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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 TO PLAINTIFF'S OBJECTION TO FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE**

INTRODUCTION AND SUMMARY

On July 21, 2020, U.S. Magistrate Judge Timothy J. Cavan entered his Order and Findings and Recommendations, recommending that the Court grant the Tribal Defendants' and Defendant Alden Big Man's motions for summary judgment and deny Plaintiff Big Horn County Electric Cooperative's (BHCEC) summary judgment motion. (ECF No. 129). BHCEC filed its Objection to the Findings and Recommendations and brief in support on August 12, 2020. (ECF Nos. 132 and 133).

Pursuant to L. R. 72.3(b), Defendants Unknown Members of the Crow Tribal Health Board, Honorable Chief Justice Kenneth Pitt, Honorable Judge Dennis Bear Don't Walk, and Honorable Judge Michelle Wilson (collectively, Tribal Defendants) file this response, noting at the outset that BHCEC does not object to resolution of the tribal jurisdictional issues in this case by means of summary judgment. BHCEC simply and expressly argues that it, not Defendants, is "entitled to summary judgment." Obj. Br. at 2, 15.

BHCEC's first objection is to the Magistrate's "combined factual and legal findings" that the land at issue in this case is tribal trust land over which the Crow Tribe has retained its civil jurisdiction with respect to non-Indian activities and conduct. While not specifically objecting to the Magistrate's finding that Defendant Alden Big Man lives on tribal trust land, BHCEC reiterates its argument

that tribal jurisdiction over non-Indian activities and conduct on that land has been lost. However, BHCEC fails to show how the Magistrate incorrectly concluded that the requisite specific and express intent of Congress needed to divest or diminish tribal jurisdiction on tribal trust land is lacking.

BHCEC further objects to the Magistrate's findings that, even if the land at issue in the case is non-Indian fee land or its equivalent, both tests set forth in *Montana v. United States*, 450 U.S. 544 (1981) for determining tribal jurisdiction over the activities and conduct of non-Indians on non-Indian fee land– the "consensual relationship" and the "direct effect" test -- are satisfied to sustain tribal jurisdiction in this case. With respect to this objection, BHCEC offers no basis beyond disagreement with the Magistrate's findings for this Court to determine that the Magistrate's findings were incorrect. Accordingly, "[t]he Court [should] adopt[] Judge Cavan's Findings and Recommendations in full." *Fid. Expl. & Prod. Co. v. Bernhardt*, CV 16-167-BLG-SPW, 2019 WL 1149975, at *1 (D. Mont. Mar. 13, 2019) ("*Fidelity*").

STANDARD OF REVIEW

The Court reviews *de novo* a Magistrate's findings and recommendations to which a party has properly objected. *Fidelity*, 2019 WL 1149975, at *1 *citing* Fed. R. Civ. P. 72(b)(3) and 28 U.S.C. § 636(b)(1)(C). The portions of the findings and recommendations to which no specific objection has been made are reviewed for

clear error. *Fidelity*, 2019 WL 1149975, at *1, *citing McDonnell Douglas Corp. v. Commodore Bus. Machs., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981), and *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." *Fidelity*, 2019 WL 1149975, at *1, *citing McMillan v. United States*, 112 F.3d 1040, 1044 (9th Cir. 1997) (citations omitted).

As this Court explained in *Fidelity*,

> "A party makes a proper objection by identifying the parts of the magistrate's disposition that the party finds objectionable and presenting legal argument and supporting authority, such that the district court is able to identify the issues and the reasons supporting a contrary result." "It is not sufficient for the objecting party to merely restate arguments made before the magistrate or to incorporate those arguments by reference." "Objection[s] to a magistrate's findings and recommendations [are] not a vehicle for the losing party to relitigate its case" Congress created magistrate judges to provide district judges "additional assistance in dealing with a caseload that was increasing far more rapidly than the number of judgeships." There is no benefit to the judiciary "if the district court[ ] is required to review the entire matter de novo because the objecting party merely repeats the arguments rejected by the magistrate."

2019 WL 1149975, at *1 (internal citations omitted; brackets in original).

I. RESPONSE TO OBJECTIONS REGARDING THE MAGISTRATE'S FINDINGS FOR TRIBAL JURISDICTION ON TRIBAL TRUST LAND

BHCEC does not object to the Magistrate's finding that Big Man resides on tribal trust land where the electrical energy and service that he received from BHCEC was disconnected. As the Magistrate notes, this finding was made

following oral argument and the submission by both parties of Supplemental Statements of Fact and supporting documents. Magistrate's Findings at 10. As BHCEC repeatedly states, "the complete documents [for determining the status of Big Man's land] were ultimately made a part of the record" for the Magistrate's consideration. BHCEC Obj. Br. at 5, 7, 8.

It is from the finding that Big Man resides on tribal trust land that the Magistrate correctly proceeded to employ the well-established legal principle that tribes presumptively retain their inherent right to exclude non-Indians from tribal land and the concomitant rights to condition non-Indians' entry to tribal land and exercise jurisdiction over non-Indian activities and conduct on tribal land. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-149 (1982). This presumption of inherent tribal rights and authority can be defeated only by an express treaty provision or act of Congress. *Id*. at 149-52.

The Magistrate found, consistent with BHCEC's long-standing admissions in this case, that the requisite express treaty provisions or acts of Congress simply do not exist to defeat tribal jurisdiction on tribal trust land in this case. For example:

> **[Tribal Defendants'] 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.
>
> **[BHCEC] Answer:** Admit. 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.

BHCEC Resp. to Tribal Defs.' First Set of Interrogs., Reqs. for Admis., and Req. for Prod. of Docs. at 2, attached to Tribal Defs.' Br. in Supp. of Summ. J. (ECF Nos. 88-1). In support of its summary judgment motion, BHCEC nevertheless argued that the General Allotment Act and Crow Allotment Act divested or diminished tribal jurisdiction. The Magistrate disagreed. "There is nothing in the General Allotment Act or Crow Allotment Act which specifically limits the Crow Tribe's civil jurisdiction over non-Indian activities on Tribal land." Magistrate's Findings at 11-12. Nothing in BHCEC's objections contradicts or casts doubt on this finding.

The Magistrate also correctly rejected BHCEC's "designated purpose" implicit divestiture argument; that where Congress has designated tribal land for a specific purpose, that implicitly divests tribal jurisdiction over non-Indian activities and conduct on the land. As the Magistrate noted, "BHCEC offers no authority to support its argument" that a congressional designation of a land's purpose *implicitly* leads to a loss of a tribe's right to exclude non-Indians from the land. Magistrate's Findings at 12. BHCEC objects that this finding is in error, BHCEC Obj. Br. at 9, but offers no explanation or authority for its disagreement with the finding. Indeed, the Supreme Court recently rejected a similar implicit divestiture

argument, stating that "congressional intrusions on [certain] pre-existing [tribal] treaty rights fall short of eliminating all tribal interests in the land." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2466 (2020).

BHCEC's objections also rely on an "easements and rights-of-way" implicit divestiture argument. BHCEC Obj. Br. at 5-10. The Title Status Report appendices admitted into the record immediately after oral argument list various easements and rights-of-way for the tract of tribal trust land within which Big Man's parcel of land is located, some of which pertain to BHCEC. However, as Tribal Defendants' pointed out at oral argument, Cross Motions for Summary Judgment Transcript, at 34, lines 8-10, none of BHCEC's actual easements or rights-of-way are in the record in this case, due to BHCEC's own volition. For example:

> **[Tribal Defendants'] Interrogatory No. 9:** Please state how many rights-of-way agreements BHCEC has on the Reservation.
>
> **[BHCEC] Answer:** Objection. Tribal Health Board Defendants seek information concerning right of way agreements which is impermissibly broad including irrelevant information which exceeds the scope of permissible discovery and *which has no bearing upon whether the Crow Tribe has the jurisdictional authority to regulate the business activities of BHCEC through enforcement of Title 20*. Responding comprehensively to this overly broad interrogatory will require unwarranted examination of over seventy-nine years accumulation of business records, and not withstanding exposing BHCEC to excessive unnecessary expense, would not reasonably be calculated to lead to the discovery of admissible evidence.

BHCEC Resp. to First Set of Discovery at 4 (emphasis added).

Further, the terms "easement" and "right of way" do not appear in the text (as opposed to court case quotations, parentheticals, or summaries) of BHCEC's Complaint (ECF No. 1), or in its Summary Judgment Motion, supporting briefs or Statements and Supplemental Statements of Undisputed and Disputed Facts (ECF Nos. 83, 83-1, 83-4, 104, 109, 116). Nor, in response to the Magistrate's Order regarding Supplemental Statements of Undisputed Facts and supporting materials (ECF No. 112), did BHCEC seek to submit the actual easements or rights-of-way. (ECF 113) Thus, for the entirety of the summary judgment proceedings in this case, BHCEC did not rely on its easements and rights-of-way, and, it expressly disavowed their relevancy.

In its objections, BHCEC admits that at least some of the easements and rights-of-way are merely "adjacent to" Big Man's land. BHCEC Obj. Br. at 5-6. BHCEC also claims to have easements or rights-of-way that cover the entire larger tract of land wherein Big Man's parcel is located. BHCEC Obj. Br. at 7, 9. BHCEC argues that the easements and rights-of-way make tribal trust land "the equivalent of non-Indian fee land" for purposes of determining tribal jurisdiction over non-Indian activities and conduct on or within the easements or rights-of-way. BHCEC Obj. Br. at 6-10.

But the Magistrate, who had the benefit of BHCEC's original position, later arguments and the listing of the easements and rights-of-way in the Title Status

Report appendices, correctly recognized that, under applicable authority including *Merrion*, the mere existence of easements and rights-of-way in and of themselves do not dictate BHCEC's desired result. Magistrate's Findings at 13-14. The threshold inquiry for determining whether tribal land becomes non-Indian fee land or its equivalent for purposes of jurisdictional determinations in federal Indian law is congressional intent as evidenced by the congressional act authorizing the easement or right-of-way. *See Strate v. A-1 Contractors*, 520 U.S. 438, 454-55 (1997); *accord Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1063 (9th Cir. 1999), *cert. denied*, 529 U.S. 1110 (2000) (bestowal of or limitations on land rights and therefore land status for purposes of tribal jurisdictional determinations is first and foremost a question of congressional intent); *see also McGirt*, 140 S. Ct. at 2462-63 (citations omitted) ("To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. . . . . [and to alter the status of Indian reservation land,] Congress [must] clearly express its intent to do so . . . .").

Despite ample opportunity, BHCEC did not offer any congressional acts or congressional intent pertaining to its easements and rights-of-way until its Objections. *See* BHCEC Obj. Br. at 8 (referencing 25 U.S.C. §§ 323-328). For whatever reason, BHCEC's reference to these statutes and cases construing them is without analysis of statutory language or congressional intent. In any event, this

Court is not required to consider new arguments or evidence raised in objections to a magistrate's findings and recommendations that could have been raised previously. *United States v. Howell*, 231 F.3d 615, 622 (9th Cir. 2000), *cert. denied*, 534 U.S. 831 (2001), *citing United States v. Raddatz*, 447 U.S. 667 (1980). To the extent this Court has discretion to consider the new arguments or evidence raised in objections, the typical basis for doing so is where a criminal defendant is proceeding *pro se*. *E.g.*, *Evans v. Kirkegard*, No. CV 11-112-M-DWM, 2013 WL 4679705, at *2 (D. Mont. Aug. 30, 2013), *citing Akhtar v. Mesa*, 698 F.3d 1202, 1208-09 (9th Cir. 2012); *accord Brown v. Roe*, 279 F.3d 742, 746 (9th Cir. 2002). That is not the case here. *See Brown*, 278 F.3d at 745 (expressly distinguishing cases where litigants are represented by counsel).

Moreover, the act or intent of Congress is not the end of the inquiry. Whether tribal land becomes the equivalent of non-Indian fee land also is a question of the actual terms of the easement or right-of-way authorized by Congress. *Strate*, 520 U.S. at 454-456; *Red Wolf*, 196 F.3d at 1063. BHCEC has not revealed those terms in this case by choosing not to submit its easements and rights-of-way, perhaps due its original position that they are "irrelevant" to the issues at bar.

Finally, even if BHCEC were correct that there is sufficient congressional intent to treat the tribal trust land on which Big Man resides as the equivalent of

non-Indian fee land for purposes of determining tribal jurisdiction, that merely gets BHCEC out from under the presumption of tribal jurisdiction applicable to tribal trust land, a presumption which has not and cannot be defeated in this case due to a lack of an express treaty provision or act of Congress. But as the Magistrate correctly recognized, having land be non-Indian fee land or its equivalent is not the end of the inquiry. Tribal jurisdiction over the activities and conduct of non-Indians on non-Indian fee land can be confirmed, and as Tribal Defendants will show next, the Magistrate properly confirmed tribal jurisdiction in this case.

II. RESPONSE TO OBJECTIONS REGARDING THE FINDINGS OF JURISDICTION UNDER THE *MONTANA* NON-INDIAN FEE LAND TESTS

A. The Consensual Relationship Test

BHCEC objects to the Magistrate's finding that a consensual relationship between it and Big Man exists sufficient to confirm tribal jurisdiction over its activities and conduct. But the Magistrate correctly applied the factors set forth in *Big Horn County Electric Cooperative v. Adams*, 219 F.3d 944 (9th Cir. 2000), which are whether a consensual relationship exists, and whether there is a sufficient nexus to the relationship and the tribal regulation at issue. Magistrate's Findings at 16.

In finding the existence of a consensual relationship, the Magistrate relied on *Adams'* holding that BHCEC's voluntary provision of electrical services on the

Reservation creates a consensual relationship. *Id*. at 17-18. The Magistrate then found that under *Adams*, a sufficient nexus exists between BHCEC's activities arising from this relationship and the Tribe's utility winter disconnection law. "[T]he prohibition against disconnecting electrical service in the winter months is a regulation on the activities of BHCEC, and thus squarely within the consensual relationship exception." *Id*. at 18. The Magistrate further found the requisite nexus existed based on BHCEC's Membership Application with Big Man. "But for the contract between BHCEC and Big Man, BHCEC would not have the right to terminate service for non-payment and Big Man would never have obtained electricity in the first place." *Id*.

BHCEC focuses its objection on the nexus requirement findings (BHCEC Obj. Br. at 11-12), but fails to offer any specific authority or evidence for why the Magistrate's nexus-based-on-activities finding is incorrect in this case. BHCEC's objection to the nexus-based-on-contract finding also merely reiterates its summary judgment motion arguments that because the Membership Agreement terms are not at issue in this case, there is no nexus to sustain the applicability of the Tribe's law. The Magistrate had the benefit of BHCEC's nexus arguments and correctly rejected them.

B. The Direct Effect Test

BHCEC objects to the Magistrate's findings that a direct effect exists sufficient to confirm tribal jurisdiction over its activities and conduct in this case. BHCEC Obj. Br. at 13-14. BHCEC bases its objections on two points: 1) that the Magistrate's reliance on *Glacier Electric Cooperative v. Gervais*, CV 14-75-GF-BMM, 2015 WL 13650531 (D. Mont. Apr. 24, 2015), an exhaustion of tribal remedies case, was inappropriate to use in this case where the issue is tribal jurisdiction on the merits; and, 2) that the Magistrate incorrectly determined that the Tribe's utility winter disconnection law is needed to protect the Tribe and tribal communities from endangerment.

In response to BHCEC's point that *Glacier Electric* was merely a tribal-remedies- exhaustion case, as opposed to a tribal-jurisdiction-on-the-merits case, as Tribal Defendants already have stated, the standard for determining whether exhaustion is required (colorable or plausible) is lower than the standard for determining whether tribal exhaustion exists, but the factors generally are the same. Tribal Defs.' Br. in Supp. of Summ. J. (ECF No. 88), at 17 fn. 3, *citing Rincon Mushroom Corp. v. Mazzetti*, 490 Fed. App'x. 11, 13, (9th Cir. 2012). Thus, the Magistrate's use of *Glacier Electric*'s express finding that a tribe's "winter shut-off [law] undoubtedly has a direct effect on the health or welfare" of a tribe, was appropriate. While there are no post-exhaustion decisions in *Glacier*

Electric, BHCEC offers no post-exhaustion cases that would undermine the Magistrate's finding.

The Magistrate also found that "[t]he termination of heat in the middle of the winter clearly poses a danger to the health and welfare of Big Man, and potentially to any Tribal member who obtains electrical services from BHCEC within the reservation boundaries, and thus the Crow Tribe itself." Magistrate's Findings at 20. BHCEC disagrees with this finding, but offers no authority or argument beyond what was presented already to the Magistrate. In short, the Magistrate already has rejected BHCEC's argument that "the absence of tribal authority to enforce" its utility winter disconnection law does not harm the Tribe's ability to protect its vulnerable populations. BHCEC Obj. Br. at 14.

III. RESPONSE TO OBJECTIONS THAT THE JURISDICTIONAL FINDINGS IN THIS CASE ARE LIMITED TO BHCEC'S ACTIVITIES AND CONDUCT ON BIG MAN'S LAND

BHCEC objects to the Magistrate's finding that the issue of tribal jurisdiction in this case is limited to BHCEC's activities and conduct on Big Man's land. BHCEC Obj. Br. at 9. In support of this objection, BHCEC relies on its Complaint in this Court. *Id.*

The Magistrate, however, correctly recognized that BHCEC's Complaint does not present this Court with an original action seeking a broad, general declaration of the Tribe's authority over BHCEC's activities and conduct

throughout the Reservation or elsewhere. BHCEC's Complaint arises from Big Man's proceedings initiated in the Crow Tribal Courts, and thus presents this Court with the opportunity to review the Tribal Courts' decisions once tribal remedies have been exhausted. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 853-857 (federal district courts have federal question jurisdiction under 28 U.S.C. § 1331 to review whether a tribal court has exceeded the lawful limits of its jurisdiction, but only after the parties have exhausted their remedies available in the tribal court).

In its post-exhaustion reviewing capacity to the Tribal Court proceedings, this Court's inquiry is limited to the question of whether the Tribal Courts correctly determined federal law issues of the Tribe's authority to regulate BHCEC's conduct and activities on Big Man's land, and the Tribal Courts' authority to hear Big Man's claims arising on that land. *See Zurich Am. Ins. Co. v. McPaul*, No. CV-19-08227-PCT-SPL, 2020 WL 4569559, at *2 (D. Ariz. Aug. 7, 2020) (federal "district court's review of tribal jurisdiction is akin to an appellate review of the tribal court record"), *citing Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 817 n.9 (9th Cir. 2011). For this Court to reach issues outside of the scope of its review would essentially be an advisory opinion. *See also Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 868 (9th Cir. 2017) (in declaratory judgment actions, what makes a "proper judicial resolution of a 'case

or controversy' rather than an advisory opinion – is the settling of some dispute" which affects the relationship of the parties as confined to the litigation").

CONCLUSION

For the reasons stated above, the Court should adopt the Findings and Recommendations of the U.S. Magistrate Judge in full.

RESPECTFULLY SUBMITTED, this 26th day of August, 2020.

/s/ Melody L. McCoy
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/s/ Wesley James Furlong
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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(B), I certify that this response 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 3,340 words, excluding the caption, certificates of service and compliance, which is less than the permitted 6,500 words.

/s/ Melody L. McCoy

PRO HAC VICE COUNSEL FOR
TRIBAL DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2020, **TRIBAL DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTION TO FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE** was served upon the following via the Court's electronic filing system:

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