EXHIBIT 12

THREE AFFILIATED TRIBES — IN DISTRICT COURT

FORT BERTHOLD RESERVATION — NEW TOWN, NORTH DAKOTA

Gabriel Fettig, Howard Fettig,
Charles Fettig, and Morgan Fettig,

Plaintiffs,

vs.

WPX Energy Williston LLC,
Defendant.

CIV2020-0179

ORDER DENYING MOTION TO DISMISS AND GRANTING LEAVE TO FILE AMENDED COMPLAINT

The Defendant has moved this Court to dismiss this complaint seeking damages for the alleged breach of a side agreement to a right of way (hereinafter ROW) over allotted lands beneficially owned by the Plaintiffs. The Plaintiffs claim that the Defendant and its employees and agents breached a no-smoking provision of the side agreement by smoking cigarettes during the use of the right of way and disposing of the butts on their property. They seek the damages specified in the side agreement ($5000) for each violation. In their original complaint they also sought termination of the ROW's, but now seek leave to file an amended complaint deleting that request for relief.

The Defendants have moved this Court to dismiss the complaint on three discrete grounds: 1) tribal court jurisdiction is preempted because the subject matter of the lawsuit, oil and gas leases on allotted lands, is governed exclusively by federal law, see Kodiak v Burr, and thus this Court's jurisdiction is precluded; 2) even if the claim arises under tribal law, and not federal, there are administrative remedies through the Department of Interior that should be exhausted prior to this Court's exercise of jurisdiction under the MHA Nation Supreme Court ruling in XTO Energy v. Burr, APP

2016-002; and 3) this Court lacks jurisdiction over the claim because it involves a non-Indian Defendant and tribal jurisdiction does not lie under Montana v. United States, 450 U.S. 544 (1981).

Argument on the motion was held on the 2nd day of June 2021. Counsel for the Plaintiffs, Reed Soderstrom, appeared along with counsel for the Defendant, Robin Wade Forward. Both counsel presented spirited arguments and engaged the Court. For the forthcoming reasons the Court denies the motion to dismiss on all three grounds and will discuss the legal issues seriatim after a review of the facts.

FACTS PRESENTED

Because the instant motion comes to the Court prior to an adjudication of the merits the Court will assume the facts in a light favorable to the non-moving party. Ultimately, however the burden is upon the Plaintiffs to demonstrate that this Court has jurisdiction over the dispute so the Court will address the issues cognizant of its limited jurisdiction over non-Indians.

The Plaintiffs are members of the Three Affiliated Tribes and are the beneficial owners of certain lands held in trust by the United States for them (oftentimes referred to as allotted lands, although whether the lands were actually ever allotted or were acquired by Plaintiffs throughs some other mechanism is largely irrelevant). They entered into a right of way agreement with the Defendant oil company for oil and gas production on four allotments: Allotment 1109A, Allotment 1836-A, Allotment 921, and Allotment 853.

The execution and enforcement of ROW's on allotted and trust lands held by the United States for Indian tribes and individuals for natural resources extraction is a heavily

federally-regulated industry discussed extensively in the MHA Nation's Supreme Court decision in XTO Energy et al v. Burr , et al, APP 2016-02 and the United States Court of Appeals decision in Kodiak Oil & Gas v. Burr, 932 F.3d 1125 (8th Cir. 2019). The Kodiak Court upheld a preliminary injunction issued by a federal district court enjoining this Court from exercising jurisdiction over a lawsuit brought by allotted landowners against oil companies for alleged breach of ROW's for failure to capture flared gas on their lands. The MHA Nation Supreme had upheld this Court's exercise of jurisdiction over the disputes involved in Kodiak, but required exhaustion of administrative remedies available through the Bureau of Land Management prior to the exercise of jurisdiction. The United States Court of Appeals disagreed with the MHA Nation Supreme Court's decision regarding this Court's jurisdiction, however, finding that the legal issues in dispute pertained to federal law and not tribal law and thus tribal court jurisdiction was thus preempted under federal court precedents prohibiting tribal courts from asserting jurisdiction over causes of action arising primarily under federal law[1]. See Nevada v. Hicks, 533 U.S. 353 (2001).

Both the federal district court Judge, the Honorable Daniel Hovland, and the United States Court of Appeals for the Eighth Circuit did an excellent job in Kodiak analyzing the breadth of federal law and regulations pertaining to the regulation of the oil and gas extraction industry in Indian country. Kodiak, 1132-33 and explained that with regard to disputes pertaining to the operation of the ROW's themselves allotted

[1] The Plaintiffs asked for leave to amend their original complaint seeking not only enforcement of the stipulated penalties for violation of the side agreement to the ROW's but also recission of the ROW's in acknowledgement of the Kodiak decision that this Court lacks jurisdiction to address any violation of the ROW itself and this Court granted leave.

landowners would have to seek federal administrative or judicial remedies to obtain relief. [2]

The federal regulations governing ROW's for oil and gas production in Indian country permit the landowners and ROW recipients to enter into what the parties refer to as "side agreements" dealing with issues tangentially related to the purpose of the ROW and to also stipulate to "negotiated remedies" for violations of those side agreements. 25 CFR §§169.401 et seq. In the case at bar the parties entered into a side agreement on a form provided by the BIA, an issue stressed heavily by the Defendant, that included several provisions not directly related to the purpose of the ROW's.[3] One of the provisions that forms the gravamen for this dispute is Section O of the side agreement which provides that the Defendant will not permit "smoking" on their lands in the exercise of the ROW's. This Court is not aware of, nor have the Parties brought to the Court's attention, any federal law or regulations governing the issue of smoking on ROW's for mineral extraction. Section O also restricts hunting on the lands where the ROW's are located, another issues that seems to be clearly regulated by tribal law, not federal law. The negotiated remedy for a violation of this section is $5000 per incident. The Plaintiffs claim that they have been to the job sites and found numerous cigarette butts left there by the Defendant's workers and have also attached photographs to their complaint of the Defendant's employees smoking on their lands.

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[2] This fine analysis is somewhat contradicted by federal regulations, 25 CRF§169.403€ that expressly recognize that the landowners and oil extractors may stipulate that the tribal court have jurisdiction to enforce ROW's including the right to terminate them This choice of form provision was apparently not part of the ROW's in that case.

[3] Although these side agreements are made part of the ROW's they are not executed by the Department of Interior but only by the ROW owners and the landowners.

Section J of the side agreement provides that the Defendant will comply with all applicable state, federal and local regulations in exercising its rights under the ROW's. In addition 25 CFR §169.402 vests both the BIA and the "tribe with jurisdiction" to "investigate compliance consistent with tribal law."25 CFR §169.403 permits the Parties to a ROW to negotiate remedies for "a violation, abandonment or non-use" of a ROW and the Parties both concur that this section is also applicable to side agreements.

That section permits Indian landowners and the grantee to negotiate remedies for violations of the side agreement and a mechanism for enforcement of the remedies, provided the enforcement mechanism is exercised by or on behalf of the majority of the landowners. This does not seem to be an issue herein as all landowners signed off on the side agreements. If the negotiated remedy includes termination of the ROW the BIA must concur with this remedy. Termination is not the negotiated remedy for this alleged violation; instead it is a monetary fine of $5000 per violation so BIA concurrence is not a requirement.

§169.403(d) states that a landowner "may" request the assistance of the BIA in enforcing negotiated remedies, but does not mandate administrative remedies. Subsection (e) allows the Parties to stipulate that violations will be addressed by the Tribe and disputes resolved in tribal court or any other court of competent jurisdiction with the proviso that the BIA does not necessarily have to bound by the decision of the Tribal Court, but the regulation does state that the BIA will defer to ongoing efforts to enforce violations. 25 USC §169.404 describes the procedure that the BIA will utilize if it is called upon to enforce the side agreements to the ROW. The side agreement, although it does refer to the applicability of local law and the ROW also refers to the reservation of

the Tribe's jurisdiction to enforce its laws with regard to the ROW including its "inherent sovereign power to exercise civil jurisdiction over non-members on Indian land", does not expressly stipulate to this forum having the authority to enforce the side agreement. The language of the side agreement, coupled with the federal regulations, certainly does seem to beg the issue of what forum, if not this one, is the appropriate one since state law and courts would certainly not seem to have that authority. This Court is also not aware of what federal laws exist pertaining to smoking on or near oil extraction sites that would be enforceable in federal court.[4]

DOES THIS COURT HAVE JURISDICTION OVER THE DISPUTE?

The Defendants' first contention is that this dispute pertains to a ROW over tribal lands for the purposes of oil and gas development and that this area of the law is exclusively controlled by federal law, similar to the decision in the Kodiak case. The Kodiak Court did note that in general Tribal Courts may only enforce tribal law and if the gravamen of a dispute arises under federal law Tribal Courts cannot adjudicate the claim, citing Nevada v. Hicks, 533 U.S. 353 (2001). The Kodiak Court held that in "cases where non-Indians are concerned , tribal courts' adjudicative authority is limited (absent

[4] As the Kodiak Court pointed out tribal courts are not courts of general jurisdiction when adjudicating claims involving non-Indians. The same can be said for federal courts though as just because an agreement is entered into between a tribal member and a non-Indian does not ipso facto vest federal courts with jurisdiction to hear the merits of the matter as there must be some basis for federal court jurisdiction. Just because the United States Supreme Court has held that federal question jurisdiction lies for cases challenging tribal court jurisdiction over non-Indians does not mean that the federal courts have authority to hear the underlying dispute. So, for example a non-Indian who challenges tribal jurisdiction over him in a marriage dissolution proceeding cannot ask a federal court to divorce him from his Indian wife. .

congressional authorization) to cases arising under tribal law."[5] The Court went on to examine the breadth of federal statutory and regulatory law dealing with oil and gas leases on Indian lands and concluded that federal law preempted the field.

The Kodiak court did not deal with these side agreements to ROW's that can apparently pertain to any number of issues that are merely ancillary to the ROW.[6] In this case the Plaintiffs are so apparently averse to smoking cigarettes on their land that they negotiated an agreement that the Defendant's employees not smoke on their lands and included a fairly stiff penalty for violations. It is correct, as the Defendant asserts, that this agreement was executed on a federal form and that it is attached to a ROW. The side agreement itself is not approved of by the BIA but ii is an ancillary agreement that is part of the larger ROW approved of by the United States. The ROW and the side agreement refer to the right of the Tribe to regulate conduct of non-Indians in paragraph 3 of the ROW and refers to the Tribe's authority to enforce its laws, even against non-Indian litigants. The side agreement references the application of "local 'law to it.

Even the federal regulations governing ROW's seem to contemplate the application of tribal law and the use of this Court to enforce these side agreements as the regulations refer to the right of the Tribe to enforce violations and the right of this Court to enforce the negotiated remedy. This regulation would be rendered superfluous if the Court accepts the Defendant's argument that any side agreement to a ROW is ipso facto a

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[5] An exception to this however would have to be the Indian Civil Rights Act, 25 USC §1301 because that is a federal law only enforceable in tribal courts, except through limited habeas corpus jurisdiction. See 25 UC §1303

[6] These side agreements appear unlimited in scope and theoretically the parties could have contracted for the playing of a Lawrence Welk song before work every day and this apparently would become a federal mandate to enforce this if the arguments of the Defendant are accepted

claim arising under federal law because Parties cannot create tribal court jurisdiction if federal law preempts it. This Court interprets Kodiak to mean that if the underlying claim of the lawsuit pertains to the exercise of the ROW rights, or seeks compensation for the alleged violation of the ROW itself, or is seeking to terminate the ROW, then federal law governs and the application of tribal law is preempted. However, if the lawsuit pertains to an agreement incorporating local law that is only ancillary to the ROW then tribal court jurisdiction would lie, assuming the standards laid out in Montana v. United States are met.

There are numerous tribal law issues that may arise in the operation of ROW rights. For example, what if a tribal member were injured on the job while working for a company on the reservation with a ROW for oil extraction. Does this worker's compensation case thus become one of exclusive federal jurisdiction because the company was only there because of the ROW. What if a grass fire were to break out caused by an employee of the Defendant, who happens to be a Crow Indian, smoking at the well site. Does the federal court have exclusive jurisdiction over this?

Paragraph 3 of the ROW also seems to be a reservation by the Tribe of its rights under 25 CFR §169.403(e) to address violations of the side agreement to the ROW. That paragraph specifically reserves to the Tribe the jurisdiction to enforce its laws pertaining to violations on the ROW's even against non-Indians. Although that paragraph does not explicitly mention the tribal court of the Tribes it refers to the authority to enforce and this Court is the arm of the tribal government designated to enforce the laws of the Tribe. The Court thus finds that Kodiak is not controlling here and instead the Parties contracted to permit the Tribe and its Court to address violations of the side agreement and thus this

claim arises under tribal and not federal law. Federal regulations permit this and clearly grant this Court jurisdiction to enforce the side agreement.

SHOULD THE PLAINTIFFS BE REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES

The Defendant's next argument is that even if tribal jurisdiction is not preempted the Court should stay its hand and require the Plaintiffs to exhaust administrative remedies prior to asserting jurisdiction. They point to the MHA Nation's Supreme Court decision in XTO Energy et al v. Burr , et al, APP 2016-02 in support of this claim as well as a recent decision of the United States District Court for the District of North Dakota in Chase v. Andover Logistics, L.P./, 1:19-CV-00143. In Chase the Court held that tribal landowners should be required to exhaust their administrative trespass remedies with the Department of Interior before seeking trespass damages against a non-Indian company that allegedly continue to exercise easement rights after termination of the easement. The Plaintiffs were also challenging the legality of the initial easement granted by the BIA. The Court did not find that exhaustion was mandatory, but only that under Klaudt v. US Dept of Interior, 990 F.2d 409,411 (8th Cir. 1993) exhaustion was the more prudent rule when the underlying claim was that the Department of Interior was derelict in authorizing an easement and not resolving a holdover situation and the Department was in the process of addressing the alleged trespass.

Similarly in XTO the MHA Nation Supreme Court ordered tribal plaintiffs to exhaust their administrative remedies available through the Bureau of Land Management in the flaring of methane dispute that was the subject matter of the Kodiak case before the Eighth Circuit. Although the Eighth Circuit ultimately held that this Court lacked the

jurisdiction to hear that dispute, this Court still feels that the MHA Nation Supreme Court decision has precedential value for purposes of other similar proceedings.

The MHA Nation Supreme Court did not find that exhaustion was compelled under federal or tribal law, but instead applied the general principles of federal law found in McCarthy v. Madagan, 503 US 140, 145 (1992) that stressed the value of having agency interpretation of regulations prior to judicial decision-making, especially in the area of complex or technical issues. The issues of flaring and failure to capture gases released during the fracking process are complicated issues, this Court notes. Discovering cigarette butts and photographing employees smoking on-site are less complex, although the Court certainly does not underestimate the ability of the BIA to complicate them.

Two issues thus arise. Are there federal administrative remedies available in this case and if so, are they mandatory or discretionary?. Second if these remedies exist would requiring exhaustion assist this Court in resolving any technical or complicated issues pertaining to the alleged violation of the side agreement.

This Court does find that 25 CFR §169.403(d) provides an optional administrative remedy through the BIA in the form of enforcing negotiated remedies, and although it is not clear that this includes determining violations of side agreements, for purposes of determining this legal issue the Court will assume that the BIA would undertake an investigation and enforce negotiated remedies if violations are found. The remedy of termination seems to be the BIA's primary remedy, but that is not sought here, so the Court assumes that similar to the BIA assessment of trespass damages that the BIA could assess damages if violations are found. It is clear however that at least the BIA assumes that in cases where the landowners or Tribe have included a provision that the Tribe will

retain the right to address violations of side agreements, the BIA will stay its hand in deference to the Tribe. Subsection (e) expressly provides for the agency to "defer to ongoing proceedings." This Court does not want to create a situation of renvoi where both this Court and the BIA are staying their adjudicative hands as such would result in injustice to these parties who are entitled to an expeditious resolution of their conflict.

For several reasons this Court will not stay these proceedings pending exhaustion of remedies before the BIA. First, as opposed to the situation in XTO Energy v. Burr where the Supreme Court ordered exhaustion to permit the BLM to determine some rather complicated issues, the dispute in this case seems fairly straightforward involving an issue of whether the Defendant's agents and employees smoked on the job site. DOI's perspective on this would not enlighten this Court. Second, the agency that has some administrative power in this case, through its own regulations, indicates a preference to defer to this Court if the parties stipulated to apply tribal law in their ROW. These parties did so in the ROW. Third, this Court is cognizant of the fact that the COVID crisis hit the local BIA office particularly hard and the office has been essentially closed since spring of 2020, preventing the public from entering and delaying many administrative matters including probates. It is impossible to tell when that office would be able to get back and operational and what kind of backlog it has. Lastly, this Court is concerned about the inordinate delays in administrative matters before the BIA and the impact it has on litigants in this Court. The undersigned is presiding over one matter, Gorneau v. Brugh, CV 2011-0621, a trespass action filed by tribal members against others, where the Court has stayed its hand to permit the BIA to determine a partition action filed by the Tribes. That case has been pending for ten years and the partition petition for some seven years

and it does not appear to be anywhere close to administrative conclusion. The Plaintiffs point out that in the Chase v. Andover Logistics, L.P./, 1:19-CV-00143 litigation pending in the federal district court in North Dakota the alleged trespasses involved in that case have allegedly been ongoing for decades without administrative resolution or even a trespass citation by the BIA. The Court certainly understands the important role the trust responsibility has in the relationship between the Tribes and the DOI and wants to support that symbiotic relationship. However, the Court has a constitutional duty under the Constitution of the Three Affiliated Tribes to adjudicate actual cases and controversies in a timely manner and continually deferring cases because there is some glimmer of an administrative remedy does not appear to be justice to this Court.

JURISDICTION UNDER MONTANA

Lastly, the Defendant contends that even if this Court's jurisdiction is not preempted by the Kodiak analysis and if administrative remedies need not be resorted to, this Court nonetheless lacks jurisdiction over the Defendant because it is a non-Indian company. The Montana analysis has been somewhat reinvigorated by a recent United States Supreme Court case, United States v. Cooley, in which the SCOTUS upheld the authority of a tribal police officer to detain and investigate criminal conduct by a non-Indian on the Crow reservation noting that criminal conduct by non-Indians has an impact on the health and welfare of tribal members under the second prong of Montana. The United States Court of Appeals for the Eighth Circuit had almost declared the second prong of Montana a legal impossibility by limiting it to situations where the Tribe must demonstrate near catastrophic consequences caused by the actions of a non-Indian. Belcourt Public School District v. Herman, 786 F.3d 653 (8th Cir. 2015). The Cooley case

clearly demonstrates that such an analysis is incorrect and requires a recalibration of the Montana analysis with regard to suits brought by individuals against non-Indians.

The standard for assessing whether tribal court jurisdiction over non-Indians can be condoned under federal law remains Montana v. United States, 450 U.S. 544 (1981). In that case the United States Supreme Court limited the authority of Indian tribes to regulate the conduct of non-members on non-Indian owned **fee lands** within reservation boundaries. Although that case had nothing to do with tribal court adjudicatory authority, it was cited by the Supreme Court as the controlling case on this issue of tribal court authority to hear disputes involving non-Indians on non-tribal lands in Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997). There are two situations when tribal courts can adjudicate the interests of non-Indians: 1) when the non-Indian has entered into a consensual relationship with a tribal member and the subject matter of the lawsuit pertains to that consensual relationship or; 2) when the non-member's conduct "threatens or has some direct effect on the political integrity, the economic security, or health or welfare of the Tribe." *Montana*, at 566. In defining the second prong of Montana it appears to this Court that expressed congressional intent, as expressed at 18 USC §2265(e) is very compelling.

Montana seemed to lay out a clear rule for determining tribal authority over non—Indians. If the conduct pertained to the ownership or use of a non-Indian's fee lands within reservation boundaries the Tribe's jurisdiction was proscribed and could only be exercised under one of the two exceptions. Tribal authority over the actions of non-Indians on tribal or trust lands was unlimited however and indeed even as recently as

the United States Supreme Court's decision in Plains Commerce, Chief Justice Roberts described tribal authority over activity on its own lands as being "plenary."[7]

The Plaintiffs point out that in this case the dispute is clearly regarding a ROW over Indian-owned trust lands and Montana only applies to restrict this Court's adjudicatory authority over disputes regarding fee land, citing several cases in support of that proposition. So perhaps the Montana distinction between Indian and non-Indian lands on the reservation may continue to have some meaning, but later Supreme Court decisions dictate otherwise. The next reiteration of Montana seems to be Nevada v. Hicks, 533 U.S. 353 (2001), although the opinion in that case is not clear on whether it created an exception to Montana or whether the Court merely engaged in statutory interpretation to hold that a tribal court could not exercise jurisdiction over a cause of action premised on 42 U.S.C. §1983 brought by a tribal member against a "state" employee- a game warden. The vast majority of cases, with one *major* exception, simply restate the Court's holding in Hicks as an example of when a tribal court lacks civil

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[7] Roberts commented on the legal impact of lands going out of trust and into fee status as follows: "Our cases have made clear that once tribal land is converted into fee simple, **the tribe loses plenary jurisdiction over it**. See *County of Yakima*, *supra*, at 267–268 (General Allotment Act permits Yakima County to impose ad valorem tax on fee land located within the reservation); *Goudy* v. *Meath*, 203 U. S. 146, 140–150 (1906) (by rendering allotted lands alienable, General Allotment Act exposed them to state assessment and forced sale for taxes); *In re Heff*, 197 U. S. 488, 502–503 (1905) (fee land subject to plenary state jurisdiction upon issuance of trust patent (superseded by the Burke Act, 34 Stat. 182, 25 U. S. C. §349) (2000 ed.)). Among the powers lost is the authority to prevent the land's sale, see *County of Yakima*, *supra*, at 263 (General Allotment Act granted fee holders power of voluntary sale)—not surprisingly, as "free alienability" by the holder is a core attribute of the fee simple, C. Moynihan, Introduction to Law of Real Property §3, p. 32 (2d ed. 1988). Moreover, when the tribe or tribal members convey a parcel of fee land "*to non-Indians*, [the tribe] loses any former right of absolute and exclusive use and occupation of the conveyed lands." *South Dakota* v. *Bourland*, 508 U. S. 679, 689 (1993) (emphasis added).

jurisdiction and therefore may not exercise jurisdiction over the claim.[8] However, as noted, there is one case which appears to interpret the *Hicks* decision as establishing that the *Montana* exceptions do not apply to state or government entities. See MacArthur v. San Juan County, 497 F.3d 1057, 1073 (10th Cir. 2007) (citing Montana, 450 U.S. 544). Specifically, the Tenth Circuit cites Justice O'Connor's concurrence in *Hicks* as establishing "a per se rule that consensual relationships entered into between state governments and tribes, 'such as contracts for services or shared authority over public resources,' could no longer give rise to tribal civil jurisdiction." *Id.* (citing Hicks, 533 U.S. at 393-94). In addition, the circuit court noted Justice Scalia's response that "[t]he [*Montana*] Court . . . obviously did not have in mind States or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into." San Juan County, 497 F.3d at 1073 (quoting *Hicks*, 533 U.S. at 372). When considering the language in *Hicks* that, at the very least, the first *Montana* exception cannot apply to States or state officers, Justice Scalia was surely implying that the exception could not pierce the sovereign immunity protection enjoyed by States and state officers.

At least five Justices of the Supreme Court seemed to conclude in Hicks, however, that the Montana analysis applies to all assessments of tribal court authority over non-Indian litigants, even when the cause of action arises on trust lands or the dispute involves regulation of those lands.

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[8] A tribal court may not exercise civil jurisdiction over state agents for on-reservation investigations stemming from off-reservation conduct

The Supreme Court's latest pronouncement on the subject, Plains Commerce Bank v. Long Family Cattle Company, 554 U.S. 316 (2008) seems to preclude the exercise of tort jurisdiction over a cause of action arising on fee lands within Indian country if the cause of action relates to the ownership of fee land and the Tribe's sovereign interests are not implicated. It is telling that the fee lands in Plains Commerce were located on the Cheyenne River Indian reservation and were owned by a Bank and being sold to tribal members. Despite this appearing to be a dispute arising from consensual relations between a tribal member and non-Indian the Court held that a tort action for discrimination was too attenuated from the underlying consensual relationship to condone tribal jurisdiction. The tribal court in the Plains Commerce Bank case had upheld tribal court jurisdiction over an action brought by Indian plaintiffs against a non-Indian Bank asserting that the Bank had discriminated against them by foreclosing on fee lands within a reservation and selling them to non-Indians on more favorable terms than those offered them. Even though the tribal court noted that the transaction between the Bank and the Long Family Cattle Company was certainly a consensual one and it arose on the reservation, the Supreme Court nonetheless held that because the cause of action sounded in tort jurisdiction did not lie. The Court strongly suggested however that the reason the tribal Court lacked jurisdiction was because the cause of action pertained to ownership of fee land. This case has nothing to do with a dispute over "ownership" of fee land, but instead whether an easement existed prior to transfer of the lands to non-Band members.

Plains Commerce can be viewed as being entirely consistent with the Montana analysis creating a presumption against the tribal court exercise of jurisdiction over a

dispute that involves fee land and a non-Indian's use of fee land were it not for some of the language used in Plains Commerce to extricate the Court from the obvious reality in that case that the tribal members had entered into a consensual relationship with the Bank and the dispute before the Court pertained to that consensual relationship. The Supreme Court held the Bank could not have reasonably foreseen it being subjected to tribal law merely because it contracted with a tribal member on the reservation, 554 U.S. at 338, although that probably does not make sense from a business perspective, especially now since the United States Supreme Court has held that any business that engages in commerce in a jurisdiction, even e-commerce business, has sufficient ties to the jurisdiction to be taxed by that jurisdiction. See South Dakota v. Wayfair, 585 US _____ (June 21, 2018 memorandum decision).

The Plains Commerce Court, however, started using language to narrow the first prong of Montana in an apparent attempt to limit tribal court civil jurisdiction over causes of action arising from purely private consensual relationships such as contracts or other commercial dealings. The Court held that the exercise of tribal jurisdiction "must stem from the tribe's inherent sovereignty to set conditions on entry, preserve tribal self-government or control internal relations." 554 U.S. 337.

This language was seized upon by the United States District Court for the District of North Dakota in a case arising on the Fort Berthold reservation to enjoin this Court's exercise of jurisdiction over a suit brought by tribal members against non-Indian entities to address the flaring of gases from oil wells on trust lands in violation of leases. In Kodiak Oil and Gas et al v. Burr et al, 303 F.Supp.3d 964 (D.N.D. 2018) the Court held that in order for a Tribal Court to exercise jurisdiction over a dispute involving non-

Indian consensual relations with tribal members the tribal member or party has to demonstrate that the conduct of the non-Indian implicates the tribe's "sovereign interests." Although the 8th Circuit seemed to uphold the District Court's preliminary injunction on other grounds the Court did seem to acquiesce in this interpretation of the first prong of Montana.

This is a rather extraordinary reiteration of the first prong of Montana and seems to be an attempt to superimpose the second prong of Montana[9] onto the first prong by ruling that the conduct of the non-Indian has to impact the "sovereign interests of the Tribe." Under this standard it is almost impossible to see how Tribal Courts can divorce a tribal member married to a non-Indian, order a non-Indian to pay child support, issue a domestic violence protection order against a non-Indian, order a non-Indian to pay debts owed to tribal businesses, garnish wages of non-Indians who owe debts even when they work for tribal entities. These are the rather mundane things tribal and state courts do on a regular basis, which may not impress jurists in the federal system, but are part and parcel of what constitutes justice in this country. To strip Tribal courts of their jurisdiction over these things because they do not impact "sovereign interests" seems a

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[9] The second prong of Montana has been essentially eviscerated in the Eighth Circuit by that Court's rulings in Belcourt Public School District v. Herman, 786 F.3d 653 (8th Cir. 2015) where the Court held with regard to the second prong of Montana that:

> The conduct must do more than injure the tribe, it must "*imperil the subsistence*" of the **tribal** community. [*Montana*, 450 U.S. at 566]. One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that **tribal** power must be *necessary to avert catastrophic consequences*." Cohen § 4.02[3][c], at 232, n.220.

bit arbitrary and will undoubtedly result in many situations where Indian litigants are left without a forum to gain relief.

Cooley seems to broaden the notion of the Tribe's sovereign interests, however, by declaring that the Tribe has a right, recognized in the second prong of Montana, to detain and search non-Indians committing criminal conduct in Indian country. Therefore, even if the District Court's analysis in Kodiak is correct and in order for this Court to assess its jurisdiction over a non-Indian litigant by assessing whether that non-Indian litigant's conduct affects sovereign interests of the Tribe, the Court finds that this test has to be undertaken with a fresh perspective because of Cooley.

This Court finds jurisdiction over the non-Indian Defendant for several reasons. First, the parties contracted to be bound by tribal law, and ergo this Court's authority to enforce tribal law, in the ROW agreement itself. Paragraph 3 of the ROW also seems to be a reservation by the Tribe of its rights under 25 CFR §169.403(e) to address violations of the side agreement to the ROW. That paragraph specifically reserves to the Tribe the jurisdiction to enforce its laws pertaining to violations on the ROW's even against non-Indians. Although that paragraph does not explicitly mention the tribal court of the Tribes it refers to the authority to enforce and this Court is the arm of the tribal government designated to enforce the laws of the Tribe.

Second, this Court finds jurisdiction under the first prong of Montana. Even counsel for the Defendant at oral argument seemed to concede that these parties have a "consensual relationship" in the form of a contract (the ROW and the side contract), although counsel did not concede that it is the type of consensual relationship that would confer jurisdiction on this Court. Even if the Plaintiffs have the additional burden of

demonstrating that their consensual relationship with the Defendant implicates tribal interests, the Court finds that they have carried that burden here. The Three Affiliated Tribes certainly has a compelling interest in the efficient management of energy production industry on the Fort Berthold reservation since the industry is the main economic driver of the Tribes for its members. Indeed, tribal government consent to ROW's over lands whenever the Tribe has an interest is mandated under federal law and the only reason the Tribes are not party to this ROW and side contracts is because the allotments at issue are solely owned by individual landowners. The management of ROW's over all tribal lands however is certainly an area of concern for the Tribes as without that efficient management and enforcement the Tribes lose their main economic engine.

Even if the argument is made that this consensual relationship only concerns the side agreement prohibiting smoking at the well site, the Tribes still maintain a sovereign interest in enforcement of that contract. The MHA Nation has declared a state of emergency on the Fort Berthold reservation due to the ongoing drought and tender fire conditions. See Resolution 21-110-FWF, May 13, 2021. That resolution refers to the "increase in wildfire frequency" on the reservation and the potential for a wildfire to decimate homes and the oil industry on the reservation. There has already been one brush fire south of Mandaree. This Court notes that the National Library of Medicine calculates that a significant number of wildfires and house fires are caused by cigar rete smoking and the negligent disposal of butts.

https://www.sciencedirect.com/science/article/abs/pii/S0091743500906807?via%3Dihub The Tribes have an interest in ensuring that contracts prohibiting smoking on or near well sites are respected and enforced.

With regard to the second prong of Montana, the United States Supreme Court has now had the opportunity to expound upon its meaning in the context of an actual case or controversy in Cooley. Cooley certainly calls into question the United States Court of Appeals for the Eighth Circuit decision in Belcourt Public School District v. Herman, 786 F.3d 653 (8th Cir. 2015). Even if good law, that case however did not involve any consensual relations between the Tribe and a non-Indian but instead involved an attempt by a tribal member to sue a state school district in tribal court, a case more likened to the Hicks case. In this case there is a consensual transaction, This Court thus finds that jurisdiction may lie under the second prong of Montana as interpreted by the Plains Commerce case and illuminated by the Cooley analysis.

IT IS THEREORE ORDERED, ADJUDGED, AND DECREED that the Defendant's motion to dismiss asserting that this Court lacks jurisdiction over the Plaintiffs' complaint is DENIED and this Court finds it has jurisdiction and it is further

ORDERED, ADJUDGED AND DECREED that the Plaintiffs' motion for leave to file their amended complaint removing the prayer for relief in the form of termination of the ROW is granted.

So ordered this 4th day of June 2021.

B. J. June

ASSOCIATE JUDGE

ATTEST: _____
CLERK OF COURTS