

**IN THE WIND RIVER TRIBAL COURT
SHOSHONE AND ARAPAHO TRIBES
WIND RIVER INDIAN RESERVATION
FORT WASHAKIE, WYOMING**

| | | |
|---|---|-------------------------|
| EASTERN SHOSHONE AND |) | |
| NORTHERN ARAPAHO TRIBES, |) | |
| PETITIONERS AND CROSS-RESPONDENTS |) | |
| |) | |
| V. |) | No. CV-2024-0001 |
| |) | |
| MERIT ENERGY OPERATIONS I, LLC, |) | |
| RESPONDENTS AND CROSS-PETITIONERS. |) | |

ORDER AND OPINION AFTER ORAL ARGUMENT

For the following reasons, the court (1) **DENIES** Merit Energy Operations I, LLC’s **MOTION TO DISMISS**; (2) **GRANTS** the Eastern Shoshone and Northern Arapaho Tribes’ **PETITION TO VACATE THE ARBITRATION AWARD**; and (3) **DENIES** Merit Energy Operations I, LLC’s **PETITION TO CONFIRM THE ARBITRATION AWARD**.

FACTUAL AND PROCEDURAL BACKGROUND

On January 30, 2024, an arbitration panel convened by the parties under the rule of the American Arbitration Association (“AAA”) issued an award favoring Merit Energy Operations I, LLC (“Merit Energy” or “Merit”) over the Northern

Arapaho and Eastern Shoshone Tribes of the Wind River Indian Reservation (“Tribes”). The arbitration award determined the value of oil and gas equipment at the Steamboat Butte oil field on the Wind River Indian Reservation.

In 2016, Merit Energy acquired a lease originally granted in 1996 to the Marathon Oil Company allowing it to extract resources from the lands of the Wind River Indian Reservation. The lease expired on December 31, 2022. Section 10 of the lease envisioned that, upon the expiration of the lease, the Tribes could purchase oil and gas equipment owned by Merit Energy, assuming the parties reached an agreement on price. For whatever reason, the parties could not agree on price. Section 10 provided for the resolution of the dispute over price to be determined by “a board of three appraisers.” Merit Energy initiated arbitration proceedings on December 7, 2022, invoking Sections 10 and 20, the latter providing the procedures for the arbitration.

The board of appraisers concluded that the Tribes must pay \$12,630,000 for the equipment they elected to purchase in accordance with Section 10. The Tribes objected to the proceedings on tribal sovereignty immunity grounds, invoking Section 24 of the lease, which ostensibly preserves the Tribes’ immunity from suit. The board rejected that claim, reasoning that the sovereign immunity defense had been rejected in proceedings related to an earlier arbitration between the parties. The Tribes also insisted that the Tribes’ Oil Field Transition Ordinance of 2022 governed the appraisal, which the Tribes assert would have reduced the equipment price. The board rejected that claim as well, reasoning that the ordinance conflicted with a lease provision that barred the parties from altering the lease terms without the other party’s consent.

After the issuance of the arbitration award in January, the Tribes invoked the Wind River Arbitration Act and brought a petition to this court to vacate the arbitration award. *See* Petition to Vacate Arbitration Award (Feb. 2, 2024) (“Petition”). Merit Energy responded with a pleading moving to dismiss the Petition or, in the alternative, confirming the arbitration award. *See* Respondent’s Special Appearance, Motion to Dismiss, Response to Petition to Vacate Arbitration Award, and Counter-Petition to Confirm Arbitration Award (March 1, 2024) (“Counter-Petition”). On March 21, 2024, the Tribes filed a reply. On April 4, 2024, Merit replied.

On July 15, 2024, the court heard oral argument from the parties.

LEGAL BACKGROUND

Motions to Dismiss

Merit Energy seeks the dismissal of the Tribes' petition for lack of jurisdiction. Under the Wind River Tribal Court Rules of Civil Procedure, a defendant may move to dismiss a claim for lack of jurisdiction or failure to state a claim upon which relief can be granted. WIND RIVER RULES OF CIVIL PROCEDURE 6, §§ 3(a), (f). Motions to dismiss will be adjudicated in accordance with the Federal Rules of Civil Procedure. WIND RIVER RULES OF CIVIL PROCEDURE, Rule 1(f) ("Any procedures or matters not specifically set forth herein shall be handled in accordance with the Federal Rules of Civil Procedure insofar as such are not inconsistent with these rules, and with general principals of fairness and justice as prescribed and interpreted by the court."). The relevant Wind River court rules closely track federal rule. *See* FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1), (6).

Other tribal courts following rules that point to the federal rules for guidance have stated the following relevant principles. The Court finds these decisions persuasive and consistent with the federal rules. First, where a defendant has moved to dismiss a complaint, "the court will construe the complaint liberally and will presume, for the purposes of the motions only, that all the allegations of the complaint are true and will draw any inferences in favor of the Plaintiff." *McCallister v. Spirit Mountain Gaming, Inc.*, 2005 Grand Ronde Trib. LEXIS 4, at *4 (Grand Ronde Tribal Ct. 2005). *See also Mashantucket Pequot Gaming Enter. v. Ziffer*, 2000 Mashantucket Trib. LEXIS 2, at *2 (Mash. Pequot Tribal Ct. 2000) ("When considering a motion to dismiss for failure to state a claim pursuant to M.R.C.P. 12.b.(6), the court must accept the material facts alleged in the pleading as true. . . . All doubts and inferences are to be resolved in the pleader's favor.") (citation omitted). Second, on motions to dismiss for lack of jurisdiction, the burden of proof rests with the plaintiff to show jurisdiction, but when subject matter jurisdiction is challenged, the defendant must demonstrate to the court that there is no subject matter jurisdiction. *McCallister*, 2005 Grand Ronde Trib. LEXIS 4, at *4.

Petitions to Vacate Arbitration Awards

The Tribes have petitioned the Court to vacate an arbitration award issued by a panel of the American Arbitration Association. Under Section 17 of the Wind River Arbitration Act,¹ the Court shall vacate an arbitration award where:

- (A) The award was procured by corruption, fraud, or other undue means;
- (B) There was:
 - (I) evident partiality by an arbitrator appointed as a neutral,
 - (II) corruption of any of the arbitrators(s), or
 - (III) misconduct by an arbitrator prejudicing the rights of any party to the arbitration proceedings;
- (C) The arbitrator(s) exceeded their powers;
- (D) The arbitrator(s) refused to postpone the hearing upon sufficient cause being shown, refused to hear evidence material to the controversy, or otherwise conducted the arbitration proceedings as to substantially prejudice the rights of any party;
- (E) There was no agreement to arbitrate . . . ;
- (F) The arbitration was conducted without proper notice . . . ;
- (G) The arbitrator(s) demonstrated manifest disregard of governing law.

WIND RIVER ARBITRATION ACT § 17. *See also* FEDERAL ARBITRATION ACT, 9 U.S.C. § 10(a) (same four factors as the Wind River code sections 17(A) and (B)). Federal and tribal courts have added a “judicial gloss” to the federal statute that allows a judge to vacate an arbitration award where the arbitrator exhibited “manifest disregard” of the law. *E.g.*, *Seneca Nation of Indians v. New York*, 988 F.3d 618, 625-26 (2d Cir. 2021) (“judicial gloss” and “manifest disregard”); *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 854 (8th Cir. 2001) (same);

¹ There is some dispute over whether the Wind River Arbitration Act or federal law governs the review of the Tribes’ petition to vacate. Section 23 of the lease does little to settle this question, stating that both tribal and federal laws apply in general to the lease: “This lease that be governed by the laws of the Shoshone and Northern Arapaho Tribes of the Wind River Reservation, and the laws of the United States, now in effect, or amended or enacted hereafter, as applicable.” However, for purposes of the determining the standard for reviewing a petition to vacate, it matters little. Both the tribal code and federal law effectively contain the same standards.

First Specialty Ins. Co. v. Confederated Tribes of Grand Ronde Community of Oregon, 16 Am. Tribal Law 390, 395 (Grand Ronde Community Ct. App. 2006). This principle is codified in the tribal code here. WIND RIVER ARBITRATION ACT § 17(G). Federal and tribal courts agree that a petitioner “bears a heavy burden” to prevail on a petition to vacate an award based on manifest disregard of the law. *Seneca Nation*, 988 F.3d at 626. See also *First Specialty*, 16 Am. Tribal Law at 395 (“[T]he review of arbitration awards by Grand Ronde courts is a limited one.”).

The determination of whether an arbitration panel engaged in a manifest disregard of the law involves a question of law the reviewing court reviews *de novo*. *Goldgroup Resources, Inc. v. Dynaresource De Mexico, S.A. De C.V.*, 994 F.3d 1181, 1186 (10th Cir. 2021).

ANALYSIS

I. This Court Possesses Jurisdiction to Adjudicate the Petition to Vacate and Concomitant Matters.

A. This Court Possesses Jurisdiction under Tribal Laws.

Tribal codes confirm that this Court possesses jurisdiction over the parties and the dispute at issue here. Tribal statutory enactments firmly assert tribal jurisdiction over any activities that occur within the Wind River Reservation. Section 1-2-1 of the Wind River Law and Order Code provides:

It is hereby declared as a matter of tribal policy and legislative determination, that the public and tribal interests demand that the tribes provide all individuals living within the Wind River Indian Reservation with an effective means of redress for both civil and criminal conflicts against members, *non-enrolled members*, and other persons who through their residence, *presence, business dealings*, other acts or failures to act, or other significant minimum contacts with this reservation and/or its residents commit criminal offenses against the tribes or incur civil obligations to persons or entities entitled to the tribes’ protection. This action is deemed necessary as a result of the confusion and conflicts caused by the increased contact and interaction between the tribes, their members, and other residents of the reservation

and other persons and entities over which the tribes have not previously elected to exercise jurisdiction. The jurisdictional provisions of this Law and Order Code, to insure maximum protection for the tribes, their members and other residents of the reservation, should be applied equally to all persons.

WIND RIVER TRIBES' LAW AND ORDER CODE § 1-2-1 (emphasis added). The Tribes as the governing body of the Wind River Reservation in enacting this provision assert jurisdiction over nonmembers by virtue of their presence and business dealings within the reservation. *Id.* See also WIND RIVER TRIBES' LAW AND ORDER CODE § 1-2-2(1) (“The jurisdiction of the Tribal Courts of the Shoshone and Arapaho Tribes shall extend to the territory within the Wind River Indian Reservation and to such other lands without such boundaries as may have been or may hereafter be added to the reservation or held in trust for the tribes under any law of the United States or otherwise.”). The Tribes also assert personal jurisdiction over:

- b) Any person who transacts, conducts, or performs any business or activity within the reservation, either in person or by an agent or representative, for any civil cause of action;
- c) Any person who owns, uses or possesses any property within the reservation for any civil cause of action[.]

WIND RIVER TRIBES' LAW AND ORDER CODE § 1-2-3(2). Finally, the Tribes assert jurisdiction over real and personal property located on the reservation, to the extent tribal and federal law allows. *Id.* § 1-2-4.

Tribal statutory authority also vests jurisdiction in this Court to adjudicate matters related to arbitration. The Wind River Arbitration Act's stated purpose is to provide a forum to allow for the adjudication of petitions to vacate arbitration awards:

The Eastern Shoshone Tribe and the Northern Arapaho Tribe (both referred to herein as the “Tribes”) possess inherent sovereign authority to adjudicate matters arising on the Wind River Indian Reservation, including the right and obligation to adjudicate arbitrations. The purpose of the Wind River Arbitration Act is to codify the preexisting authority of the Wind River Tribal Court to adjudicate arbitrations including, as appropriate, compelling arbitration, confirming arbitration awards, and vacating arbitration awards. In

addition, this Wind River Arbitration Act sets forth the procedures to adjudicate arbitrations.

WIND RIVER ARBITRATION ACT § 2(1). The same act vests “exclusive jurisdiction” in this Court to adjudicate arbitration awards in which the Tribes were a party:

The [Wind River Tribal Court] shall have exclusive jurisdiction in all proceedings upon motions to confirm, vacate, modify, or correct arbitration awards in which the Tribes, the Northern Arapaho Tribe, the Eastern Shoshone Tribe, or their officers, employees, or agents are parties in their official capacity, unless there is an explicit agreement providing for another court to have jurisdiction over such motions to confirm, vacate, or correct arbitration awards.

Id. § 3(2).²

The Tribes allege that this Court possesses jurisdiction to adjudicate the petition to vacate the arbitration award here. All evidence shows that the Steamboat Butte Field, the personal property at issue in the arbitration, and significant business activities are (or were) located or conducted on the Wind River Reservation. Section 22 of the lease makes this explicit:

Lessee, its employees, agents, subcontractors, and assignees acknowledge and agree that this lease is entered into and will be performed on the Wind River Reservation; the Tribal Court of the Wind River Reservation has jurisdiction over all civil matters and consensual matters arising or to be performed on the Reservation or which have a proximate effect on persons or property on the Reservation. Lessor and Lessee acknowledge that non-tribal courts may have jurisdiction over Lessee's activities, matters arising under the lease, or reasonably related thereto, provided such acknowledgment shall not constitute Lessor's consent or agreement to such jurisdiction. Lessee retains the right to appeal in the Tribal Court System provided by tribal law and appeal in the federal courts provided by federal law. [emphasis added]

Merit Energy argues that the Tribes’ petition did not comply with the tribal rule that a pleading must contain “[a] short, plain statement of the grounds upon

² Whether this Court’s jurisdiction over an arbitration award truly is “exclusive” as to federal or state courts is not for the Court to decide, nor does it matter, since it is enough to note that this Court possesses jurisdiction over arbitration awards involving the Tribes.

which the court's jurisdiction depends. . . ,” quoting Rule 4(1)(a) of the Wind River rules of civil procedure. Merit argues that the Tribes' petition “devote[s] just one conclusory sentence to establishing subject-matter jurisdiction.” Counter-Petition at 10. In actuality, the Petition includes more than one mere sentence on this Court's jurisdiction. The Tribes' petition includes language as follows:

3. This Court has jurisdiction pursuant to Section 3 of the Tribal Arbitration Act and Title I, Chapter 2 of the Law and Order Code of the Shoshone and Arapaho Tribes of the Wind River Indian Reservation (“S&A LOC”).

4. This Court has personal jurisdiction over the parties pursuant to Title I, Chapter 2, Section 1-2-3 of the S&A LOC. Merit entered into a Lease with the Tribes, conducted oil and gas business activities pursuant to the Lease at the Steamboat Butte Field, and otherwise engaged in business activities on lands held in trust by the United States for the Tribes on the Wind River Reservation.

5. This Court has general subject matter jurisdiction pursuant to Title I, Chapter 2, Section 1-2-5 of the S&A LOC. This is a matter arising from a lease for tribal property located on the Wind River Reservation, and this Court has general subject matter jurisdiction over all civil causes of action arising on the Reservation.

Petition at 3. These allegations, largely confirmed in Section 22 of the lease, handily fulfill the short, plain statement requirement. The Court rejects Merit's argument that the Petition fails to adequately allege jurisdiction.

Merit insists, however, that the use of the present tense in Section 1-2-5 of the tribal law and order code means that this Court cannot possess jurisdiction over a party that no longer conducts business or otherwise has contacts within the reservation. Counter-Petition at 10-11. That provision is as follows:

Subject to any contrary exceptions, or limitations contained in either federal or applicable tribal law the Wind River Tribal Court shall have general subject matter jurisdiction over all civil causes of action, *arising* on the reservation and over all offenses prohibited by this Code which *occur* within the exterior boundaries of the Wind River Indian Reservation to adjudicate and determine the rights and responsibilities of all parties.

WIND RIVER LAW AND ORDER CODE § 1-2-5 (emphasis added). Merit points to the language emphasized above for proof that the code only contemplates jurisdiction over “present[]” disputes, noting that it “no longer conducts oil-and-gas business in the Steamboat Butte area. . . .” Counter-Petition at 10. If the Court were to accept Merit’s interpretation of the code, then a party that has concluded its business on the reservation and then physically departed the scene simply could not be sued. This “gotcha” argument is nonsensical. The Court notes that the Tribes’ lawmaking body established that a key policy of the Tribes’ jurisdictional provisions is to “insure maximum protection for the tribes, their members and other residents of the reservation [and] should be applied equally to all persons.” WIND RIVER LAW AND ORDER CODE § 1-2-1. Merit here demands a kind of special immunity that runs deeply afoul of that policy of fundamental fairness.³ This Court rejects Merit’s present tense-based argument.

B. This Court Possesses Jurisdiction under Federal Law

Merit Energy challenges the inherent power of the Tribes to adjudicate this matter on two additional grounds rooted in federal law. First, Merit argues that this Court has no power (for a variety of reasons) to grant a petition to vacate an arbitration award issued by a panel of the American Arbitration Association. Second, Merit argues that federal Indian law limits on inherent tribal jurisdiction also affirmatively bar this Court’s jurisdiction. The Court rejects both arguments.

First, this Court holds that Section 22 is explicitly the forum selection clause relevant for addressing disputes arising under the lease and Section 23 is the law chosen by the parties to interpret the lease. Any commercial arbitration rules to the contrary must give way. As the Texas Supreme Court stated, “When the agreement and the incorporated rules speak to the same point, the agreement’s voice is the only voice to be heard.” *Americo Life, Inc. v. Myer*, 440 S.W.3d 18, 25 (Tex. S. Ct. 2014).

Merit argues that the AAA’s rules prohibit this Court from asserting jurisdiction over a petition to vacate or confirm an arbitration award. Merit points to Section 20.1.3 of the lease, which provides, “The American Arbitration Association’s rules for commercial arbitration shall be utilized.” Merit then points to a provision in AAA’s rules that Merit argues precludes tribal court jurisdiction.

³ The Court notes that the federal court jurisdictional provisions are also in the present tense. See 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”). Tellingly, Merit cites no federal authority for the proposition that a jurisdictional statute written in the present tense means that a court may only exercise jurisdiction over “present” disputes.

According to Merit, that provision states, “Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.” Counter-Petition at 7 (quoting AAA rules). Merit claims that the absence of a reference to tribal courts in the AAA rules means that only federal and state courts possess jurisdiction to adjudicate arbitration awards. Effectively, Merit is arguing that the absence of a reference to tribal courts in the AAA rules acts as a mandatory forum selection clause that affirmatively prohibits tribal court jurisdiction.

Textually, it is hardly clear that the parties intended the incorporation of the AAA rules for any purpose other than providing the procedural logistics for conducting an arbitration proceeding. Section 20.1.2 details the procedure and timeframes through which the parties could initiate arbitration, pointing to the AAA to serve in the role of providing neutrals. Section 20.1.3 provides further procedural details, including guarantees of procedural fairness, the introduction of evidence, the generation of a transcript, briefing, and the obligation of the arbitrators to reach a decision. The second sentence of Section 20.1.3, a detailed and lengthy paragraph silent on the question of arbitration enforcement, focuses on the guarantee of procedural fairness and provides, “The American Arbitration Association’s rules for commercial arbitration shall be utilized.” These are procedural provisions, far removed from anything as specific as a mandatory forum selection clause.

Merit’s incorporation argument must give way to tribal codes and to the lease itself. Merit’s selective quotation of one sentence within Section 20.1.3 is a request to ignore Sections 22 and 23 of the lease, the tribal jurisdiction and governing law provisions. Section 22 is an acknowledgement by all parties to the lease that this Court possesses “jurisdiction over all civil matters and consensual matters arising or to be performed on the Reservation or which have a proximate effect on persons or property on the Reservation.” The next sentence of Section 22 is an acknowledgement that “non-tribal courts may have jurisdiction over Lessees activities, matters arising under the lease, or reasonably related thereto, provided such acknowledgment shall not constitute Lessor’s [that is, the Tribes’] consent or agreement to such jurisdiction.” The next and final sentence allows for appeals to the tribal appellate court and for “appeal in the federal courts provided by federal law.”

Merit drops a footnote designed to disclaim the importance of Section 22, selectively quoting the provision as merely acknowledging that this Court possesses

“jurisdiction over all civil matters . . . arising or to be performed on the Reservation,” concluding without analysis that “Section 22 does not deal with contractual disputes between the parties, and its purpose is apparently distinct.” Counter-Petition at 7 n. 2. Merit is wrong. Section 22 broadly acknowledges that this Court has jurisdiction over all civil and consensual matters, which on its face includes arbitration award adjudications like the instant matter. Were Section 22 designed to include every civil and consensual matter excepting arbitration awards, the parties surely would have stated so in the lease.

The governing law of the lease further cements tribal court jurisdiction over petitions to vacate or confirm arbitration awards. Section 23 of the lease establishes tribal and federal law – not commercial arbitration rules – as the governing law of the lease. That provision begins, “This lease shall be governed by the laws of the Shoshone and Northern Arapaho Tribes of the Wind River Reservation, and the laws of the United States, now in effect, or amended or enacted hereafter, as applicable.” Any silence as to tribal court jurisdiction is irrelevant where the parties agreed to tribal and federal law as the governing law, not the commercial arbitration rules.⁴

In short, with the parties agreeing to this broad swath of tribal and federal law to govern this contract, the incorporation of commercial arbitration rules is best read as allowing for gap-fillers on minor arbitration-related procedures, rather than as the

⁴ Merit’s forum selection argument also ignores the Wind River Arbitration Act. In section 23 of the lease, the parties agreed that tribal and federal laws, “now in effect, or amended or *enacted hereafter*” (emphasis added), govern the interpretation of the lease. Section 3(2) of the tribal arbitration act extends jurisdiction to this Court to adjudicate arbitration awards in which the Tribes are parties.

The parties acknowledge that the tribal arbitration act postdates the lease, but since the lease recognizes tribal laws “enacted hereafter” as the governing law of the lease, the date when the tribal statute was enacted is not controlling. Tribal nations are both economic actors and economic regulators, *e.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138-44 (1982) (acknowledging that tribal nations, like state governments and federal agencies, can both collect a severance tax as a regulating government and collect royalties as a business actor). Importantly, the United States Supreme Court in *Merrion* acknowledged that a tribal sovereign may impose a tax on a lessor even where the tribe had not done so at the outset of the lease. *Id.* at 145-46. Merit’s consent to the application of tribal laws “enacted hereafter” is adequate to make the tribal arbitration act valid governing law.

Merit and the arbitral panel make much of the provision in Section 23 of the lease that states, “No laws or regulations which become effective after the date of approval of this lease shall operate to effect the duration of this lease, rate of royalty, rental, or acreage unless agreed to in writing by all the parties to this lease.” Neither the provisions of the tribal arbitration act governing the confirmation and vacature of arbitration awards nor the tribal oil field transition ordinance provisions allegedly impacting the price of the equipment do not implicate this proviso, as these provisions do not “operate to effect the duration of this lease, rate of royalty, rental, or acreage” of the parties’ business activities.

Ultimately, even if this Court were to discard the tribal arbitration act as an additional, independent source of the Court’s jurisdiction, the lease terms and the tribal codes enacted at the time of this lease’s origination in 1996 and Merit’s acquisition of the lease in 2016 are more than adequate to vest this Court with jurisdiction.

source of a mandatory forum selection clause that overrides multiple lease provisions establishing tribal court jurisdiction and governing law.

None of Merit's cases compel a contrary conclusion. Merit cites *Enerplus Res. (USA) Corp. v. Wilkinson*, 865 F.3d 1094 (8th Cir. 2017), for the unremarkable proposition that a forum selection clause forbidding tribal court jurisdiction actually does forbid tribal court jurisdiction. *Enerplus* is distinguishable from this case, however. There, the lease at issue provided that "any disputes arising under the Agreement . . . shall be resolved in the United States District Court for the District of North Dakota and such court shall have exclusive jurisdiction hereunder and no party shall have the right to contest such jurisdiction or venue." *Id.* at 1097. Here, Section 22 of the lease allows for tribal court jurisdiction, unlike in *Enerplus*, where the parties intended that the federal court possess exclusive jurisdiction.

Merit cites to a decision of the Mandan, Hidatsa, & Arikara Supreme Court, *White Calfe & Rez Rock N Water, LLC v. Halcón Operating Co., Inc.*, AP 2017-005, that disclaimed tribal court jurisdiction over an arbitration award. The lease at issue in that case contained a forum selection clause that prohibited tribal court jurisdiction in a manner similar to the *Enerplus* lease, see *Halcón Operating Co. v. Rez Rock N Water, LLC*, 2018 WL 4092052, at *7 (D.N.D. July 9, 2018), making that case distinguishable as well.

Merit cites *Kodiak Oil & Gas (USA), Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019), for the proposition that even if tribal law applies, this matter arises under federal law, which preempts tribal law. *Kodiak* is also distinguishable. That case involved a suit in tribal court by individual tribal citizens against oil and gas companies doing business on allotted lands within the reservation under a federally approved lease. *Id.* at 1130. The court there had already concluded that there was no tribal jurisdiction when it reached the preemption conclusion. *Id.* at 1138. The court added that there was little or no tribal contract law to apply anyway, only "MHA common law." *Id.* at 1137. Here, the Tribes are a party, the land at issue is tribally controlled land, the Tribes have invoked extensive tribal statutory law that covers the entirety of this specific dispute, and the nonmembers have explicitly consented to tribal jurisdiction. Most importantly, there is no federal contract right or duty at play here, eliminating any federal interest that could be construed as preempting tribal law. *Kodiak* is inapposite.

Merit also invokes federal policy favoring arbitration, articulated by the United States Supreme Court in cases such as *Epic Systems Corp. v. Lewis*, 584 U.S.

497 (2018), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Merit even argues at one point that federal law is designed to “protect[] arbitration decisions from tribal courts. . . .” Counter-Petition at 7 (citing *White Calfe & Rez Rock N Water, LLC v. Halcón Operating Co., Inc.*, AP 2017-005 (Mandan, Hidatsa, & Arikara Nation S. Ct.)). Merit’s authorities do not support the weight Merit places on them. *Epic Systems* and *AT&T Mobility* both involved whether a party to an agreement should be compelled to arbitrate at all, not the enforcement of an arbitration award issued after arbitration concluded. Both decisions’ recitation of federal policy favoring arbitration reflect federal policy favoring agreements to arbitrate. *Epic Systems* cited Sections 2, 3, and 4 of the Federal Arbitration Act (“FAA”). 584 U.S. at 505-06. FAA § 2 requires federal and state courts to treat agreements to arbitrate as “valid, irrevocable, and enforceable.” *Id.* at 505. FAA §§ 3 and 4 require courts to “respect and enforce the parties chosen arbitration procedures.” *Id.* at 506. *See also American Express Corp. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013) (reciting policies favoring enforcement of arbitration agreements in terms of which parties must participate and under which rules); *AT&T Mobility*, 563 U.S. at 339 (same). Federal policies, even assuming they were somehow dispositive, have been fulfilled here; the Tribes did participate in arbitration. But jurisdiction to enforce an arbitration award *against a sovereign* in its own courts is a far different matter.

In contrast to Merit’s assertion that arbitration awards should be “protected . . . from tribal courts,” federal courts regularly hold that challenges to the validity or enforcement of arbitration awards can occur in tribal courts. Nothing in federal policy favoring arbitration elevates federal and state courts over tribal courts to adjudicate petitions to vacate or confirm an arbitration award, nor is there any federal law disfavoring or displacing tribal courts from this arena. One federal court in similar circumstances held that there is “no reason to exclude” tribal courts from the FAA’s permissive venue provisions. *First Specialty Ins. Corp. v. Confederated Tribes of the Grand Ronde Community of Oregon*, 2007 WL 3283699, at *3 (D. Or. Nov. 2, 2007). Similarly, numerous federal courts have held that tribal court jurisdiction and federal policies favoring arbitration are not mutually exclusive. *E.g.*, *Gaming World Intl., Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 851-52 (8th Cir. 2003) (ordering exhaustion of tribal remedies where a petition to compel arbitration involved facts arising on tribal lands); *Bank One, N.A. v. Shumake*, 281 F.3d 507, 514 (5th Cir. 2002) (dismissing petition to compel arbitration to allow for exhaustion of tribal court remedies); *Basil Cook Enter., Inc.*

v. St. Regis Mohawk Tribe, 117 F.3d 61, 63-69 (2d Cir. 1997) (same); *Bruce H. Lien Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 93 F.3d 1412, 1415-16 (8th Cir. 1996) (ordering exhaustion of tribal remedies where the validity of an arbitration agreement is questioned); *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1227-29 (9th Cir. 1989) (same); *Heldt v. Payday Financial, LLC*, 12 F. Supp. 3d 1170, 1191-93 (D.S.D. 2014) (same, even where it is alleged that there was no tribal forum).

Notably, Merit does not complain that the tribal arbitration act will prejudice its position. As noted above, the tribal arbitration code requires the tribal court to confirm, vacate, or modify arbitration awards in instances largely tracking the federal arbitration act. Section 17 of the tribal arbitration act, which governs vacature of arbitration awards, for example, closely tracks Section 10 of the federal arbitration act.

Additionally, the FAA itself does not bar tribal court jurisdiction. Congress knows how to bar tribal courts from jurisdiction in specific types of cases. For example, in *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473 (1999), the United States Supreme Court held that the Price-Anderson Act explicitly preempted state and tribal court jurisdiction over public liability claims arising from a nuclear incident. *Id.* at 485. The FAA says nothing explicitly or implicitly about “protecting” arbitration awards from tribal courts.

Second, since Merit consented to tribal jurisdiction over matters arising from this lease, this Court possesses inherent power to adjudicate the arbitration award under federal Indian law principles governing tribal jurisdiction over nonmembers. Merit argues that tribal courts do not possess civil jurisdiction over nonmembers absent (1) a delegation of federal power; (2) nonmember consent; or (3) nonmember conduct that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *See generally Montana v. United States*, 450 U.S. 544, 565-66 (1981). Here, it is enough to focus on Merit’s consensual business dealings with the Tribes on reservation lands.

The leading federal cases on nonmember consent-based jurisdiction strongly support tribal jurisdiction in this instance. The cases most relied upon by Merit, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), did not find nonmember consent to tribal jurisdiction. However, both cases are easily distinguishable. In *Plains Commerce*, the nonmember bank lent money to a tribal member-owned business

through an agreement that said nothing about tribal court jurisdiction. 554 U.S. at 330-40. In *A-1 Contractors*, the nonmember landscaping company had a contract with the tribe, but the accident leading to the tort claim against the company in tribal court had nothing to do with the contract with the tribe. 520 U.S. at 456-57. In both cases, unlike here, the disputes arose on nonmember controlled fee lands within the reservation. See *Plains Commerce*, 554 U.S. at 328-30; *A-1 Contractors*, 520 U.S. at 454-56.

Here, the record shows definitively that Merit has consented to this Court's jurisdiction. As noted before, Section 22 of the lease executed by Merit's predecessor-in-interest establishes that "the Tribal Court of the Wind River Reservation has jurisdiction over all civil matters and consensual matters arising or to be performed on the Reservation or which have a proximate effect on persons or property on the Reservation." Section 23 establishes the governing law of the lease as tribal and federal law "now in effect, or amended or enacted hereafter" Since tribal law governs the lease, tribal codes apply. Section 1-2-1 of the Wind River Law and Order Code asserts jurisdiction over the business dealings of nonmembers within the reservation. Eradicating any doubt, Section 22 of the lease confirms that the lease was "entered into and will be performed on the Wind River Reservation. . . ."

This case is similar to recent decisions of the federal courts that confirmed tribal court jurisdiction over nonmember conduct on tribally controlled lands and at least one time on nonmember controlled fee lands. Those cases, once few, are growing in number. They include without limitation *Lexington Ins. Co. v. Smith*, 94 F.4th 870 (9th Cir. 2024) (confirming tribal court jurisdiction over claim against nonmember insurance company for damages on insured property located on tribally controlled lands); *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019) (confirming tribal court jurisdiction over claim by tribe against polluter to enforce settlement where nonmember agreed to pay fees arising from pollution dumped on nonmember fee lands within the reservation), *cert. denied*, 141 S. Ct. 1046 (2021); *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892 (9th Cir.) (confirming tribal court jurisdiction over tort claim brought against former tribal employee for incidents arising on tribally controlled lands), *cert. denied*, 140 S. Ct. 513 (2019); *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014) (affirming tribal jurisdiction over tort claim against nonmember arising on tribally controlled lands where nonmember agreed in lease to comply with all tribal laws), *aff'd by equally divided Court*, 579 U.S. 545

(2016); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011) (confirming tribal court jurisdiction over eviction action brought against nonmember holdover tenant on tribally controlled lands).

Given Merit's written consent and acknowledgment of tribal jurisdiction over its reservation-based business activities, its argument here has no basis unless there is an explicit federal bar on tribal jurisdiction that would compel this Court to dismiss this action even in light of Merit's consent to tribal jurisdiction. There is none alleged.

In conclusion, the Court denies Merit's motion to dismiss for lack of jurisdiction.

II. The Tribes' Sovereign Immunity Requires Vacature of the Arbitration Award.

Over the Tribes' objections, the arbitration panel here proceeded with the arbitration and issued an award. The panel noted that the Tribes' immunity claim was "preserved" but proceeded anyway. This was in manifest disregard of the law, requiring vacature of the arbitration award.

The Tribes claim that nothing in tribal law nor the lease waived or abrogated its immunity from suit. Merit Energy's primary argument on this point is that the United States Supreme Court's decision in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), forecloses the Tribes' immunity defense due the existence of the arbitration clause in the lease. The Court concludes that Section 24, which explicitly preserved the Tribes' immunity, controls.

Federal, state, and tribal courts all conclude that tribal nations possess immunity in any forum and from any claimant (excepting the federal government). *See generally* RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 25. "Indian tribes have authority to waive their immunity from suit, and to craft waivers of immunity by statute or agreement. To relinquish its immunity, a tribe's waiver must be clear and express." *Id.* cmt. c. "Tribal law governs the [authority of tribal officials to waive] tribal immunity by contract." *Id.*

The dispute between the Tribes and Merit over sovereign immunity is complex. After all, the Tribes did consent to a dispute resolution procedure. Section

20.1.1 of the lease provides for the initiation of arbitration in the event of a contractual dispute between the Tribes and Merit: “Any dispute between the parties which is contractual in nature, whether as to the construction or operation of this Lease or the respective rights and liabilities of the parties hereunder, shall be subject to arbitration under this Section.” Sections 20.1.2 and 20.1.3 (discussed above) provide substantial guidance on how the parties would pursue arbitration as a process, with the second sentence of Section 20.1.3 providing, “The American Arbitration Association’s rules for commercial arbitration shall be utilized.” Section 20.3 of the lease further provides, “Exercise of any of the remedies outlined in this lease shall not exclude recourse to any other remedy in law or equity for breach of this lease.”

Even with this agreement to arbitrate, tribal law and the lease itself make clear that the Tribes are engaging in business activities while preserving the Tribes’ immunity from suit. Section 24 of the lease provides, “Nothing in this lease is, shall be deemed to be, or construed as a waiver of the sovereign immunity of the Tribes.” Section 3(3) of the Wind River Arbitration Act states, “Nothing in the Code shall be construed as a waiver of sovereign immunity of the Tribes or their employees, officers, and/or agents.” Chapter 1, Section IX of the Wind River Indian Reservation Oil Field Transition Ordinance provides, “Nothing in this Ordinance shall be construed as a waiver of the sovereign immunity of either the NAT or EST. The Tribes may consider waiving immunity from suit on a case-by-case basis, provided, however, that any waiver of immunity must never be implied, but rather must be expressed clearly and unequivocally.” Section 1-8-5 of the Wind River Law and Order Code provides, “Except as required by controlling law or as specifically waived by resolution or ordinance of the tribes specifically referring to as such, the Shoshone and Arapaho Tribes shall be immune from suit in any civil action. . . .”

This wall of explicit reservations of the Tribes’ immunity from suit is well-nigh impenetrable. Neither the Court nor Merit Energy can locate a case where the court found a waiver of tribal immunity that overrode a lease, contract, statute, or constitutional provision containing a reservation such as the one contained in Section 24 of the lease. Conversely, cases confirming tribal immunity explicitly preserved by contract or statute are legion. Representative examples include *Engasser v. Tetra Tech, Inc.*, 519 F. Supp. 2d 703 (C.D. Cal. 2021), where the court confirmed the tribe’s immunity from suit by relying on contract language stating, “Nothing herein shall be construed as a waiver of sovereign immunity.” *Id.* at 709. That court parsed through several other contract provisions that could plausibly be construed as

implied waivers of immunity, most notably a provision in which the parties agreed to “meet and confer” prior to “commencing litigation,” but could find no explicit waiver. *Id.* Similarly, in *Teesateskie v. Eastern Band of Cherokee Indians Minors Fund*, 13 Am. Tribal Law 180 (Eastern Band of Cherokee Indians S. Ct. 2015), the court affirmed the dismissal of a suit brought by beneficiaries of a tribal trust fund for breach of trust. *Id.* at 183. There, the tribe had purchased insurance and waived its immunity by statute to allow for tort claims covered by the insurance policy, leading the plaintiffs to argue that the tribe must therefore have waived its immunity. *Id.* at 185-86. The court still confirmed the tribe’s immunity, which had been reserved in both the tribe’s judicial code and its minors’ trust fund statute. Both provisions read strikingly similar to the provisions here: “Nothing in this chapter shall be construed as a waiver of the sovereign immunity of the Eastern Band of Cherokee Indians.” *Id.* at 186 (quoting CHEROKEE CODE § 7-13); *id.* (same, quoting CHEROKEE CODE § 16C-5(l)(13)).

Other cases where a tribe reserved its immunity by contract or statute using language similar to the Tribes’ reservations here and where the court dismissed claims include *Long v. Snoqualmie Gaming Commission*, 435 P.3d 339, 344 (Wash. Ct. App. 2019) (“The [tribal statute] states that ‘nothing in [it] shall be construed as a waiver of the sovereign immunity of the Commission.’”); *Bartha v. Mohegan Tribal Gaming Authority*, 6 Am. Tribal Law 480, 483 (Mohegan Tribal Gaming Disputes Ct. App. 2005) (“[N]othing in this ordinance is to be construed as a waiver of the Tribe’s sovereign immunity from uncontested lawsuit, nor as consent by the Tribe to bring an action against the Tribe. . . .”); *Boice v. Washoe Tribe of Nevada and California*, 2001 WL 36209875, at *1 (Inter-Tribal Ct. App. Nev. May 16, 2001) (“Nothing contained in this Law and Order Code shall be construed as a waiver of tribal sovereign immunity.”); *Williams v. Poarch Band of Creek Indians*, 2015 WL 4104611, at *5 (S.D. Ala. July 8, 2015) (“Nothing contained in this Title shall be construed as a waiver by the [Poarch Band] of sovereign immunity from uncontested lawsuits or as consent by the [Poarch Band] to the bringing of any action against the [Poarch Band]. . . .”). There are many, many more cases like these.

Merit Energy nonetheless insists that the Tribes’ contractual agreement to arbitrate constitutes a waiver of tribal immunity. Merit relies on *C&L Enterprises*, a United States Supreme Court decision finding an implied waiver of tribal immunity in a construction dispute. There, the tribe and a construction contractor entered into a “standard form agreement copyrighted by the American Institute of Architects.” 532 U.S. at 415. The agreement contained an arbitration clause:

All claims or disputes between the Contractor [C & L] and the Owner [the Tribe] arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction [I]ndustry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.”

Id. The *C&L* Court quoted American Arbitration Association Rules recognizing state and federal court authority to enforce arbitration awards: “Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.” *Id.* The Court also quoted the choice-of-law provision: “The contract shall be governed by the law of the place where the Project is located.” *Id.* That place was located off-reservation, in Oklahoma. *Id.*

Initially, the Court notes that the lease here and the contract in *C&L* contain several similarities and differences, but the differences are critical. Obviously, both agreements contain an arbitration clause that references the rules of the American Arbitration Association that then (and now, according to Merit) pointed to state or federal courts for enforcement of arbitration awards. But the similarities end there. First, the lease here was not a standard form contract, but instead was a tribally-bespoke agreement generated and executed by the Tribes and its business partner. Second, reflecting the bespoke character of the lease, the governing law of the lease is tribal and federal law rather than the generic “place where the Project is located.” Third, the lease here makes clear that the lease activities were performed on the reservation. This, along with the governing law provision, ensures that state law has no force in interpreting this agreement. Fourth, the arbitration provision in the lease is not exclusive to other remedies, whereas in *C&L*, the Court characterized the arbitration clause as “binding.” *Id.* at 419. Fifth, and most damning to Merit’s claims, there was no explicit reservation of tribal immunity in the standard form construction agreement in *C&L*.

The *C&L* Court’s analysis leading to its conclusion that the contract there effectively, if implicitly, waived tribal immunity focused heavily on the “binding” character of the arbitration clause; the recognition of the power of “any court having jurisdiction” to enforce an arbitral award; the AAA rules pointing to state or federal

courts; and the choice of law provision that ultimately pointed to Oklahoma law and courts. *Id.* at 418-19. The only commonality between that contract and this lease is the reference to the AAA rules. The lease’s reference to the AAA is buried in a recitation of the procedural framework of the arbitration itself, not the enforcement of any award. Nothing in the lease mentions state courts or state law at all. Nor does the lease specifically mention the provision in the AAA rules that Merit cites as the forum selection clause. Merit still insists that this passing reference to the AAA rules generally is enough to incorporate the AAA rule on state and federal court enforcement. That incorporation by reference, Merit concludes, is enough to abrogate tribal immunity. Merit is incorrect.

In a conflict, if there is one, between Section 24’s explicit reservation of tribal sovereign immunity and Section 20.1.3’s passing reference to the AAA rules must be decided in favor of tribal sovereign immunity. A handful of post-*C&L* cases confirm that a bare arbitration clause like the one in the instant case is insufficient to work a waiver of tribal immunity. In *Engasser*, for example, the court noted that “contractual provisions did not waive immunity where the dispute resolution procedure was not binding, the tribe did not unequivocally submit to a court’s jurisdiction, or the tribe expressly retained its sovereign immunity.” 519 F. Supp. 3d at 708 (citing *Miller v. Wright*, 705 F.3d 919, 925-26 (9th Cir. 2013), and *Demontiney v. U.S. ex rel. Dept. of the Interior, Bureau of Indian Affairs*, 255 F.3d 801, 812-13 (9th Cir. 2001)). In *Engasser* and *Demontiney*, the tribes both expressly reserved their immunities from suit. *Engasser*, 519 F. Supp. 3d at 709 (“Nothing herein shall be construed as a waiver of sovereign immunity.”); *Demontiney*, 255 F.3d at 812 (“Nothing in this contract shall be construed as . . . [a]ffecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by the Chippewa Cree Tribe[.]”). In *Miller*, the contract did not explicitly reserve tribal immunity, but the dispute resolution mechanism agreed to by the tribe – mediation – was not binding. 705 F.3d at 925-26.

Even if this Court were to accept the notion that the passing reference to the AAA rules was sufficient to establish a mandatory forum selection clause that overrode the explicit lease and statutory terms pointing to this Court, under Wind River tribal law, a mere forum selection clause is insufficient to abrogate tribal sovereign immunity. Tribal law demands that a valid waiver of immunity may only be authorized “by resolution or ordinance of the Tribes. . . .” WIND RIVER LAW AND ORDER CODE § 1-8-5. No party has proffered such an ordinance or resolution. And since the Tribes have repeatedly reserved their immunity from suit in the lease and

every relevant tribal statute, the Court presumes there is no such tribal paper waiving immunity. The decision in *Danka Funding Co., Inc. v. Sky City Casino*, 727 A.2d 837 (N.J. Super. 1999), is instructive. There, a tribal official executed a contract that included a forum selection clause that included a statement that the contracting party consented to the jurisdiction of the forum. *Id.* at 363. The court refused to find a valid waiver of tribal immunity because tribal law demanded that a waiver of immunity was valid only if enacted by the tribal council. *Id.* at 364-65. Even if the Court were to find that the arbitration provision or the AAA rules somehow amounted to a waiver of tribal immunity, that waiver would be invalid under tribal law.

Ultimately, Merit hangs its hat on the same peg as the arbitration panel, arguing that a federal court in its adjudication of a prior arbitration award had already rejected the Tribes' immunity defense. *See Merit Energy Operations I, LLC v. Northern Arapaho and Eastern Shoshone Tribes*, No. 23-CV-063-SWS (D. Wyo. Sept. 22, 2023). A simple review of that court's opinion finds no reference to a tribal immunity defense, which makes sense because the Tribes apparently did not raise their immunity defense in that case. *See generally* The Northern Arapaho and Eastern Shoshone Tribes' Brief in Support of Their Motion to Dismiss and For an Award of Fees and Costs, *Merit Energy Operations I, LLC v. Northern Arapaho and Eastern Shoshone Tribes*, No. 23-CV-063-SWS (D. Wyo. June 20, 2023) (docket no. 16) (focusing a motion to dismiss on a lack of federal court subject matter and diversity jurisdiction); The Northern Arapaho and Eastern Shoshone Tribes' Reply Brief in Support of Their Motion to Dismiss and For an Award of Fees and Costs, *Merit Energy Operations I, LLC v. Northern Arapaho and Eastern Shoshone Tribes*, No. 23-CV-063-SWS (D. Wyo. July 31, 2023) (docket no. 31) (same). The federal district court *did* reject the Tribes' subject matter and diversity-based jurisdiction argument, but not an immunity argument.

Merit cites *Montana v. United States*, 440 U.S. 147 (1979), *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984), and several others for the proposition that the prior arbitration award collaterally estops the Tribes' relitigation of prior issues. Neither of these cases is apposite to the Tribes' immunity defense for the same reason that participation in arbitration does not abrogate immunity.⁵ Both

⁵ These other cases did not involve the invocation of sovereign immunity, either. *See B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138 (2015) (declining to find an issue precluded in a trademark materiality case); *Manganella v. Evanston Ins. Co.*, 700 F.3d 585 (1st Cir. 2012) (applying collateral estoppel to arbitration awards deciding same issue, no sovereign party involved); *Kremer v. Chemical Constr. Co.*, 456 U.S. 461 (1982) (collateral estoppel applied

Montana and *Stauffer Chemical* involved issues raised by sovereign governments, respectively, taxes and environmental regulations, in state and federal courts, respectively, not sovereign immunity. Here, the Tribes did preserve their immunity defense, which is enough to ensure the Tribes may now raise it.

Relatedly, Merit echoes the arbitration panel in asserting that the Tribes' participation in this and prior arbitration proceedings on matters involving the same or similar leases is sufficient to abrogate tribal immunity. Not so. Merit's claim is rooted in equity, not law, and equity rarely, if ever, runs against a sovereign. Sovereign immunity is a jurisdictional defense that can be raised at any time, even *sua sponte* by a court. Merit asks the Court to read the Tribes' actions as impliedly abrogating Section 24 of the lease. The United States Supreme Court has rejected multiple claims that tribal participation in litigation does not automatically abrogate immunity. *E.g.*, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1998) (citing and discussing *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-12 (1940)). The Tribes' reluctant participation in arbitration, done after asserting their immunity defense, cannot serve to waive immunity, especially where there is no tribal resolution or ordinance abrogating immunity. *Cf. Hydrothermal Energy Co. v. Fort Bidwell Indian Community Council*, 170 Cal. App. 3d 489, 492-93 (1985) (rejecting claim that tribal immunity could be waived by a tribal official without authority to execute a tribal waiver).

Ignoring the Tribes' immunity is manifest disregard of controlling law, requiring this Court to vacate the arbitration award. *E.g.*, *First Specialty Ins. Corp. v. Confederated Tribes of the Grand Ronde Community of Oregon*, 16 Am. Tribal Law 390, 405 (Grand Ronde Community Ct. App. 2006) ("The arbitration panel showed a manifest disregard for the law when it decided that the Grand Ronde Tribe had waived its sovereign immunity on these issues."); *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 854 (8th Cir. 2001) (vacating an arbitration award barred by tribal immunity, holding that "[a]n award 'manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.'" (citation omitted)).

In sum, Merit Energy acquired a lease that explicitly preserved the Tribes' sovereign immunity from suit. The Tribes' preservation of its immunity in its

to non-sovereign; no immunity at issue); *B-S Steel of Kansas, Inc. v. Texas Industries, Inc.*, 439 F.3d 653 (10th Cir. 2006) (same as *Manganella*).

contract documents has been present from the moment Merit engaged with the Tribes. Any arbitral award arising from a proceeding barred by the Tribes' immunity must be vacated.

Dated: 8/14/2024

Signed: Matthew Fletcher

Matthew L.M. Fletcher, Judge *Pro Tem*