Lucas Buckley, #6-3997
HATHAWAY & KUNZ, LLP
P. O. Box 1208
Cheyenne, WY 82003-1208
(307) 634-7723
(307) 634-0985 (fax)
lbuckley@hkwyolaw.com

ATTORNEY FOR RESPONDENTS
EASTERN SHOSHONE AND
NORTHERN ARAPAHO TRIBES

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

MERIT ENERGY OPERATIONS I, LLC, Petitioner, vs. EASTERN SHOSHONE AND NORTHERN ARAPAHO TRIBES, Respondents.	)	Case No. 1:23-cv-00063-SWS

THE NORTHERN ARAPAHO AND EASTERN SHOSHONE TRIBES' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS AND FOR AN AWARD OF FEES AND COSTS

The Northern Arapaho Tribe, the Eastern Shoshone Tribe, and Merit are parties to an Oil and Gas Lease governing the Circle Ridge Field on the Wind River Reservation (the "Lease"). (*See* Dkt. 1 at ¶¶ 2-4). On April 7, 2023, an arbitration panel issued a decision relating to the Equipment at the Circle Ridge Field. (Dkt. 1-2). On April 11, 2023, Merit filed with this Court a Petition to confirm that arbitration award pursuant to the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 9-10. (Dkt. 1 at ¶ 8). This Court, as recently confirmed by the United States Supreme Court, lacks jurisdiction over the dispute and thus must dismiss Merit's Petition. Moreover,

because the Parties' contract *requires* that the losing party pay all fees and expenses, in granting the Tribes' Motion and dismissing Merit's Petition, the Court should also award the Tribes all of their fees and costs.

I. BINDING SUPREME COURT PRECEDENT REQUIRES MERIT'S PETITION BE DISMISSED FOR LACK OF JURISDICTION.

Federal courts have been granted jurisdiction over two principal types of cases: "suits between citizens of different States as to any matter valued at more than $75,000 (diversity cases), 28 U.S.C. § 1332(a), and suits 'arising under' federal law (federal-question cases), § 1331." *Badgerow v. Walters*, 142 S. Ct. 1310, 1311 (2022). Merit's Petition cannot satisfy either requirement.

Here, Merit's Petition incorrectly asserts that the Court has federal question jurisdiction. (*See* Dkt. 1 at ¶ 13). But Merit's mere request to confirm an arbitration award pursuant to the FAA does not itself raise a federal question. *See Badgerow*, 142 S. Ct. at 1317-18 (holding that disputes under Sections 9 and 10 of the FAA regarding "the enforceability of an arbitral award" do not themselves raise a federal question). That is because the FAA's "authorization of a petition" to enforce an arbitration award "does not itself create jurisdiction"; "[r]ather, the federal court must have … an '*independent jurisdictional basis*' to resolve the matter." *Id.* at 1314 (emphasis added). As such, an applicant seeking to confirm or vacate an arbitral award "must identify a grant of jurisdiction"—apart from the FAA—that confers "access to a federal forum." *Id.* at 1316 (also explaining that a contrary approach would mean that "every arbitration in the country, however distant from federal concerns, could wind up in federal district court").

Critically in *Badgerow*, and here, this independent grant of jurisdiction must be apparent from "the face of the application itself," without proceeding "downward" or "look[ing] through

the Section 9 and 10 applications to the underlying substantive dispute." *Id. at* 1317-18. In other words, federal jurisdiction must be apparent without looking to a dispute "not before" the court. *Id.* at 1317.

Applying this rule of decision, the Supreme Court thus explained that it would be improper for federal jurisdiction to hinge on a federal question raised in the *underlying* dispute, a dispute which the federal court itself was not tasked to resolve; instead, the federal court must focus solely on the confirmation lawsuit before it when considering its jurisdiction. *Id.* In *Badgerow*, because the federal court was only tasked with whether to confirm or vacate an arbitration award, the matter lacked jurisdiction and had to be dismissed. *Id.* at 1317-18.

Against this backdrop, it is clear that Merit's Petition to confirm the arbitration award pursuant to the FAA must be dismissed as devoid of federal court jurisdiction. Merit's hodgepodge of potential federal connections cannot save it, as those are all clearly irrelevant to the actual jurisdictional question before this federal court. (*See* Dkt. 1 at ¶ 13). When deciding whether to confirm the arbitration award, for example, it makes no difference to this federal court that the *underlying* dispute was connected to the Circle Ridge Field located on federal Indian land, that the *underlying* Lease is governed (in part) by federal law, or that the Business Councils of both Tribes ratified the *underlying* Lease. *See Badgerow*, 142 S. Ct. at 1314 (explaining that a federal court assessing its jurisdiction looks "only to the application actually submitted to it," and does not "look through" the application to the underlying dispute between the parties). It likewise makes no difference that the *underlying* Lease—as Merit's Petition asserts—was entered into pursuant to the Indian Minerals Development Act ("IMDA"), was subject to various federal laws, or was approved by the federal Secretary of the Interior. *See, e.g.*, *id.*; *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 951-52 (9th Cir 2004) (concluding there was no federal question where a company's

petition merely sought enforcement of arbitration award, despite that the underlying dispute involved a federal Indian Mineral Leasing Act (IMLA) Lease requiring the Secretary's approval, because the company was only seeking confirmation of the arbitration award and "[f]ederal approval of the underlying leases or amendments has no material bearing on whether this award requires confirmation or enforcement"); *see generally Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 770 F.3d 944, 948-49 (10th Cir. 2014) (district court properly dismissed contract claims against Tribe for lack of subject matter jurisdiction because the presence of "federal issues – whether the contract required approval by the United States Secretary of the Interior . . . and whether the contract was a valid 'Minerals Agreement' under the Indian Mineral Development Act of 1982" do not give rise to federal question jurisdiction).

In short, looking only at Merit's actual request to confirm the arbitration award—and without "looking through" that Petition to Merit's jumble of irrelevant facts such as the underlying Lease, the circumstances of the Parties' negotiations, federal laws and approvals, or the underlying dispute itself—it is abundantly clear the Court lacks federal question jurisdiction here.

It is also irrelevant that, pre-*Badgerow*, another federal court entered an order confirming a final arbitration award related to the same Lease. (*See* Dkt. 1 at ¶ 13). That another court may have—again, pre-*Badgerow*—asserted jurisdiction, possibly incorrectly, still does not confer jurisdiction here; the creation of federal jurisdiction is for Congress alone. *See generally Badgerow*, 142 S. Ct. at 1311 (Congress has granted federal courts limited jurisdiction, mainly over "diversity cases" and "federal-question cases"). Indeed, before *Badgerow,* there was disagreement as to whether a federal court could in fact "look through" to the underlying dispute when assessing its jurisdiction, as a Court can do in actions to compel arbitration. *Id.* at 1317. But

that approach is no longer viable for petitions to confirm arbitration awards, because the Supreme Court in *Badgerow* has said so.

Finally, for avoidance of doubt, there also is no diversity jurisdiction because the Tribes are stateless for diversity purposes. *See, e.g.*, *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993) (explaining that "Indian tribes are not citizens of any state for purposes of diversity jurisdiction" and affirming dismissal for lack of diversity jurisdiction); s*ee also Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974) (observing that "an Indian tribe is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction" because tribes fall under " 'stateless person' cases which hold that where a party is unable to establish that he is either a citizen of a state or a citizen or subject of a foreign state, no diversity jurisdiction exists in federal court"). Merit Petition acknowledges that the Northern Arapaho Tribe and the Eastern Shoshone Tribe are both federally-recognized Indian tribes, (Dkt. 1 at ¶ 12) and thus no diversity jurisdiction exists.

In sum, as is apparent from the face of Merit's Petition, this federal court lacks jurisdiction over Merit's Petition to confirm the arbitration award. Merit's Petition, therefore, must be dismissed. *Matios v. City of Loveland*, 2022 WL 2734270, at *2-3 (10th Cir. July 14, 2022) (applying *Badgerow*, explaining that FAA does not create jurisdiction, that courts do not look through to underlying dispute for jurisdiction, and that petition to conform the award does not establish federal-questions jurisdiction, and thus remanding with instruction to dismiss petition to confirm arbitration award for lack of diversity and subject matter jurisdiction); *Andrew v. Talbot*, 2020 WL 9432912, at *2-3 (D. Colo. Feb. 20, 2020) (finding that FAA alone cannot confer subject matter jurisdiction and dismissing petition to confirm arbitration award for lack of jurisdiction).

II. THE PARTIES' CONTRACT REQUIRES THAT MERIT PAY THE TRIBES' FEES AND COSTS.

Since Merit's Petition to confirm award is devoid of federal court jurisdiction and must therefore be dismissed, the Tribes are clearly the prevailing party and Merit must pay all the Tribes' fees associated with this federal court action. Here, the Parties' contract—the Lease—explicitly mandates that all reasonable expenses relating to resolution of lease disputes, including attorneys fees and expenses shall be paid by the losing party. Lease § 20.0.5.[1] This explicitly includes expenses for judicial enforcement. *Id.*

The parties' contract—the Lease—must always be the starting point for the analysis, and must be enforced according to its plain terms. *See CITGO Asphalt Refining Co. v. Frescati Shipping Co., Ltd.,* 140 S. Ct. 1081, 1088-89 (2020) (explaining that contracts are construed by their terms and consistent with the parties' intent). Because the Lease's plain language unequivocally states that the losing party ***shall*** pay all reasonable expenses, if the Court grants the Tribes' Motion and dismisses Merit's Petition to Enforce the Arbitration Award, the Court should also award the Tribes' all fees and costs. *See* Black's Law Dictionary, Shall (explaining that "shall" generally means something is "imperative or mandatory"); *Neustrom v. Union Pac. R.R. Co.*, 156 F.3d 1057, 1063 (10th Cir. 1998) (explaining that unambiguous contracts, such as the Lease's mandatory fee shifting provision, must be "enforced according to their plain, general, and common meaning in order to ensure the intentions of the parties are enforced"); *see also Ericsson,*

[1] Merit has alleged in this dispute that the Lease is a confidential document. The Tribes, therefore, have not attached the Lease hereto because no Protective Order has been established in this matter. However, the Lease has been previously filed with this Court in a dispute between the parties in Case No. 21-25, at Doc. Nos. 01-02 and 15-01. As such, the Lease is available to the Court and the Tribes request that this Court take judicial notice of such filing until such time as a Protective Order may be established in this case.

Inc. v. CoreFirst Bank & Trust, 746 Fed. Appx. 756, 763 (10th Cir. 2018) (noting that a party may be reimbursed for attorneys' fees when there is express contractual authorization); *Summit Valley Indus. v. Local 112,* 456 U.S. 717, 721 (1982) (same).

CONCLUSION

For the reasons stated herein, the Tribes respectfully request that the Court dismiss Merit's Petition and award the Tribes all fees and costs and any and all other relief it deems appropriate as a result of the dismissal.

DATED this 20th day of June, 2023.

/s/ Lucas Buckley
Lucas Buckley, WSB #6-3997
HATHAWAY & KUNZ, LLP
2515 Warren Avenue, Suite 500
P.O. Box 1208
Cheyenne, WY 82003-1208
307.634.7723 (telephone)
307.534.0985 (facsimile)
lbuckley@hkwyolaw.com

COUNSEL FOR RESPONDENTS EASTERN SHOSHONE AND NORTHERN ARAPAHO TRIBES

L. Clare Johnson
General Counsel, Northern Arapaho Tribe
533 Ethete Road
Ethete, WY 82520
Phone: (307) 349-9422
Clare.johnson@northernarapaho.com

Keith M. Harper (*pro hac vice pending*)
Grace C. Signorelli (*pro hac vice pending*)
JENNER & BLOCK LLP
1099 New York Avenue NW, Suite 900
Washington, DC, 20001-4412
(202) 639-6000
kharper@jenner.com
gsignorelli@jenner.com

COUNSEL FOR THE NORTHERN ARAPAHO TRIBE

Brett Stavin (*pro hac vice forthcoming*)
ROSETTE, LLP
400 N. Walker Ave., Suite 250
Oklahoma City, OK 73102
bstavin@rosettelaw.com

COUNSEL FOR EASTERN SHOSHONE TRIBE

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June 2023, I electronically transmitted the foregoing document to the Clerk of Court of the U.S. District Court, District of Wyoming, using the CM/ECF system for filing. Based on the records currently on file the Clerk of Court will transmit a Notice of Electronic Filing to all registered counsel of record.

/s/ Lucas Buckley
Hathaway & Kunz, LLP