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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

MERIT ENERGY OPERATIONS I, LLC, Petitioner, vs. EASTERN SHOSHONE AND NORTHERN ARAPAHO TRIBES Respondents.	1:23-cv-00063-SWS

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

Petitioner has failed to establish that the face of its Petition raises a federal question for this Court to decide. Following Petitioner's admission that diversity jurisdiction is similarly lacking, this Court has no jurisdictional grounds upon which it may proceed. *Badgerow v. Walters*, 212 L. Ed. 2d 355, 142 S. Ct. 1310 (2022). The Court thus must dismiss this case.

As background, on April 7, 2023, an arbitration panel issued a decision relating to the oil and gas Equipment at the Circle Ridge Field, an oil and gas field on the Wind River Reservation. (Dkt. 1-2). On April 11, 2023, Petitioner filed with this Court a Petition to confirm that arbitration

award under the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 9-10. (Dkt. 1 at ¶ 8). On June 20, 2023, Respondents timely filed a Motion to Dismiss the Petition and award fees and costs to the Respondents, joined by a supporting brief. (Dkt. 15-16). As explained therein, this Court, as recently held by the United States Supreme Court in *Badgerow*, lacks jurisdiction over the dispute and must dismiss the Petition because the Petition identifies no valid, independent basis for jurisdiction apparent from the face of the Petition itself without improperly relying on the FAA or looking "downward" to the underlying Lease-based dispute between the Parties. (Dkt. 16 at pp.2-5). Moreover, because the Parties' contract *requires* that the non-prevailing party pay all fees and expenses, in dismissing the Petition, Respondents also request the Court award them all of their fees and costs. (*Id.* at pp.6-7).

Petitioner filed an Opposition to Respondent's Motion to Dismiss on July 14, 2023, arguing the Court has jurisdiction given the nature of the Parties' underlying dispute. (Dkt. 20). This approach is incorrect, as explained more fully below. Given Petitioner's failure to identify a valid jurisdictional basis, this Court must dismiss the Petition.

I. PETITIONER MISINTERPRETS THE SUPREME COURT'S RECENT DECISION REQUIRING AN INDEPENDENT JURISDICTIONAL BASIS.

Petitioner's Petition incorrectly contends that the Court has federal question jurisdiction. (*See* Dkt. 1 at ¶ 13). Yet Petitioner's mere request to confirm an arbitration award pursuant to Section 9 of 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).

It is also irrelevant that the underlying dispute "grew out of" a claim that could have been brought in federal court. *Id* at 1318. "Congress has not authorized a federal court to adjudicate a

Section 9 or 10 application just because the contractual dispute it presents grew out of arbitrating different claims, turning on different law, that (save for the parties' agreement) could have been brought in federal court." *Id.* Because Petitioner has not established that resolution of the parties' present dispute—whether to confirm the arbitral award—is itself a matter of federal law, the Petition must be dismissed.

To avoid this outcome, Petitioner attempts to frame the issue here as one that concerns the parties' contractual rights arising under the Lease. (Dkt. 20). To the contrary, the question presented herein is solely whether this Court should confirm the arbitral award. (Dkt. 1 at ¶ 1). This is a distinct request, and one that does not arise from the Lease. The references to federal law in the Lease cannot alone be enough to bestow this Court with subject matter jurisdiction; after all, the subject matter jurisdiction of federal courts can never be satisfied solely through contractual agreement. *Hursh v. DST Sys., Inc.*, 54 F.4th 561, 565 (8th Cir. 2022); *see also Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167 (1939) ("The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer.").

Despite Petitioner's attempt to connect this proceeding to the Lease's governing law provision, a Lease-based dispute is not before this Court. (*See* Dkt. 1 at ¶ 13). Indeed, Petitioner's precise reasoning was rejected in *Badgerow*. There, the petitioner expressly argued that, without judicial look-through of Section 9 applications to confirm an arbitral award, federal courthouse doors would be closed "to many post-arbitration motions, even when they grow out of disputes raising *exclusively* federal claims." *Id.* at 1321 (citations and internal quotations omitted) (emphasis in original). The Supreme Court rejected this argument, holding that Section 9 applications *do not* receive any look-through beyond the face of the Petition. *Id.* at 1320. Thus,

as in *Badgerow*, this Court cannot look through the Section 9 application to the underlying substantive dispute to establish subject matter jurisdiction. Federal jurisdiction over the confirmation of a Section 9 application must arise from the face of the application alone. *Badgerow*, 142 S. Ct. 1310.

As the Court explained in *Badgerow*, federal courts thus would not be tasked with confirming all arbitration awards; that task would largely fall to other appropriate courts. Yet there would still be some instances in which an independent jurisdictional basis to confirm an arbitration award would be present on the face of the petition itself. In *Catalina Holdings (Bermuda) Ltd. V. Hammer*, for example, the Petitioner, a foreign entity, requested confirmation of an arbitration award under both the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *Catalina Holdings (Bermuda) Ltd. V. Hammer*, 378 F. Supp. 3d 687, 689-91 (N.D. Ill. 2019). That Court first acknowledged that jurisdiction could not be based upon the FAA, as it "requires that parties seeking review of an arbitral award 'establish some independent basis for federal subject matter jurisdiction.'" *See id.* at n. 3 (citations omitted). Yet the Convention on the Recognition and Enforcement of Foreign Arbitral Awards provided such an "independent basis for jurisdiction" because it, standing alone, could mark both "the beginning and end" of the Court's authority over the case. *See id.*

In short, as *Badgerow* plainly held, 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," which must be present on the face of the petition itself. *Badgerow*, 142 S. Ct. at 1314 (emphasis added). The face of Petitioner's Petition, the only document this Court may rely on, merely seeks confirmation of an arbitration award which in and of itself is not a federal question. And since *Badgerow* forecloses the

possibility of establishing federal court jurisdiction based on the underlying substantive dispute (in the arbitration, this Petition must be dismissed for want of subject matter jurisdiction.

II. PETITIONER'S SOLE BINDING AUTHORITY DOES NOT SUPPORT JURISDICTION.

Petitioners misplace their reliance on *P & P Industries, Inc. v. Sutter Corporation* 179 F.3d 861 (10th Cir. 1999). For one, *P & P Industries* was decided years before the Supreme Court's decision in *Badgerow*, which squarely controls the outcome here. Second, in *P & P Industries*, the dispute was simply which federal district court was the appropriate forum in which to confirm the award, *id.* at 861, not whether any federal court had *jurisdiction* to confirm the award. The Tenth Circuit then held that the district court had *diversity jurisdiction* pursuant to 28 U.S.C. § 1332 "because the parties are citizens of different states, and the amount in controversy exceeds $75,000." *Id.* at 866.[1] But here, "Merit does not contend that the parties are diverse." (Dkt. 20 at fn.1). Thus, the analysis in *P & P Industries* is irrelevant.

Petitioner concedes that the Court does not have diversity jurisdiction and nothing in *P & P Industries* supports an exercise of federal question jurisdiction. As such, Petitioner has not—and cannot—support an exercise of jurisdiction by this Court.

III. PETITIONER'S SOLE RELEVANT AUTHORITY MISAPPLIES *BADGEROW*.

Despite the claim that several courts examining subject matter jurisdiction over Section 9 and 10 petitions after *Badgerow* have recognized that an underlying contract subject to federal law

[1] Before determining whether the United States District Court for the Western District of Oklahoma was the proper *forum* to confirm the arbitration award, the Tenth Circuit first undertook a second jurisdictional inquiry to determine whether any court had jurisdiction to confirm the award. *Id.* at 866-67. Having already determined that jurisdiction lay in federal court pursuant to *diversity* jurisdiction, this second jurisdictional inquiry established only that the confirmation itself was one which could be entered by a judicial body. This is not the present dispute before this Court.

would be sufficient for a federal court to exercise jurisdiction over a petition solely seeking confirmation of an arbitral award, Petitioner cites only a single out-of-circuit decision from the Southern District of New York. (Dkt. 20 at p.7 (citing *Trs. of N.Y. State Nurses Ass'n Pension Plan*, 2022 WL 2209349, at *3 (S.D.N.Y. June 20, 2022), *appeal docketed*, No. 22-1783 (2d Cir. Aug. 15, 2022)) (hereinafter referred to as "*White Oak*")). Petitioner suggests this Court rely on this *White Oak* case to essentially "look through" the Section 9 application to the underlying arbitration because it centers around federal issues, mirroring the successful request in *White Oak* for the court to "look through" to the federal ERISA issues below. But this is the approach the U.S. Supreme Court rejected in *Badgerow*. And indeed, the *White Oak* case is currently being appealed on that precise basis. *Trs. of N.Y. State Nurses Ass'n Pension Plan*, No. 22-1783 (2d Cir. Aug. 15, 2022) [Docket Nos. 76 & 83]. This Court should not compound the error in *White Oak* by following its erroneous conclusion. *See Hursh v. DST Systems, Inc.*, 2023 WL 2754432 at *1 (W.D. Mo. Mar. 23, 2023) (citing *Hursh v. DST Sys., Inc.*, 54 F.4th 561 (8th Cir. 2022) (addressing on remand the subject matter jurisdiction of the federal court to confirm or vacate an arbitral award after the Eighth Circuit rejected the erroneous conclusion set forth in *White Oak*).

A closer look at the non-binding *White Oak* ruling shows how it reached its conclusion regarding the principles set forth by *Badgerow*. *White Oak* described *Badgerow* as involving the "legal question of 'the **enforceability of' the contractual mechanism for settling disputes**." *Id.* at *3 (quoting *Badgerow*, 142 S.Ct. at 1314) (incorrect citation in original) (emphasis added). Yet, the complete language surrounding the relied-upon *Badgerow* quote actually said this: "[r]ecall that the [parties] are now contesting not the legality of Badgerow's firing but the **enforceability of an arbitral award**." *Badgerow*, 142 S.Ct at 1314 (alteration for clarity) (emphasis added). Given the *White Oak*'s court's initial reading of *Badgerow*, however, the *White Oak* court then

held that "whether a non-diverse Section 9 or 10 application states a federal question on its face is a question that looks to the governing law of the *contract*, not to the law of the underlying claims." *White Oak*, 2022 WL 2209349 at *3 (emphasis in original). That is wrong. *Badgerow* plainly requires that courts *only* look to the Section 9 application and award, not the underlying claims or the underlying contract. *Badgerow*, 142 S. Ct. at 1314 (stating that "a court may look only to the application actually submitted to it in assessing its jurisdiction").

In other ways, however, *White Oak* still undermines Petitioner's own jurisdictional arguments. *White Oak* explicitly—and correctly—acknowledges that the independent jurisdictional basis required for a federal court to confirm, vacate, or modify an arbitral award must be determined "with reference only to 'the application actually submitted.'" 2022 WL 2209349 at *2 (citation omitted). Indeed, the court properly acknowledged that "a district court may not exercise jurisdiction solely because the *underlying* substantive controversy between the parties would have been maintainable in federal court for example, by presenting a federal question." *Id.* (emphasis added). Thus, "it is immaterial whether any claims in the arbitration were, in whole or in part, 'governed by federal statutory and common law.'" *Id.* at *3. That should put an end to Petitioner's jurisdictional arguments here, all of which are grounded in the parties' underlying Lease-based dispute.

Petitioner claims that multiple courts have applied *Badgerow* in the same manner as the court in *White Oak*. (Dkt. 20 at p.7). However, the opposite is true; numerous courts throughout the country have properly applied *Badgerow*, and some have even expressly rejected *White Oak*. The Second Circuit, for example, dismissed an appeal centered on a petition to vacate in part and otherwise confirm an arbitration award, noting that federal courts lacked jurisdiction over the dispute. *Malkin v. Shasha as co-Tr. of Violet Shuker Shasha Tr.*, No. 21-2675, 2023 WL 3012381,

at *2 (2d Cir. Apr. 20, 2023) (citing *Badgerow*, 142 S. Ct. at 1316–17) (holding that a petition relying on underlying arbitration decided pursuant to several federal acts is a foreclosed approach to establishing federal question jurisdiction post-*Badgerow*). This Court has already determined that "a petition to confirm an arbitration award," without more, "does not establish federal-question jurisdiction." *Matios v. City of Loveland*, 2022 WL 2734270, at *2 (10th Cir. July 14, 2022) (citing *Badgerow*, 412 S.Ct. at 1316-17). Even subsequent opinions issued by the United States District Court for the Southern District of New York, citing *Badgerow*, *White Oak*, or both, correctly hold that although the underlying controversies may have presented a federal question, the petition to confirm or vacate the award submitted to the court did not, on its face, establish federal question jurisdiction. *E.g.*, *Riverbay Corp. v. Serv. Emps. Int'l Union, Loc. 32BJ*, No. 22-CV-10994 (LJL), 2023 WL 2136423, at *3 (S.D.N.Y. Feb. 21, 2023); *Wynston Hill Cap., LLC v. Crane*, 628 F. Supp. 3d 540, 546 (S.D.N.Y. 2022); *Reineri v. Int'l Bus. Machines Corp.*, No. 21CV8654LAKBCM, 2022 WL 2316622, at *3 (S.D.N.Y. June 28, 2022). In fact, at least one court of appeals has rejected *White Oaks'* deviation from *Badgerow*. *See Hursh*, 2023 WL at *5 (citing *Hursh*, 54 F.4th at 565) (noting that *White Oaks* was raised as a basis for finding subject matter jurisdiction, but that the argument was rejected by the Eighth Circuit).

Against this weight of authority properly applying *Badgerow*, this Court should not be persuaded by Petitioner's reliance on *White Oak*, a singular, nonbinding, case from New York that is currently on appeal.

IV. PETITIONER'S ARGUMENTS PERTAINING TO THE LEASE ARE IRRELEVANT.

While Petitioner argues that the *underlying* contractual rights under the Lease would present federal questions, this Court is not faced with such a determination. The Petition's stray references to specific federal laws do nothing to raise an actual federal question. To be sure, the

Lease was entered into pursuant to a federal statute (the Indian Mineral Development Act), and royalties thereunder were administered pursuant to a separate federal statute (the Federal Oil and Gas Royalty Management Act). Yet, these statutes are entirely irrelevant to the sole issue presented in the application (whether an arbitration award should be confirmed), and the only way that Petitioner wraps them into this proceeding is by literally "looking through" to the underlying arbitration. As such, the two cases cited by Petitioner on this point—*Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Okla.*, 725 F.2d 572 (10th Cir. 1984) and *Comstock Oil & Gas Inc. v. Ala. & Coushatta Indian Tribes of Tex.*, 261 F.3d 567 (5th Cir. 2001)—are wholly irrelevant to the jurisdictional question of whether an arbitral award can be confirmed in a federal court. Neither has any bearing on whether this Court has federal question subject matter jurisdiction pertaining to the confirmation of the arbitral award at hand.[2]

V. THE PARTIES' CONTRACT REQUIRES THAT PETITIONER PAY THE TRIBES' FEES AND COSTS.

Since Petitioner's Petition to confirm the arbitral award is devoid of federal court jurisdiction and must therefore be dismissed, the Tribes are clearly the prevailing party and Petitioner must pay all the Tribes' fees associated with this federal court action pursuant to the Lease's terms. There is a reason for this fee-shifting clause in the Lease, to require the losing party to cover the fees incurred by the successful party. Defending this federal case has generated costs for the Tribes that they would otherwise not have incurred. If this Court dismisses this action, the fee-shifting provision requires that Merit bear the costs incurred by the Tribes in defending this action.

[2] Despite the singular use of the term 'arbitrator,' *Tenneco Oil Co.* has no bearing on arbitration, arbitral awards, or the question of jurisdiction following the same. 725 F.2d at 576. *Comstock* likewise has nothing to do with the confirmation of arbitration awards.

In response, Petitioner argues that this Court's dismissal of the suit in its entirety for want of jurisdiction, presumably with prejudice, would not render Respondents the prevailing parties. Not only is this inconsistent with common sense, but it is also inconsistent with the case law that Petitioner cites in support of Petitioner's position. (*See* Dkt. 20 at p.9).

Petitioner's claim finds its home in the distinguishable opinion of *Gas Sensing Technology Corp. v. Ashton*, 2017 WL 3457118 (D. Wyo. July 18, 2017) (hereinafter referred to as "*Gas Sensing*"). First, the *Gas Sensing* opinion required that the court "look to Queensland law." *Id.* at *1. Second, the court in *Gas Sensing* was reviewing an award of attorneys' fees and costs in the face of a dismissal for lack of personal jurisdiction which caused the complaint to be dismissed without prejudice. The entirety of the quote that was cited by Petitioner sheds light on the differences in circumstances:

> However, when the defendant succeeds on a motion to dismiss for lack of personal jurisdiction and the complaint is dismissed without prejudice, the defendant does not improve its position through the litigation. Rather, Plaintiffs have the ability to refile its claims against [the defendant] and continue to litigate its claims. As such, the Court finds [the defendant] is not a prevailing party.

Id. (alterations made for clarity).

Not only was the court in *Gas Sensing* reviewing dismissal for lack of personal jurisdiction rather than subject matter jurisdiction, but the court was also reviewing a circumstance in which the complaint, as to the defendant at hand, was dismissed without prejudice and could be refiled against the same defendant. If this Court dismisses Petitioner's Petition for a lack of subject matter jurisdiction, Petitioner will not be able to refile its claims with this Court and continue to litigate the confirmation of the arbitral award. As such, Respondents will improve their position.

Should the Court dismiss the Petition for lack of subject matter jurisdiction, the Respondents will clearly be the prevailing party in this action and the Parties' contract demands they be reimbursed for all attorneys fees and costs.

CONCLUSION

For the reasons stated herein, the Tribes respectfully request that the Court dismiss Petitioner'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 31st day of July, 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 31st day of July 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