

Melody L. McCoy (*pro hac vice*)  
NATIVE AMERICAN RIGHTS FUND  
1506 Broadway  
Boulder, CO 80302  
Phone: (303) 447-8760  
Fax: (303) 443-7776  
mmccoy@narf.org

Wesley James Furlong (MT Bar No. 42771409)  
NATIVE AMERICAN RIGHTS FUND  
745 West 4th Avenue, Suite 502  
Anchorage, AK 99501  
Phone: (907) 276-0680  
Fax: (907) 276-2466  
wfurlong@narf.org

*Attorneys for Defendants Unknown Members of Crow  
Tribal Health Board, Hon. Chief Justice Kenneth Pitt,  
and Hon. Judges Dennis Bear Don't Walk and Michelle Wilson*

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

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**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'  
REPLY BRIEF IN SUPPORT  
OF THEIR MOTION FOR  
SUMMARY JUDGMENT**

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Pursuant to L. R. 7.1(d)(1)(C), and this Court's Order of December 9, 2019 (ECF No. 96), Tribal Defendants file this Reply Brief in support of their summary judgment motion (ECF No. 87).

## **ARGUMENT**

### **I. The Tribe's Utility Winter Disconnection Law Applies To Big Horn's Activities and Conduct**

#### **A. The Tribe Has Retained its Inherent Civil Jurisdiction over Big Horn's Activities and Conduct on the Tribal Trust Land where Big Man Resides**

The only issue before this Court is whether the Tribe has retained its inherent civil jurisdiction over Big Horn's activities and conduct occurring on the land where Big Man resides, and where his electric energy and service provided by Big Horn were disconnected. Because this land is held in trust, the Tribe's jurisdiction is presumed, and Big Horn cannot overcome this presumption. The facts supporting this are not in dispute.

Big Horn admits that Big Man resides on trust land where he received electric energy and service from Big Horn. Tribal Defs.' Statement of Undisputed Facts (TD SUF), ECF No. 89 ¶¶ 2, 7. Additionally, Big Horn did not dispute this fact or admission by filing a Statement of Disputed Facts simultaneously with its response to Tribal Defendants' summary judgment motion. *See* L.R. 56.1(b). Therefore, it is now an undisputed material fact that Big Man resides on trust land. *See Price v. City of Red Lodge*, No. CV 14-58, 2015 WL 6672218, at \*3 n.2 (D. Mont. Oct. 30, 2015)

(citing L.R. 56.1(d) (“[F]ailure to file a Statement of Disputed Facts will be deemed an admission that no material facts are in dispute”).

Undoubtedly recognizing the futility of arguing that the Tribe lacks civil jurisdiction over Big Horn’s activities and conduct on the trust land where Big Man resides, and where his electric energy and service were disconnected, Big Horn attempts to expand the issue in this case by challenging the Tribe’s jurisdiction “on the Crow Reservation” generally, without limitation to the undisputed trust land actually at issue. Big Horn Resp. Br. to Tribal Defs.’ Mot. Summ. J., ECF No. 99 (Big Horn SJ Resp. Br.) at 4-6. As Tribal Defendants have argued, this expansion is improper. Tribal Defs.’ Resp. Br. to Big Horn’s Mot. Summ. J. (Tribal Defs.’ SJ Resp. Br.), ECF No. 102 at 1-4. The only issue is whether the Tribe has civil jurisdiction over Big Horn’s activities and conduct occurring on Big Man’s trust land.

The status of the land is essential to determining issues of tribal and state jurisdiction in Indian country. For these jurisdictional determinations, federal Indian law jurisprudence generally recognizes two basic categories of land: (1) Indian land, including: (a) land held by the United States in trust for a tribe, *see, e.g., Montana v. United States*, 450 U.S. 544, 557 (1981) (citation omitted) (“land . . . held by the United States in trust for the Tribe”), or for individual Indians, *see, e.g., Cty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 256 (1992) (“land is held by the United States in trust for . . . individual [tribe]

members”) (with individual Indian trust land often being referred to as trust allotments, *see, e.g., DeCoteau v. Dist. Cty. Ct.*, 420 U.S. 425, 428 (1975) (individual “Indian trust allotments”)); and, (b) other land of a tribe or individual tribe members, including land held in fee by a tribe, *see, e.g., Montana*, 450 U.S. at 557 (non-trust “land belonging to the Tribe”), and tribe members, *see, e.g., Cty. of Yakima*, 502 U.S. at 256 (land “owned in fee by Indians”);<sup>1</sup> and, (2) non-Indian fee land, *see, e.g., Montana*, 450 U.S. at 565 (“non-Indian fee lands”), and its “equivalent,” *see, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997) (state highway right-of-way is the “equivalent” of non-Indian fee land).<sup>2</sup>

Big Horn’s refusal to acknowledge these established land status distinctions predicates its refusal to acknowledge the presumption of tribal jurisdiction applicable here. As Tribal Defendants have argued, inherent tribal civil jurisdiction over the activities and conduct of non-members on Indian land is presumed to exist unless affirmatively limited by a Treaty or federal statute. *Window Rock Unified Sch. Dist. v. Reeves*, 861 F. 3d 894, 898-99 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 648 (2018).<sup>3</sup>

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<sup>1</sup> *See also* 18 U.S.C. § 1151(b) (definition of Indian Country includes “dependent Indian communities”).

<sup>2</sup> Tribal Defendants are unaware of any land known as “allotted fee land held in trust by the United States for Individual tribal members” to which Big Horn refers. Big Horn SJ Resp. Br. at 8.

<sup>3</sup> Contrary to what Big Horn argues, Big Horn SJ Resp. Br. at 2-6, nowhere do Tribal Defendants argue that the presumption of tribal jurisdiction applies anywhere other

In contrast, on non-Indian fee land or its equivalent, tribal jurisdiction over non-member activities and conduct can be confirmed by the consensual relationship and direct effect tests articulated in *Montana*. 450 U.S. at 565-66.

Big Man's land is within the first category of Indian land. It is not non-Indian fee land. Big Horn has admitted and not disputed that the land is trust land. TD SUF ¶¶ 2, 7. Indeed, Big Horn expressly states that the land on which Big Man resides is "unallotted land[]" that is "tribal trust land." Big Horn SJ Resp. Br. at 8 fn.1.<sup>4</sup> Big Man's land is clearly land where tribal civil jurisdiction over the activities and conduct of non-Indians is presumed.

Moreover, Big Horn has not and cannot defeat the tribal jurisdictional presumption on this land. Although Big Horn has admitted and not disputed that there are no express treaty provisions or acts of Congress that divest or diminish the Tribe's jurisdiction on this tribal trust land, TD SUF ¶ 5, Big Horn nevertheless

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than on the trust land at issue in this case; nor is that argument necessary given the undisputed material facts of this case.

<sup>4</sup> Now that the fact that Big Man resides on tribal trust land is an undisputed material fact, Big Horn's point, Big Horn SJ Resp. Br. at 9, that Big Man's Tribal Court Complaint did not reference his land status, is without merit. In any event, under basic rules of notice pleading, "the complaint in a civil action need not contain specific facts establishing a prima facie case, but must only contain a short and plain statement of the claim," *Vangala v. St. Mary's Reg'l Med. Ctr.*, 31 Fed. App'x 537, 538 (9th Cir. 2002), that "give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Lee v. L.A.*, 250 F.3d 668, 679 (9th Cir. 2001) (citation omitted).

argues that the Tribe *implicitly* has lost its right to exclude non-members from Big Man's land. Big Horn SJ Resp. Br. at 8 fn.1 (“By reason of federal common law . . . the Crow Tribe lost ‘the right of absolute and exclusive use and occupation’ upon the tribal trust land [on] which Big Horn provides service to [tribe] members” including Big Man). But there is no authority for using the implicit tribal jurisdictional divestment analysis, applicable to “non-Indian fee land” or its “equivalent,” as was involved in, *e.g.*, *Strate*, 520 U.S. 438, and *South Dakota v. Bourland*, 508 U.S. 679 (1993), to determine tribal jurisdiction on the tribal trust land at issue here. Rather, absent an express treaty or statutory provision, the Tribe's presumed jurisdiction is retained. *Window Rock*, 861 F.3d at 898-99.

Finally, since it is now an undisputed material fact that Big Man resides on tribal trust land, Big Horn's argument, Big Horn Resp. Br. at 10-15, about allotted land not being tribal land is irrelevant. In any event, contrary to Big Horn's argument, the mere fact that an Indian reservation has been allotted or is able to be allotted, or that the reservation boundaries have been diminished or disestablished or are able to be diminished or disestablished, does not *per se* divest tribal civil jurisdiction over non-Indian activities and conduct on trust allotments. *See, e.g.*, *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996), *cert. denied*, 520 U.S. 1139 (1997) (upholding tribal oil and gas severance tax on non-Indian oil company extractions on trust allotment of tribe members where reservation

boundaries had been held to have been disestablished). As *Mustang Production* properly recognized, the question is whether Congress has divested or diminished tribal jurisdiction or the tribe's right to exclude nonmembers. 94 F.3d at 1385; accord *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1008 (8th Cir. 2010), cert. denied, 564 U.S. 1019 (2011) (citation omitted) (finding congressional intent to sever ceded surplus lands from a reservation, but "Congress never expressed a similar intention with respect to the allotted lands. The simple act of dividing the . . . Reservation into individual allotments was insufficient to divest the allotted lands of their reservation status. . . . [and] the Tribe did not . . . relinquish . . . jurisdiction over the allotments"). None of the acts of Congress cited by Big Horn, Big Horn SJ Resp. Br. at 8 footnote 1, and 10-14, show the requisite congressional intent, at least with respect to trust allotments within the Crow Reservation.

**B. Alternatively, Both the *Montana* Consensual Relationship and Direct Effect Tests Confirm the Tribe's Jurisdiction**

**1. Big Horn's consensual relationship with the Tribe and Tribe Members was conclusively established in *Adams II*, or, alternatively, is present here based on Big Horn's provision of electric energy and service**

As Tribal Defendants have argued, *Big Horn County Electric Cooperative, Inc. v. Adams (Adams II)* expressly 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), and collateral estoppel applies to preclude Big Horn from re-litigating that issue in this case. Tribal Defs.' SJ Resp. Br. at 12-16.

Alternatively, assuming *arguendo* that the issue has not been conclusively resolved, *Adams II* correctly held, based on the same facts as are in the present case, that Big Horn has a consensual relationship with Big Man. The primary facts are Big Horn’s “voluntary provision of electrical services” to Tribe members like Big Man. 219 F.3d at 951. *Adams II* further made clear that Big Man’s Membership Application, while a relevant factor in Big Horn’s consensual relationship under *Montana*, is not the determining factor; rather the determining factor is the electrical service provision. *Id.*; accord *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) (concluding that a non-Indian electric cooperative that provides electricity to tribe members on a reservation “has entered into a consensual relationship” under *Montana*).

Additionally, as Tribal Defendants have argued, an important pertinent factor in determining whether a non-Indian has a consensual relationship under *Montana* is whether the non-Indian has notice of tribal law and notice that it is subject to tribal law. Tribal Defs’ Br. in Supp. of Summ. J., ECF No. 88 (Tribal Defs.’ SJ Br.) at 16-19. Big Horn apparently agrees with this as it points out that consensual relationship cases take into account a non-Indian’s “decision to enter into the arrangement or contract [with a tribe or tribe member] with fair notice of the [tribal] regulation” at issue. Big Horn SJ Resp. Br. at 17. Big Horn, however, argues that it never



reasonably should have anticipated being subject to the Tribe's Winter Utility Disconnection Law. But like its admission and failure to dispute that Big Man resides on trust land, Big Horn has admitted and failed to dispute that it had notice of the Tribe's Law. TD SUF ¶ 6. Hence, it is now an undisputed material fact that Big Horn has been specifically aware of the Tribe's Law since 1986, over a decade before it began providing electric energy and service to Big Man. *Id.* at ¶s 6, 7.

Finally, *Adams II* also supports that the requisite nexus is present between the consensual relationship – electric energy and service provision – and the tribal jurisdiction at issue in this case: seasonal regulatory notice and approval requirements regarding the disconnection of the energy and service provided.<sup>5</sup> Thus, *Montana's* consensual relationship test may be used to confirm the Tribe's jurisdiction in this case.

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

Big Horn gives short shrift to the notion that utility disconnection has anything to do with a community's health, safety and welfare. Big Horn SJ Resp. Br. at 18-19. As Tribal Defendants have argued, however, there is ample federal and state law

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<sup>5</sup> Even if Big Horn were correct that the Membership Application is the sole basis of Big Horn's consensual relationship with Big Man, the nexus between the Application and the Tribe's Utility Winter Disconnection Law, Title 20 of Crow Tribe Law and Order Code, which regulates the services that the Application covers, is sufficient under *Montana*.

and commentary as well as organizational reporting documenting the adverse effects that utility disconnections have on the health, safety and welfare of communities, particularly disconnections that affect vulnerable populations such as the very young, the elderly, the poor, the sick, and the disabled, and that occur in cold climates and during cold weather. Tribal Defs.’ SJ Resp. Br. at 21-24. Thus, with good reason this Court already has held expressly that an electric utility’s “winter shut-offs undoubtedly ha[ve] a direct effect on the health and welfare of the . . . Tribe.” *Glacier Elec.*, 2015 WL 13650531, at \*4. The same result is called for here.

## **II. Big Horn Agrees That The Validity And Enforceability Of The Membership Application Forum Selection Clause Are Not Issues Before This Court**

Nowhere do Tribal Defendants argue, as Big Horn posits, Big Horn SJ Resp. Br. at 19, that the Tribe seeks to “legislatively entitle its members to not adhere to contractual obligations.” Regarding Big Man’s Membership Application terms like the forum selection clause, Tribal Defendants’ argument is, and always has been, that the validity and enforceability of those terms are non-jurisdictional issues, separate from the threshold issue of the existence and scope of the Tribe’s inherent jurisdiction, which should be decided by the Tribal Courts. Tribal Defs.’ SJ Br. at 24-26; Tribal Defs’ SJ Resp. Br. at 24-26. Big Horn apparently agrees with this argument as it now expressly states that the Application “is not directly at issue in this matter at this time.” Big Horn SJ Resp. Br. at 19.

Big Horn nevertheless proceeds to argue that the forum selection clause “should have negated the entire Big Man lawsuit altogether.” Big Horn SJ Resp. Br. at 19-20. But Big Horn puts forth no authority from this Court or from the Ninth Circuit in support of this argument. As Tribal Defendants have argued, this Court should follow *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 33 (1st Cir. 2000), and *Snowbird Construction, Inc. v. United States*, 666 F. Supp. 1437 (D. Idaho 1987), to hold that the Membership Application’s forum selection clause’s validity and enforcement are issues to be decided by the Tribal Courts.

### CONCLUSION

For the reasons set forth above and in Tribal Defendants’ Opening Brief in Support of its Motion for Summary Judgment, and their Response Brief in Opposition to Big Horn’s Summary Judgment Motion, 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 24th day of January, 2020.

/s/ Melody L. McCoy

PRO HAC VICE COUNSEL FOR  
TRIBAL DEFENDANTS

/s/ Wesley J. Furlong

LOCAL COUNSEL FOR TRIBAL  
DEFENDANTS

Attorneys for Defendants Unknown  
Members of Crow Tribal Health Board,  
Hon. Chief Justice Kenneth Pitt, and Hon.  
Judges Dennis Bear Don't Walk and  
Michelle Wilson

**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 2,586 words, excluding the caption, table of contents and authorities, exhibit list, certificates of service and compliance, which is less than the permitted 3,250 words.

/s/ Melody L. McCoy

PRO HAC VICE COUNSEL FOR  
TRIBAL DEFENDANTS

## CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2020, a true and correct copy of the foregoing TRIBAL DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT was served upon the following via the Court's electronic filing system:

James E. Torske  
TORSKE LAW OFFICE, P.L.L.C.  
314 North Custer Avenue  
Hardin, Montana, 59034  
406-665-1902  
[torskela@tctwest.net](mailto:torskela@tctwest.net)

Michael G. Black  
BECK, AMSDEN & STAPLES, PLLC  
1946 STADIUM DRIVE, SUITE 1  
Bozeman, MT 59715  
406-586-8700  
[mike@becklawyers.com](mailto:mike@becklawyers.com)

Kathryn R. Seaton  
Montana Legal Services Association  
616 Helena Avenue, Suite 100  
Helena, MT 59601  
406-442-9830 x142  
[kseaton@mtlsa.org](mailto:kseaton@mtlsa.org)

/s/ Melody L. McCoy