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

BIG HORN COUNTY ELECTRIC, COOPERATIVE, INC., Plaintiff, -v- ALDEN BIG MAN, *et al.*, Defendants.	**Case No. CV-17-065-BLG-SPW-TJC** **PLAINTIFF'S REPLY BRIEF IN RESPONSE TO MEMORANDUM OF DEFENDANT ALDEN BIG MAN AND TRIBAL DEFENDANTS' RESPONSE BRIEF**

Submitted this 24th day of January 2020.

By James E. Torske
Counsel for Plaintiff

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James E. Torske, Esq. (Bar #1563)
Torske Law Office, P.L.L.C.
314 North Custer Avenue
Hardin, Montana 59034
Telephone: (406) 665-1902
Fax: (406) 665-1903
torskelaw@tctwest.net

Attorney for Plaintiff

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INTRODUCTION

Big Horn has conclusively shown the history of the Crow Reservation includes congressional enactments providing for allotment of virtually all land within its boundaries classified as agricultural land. Congress reserved the mountain areas from allotment and placed express restrictions on the use of a small tract of land in the Little Horn Valley upon which the Crow Indian Agency is located. Consequently, by reason of the congressional

acts, as interpreted and applied by federal courts, the Crow Tribe lacks inherent sovereign authority to occupy and exclude as a basis for Title 20 regulation. Thus, as a matter of federal common law, in the absence of a landowner's right to exclude, the Crow Appeals Court's Opinion holding the Crow Tribe has jurisdiction over Big Horn, pursuant to the tribe's inherent sovereignty and tribal law, is misguided and exceeds the jurisdictional authority of the tribe.

ARGUMENT

I. Statements made 23 times in Defendants' response briefs, that Big Horn's activities at issue in this case occurred on Tribal Trust Land, does not make it so.

Tribal Defendants' entire argument is based upon a false premise that: "A. There are no Non-Tribal Trust Land Jurisdictional Issues." and "Big Horn has admitted that Big Man resides on tribal trust land." (Tribal Def's. Resp. Br. p. 1, *Big Horn v. Big Man*, 17-00065, ECF No. 102.) They go on to argue the sole issue here is whether the Crow Tribe's inherent regulatory and adjudicatory authority extends to Big Horn's delivery of electricity to cooperative members "on tribal trust land." *Id.*

Apparently intentionally, Defendants falsely allege Big Horn has admitted, based purely upon assertion in their own undisputed facts, referenced by Defendants as (TD SUF), ECF No. 89 ¶¶ 2, 7., p 1, and contrary to express allegations in Big Horn's Complaint and responses to discovery requests, that Big Man resides on tribal trust land "where Big Man's claims against Big Horn arise." (Paragraphs 2 and 7 of Tribal Defendants' Undisputed Facts actually state Mr. Big Man "resides on trust land" and he receives "services from Big Horn at his residence located on trust land . . ." not on tribal trust land.)

Defendants misrepresent that this lawsuit is somehow predicated upon Big Horn's contractual obligation to deliver electric energy to Mr. Big Man's residence on tribal trust land when in fact this action challenges the jurisdictional authority of the tribe to enforce Title 20 throughout the Crow Reservation based upon Mr. Big Man's tribal court complaint, predicated entirely on an allegation Big Horn violated tribal law. Tribal Defendants seek to limit Big Horn's challenge to tribal regulatory authority on tribal trust land rather than reservation wide Title 20 regulation, alleging "[t]his broadening is improper and unnecessary." (Tribal Defs.' Resp. Br. at 8, *supra.*) It is essential to proper resolution of the principle issue in this action concerning whether the Crow Tribe may regulate utilities and thereby alter or eliminate Big Horn's members' contractual obligations pursuant to which utility services are provided to its consumers on the reservation without regard to whether service is on trust or fee land, the effect of Title 20.

Big Horn's response to Defendants' discovery Request for Admission No. 1 that Mr. Big Man resides on trust land was accurate. (*See, e.g.* Scheduling Order, p. 3, Stipulations C and E, *Big Horn v. Big Man*, 17-00065, ECF 76, indicating delivery of electric services to Big Man's residence "within the boundaries of the Crow Reservation".) If the effect of Defendants undisputed fact is to incorporate the term tribal, it is still irrelevant, for purposes of *Montana v. United States*, 450 U.S. 103 (1982), and this case. Plaintiffs' position is accurate and not "preposterous", as represented by Tribal Defendants. (Tribal Defs.' Resp. Br. at 4, *supra*.),

That it is irrelevant Mr. Big Man in fact lives on tribal trust land is shown by Plaintiffs' response brief. Restrictions were placed on that land by congress (*See*, Footnote 1, Pls' Resp. Br. at 8 (Big Horn v. Big Man, 17-00065 ECF No. 99) creating an Agency Reservation. The land has been dedicated to tribal housing containing streets and roads, a cemetery, schools, churches, tribal and U.S. government offices, and commercial businesses, all open to the public, together with one of Big Horn's substations for distribution of electric energy to its members residing and engaged in activities, as shown by

Big Horn's response brief, throughout Crow Agency. (Federal law has defined the effect of the allotment acts which are silent with regard to a tribe's jurisdictional authority over land allotted pursuant to federal statutes. *See, Montana).*

There are no alternate providers of electricity in or near Crow Agency. Due to the Crow Allotment Act of June 4, 1920, which congressionally created the Agency Reservation as it currently exists, the Crow Tribe has no right to exclusively occupy the Agency Reservation nor exclude Big Horn from the land and thus may not impose Title 20 regulation as a matter of sovereign authority. Contrary to Defendants' argument, this case is about the tribe's authority to enforce Title 20 anywhere within reservation boundaries. That Mr. Big Man's residence is located on unallotted tribal trust land within the Agency Reservation is for purposes here irrelevant.

II. Because Mr. Big Man's residence at Crow Agency is located on unallotted tribal trust land, subject to congressional restrictions, no presumption of tribal civil jurisdiction exists.

Big Horn has shown, in its response brief, Defendants' reliance upon *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894 (9th Cir. 2017), is unwarranted as that case, and all other cases relied upon by Defendants centered upon non-Indian activities on tribal trust land, are distinguishable from this case. As referenced above, congressional enactment (Crow Act of June 4, 1920, 42 Stat. 751) prohibits the Crow Tribe's assertion of sovereign authority over the land in Section 1. The path goes back to *Montana* as Tribal Defendants acknowledge "statutory provisions can defeat the presumption" of tribal jurisdiction. They correctly recognize "[t]he test is whether tribal jurisdiction has been "affirmatively limited by a specific treaty provision or federal statute." (Tribal Defs.' Resp. Br. at 10.)

No presumption of tribal regulatory or adjudicatory authority applies to Mr. Big Man or Big Horn's members receiving service within Section 1 as well as throughout the allotted portion of the Crow Reservation. Defendants undoubtedly will contend Big Horn is barred from arguing the effect the Crow Act of June 4, 1920 eliminating inherent tribal right to

exclude because of Big Horn's response to Tribal Defendants' Request for Admission No. 4., which states:

> **Request for Admission NO. 4:** Please admit that there are no treaty provisions or Acts of Congress which divest or diminish the Tribe's authority to regulate business on its Reservation. . . . **Answer:** There are no treaty provisions, however, Congress has, pursuant to Article I, Section 8, Clause 3, of the United States Constitution, the reserved power to regulate commerce with Indian tribes, and thus authority to limit tribal regulation of business on the reservation.

In fact, there are no treaty provisions or acts of congress which expressly "divest or diminish the Tribe's authority to regulate business on its Reservation." It is federal common law interpreting and defining the effect of treaty or statutory provisions which divest or diminish a tribe's authority over activities or conduct within reservation boundaries, *Montana* being the pathmarking case.

Tribal Defendants' argument, from pages 4 to 11 of their response brief, that a presumption of tribal civil jurisdiction exists, is unavailing, lacks merit, and the cases cited as authority concerning activities on tribal trust land, do not here apply.

III. Tribal Defendants misrepresent the holding in Big Horn County Electric Cooperative v. Adams, relating to *Montana's* first exception.

Contrary to Tribal Defendants' representation, the 9th Circuit in *Big Horn Elect. v. Adams*, 219 F.3d 944 (9th Cir. 2000), actually held: "Therefore because neither *Montana* exception applies, the tribe lacks jurisdiction to impose an ad valorem tax on Big Horn's utility property." 219 F.3d at 951-52. Tribal Defendants assert Big Horn is precluded from addressing the implication of *Montana's* first exception in this case by the doctrine of collateral estoppel relying upon their misinterpretation of a statement taken out of context from the Adams decision. To demonstrate Defendants' incorrect interpretation, what the *Adams* court actually stated is appropriate:

> The first exception allows a tribe to exercise jurisdiction over the activities of nonmembers who enter into a consensual relationship with a tribe. The district court correctly concluded that Big Horn formed a consensual relationship with the Tribe because Big Horn entered into contracts with tribal members for the provision of electrical services. While the agreements creating Big Horn's rights-of-way were insufficient to create a consensual relationship with the Tribe, *see Red Wolf* 196 F.3d 1064, Big Horn's voluntary provision of electrical services on the Reservation did create a consensual relationship. *See Strate*, 520 U.S. at 457; *Montana*, 450 U.S. 565. Even with the presence of a consensual relationship, however, the first exception in *Montana* does not grant a tribe unlimited regulatory or adjudicative jurisdiction over a nonmember. *Montana*, 450 U.S. at 565. (Emphasis supplied.)

219 F.3d at 951.

Here, Big Horn has acknowledged its consensual relationship with Mr. Big Man but there is no nexus between that relationship and the lawsuit brought by Mr. Big Man based entirely on the allegation Big Horn violated tribal law, Title 20. No allegations were made in his complaint concerning Big Horn's or Mr. Big Man's breach or nonperformance of membership agreement obligations. The nexus between the consensual agreement, the membership agreement, and Mr. Big Man's lawsuit, is required by *Montana* and its progeny and is wholly absent in the suit brought by Mr. Big Man.

Contrary to Defendants' misguided interpretation, the consensual agreements contemplated by *Montana's* first exception ("commercial dealing, contracts, leases, and other arrangements") are Big Horn's contracts with its members, in the form of membership agreements, which contain conditions and obligations to be adhered to by both parties. As such, the relationship between Big Horn and its members, no matter which state or

reservation service is provided, is simply not voluntary, nor does Big Horn by implication voluntarily concede to tribal jurisdictional authority determined by its presence on the reservation.

Although there are consensual agreements between Big Horn and the tribe and its members the tribe may not impose Title 20 regulation on Big Horn simply because it is operating on the reservation as concluded by the Tribal Appeals Court. The Supreme Court in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 544 U.S. 316, 337 (2008) plainly stated:

> [Indian] laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. *See, Montana*, 450 U.S. at 564. . . . *See, e.g., Philip Morris*, 569 F.3d at 941 ("The mere fact that a nonmember has some consensual commercial contacts with a tribe does not mean that the tribe has jurisdiction over all suits involving that nonmember, or even over all such suits that arise within the reservation; the suit must also arise out of those consensual contacts.").

544 U.S. at 337.

Again, Defendants have not shown that this case involves Big Horn activities "on tribal trust land" nor that the suit arises out of "consensual contacts" (determined to be "contracts with tribal members for provision of electrical services." by the 9th Circuit Court in the Adams case, 219 F.3d @ 951).

IV. Big Horn's provision of electric energy and service enhances the tribe's health and welfare, making *Montana's* second exception inapplicable.

Since 1986, 34 years ago, there have been two causes of action brought against Big Horn asserting wrongful termination of service (Harris and Big Man).

Big Horn consciously trains its staff to take every reasonable measure to keep its members on its system. (*See*, Aff. of Christy Benzel and Policy 26 attached to Pl.'s Statement of Uncontroverted Facts (Big Horn v. Big Man, 17-00065 ECF No. 83-1).

Defendants' citation to cases having aggravated circumstances does not alter the facts associated with the longstanding favorable relationships Big Horn has worked hard to develop with its cooperative members. Two disgruntled and uncooperative members of Big Horn in 34 years certainly did not create necessity that Title 20 be enacted and enforced "to protect tribal self-government or control internal relations." (*Strate*, 520 U.S. at 459.

Tribal Defendants should have been more careful about what they wished for, collateral estoppel, or issue preclusion. The 9th Circuit Court in the *Adams* case not only addressed whether *Montana's* first exception afforded the Crow Tribe jurisdiction over Big Horn but also *Montana's* second exception, thereby eliminating any justification for Defendants' reliance upon any other precedent in connection with their attempt to demonstrate second exception Crow tribal jurisdiction over Big Horn in this case.

Applicability of *Montana's* second exception thus having been previously litigated, the 9th Circuit Court holding in *Adams* is here controlling. The Crow Tribe may not look to the second exception for tribal jurisdiction over Big Horn because the *Adams* court stated:

> The Supreme Court has given Montana's second exception a narrow construction, see Strate, 520 U.S. at 458-59 and County of Lewis v. Allen,

> 163 F.3d 509, 515 (9th Cir. 1998), and only allows a tribe to do "what is necessary to protect tribal selfgovernment or to control internal relations." Strate, 520 U.S. at 459. The defendants' request for us to expand Montana's second exception would effectively swallow Montana's main rule, because virtually any tribal tax would then fall under the second exception, a result that the Supreme Court has never endorsed and which conflicts with the Supreme Court's view that tribal jurisdiction is limited. See Strate, 520 U.S. at 458. (Citations omitted.)

219 F.3d at 951.

For the same reason, if the Tribal Appeals Court's decision, and Defendants argument, that tribal jurisdiction is justified based upon the second exception, virtually every nonmember activity on the Crow Reservation would be subject to tribal regulation. *Montana* and *Adams* provide otherwise.

V. Decision relative to the applicability of Big Horn's forum selection clause and Mr. Big Man's public policy arguments are not essential to summary judgment in favor of Big Horn.

a. The Crow Trial Court recognized the validity of the contractual forum selection provisions, but the Crow Appeals Court simply ignored them incorrectly concluding it was unreasonable that Big Horn expect cooperative members to appear in a "foreign court". At this stage of proceedings in this matter it is submitted those provisions in the membership agreement are reasonable and enforceable, however, elects to rely upon its response brief for the Court's consideration.

b. With all due respect, in the absence of Crow tribal jurisdictional authority, Mr. Big Man's tribal public policy arguments, set forth in his memorandum, simply would not

apply to Big Horn as they are a matter of internal relations between the tribe and tribal members and not external relations between the tribe and nonmembers. Big Horn elects not to reply in detail to Mr. Big Man's arguments and rests on its response brief.

CONCLUSION

Montana's main rule, but neither exception, applies. Big Horn is entitled to summary judgment holding the Crow Tribe is without jurisdiction to regulate Big Horn's delivery of electric service to its members within the Crow Reservation.

RESPECTIVELY SUBMITTED this 24th day of January 2020

/s/ James E. Torske
James E. Torske

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I certify that this reply 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 intended material. Pursuant to Local Rule 7.1(d)(2)(E), I certify that the word count calculated by Microsoft Word for Windows is 2,532 words, excluding the caption and certificates of service and compliance.

/s/ James E. Torske
James E. Torske

CERTIFICATE OF SERVICE

I, James E. Torske, Counsel for Plaintiff, hereby certify that I electronically filed the foregoing document with the Clerk of Court for the United State District Court for the District of Montana, using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/James E. Torske
James E. Torske