against Big Horn on tribal land.

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

Even if this Court were to employ the *Montana* fee land tests as an alternative means for determining the Tribe's civil jurisdiction over Big Horn's activities and conduct on tribal trust land, application of those tests confirms the Tribe's jurisdiction here.

[3] Big Horn does argue that Treaties and acts of Congress have divested or diminished tribal civil jurisdiction over non-Indian activities and conduct occurring on non-Indian fee land. Big Horn SJ Br. at 11-12. As Big Horn acknowledges, these are the same Treaties and congressional acts that were construed in *Montana* where tribal jurisdiction over non-Indians on non-Indian fee land was held to have been divested. But since non-Indian fee land is not at issue in this case, Big Horn's argument and authority are irrelevant.

1. Big Horn has a Consensual Relationship with the Tribe and Tribe Members

a. *Adams II*'s ruling that Big Horn's voluntary provision of electrical services on the Reservation creates a consensual relationship precludes re-litigation of that issue

As Big Horn correctly acknowledges, under *Montana*'s consensual relationship test, non-Indian consent to tribal jurisdiction can be implicit. Big Horn SJ Brief at 13-14. As Big Horn further acknowledges, almost a decade ago, the Ninth Circuit in *Big Horn County Electric Cooperative, Inc. v. Adams* (*Adams II*) held that "Big Horn's voluntary provision of electrical services on the Reservation … create[s] a consensual relationship" under *Montana*. 219 F.3d 944, 951 (9th Cir. 2000); *see* Big Horn SJ Br. at 18. Puzzlingly, Big Horn nevertheless argues that "[i]mplicit consent does not exist in this case." *Id*. at 14. "The mere fact that Big Horn delivers service to its members on the reservation, some of whom are members of the tribe, is not justification for concluding that Big Horn has given its implicit consent to tribal regulation." *Id*. at 13.

The doctrine of collateral estoppel, or issue preclusion, precludes Big Horn from re-litigating this issue. *See Wash. Mut., Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011); *see also French v. Starr*, No. CV-13-02153, 2015 WL 12592104, at *5-8 (D. Ariz. Feb. 12, 2015), *aff'd*, 691 Fed. App'x 885 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 327 (2017) (upholding tribal appeals court decision, where, in finding that it had jurisdiction, tribal appeals court relied on its

conclusions in an earlier case applying a tribal property code and the common law doctrine of collateral estoppel to conclude that non-Indian was estopped from challenging tribe's ownership of land he leased: "Plaintiff is precluded by the terms of the [lease] and by his conduct from asserting that the lot he leased from [the tribe] was not" tribal land in an effort to resist tribal jurisdiction).

Collateral estoppel generally applies to both issues of law and issues of fact "when four conditions are met: (1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012) (citations omitted). All four conditions are met here.

The consensual relationship issue in *Adams II* and in this case is identical: whether Big Horn has entered into a consensual relationship under *Montana* for purposes of determining tribal civil jurisdiction over Big Horn's activities and conduct by providing electricity within the Reservation. That the asserted tribal regulation in *Adams* was a utility tax, and the tribal regulation here is the Utility Winter Disconnection Law, is a distinction without a difference. As *Adams II* explained, the consensual relationship determination is a threshold and independent inquiry from the subsequent inquiry of whether the consensual relationship is sufficient to sustain the tribal jurisdiction at issue. 219 F.3d at 951 (having found

that a consensual relationship exists, the court noted that, "[e]ven with the presence of a consensual relationship, however, the first exception in *Montana* does not grant a tribe unlimited regulatory or adjudicatory jurisdiction over a nonmember," and then proceeded to analyze whether the existing consensual relationship could support the tribal jurisdiction at issue).

The issue of whether Big Horn has a *Montana* consensual relationship was actually litigated and decided in *Adams*. In this Court, "Big Horn contend[ed] that no qualifying consensual relationship exists." *Big Horn Cnty. Elec. Coop. v. Adams* (*Adams I*), 53 F. Supp. 2d 1047, 1051 (D. Mont. 1999). In the Ninth Circuit, Big Horn argued that "neither exception to *Montana's* main rule applies," *Big Horn Cnty. Elec. Coop. v. Adams*, No. 99-35799, 2000 WL 33997507, at *18 (9th Cir. filed Jan.18, 2000) (Br. of Appellee). The Tribal Appeals Court, this Court, and the Ninth Circuit all determined that a consensual relationship existed between Big Horn and the Tribe and Tribe members. *Adams I*, 53 F. Supp. 2d at 1051 ("The Crow Tribal Court of Appeals determined that a consensual relationship exists . . . Big Horn voluntarily undertook to set up an electricity distribution network, in part, on the Crow Indian Reservation. Big Horn delivers electricity to the Crow Tribe and its members and charges a fee for that delivery. Big Horn's activities constitute a 'consensual relationship' as defined by *Montana*."); *Adams II*, 219 F.3d at 951 (citations omitted) ("Big Horn's voluntary provision of electrical services on the

Reservation . . . create[s] a consensual relationship.")

Adams I and *II* afforded Big Horn a full and fair opportunity to litigate the issue of the existence of a consensual relationship, and the consensual relationship issue was necessary to deciding the merits of *Adams*' jurisdictional question. Big Horn's utility property at issue in *Adams* was located on rights-of-way within the Reservation that the Ninth Circuit determined to be "the equivalent of non-Indian fee land." *Adams II*, 219 F.3d at 949. The Ninth Circuit recognized that "post-*Strate* jurisprudence leaves no doubt that *Montana*'s framework applies in determining a tribe's jurisdiction over non-members on non-Indian fee land, the precise situation presented by this case." *Id.* at 950 (citations omitted). The Ninth Circuit then proceeded to determine whether a *Montana* consensual relationship existed as the first step in determining whether the tribe had jurisdiction. *Id*. at 951.

All four conditions for collateral estoppel are met. Additionally, *Adams I* and *II* and this case represent "litigation between the same parties." *Pool Water Products v. Olin Corp*., 258 F.3d 1024, 1031 (9th Cir. 2001). Big Horn acknowledges its participation in both cases. Big Horn SJ Br. at 18. The federal court defendants in *Adams I* and *II* were the Tribe's Tax Commissioner, "Unknown Members of the Crow Public Utilities Commission," and Tribal Appeals Court Judges. *Adams I*, 53 F. Supp. 2d at 1050. Here, the federal court defendants are Unknown Members of the Crow Tribal Health Board, and the Tribal Appeals Court

Justice and Judges. Compl., Doc. 1. While the agencies, officials and judges are different, they are all named in their official capacities as representatives of the Tribe. Findings and Recommendations of U.S. Magis. J., ECF No. 97; Order Adopting Findings and Recommendations, ECF No. 98. *See Wash. Mut.*, 636 F.3d at 1216 (citation omitted) (collateral estoppel applies not only against actual parties to prior litigation, but also against a party that is in privity to a party in previous litigation); *United States v. Bhatia*, 545 F.3d 757, 759 (9th Cir. 2008), *cert. denied*, 558 U.S. 850 (2009) ("privity" required for application of res judicata or collateral estoppel is a legal conclusion designating persons in subsequent litigation with parties to former litigation as representing the same rights and interests).[4]

b. Alternatively, Big Horn's voluntary provision of electric energy and services creates a consensual relationship

Big Horn first argues that it has not consented to tribal jurisdiction based on *UNC Resources, Inc. v. Benally*, 514 F. Supp. 358 (D. N.M. 1981). *UNC Resources* construed *Williams v. Lee*, 358 U.S. 217 (1959), as – at least at the time -- the "closest" example of a non-Indian's implicit consent to tribal jurisdiction. Big Horn SJ Br. at 13-14. As Big Horn points out, *UNC Resources* understood *Williams*

[4] Alternatively, even if Tribal Defendants here are not in privity with the Tribal Defendants in *Adams*, this Court has broad discretion to apply offensive non-mutual collateral estoppel, where a party is estopped from re-litigating an issue that it previously litigated and lost against another party. *See Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 880-82 (9th Cir. 2007), *cert. denied*, 552 U.S. 1295 (2008).

v. Lee to emphasize that the non-Indian knew he was on an Indian reservation, dealing commercially with an Indian, and also was able to "self-limit" the monetary amount of his commercial dealings with the Indian, which in turn offered limits on potential liability for those dealings. *UNC Resources*, 514 F. Supp. at 363.

Big Horn draws on *UNC Resources*, which found that the non-Indian there did not consent to tribal jurisdiction, to put forth several factors in support of its argument against a consensual relationship here, including: Big Horn did not and does not take into consideration that it operates on an Indian reservation where it serves tribe members; some of Big Horn's operations occur off-reservation; Big Horn is subject to federal non-discrimination laws; and, Big Horn cannot unilaterally limit the monetary amount of services that it provides to its members, or liability for those services. Big Horn SJ Br. at 14.[5]

UNC Resources predates no fewer than half a dozen Ninth Circuit cases, from the last decade alone, which have applied the *Montana* tests either to determine tribal jurisdiction on the merits, or whether tribal remedies should be exhausted: *See, e.g.*, *FMC Corp.*942 F.3d 916; *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892 (9th Cir. 2019), *cert. denied*, 2019 WL 5875139

[5] Big Horn apparently agrees with Tribal Defendants that this Court must defer to factual findings of the Tribal Courts unless they are clearly erroneous. *FMC Corp.*, 942 F.3d at 930. Big Horn states that there is clear error, but does not identify any specific fact to which it refers. Big Horn SJ Br. at 18.

(2019); *Evans*, 736 F.3d 1298; *Window Rock*, 861 F.3d 894; *Grand Canyon*, 715 F.3d 1196; *Water Wheel*, 642 F.3d 802. As Tribal Defendants have argued, these cases – not *UNC Resources* -- set forth the applicable factors for determining a consensual relationship under *Montana*, 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 being subject to those laws. *See, e.g., Water Wheel*, 642 F.3d at 818. As Tribal Defendants have argued, application of these established factors to the facts in this case leads to the conclusion that Big Horn has entered into a *Montana*-type consensual relationship.[6]

At any rate, the facts in this case are less like the facts in *UNC Resources* and more like those in *Williams v. Lee*, and Big Horn's other arguments based on *UNC Resources* are untenable. Like the non-Indian in *Williams v. Lee*, Big Horn does know that it is operating on an Indian reservation. Big Horn's claim that it did not or does not take that fact into consideration does not mean that Big Horn did not or does not know the fact. And Big Horn's activities and conduct at issue here indisputably occur and arise on tribal trust land on the Reservation, whereas the non-Indian activities and conduct in *UNC Resources* impacted tribal land on a reservation, but actually occurred off-reservation, or on non-Indian fee land within

[6] As Tribal Defendants also have argued, under the applicable cases, Big Man's Membership Application, while a relevant factor in Big Horn's consensual relationship under *Montana*, is not the determining factor. *Adams I*, 53 F. Supp. 2d at 1051; *accord Adams II*, 219 F.3d at 951.

the reservation. 514 F. Supp. at 362-63. The non-Indians in *UNC Resources* and *Williams v. Lee* operated directly pursuant to specific federal licensing and regulatory schemes, as does Big Horn here. *See Adams II*, 219 F.3d at 948. There is no authority for Big Horn's claim that the non-Indians in *UNC Resources* and *Williams v. Lee* were not also subject to federal "non-discrimination laws," and Big Horn fails to provide any argument or authority for why that is pertinent to the consensual relationship determination. Based on Big Man's claims, Big Horn's potential monetary liability here is much more like the limited monetary liability in *Williams v. Lee* based on specific commercial transactions with an individual Indian, rather than the potential widespread tort liability from a toxic waste spill – sought via compensatory and punitive damages – that the non-Indian faced in *UNC Resources*.

Big Horn also argues that no consensual relationship exists because its dealings here are not commercial, or not "commercial-enough" under *Montana*. Big Horn SJ Brief at 15-18. In support of this argument, Big Horn relies on a pre-*Adams* North Dakota state court case, *Application of Otter Tail Power Co*., which found no consensual relationship between an electric supplier and its potential customers. 451 N.W.2d 95 (N.D. 1990). The Eighth Circuit apparently views *Otter Tail*'s finding on this point as incorrect or inconclusive, since, as Big Horn points out, in *Baker Electric Coop. v. Chaske*, it remanded to the district court to

"determine whether providing electricity to the Reservation involves a consensual relationship." 28 F.3d 1466, 1477 (8th Cir. 1994).

More importantly, Big Horn makes no argument about why *Adams II*'s express holding that "Big Horn's voluntary provision of electrical services on the Reservation … create[s] a consensual relationship," 219 F.3d at 951, does not control here or whether and why *Adams II* should be overruled or distinguished on this point. Indeed, *Adams II*'s holding has been followed expressly by at least two district courts, including this one. *Glacier Elec. Coop. v. Gervais*, CV 14-75, 2015 WL 13650531, at *4 (D. Mont. Apr. 24, 2015) (discussing *Adams II*, 219 F.3d at 951) (non-Indian electric cooperative that provides electricity to tribe members on reservation "has entered into a consensual relationship" under *Montana*); *Dish Network Corp. v. Tewa*, 2012 WL 5381437, at *7 (D. Ariz. Nov. 1, 2012) (discussing *Adams II*, 219 F.3d at 951) (provider of satellite television services has a consensual relationship with tribe members on reservation).

Finally, Big Horn argues that even if a *Montana*-type consensual relationship exists, the tribal jurisdiction asserted here lacks the requisite nexus to that relationship. Big Horn SJ Br. at 15-16 and 18. For this argument, Big Horn relies on *Adams II*, which found no nexus between Big Horn's consensual relationship – the voluntary provision of electrical services – and the Tribe's regulation, an ad valorem tax on Big Horn's utility property. 219 F.3d at 951.

Adams II itself contradicts Big Horn's lack-of-nexus argument and supports Tribal Defendants' nexus argument. Having found that the consensual relationship was "Big Horn's voluntary provision of electric services," *id*., the Ninth Circuit held that the Tribe could not exercise jurisdiction under the consensual relationship test because the tax because was "not a tax on the *activities* of [Big Horn], *i.e*., the provision of electrical services, but [was] instead a tax on the value of [Big Horn's] *property*." *Id*. (emphasis added). Here, the consensual relationship is the same as in *Adams I* and *II*: Big Horn's voluntary provision of electric services. That provision of services is precisely the activity regulated by the Tribe's Utility Winter Disconnection Law. The requisite nexus could not be clearer.

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

Consistent with gaps in the rest of its brief, Big Horn does not address any of the leading Ninth Circuit cases that set forth and apply the *Montana* direct effect test for determining tribal jurisdiction over non-Indians or exhaustion of tribal remedies, including *FMC Corp*., 942 F.3d 934-41; *Evans*, 736 F.3d at 1302-07; *Grand Canyon*, 715 F.3d at 1205-06; and *Water Wheel,* 642 F.3d at 819. Instead, Big Horn cites *Adams II* and *Plains Commerce*, following which Big Horn makes the conclusory statement that the direct effect test is simply "inapplicable" in this case. Big Horn SJ Br. at 22-23.

To the contrary, as Tribal Defendants have argued, and as this Court has

held previously, Big Horn's activities and conduct here do seriously threaten the health and welfare of the Tribe. Construing the direct effect test for purposes of whether exhaustion of tribal remedies was required, *Glacier Electric* held that an electric utility cooperative member's allegation that the utility "conducts winter shut-offs undoubtedly has a direct effect on the health and welfare of the . . . Tribe." 2015 WL 13650531, at *4; *see also Morgan v. Kennedy*, 331 F. Supp. 861, 863 (D. Neb. 1971) ("The shutting of the heat in sub-zero weather . . . cannot help but have a very damaging effect upon [the plaintiffs'] lives. The Court notices that last winter a similar situation resulted in several near-deaths in this city").

Legal scholars also have commented on how utility disconnections contribute to negative health effects, particularly for the poor, elderly, young, and other vulnerable populations, and increase the need for medical and legal responses to these effects. *See, e.g.*, David L. Schulman, et al., *Public Health Legal Services: A New Vision*, 15 Geo. J. on Poverty Law and Policy, 729, 758, 765-66, 779 (2008); Roger D. Colton, *Heightening the Burden of Proof in Utility Shutoff Cases Involving Allegations of Fraud*, 33 How. L. J. 137, 137 (1990) ("The disconnection of home heating service to low-income customers continues to be one of the major problems facing the public utility industry"); Roger D. Colton, *Prepayment Utility Meters, Affordable Home Energy, and the Low Income Utility Consumer*, 10 J. of Affordable Housing Cmty. Dev. L. 285 (2001) ("There is . . . a documented

relationship between utility disconnection and homelessness").

The U.S. Department of Health and Human Services lists the utility disconnection laws, regulations, and policies, seasonal and otherwise, of numerous states that are based on medical and other health reasons, particularly for elderly, disabled, and seriously ill persons. *See State Disconnection Policies*, U.S. Dept. of Health & Human Serv., https://liheapch.acf.hhs.gov/Disconnect/disconnect.htm (last visited Jan. 9, 2020) (noting Montana's seasonal disconnect law prohibits disconnection "when the temperature at 8 a.m. is below 32° F or if freezing temperatures are forecast for the next 24 hours for consumers receiving public assistance or if household member is age 62 or order or disabled."). The health, safety, and welfare risks and impacts to communities are well-documented by organizations including the National Center on Law & Elder Rights, *see* Jenifer Bosco, *Protecting Older Adults from Utility Disconnection* 3, National Consumer Law Center (Sept. 2018), https://ncler.acl.gov/Files/Protecting-Older-Adults-from-Utility-Disconnection.aspx ("Disconnection of utility service can be life-threatening for those who are particularly susceptible to heat of cold temperature—frail older individuals, the very young, and those with certain chronic health conditions. Loss of service is also dangerous to those who need electricity or water for medical equipment of refrigeration of medication."), and the National Consumer Law Center. *See generally* Charles Harak et al., *Access to Utility*

Service: Disconnections, Metering, Payments, Telecommunications, and Assistance Programs (6th ed. 2019), https://library.nclc.org/node/50649?s=access%20to%20utility%20services.

Regulatory provisions for notice and approval before disconnection like those in the Tribe's Utility Winter Disconnection Law are intended to mitigate the established risks of the termination of electric services when the weather is cold. Big Horn's failure to abide by notice and approval provisions undercuts the efficacy of the law and directly threatens the health, safety, and welfare of the Tribe and Tribe members. *See Glacier Elec.*, 2015 WL 13650531, at *4.

II. The Validity And Enforceability Of Big Horn's Membership Application Forum Selection Clause Are Non-Jurisdictional Issues

Big Horn argues that the forum selection clause in its Membership Application is an applicable and valid waiver of tribal jurisdiction. Big Horn SJ Brief at 19-22. Big Horn relies primarily on *Enerplus Resources (USA) Corp. v. Wilkinson*, which held that a forum selection clause can defeat the applicability of the tribal remedies exhaustion doctrine, and then proceeded to determine the clause's validity. 865 F.3d 1094, 1097 (8th Cir. 2017). But Big Horn does not address the authority otherwise, such as *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, which holds 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 21, 33 (1st Cir. 2000) (citing *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 855-57 (1985).

Ninigret's articulation of the applicable rule is more in line with Ninth Circuit law than *Enerplus*. The Ninth Circuit follows the general rule that forum selection clauses neither create subject matter jurisdiction in federal courts nor deprive them of that jurisdiction. *Kamm v. Itex Corp*., 568 F.3d 752, 754 (9th Cir. 2009) (citing *M/S Bremem v. Zapata Off-Shore Co*., 407 U.S. 1, 12(1972); *Musser v. Damrow,* No. 96–35193, 1996 WL 733196, at *1 (9th Cir. Nov. 19, 1996). The existence of subject matter jurisdiction is a separate and threshold inquiry. *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc*. 741 F.2d 273, 278 (9th Cir. 1984). *Pelleport* holds that issues of the validity and enforceability of forum selection clauses are "substantive decision[s] on the merits *apart* from any jurisdictional decision[s]." *Hansen v. Blue Cross of Calif.*, 891 F.2d 1384, 1388 (9th Cir. 1989) (quoting *Pelleport*, 741 F.2d at 276) (emphasis in original).

Indeed, for its rule on this point, *Ninigret* cited to a federal district court case in this Circuit holding, in a tribal remedies exhaustion case, that issues regarding the validity of a forum selection clause "must be resolved in the tribal court." *Snowbird Constr., Inc. v. United States*, 666 F. Supp. 1437, 1444 (D. Idaho. 1987); *Ninigret*, 207 F.3d at 33 (citing *Snowbird*, 666 F. Supp. at 1444). *Ninigret*

expressly recognized that *Snowbird*'s holding, as opposed to the holding in cases like *Enerplus*, better comports with the Supreme Court's tribal court jurisprudence, inherent tribal sovereignty, and logic. *Ninigret*, 207 F.3d at 33. Accordingly, forum selection clause validity and enforceability issues must be decided by the Tribal Court.

CONCLUSION

For the reasons set forth above and in Tribal Defendants' Opening Brief in Support of its Motion for Summary Judgment, 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 Tribal Defendants on this issue.

Respectfully submitted this 10th day of January, 2020.

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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 6,457 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 10th day of January, 2020, a true and correct copy of the foregoing TRIBAL DEFENDANTS' RESPONSE BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT was served upon the following via the Court's electronic filing system:

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