STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF MOUNTRAIL	NORTHWEST JUDICIAL DISTRICT

Dakota Petroleum Transport Solutions, LLC, Plaintiff, vs. TJMD, LLP, Rugged West Services LLC, and JT Trucking, LLC, Defendants.	)	Civil No. 31-2013-CV-00055

DAKOTA PETROLEUM'S RESPONSE BRIEF TO TJMD'S MOTION TO DISMISS OR TRANSFER

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Statement of the Issues

¶1 **Exhaustion.** Applying the federal exhaustion rule to state courts would require state courts to surrender the jurisdiction decision to the tribal and federal courts, because state courts cannot review tribal-court jurisdiction decisions. If those courts decide that jurisdiction exists in the tribal court, the state court would have to concede jurisdiction, even if it otherwise would also have jurisdiction. Does the federal exhaustion rule, a matter of federal-court comity, apply to the state courts?

¶2 **Jurisdiction.** TJMD is a North Dakota limited liability partnership. Limited liability partnerships, like corporations, are entities distinct from their owners. Additionally, the conduct happened on non-Indian land. Does the state court system have jurisdiction over an action against a non-Indian for conduct that occurred on non-Indian owned land?

¶3 **Transfer.** A court can only transfer a case within its own judicial system. The tribal court is a court of an independent sovereign. Can a state court transfer a case to a tribal court?

¶4 **Abstention.** The state-court and tribal-court cases involve different claims and different parties. Additionally, the tribal court does not have jurisdiction over this matter. Both Colorado River analysis and the first-to-file rule require a parallel proceeding, and that jurisdiction exist in the other court. Should this Court continue to exercise its jurisdiction?

Statement of the Case

¶5 Dakota Petroleum Transport Solutions, LLC has sued TJMD, LLP and two other defendants, Rugged West Services, LLC, and JT Trucking, LLC, in Mountrail County District Court, seeking recovery of damages for oil spills. TJMD has moved to dismiss the complaint, asserting various reasons. Dakota Petroleum submits this brief in response.

Statement of Facts

¶6 Dakota Petroleum has sued TJMD, Rugged West, and JT Trucking in Mountrail County District Court. (Dakota Petroleum State Compl.; Dkt. No. 1) The lawsuit seeks recovery of damages for oil spills. (Id. ¶¶ 3-8)

¶7 Dakota Petroleum operates a crude-oil transloading facility in New Town. (TJMD Tribal Compl. ¶ 4, Dkt. No. 11) TJMD is a North Dakota limited liability partnership. From June 2010 until September 2012, TJMD performed the physical operations of the transloading facility under contract with Dakota Petroleum. (Id. ¶¶ 3, 35)

¶8 When TJMD started operating the facility it was 100% non-Indian owned. Later, it became 51% Indian owned. Only after Dakota Petroleum terminated TJMD's services did TJMD become 100% Indian owned. (Ex. A, at 22)

¶9 In this state-court lawsuit, Dakota Petroleum has sued TJMD for contractual indemnity for the cleanup expenses and fines it incurred for 49 oil spills that happened while TJMD was operating the facility. (Compl. ¶¶ 3-5; Dkt. No. 1) Dakota Petroleum has also sued TJMD for negligence relating to those spills. (Id. ¶ 6)

¶10 Additionally, Dakota Petroleum has sued Rugged West for negligence relating to three of those spills, and JT Trucking for negligence relating to one of those spills. (Id. ¶¶ 7-8) Dakota Petroleum alleges that Rugged West and JT Trucking were negligent with TJMD in causing or allowing these spills. (Id. ¶ 6)

¶11 TJMD earlier started a lawsuit in Fort Berthold tribal court. (TJMD Tribal Compl.; Dkt. No. 11) TJMD sued Dakota Petroleum, Dakota Plains Holdings, Inc., Western Petroleum Corporation, and World Fuel Services Corporation for breach of contract and tort claims relating to Dakota Petroleum's ending TJMD's services at the transloading facility. (Id. ¶¶ 1-81)

¶12 In the tribal-court lawsuit, TJMD sued Dakota Petroleum for breach of contract and an alleged covenant of good faith and fair dealing. (Id. ¶¶ 41-55) TJMD sued the other defendants for tortious interference with contract, tortious interference with prospective economic advantage, and misrepresentation. (Id. ¶¶ 56-78) TJMD sued all the defendants for civil conspiracy. (Id. ¶¶ 79-81)

¶13 Dakota Petroleum has moved the tribal court to dismiss the tribal-court lawsuit. Dakota Petroleum asserts the tribal court lacks jurisdiction over it. (Ex. A, at 6-39)

Summary of Argument

¶14 The federal exhaustion-of-tribal-remedies rule does not apply to the North Dakota state court system. The federal courts apply that rule as a matter of comity to the tribal courts. Unlike federal courts, state courts do not have the power to review tribal-court jurisdiction decisions. If the exhaustion rule were to apply to state courts, a state court would have to surrender the jurisdiction decision to the tribal and federal courts. If those

courts decide that tribal-court jurisdiction exists, the state court would have to concede jurisdiction, even if the state court would otherwise also have jurisdiction.

¶15 The state court has jurisdiction under the infringement test because TJMD is not an Indian. TJMD is a state-organized limited liability partnership – a nonhuman entity distinct from ownership. The state court also has jurisdiction because the conduct involved happened on non-Indian owned land.

¶16 Transfer does not apply. A court cannot transfer a case outside its own judicial system. The tribal court is a court of an independent sovereign.

¶17 The Court should apply Colorado River analysis to decide whether to continue to exercise its jurisdiction. Colorado River analysis applies when the two lawsuits are in different court systems. Yet, regardless whether Colorado River analysis or the first-to-file rule applies, the Court should continue to hear this case. The state-court and tribal-court cases are different, and the tribal court lacks jurisdiction over this matter.

Argument

1. The federal exhaustion-of-tribal-remedies rule does not apply to the North Dakota state court system because that rule applies only as a matter of comity by federal courts to tribal courts, and state courts cannot review a tribal court's jurisdiction decision.

¶18 The overwhelming majority of courts that have considered the issue have held that the federal exhaustion-of-tribal-remedies rule does not apply to state courts. Astorga v. Wing, 118 P.3d 1103, 1106-07 (Ariz. Ct. App. 2005); Mayer & Assocs., Inc. v. Coushatta Tribe of La., 992 So.2d 446, 452 (La. 2008); Lemke ex rel Teta v. Brooks, 614 N.W.2d 242, 245 (Minn. Ct. App. 2000); Seneca v. Seneca, 741 N.Y.S.2d 375, 379 (N.Y.

App. Div. 2002); Michael Minnis & Assocs. v. Kaw Nation, 90 P.3d 1009, 1014 (Okla. Civ. App. 2004); Maxa v. Yakima Petroleum, Inc., 924 P.2d 372, 373 (Wash. Ct. App. 1996).

¶19 Federal courts can review a tribal court's decision that it has jurisdiction over claims involving nonmembers. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852 (1985). Under the exhaustion rule, when a claim challenges tribal court jurisdiction, or has colorable tribal court jurisdiction, the federal court allows the tribal court the first opportunity to decide whether it has jurisdiction. Nat'l Farmers Union, 471 U.S. at 847, 856; Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 12-13, 19 (1987). Generally, only after the tribal trial court system has decided that it has jurisdiction will a federal court decide whether the tribal court has jurisdiction. Iowa Mut., 480 U.S. at 16. If the federal court system decides that the tribal court system lacks jurisdiction, it enjoins the tribal court proceeding. Id. at 19. If it decides that the tribal court system has jurisdiction, it defers to that jurisdiction. Id.

¶20 Federal courts apply the exhaustion rule as a matter of comity to tribal courts. Iowa Mut., 480 U.S. at 16 n.8. "Comity is not a rule of law, but one of practice, convenience, and expediency." Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900). State courts are not bound to apply it.

¶21 State courts lack power to review tribal court jurisdiction decisions. Lemke, 614 N.W.2d at 245. Applying an exhaustion rule to state courts would require state courts to surrender the jurisdiction decision to the tribal and federal courts. Moreover, if those court systems decide that the tribal court has jurisdiction, the state courts would have to

concede jurisdiction to the tribal court, even if the state court would otherwise have had concurrent jurisdiction.

¶22 Applying the federal exhaustion rule in state courts would run counter to the duty of courts to exercise their jurisdiction. A court generally "has not only the right but also the duty to exercise [its] jurisdiction." 20 Am. Jur. 2d Courts § 62 (2005). The North Dakota Supreme Court applied this principle in Kristensen v. Strinden, 343 N.W.2d 67 (N.D. 1983).

¶23 In Kristensen, the North Dakota Supreme Court considered whether the state court system should concede its otherwise concurrent jurisdiction over section 1983 cases to the federal courts. Id. at 70-71. The court held that the state court system should exercise its jurisdiction. The court said that the open courts provision of the North Dakota Constitution "does not permit State courts any discretion in determining whether or not to entertain actions properly brought before them." Id. at 71. Applying Kristensen here, the Court should exercise its jurisdiction.

¶24 In Drumm v. Brown, 716 A. 2d 50, 64 (Conn. 1998), the Connecticut Supreme Court held that the exhaustion rule applies to Connecticut state courts, but only when a parallel tribal-court proceeding exists. The court defined a parallel proceeding as one "arising from the same transaction[] and occurrence[] and involving substantially the same issue[] and parties." Id. at 65.

¶25 Even under Drumm, the federal exhaustion rule does not apply here. The two cases are different. They involve different issues and different parties. Dakota Petroleum's state-court lawsuit is against TJMD, Rugged West, and JT Trucking for

recovery of damages for oil spills. (Dakota Petroleum State Compl. ¶¶ 3-8; Dkt. No. 1) TJMD's tribal-court lawsuit is against Dakota Petroleum, Dakota Plains, Western Petroleum, and World Fuels Services for damages relating to the ending of TJMD's services. (TJMD Tribal Compl. ¶¶ 1-81; Dkt. No. 11)

¶26 In Dodge v. Nakai, 298 F.Supp. 17, 26 (D. Ariz. 1968), the Arizona federal district court fashioned an exhaustion-of-tribal-remedies rule for Title II cases. It held, however, that the rule did not apply in the case before it because, among other reasons, the tribal court would not have jurisdiction over all the defendants. Id. at 26.

¶27 Applying Dodge, even if the exhaustion rule applied to the state courts, it still would not apply here. The tribal court unquestionably does not have jurisdiction over the claims against Rugged West and JT Trucking. Thus, the exhaustion rule would not apply here even if it applied to state courts.

¶28 The North Dakota Supreme Court allows state courts to exercise jurisdiction when the tribal court also has jurisdiction. In Kelly v. Kelly, 2009 ND 20, ¶ 22, 759 N.W.2d 721, the North Dakota Supreme Court held that the state court could exercise its concurrent jurisdiction over the incidents of a marriage.

¶29 The Court should not adopt the federal exhaustion rule, but should apply the infringement test. Since TJMD is not an Indian and the conduct happened on non-Indian owned land, the Court has jurisdiction under the infringement test.

2. The North Dakota court system has jurisdiction over this case under the infringement test because TJMD is not an Indian and the conduct happened on non-Indian owned land.

¶30 Under the Williams v. Lee infringement test, a state court does not have jurisdiction over a claim by a non-Indian against an Indian for conduct that occurred on that Indian's reservation. Williams v. Lee, 358 U.S. 217, 223 (1959). The state court has jurisdiction over this case for two reasons. First, TJMD is not an Indian. TJMD is a non-human entity: a state organized limited liability partnership. Second, the underlying conduct happened on non-Indian owned land.

A. The North Dakota Court system has jurisdiction because TJMD is not an Indian.

¶31 The infringement test allows state-court jurisdiction here because TJMD is not an Indian. Indian status has a racial component. United States v. Rogers, 45 U.S. (4. How.) 567, 573 (1846). Since TJMD is a non-human entity, a state-organized limited liability partnership, it does not have a racial status, and cannot be an Indian.

¶32 In Airvator, Inc. v. Turtle Mountain Mfg. Co., 329 N.W.2d 596, 602 (N.D. 1983), the North Dakota Supreme Court held that a state-organized corporation that was owned and controlled by Indians, was not an Indian for jurisdictional purposes. The court reasoned that a corporation is an entity distinct from its owners. Id. at 603. See also Zempel v. Liberty, 143 P.3d 123, 132 (Mont. 2006)(holding that state-organized corporation was not an Indian for jurisdictional analysis, because "a corporation maintains a legal identity which is 'separate and distinct' from that of its shareholders."); see generally, Stephen L. Pevar, The Rights of Indians and Tribes 161 (4th ed.

2012)(stating, "Corporations that are licensed under state law usually are considered 'non-Indian' for jurisdictional purposes even if they are owned by Indians.")

¶33 A limited liability partnership, like a corporation, is an entity distinct from its owners. Under North Dakota law and the Uniform Partnership Act (1997), even an ordinary partnership "is an entity distinct from the partnership's partners." N.D. Cent. Code § 45-14-01 (2007); Unif. P'ship Act (1997) § 201, 6 pt.1 U.L.A. 91 (2001). This entity designation applies to a North Dakota limited liability partnership through section 45-22-02 of the North Dakota Century Code.

¶34 Unlike a partner in an ordinary partnership, a partner of a limited liability partnership is not liable for partnership debt. Compare N.D. Cent. Code § 45-15-06 (2007) with id. § 45-22-08.1. "[The] limited liability [of an LLP] makes entity characterization of LLP's more certain." Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Limited Liability Partnerships, the Revised Uniform Partnership Act, and the Uniform Limited Partnership Act (2001), § 1.02(e) (2013 ed.).

¶35 Allowing ownership of an entity to determine whether an entity is Indian would prove unworkable in many cases. As the North Dakota Supreme Court recognized in Airvator, allowing ownership to determine whether an entity is Indian "would promote an unmanageable and undesirable method of determining jurisdiction because [of] the possibility of a change in the percentage of Indian shareholders." 329 N.W.2d at 604.

¶36 Additionally, allowing ownership of an entity to determine whether an entity is Indian would blur the distinction between Indians and non-Indians. When the entity is less than 100% Indian owned, the effect would be to give Indian status to non-Indians.

¶37 TERO certified status has nothing to do with state court jurisdiction. TERO certified status only gives a firm preference in being awarded contracts on the reservation. TERO Regulations of the Three Afilliated Tribes Pt. 3 (2012).

¶38 No logical basis exists for applying the fiction of Carden v. Arkoma Assocs., 494 U.S. 185 (1990), in deciding whether a state court must decline jurisdiction under the infringement test. In Carden, the United States Supreme Court considered how to assign citizenship to a limited partnership for federal diversity jurisdiction. Id. at 187-96. The Court deemed the citizenship of the limited partnership to be the citizenship of all its members. Id. at 195-96. The Carden rule is a legal construct that allows a limited partnership to sue and be sued in federal court based on diversity. See Swiger v. Allegheny Energy, Inc., 540 F.3d 179, 185 (3d Cir. 2008)(stating that rule allowing a citizenship of a partnership to be determined by the citizenship of its partners is a "legal construct" that allows the partnership access to federal court).

¶39 Even applying a Carden-like rule, it would not help TJMD. The Carden rule looks to the status of "*all* the members." 494 U.S. at 195 (emphasis added). During the events underlying this lawsuit, TJMD had non-Indian members.

¶40 Treating an entity as an Indian could adversely impact the state in its enforcement of regulatory laws on the reservation. More stringent preemption standards apply when a state applies its laws against tribal members than against nonmembers. Compare New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983)(stating "exceptional circumstances" required before state civil regulatory authority exists over tribal members with respect to on-reservation activity), with Cnty of Yakima v. Confederated Tribes and

Bands of Yakima Indian Nation, 502 U.S. 251, 257-58 (1992)(stating, "[t]his Court's more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands"); and Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989)(applying interest-balancing test to state taxation of nonmembers doing business on the reservation).

¶41 Businesses owners form entities like limited liability partnerships to separate themselves from their businesses. Courts should not allow these owners to take advantage of this separateness when it suits them, and to ignore it when it does not.

B. The North Dakota Court system has jurisdiction because the conduct occurred on non-Indian owned land.

¶42 A second reason the state court has jurisdiction is that the transloading facility, where the spills occurred, is on non-Indian owned land. (Ex. A, at 23) "[O]nce tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it." Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., 554 U.S. 316, 328 (2008). In Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997), the United States Supreme Court held that the tribal court lacked jurisdiction over an accident that happened on a state highway on the reservation. The Court said that tribal authority was not needed to preserve the tribes' right of self-government. Id.

¶43 The policy behind the infringement test is to preserve the tribe's right of self-government. Williams, 358 U.S. at 223. When the underlying conduct occurred on non-Indian owned land, state-court jurisdiction does not infringe on the tribe's right of self-government. Strate, 520 U.S. at 459. Thus, the state court system has jurisdiction. While

the North Dakota Supreme Court held in Winer v. Penny Enters., 2004 ND 21, ¶ 22, 674 N.W.2d 9, that the ownership status of land within the reservation has no bearing on the infringement test, the United States Supreme Court has yet to decide this issue.

3. Transfer does not apply because the tribal court is not part of the same judicial system.

¶44 "It is black-letter law that a legislative body cannot empower a court to transfer a case outside its own judicial system, however that judicial 'system' is defined by governing statutes." Litigating Tort Cases § 3:18 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2012). The Fort Berthold tribal court is outside the North Dakota judicial system. Although it is located within North Dakota's geographical boundaries, it is not a state court, but is the court of an independent sovereign. Indian tribes are distinct political communities. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978).

¶45 Even if this Court could transfer a case to a tribal court, it would not be appropriate to do so here. A party seeking transfer for the convenience of witnesses and the furthering of justice must show facts justifying transfer. Flattum-Riemers v. Flattum-Riemers, 2003 ND 70, ¶ 19, 660 N.W.2d 558. The party must submit an affidavit that identifies the witnesses, states their addresses, and describes the nature, necessity, and relevance of their testimony. Id. at ¶ 20. TJMD has not submitted an affidavit.

¶46 Mountrail County and the Fort Berthold Indian Reservation have overlapping geographical boundaries. (Ex. B). The state and county exercise jurisdiction over the land within the reservation, subject to the jurisdiction of the United States to carry out its obligations to the tribes. State ex rel. Baker v. Mountrail Cnty., 149 N.W. 120, 121-22 (N.D. 1914).

¶47 The transloading facility is in New Town, within Mountrail County. The tribal court also is in New Town. Stanley, where the Mountrail County courthouse is located, is less than 35 miles from New Town. (Ex. C)

4. The Court should continue to exercise its jurisdiction because the state-court and the tribal-court cases are different, and the tribal-court lacks jurisdiction over this matter.

¶48 The first-to-file rule applies only when the lawsuits are before courts in the same judicial system. See United States Fid. & Guar. Co. v. Petroleo Brasileiro S.A.–Petrobras, No. 98 Civ. 3099 (JGK), 2000 WL 48830, at *2 (S.D.N.Y. 2000)(stating, "The first filed rule is a rule of deference between federal courts. Whether a federal court should defer to a concurrent action pending in state court raises an issue of abstention."); Fowler v. Ross, 191 Cal. Rptr. 183, 186 (Cal. Ct. App. 1983 (stating the first-to-file rule "is applicable where the tribunals are within the same state but the rule does not apply where jurisdiction is taken by a state court and a federal court."). The cases here are not in the same judicial system.

¶49 The North Dakota Supreme Court has recognized that a state court has discretion to defer to the jurisdiction of a court in another judicial system. State ex rel. Stenehjem v. Simple.net, Inc., 2009 ND 80, ¶ 14, 765 N.W.2d 506. This application of comity is similar to Colorado River abstention in the federal court system.

¶50 Under Colorado River abstention, a federal court has discretion to abstain from deciding a case when a parallel proceeding exists in state court. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976). Colorado River abstention operates more restrictively than the first-to-file rule because of the "virtually

unflagging obligation" of the federal courts to exercise their jurisdiction. Id. at 817. A court's task in deciding whether to abstain under Colorado River "is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court, . . . [but] rather . . . to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice . . . to justify the *surrender* of that jurisdiction." Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 25 (1983)(emphasis in original).

¶51 Colorado River abstention applies by analogy here because the two lawsuits are in different court systems. State courts, like federal courts, have a steadfast duty to exercise their jurisdiction. 20 Am. Jur. 2d Courts § 62 (2005). As already mentioned, in Kristensen v. Strinden, 343 N.W.2d 67, 71 (N.D. 1983), the North Dakota Supreme Court went so far as to say that the open courts provision of the North Dakota constitution "does not permit State courts any discretion in determining whether or not to entertain actions properly brought before them."

¶52 Federal courts have held that Colorado River analysis applies in the international context – when one case is in federal court and the other in another country. Al-Abood v. El-Shamari, 217 F.3d 225, 232 (4th Cir. 2000); Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc., 180 F.3d 896, 898 (7th Cir. 1999); Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines, 925 F.2d 1193, 1195 (9th Cir. 1991). These cases provide support for applying Colorado River in the state and tribe context because Indian tribes are separate sovereigns. In Gavle v. Little Six, Inc., 555 N.W.2d 284, 290 (Minn. 1996), the

Minnesota Supreme Court applied Colorado River analysis in a case in which a tribal court would have had concurrent jurisdiction.

¶53 Colorado River abstention requires a pending parallel proceeding. TruServ Corp. v. Flegles, Inc., 419 F.3d 584, 591 (7th Cir. 2005); Baskin v. Bath Tp. Bd. of Zoning Appeals 15 F.3d 569, 572 (6th Cir. 1994). A parallel proceeding is one that has identical, or at least substantially similar, parties and issues as the subject case. Baskin, 15 F.3d at 572; TruServ, 419 F.3d at 592. A proceeding is parallel if a substantial likelihood exists that it will dispose of all the claims in the subject case. Id. Any doubt must be resolved in favor of finding the proceeding different. Id.

¶54 Whether a pending proceeding is parallel is decided as that proceeding currently exists. Baskin, 15 F.3d at 572. That the subject lawsuit could be asserted as a counterclaim in the other proceeding does not make that other proceeding parallel. TruServ, 419 F.3d at 593.

¶55 The two cases here involve different issues and different parties. Dakota Petroleum's state-court lawsuit is against TJMD, Rugged West, and JT Trucking for recovery of damages for oil spills. (Dakota Petroleum State Compl. ¶¶ 3-8; Dkt. No. 1) In contrast, TJMD's tribal-court lawsuit is against Dakota Petroleum, Dakota Plains, Western Petroleum, and World Fuels Services for breach of contract and tort claims relating to the ending of TJMD's services. (TJMD Tribal Compl. ¶¶ 1-81, Dkt. No. 11). The tribal-court case will not dispose of the state-court case.

¶56 Under Colorado River analysis, a court should continue to exercise its jurisdiction when doubt exists whether the plaintiff could obtain complete relief in the other case.

The United States Supreme Court has explained, "When a district court decides to dismiss or stay under Colorado River, it presumably concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties." Moses H. Cone, 460 U.S. at 28. The Court continued, "If there is any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal at all." Id.

¶57 The tribal court proceeding is not an adequate vehicle for resolution of Dakota Petroleum's lawsuit. As explained in Dakota Petroleum's briefs filed in tribal court, the tribal court lacks jurisdiction over matters between Dakota Petroleum and TJMD. (Ex. A, at 6-39).

¶58 Even if Dakota Petroleum were to pursue its lawsuit against TJMD in tribal court, Dakota Petroleum could not obtain complete relief. Dakota Petroleum's lawsuit includes claims against Rugged West and JT Trucking. The tribal court unquestionably lacks jurisdiction over the claims against these defendants.

¶59 The Court should apply the Colorado River analysis and continue to hear this case. The two cases are different, and the tribal court lacks jurisdiction. Yet, even if the Court were to apply the first-to-file rule, it should still continue with the case for the same two reasons: the cases are different, and the tribal court lacks jurisdiction.

¶60 Like Colorado River abstention, the first-to-file rule requires a parallel proceeding. State ex rel. Red Head Brass, Inc. v. Holmes Cnty. Court of Common Pleas, 684 N.E.2d 1234, 1236 (Ohio 1997). As the court in Red Head Brass said, "[I]t is a condition of the operation of the state jurisdictional priority rule that the claims or causes of action be the

same [and] if the second case does not involve the same cause of action or the same parties, the first suit will normally not prevent the second case." Id. (internal quotations omitted); see also Hampton v. Tennessee Truck Sales, Inc., 993 S.W.2d 643, 646 (Tenn. Ct. App. 1999)(stating, "[T]he two suits must involve the identical subject matter and be between the same parties....")(internal quotations omitted).

¶61 Additionally, like Colorado River abstention, the first-to-file rule requires that jurisdiction exist in the other court. RAS Family Partners, LP v. Onnam Biloxi, LLC, 968 So.2d 926, 928 (Miss. 2007). As the court in RAS Family said, "The principle of priority jurisdiction presupposes that the first court in which suit is filed is a court of competent jurisdiction." Id.; see also Hampton, 993 S.W.2d at 646 (stating, "the former suit must be pending in a court in this state having jurisdiction of the subject matter and the parties.")(internal quotations omitted).

Conclusion

¶62 The Court should deny TJMD's motion to dismiss. The federal exhaustion rule does not apply to state courts. Applying the infringement test, the state court has jurisdiction because TJMD is not an Indian, and the conduct happened on non-Indian owned land. Transfer does not apply because the tribal court is the court of an independent sovereign. Whether Colorado River analysis or the first-to-file rule applies, the Court should continue to exercise its jurisdiction because the two cases are different, and the tribal court lacks jurisdiction over this matter.

DATED this 16th day of May, 2013.

Respectfully submitted,

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