EXHIBIT 1

THREE AFFILIATED TRIBES — IN DISTRICT COURT

FORT BERTHOLD RESERVATION — NEW TOWN, ND 58763

Edward Sully Danks Sr., and
Georgiana Danks, Landowners.
Petitioner/Plaintiff,

Vs.

Slawson Exploration Company Inc. and
White Butte Oil Operation LLC.
Respondent/Defendant.

Certificate of Service VIA U.S Mail
CV-2018-0144

State of North Dakota)
) SS.
County of Mountrail)

COMES NOW, Amanda DeVille, and states the following:

1. That an **Order** and this Certificate of Service were served by me on the following individuals by sending true and correct copies of such documents in the U.S. mails (~~by certified mail~~), postage prepaid, in New Town, North Dakota addressed as follows:

PLAINTIFF/PETITIONER
Don Bruce
P.O Box 674
Belcourt, ND 58316
*Attorney for Plaintiffs'

Respondent/Defendant
Robert Thompson, III
12 17th Street, Suite 2400
Denver, Colorado 80202
*Attorney for Respondents

I further certify that I am over twenty-one years of age and am not a party to this action.

Amanda DeVille
Clerk of Court

Dated this 28th day of June 2018

THREE AFFILIATED TRIBES — IN DISTRICT COURT

FORT BERTHOLD RESERVATION — NEW TOWN, NORTH DAKOTA

Edward Sully Danks Sr., and
Georgiana Danks, Landowners

Plaintiff,

vs.

Slawson Exploration Company Inc. and
White Butte Oil Operations LLC,
Defendant.

CIV2018-0144

ORDER

The Plaintiffs filed this complaint for monetary damages alleging a tortious interference with their beneficial title to the surface estate of certain allotted trust lands on the Fort Berthold reservation. They claim that due to the Defendants' negligence an oil spill occurred on those lands and that they have suffered harm that they seek monetary damages for.

The Defendants have responded with a two-prong motion to dismiss. They argue that: 1) there is a choice of forum agreement in a October 2, 2012 Surface Use Agreement (hereinafter SUA) that stipulates that any cause of action arising from the SUA would be commenced in federal court or a North Dakota district court and that this cause of action "arises" from that SUA; and 2) this Court lacks subject matter jurisdiction over this dispute under Plains Commerce Bank v. Long Family Cattle Co, 554 U.S. 316 (2008) and its progeny, especially the recent United States District Court for the District of North Dakota's ruling in Kodiak Oil and Gas et al v. Burr, et al, Case CV-14-085 in which the federal court enjoined this Court from exercising jurisdiction over lawsuits against non-Indians for alleged breaches of private contracts related to flaring of gases

from oil wells on the Fort Berthold reservation. That case seems to imply that tribal court jurisdiction over suits against non-Indians where jurisdiction is premised upon the first prong of the Montana test is limited to those causes of action where the Tribe itself is a party or an especial tribal interest is involved.

The Plaintiffs disagree and argue that the 2012 SUA does not apply to this dispute, but instead the prior right of way agreement between the Parties is apposite and that under that agreement there is no stipulated forum for resolution of disputes. They also argue that jurisdiction is proper before this Court.

Hearing was held on the 8th day of June 2018 with the Plaintiffs appearing through Don Bruce, Attorney at Law, and the Defendants through Robert S. Thompson III. Both counsel made spirited full-throated arguments in support of their differing legal perspectives and also submitted excellent briefs to aid this Court.

Based upon the legal analysis herein this Court will first address the issue of jurisdiction because if the Court lacks jurisdiction it need not address the choice of forum issue because it cannot defer its jurisdiction in favor of another forum, stipulated to by the Parties, unless it has jurisdiction to yield. This Court finds that it has jurisdiction over this cause of action under Montana and its progeny.

However, the Court further finds that the 2012 SUA contains a choice of forum provision stipulated to by the Parties and that the jurisdictions stipulated to in that SUA- federal and state court- would have authority to resolve this dispute. This Court cannot expect the federal and state courts to honor a choice of forum provision selecting this Court as the exclusive venue for dispute resolution if it does not honor contracts that stipulate to other forums. In addition, businesses on this reservation- Indian and non-

Indian alike- have a right to contract with a reasonable expectation that the forum they select through even-handed contract negotiations will be the forum that exercises jurisdiction over disputes, provided of course that that forum would have subject matter jurisdiction. That does not mean that parties can contract away this Court's exclusive subject matter jurisdiction, but they certainly can opt for another forum in cases of concurrent or tri-current jurisdiction.

The Court finds that the cases cited by the Plaintiffs upholding tribal court jurisdiction even in the face of a choice of forum clause are inapposite here because those lawsuits pertain to the legality of the underlying agreements that include the choice of forum provisions and not the enforceability of the choice of forum clause.

FACTS PRESENTED

In a motion to dismiss this Court shall construe the facts in a light most favorable to the non-moving party. The Plaintiffs are enrolled members of the MHA Nation who possess the beneficial title to the entire surface state within Section 20, Township 151 North, Range 94 West, Fifth Principal Meridian, McKenzie County, North Dakota (hereinafter Section 20). Defendant Slawson was the original assignee, and White Butte a subsequent assignee, of the mineral leases of eighty net acres of the west-half of Section 20 owned by a non-Indian in fee. In September of 2010 Slawson and the Plaintiffs purportedly reached an agreement regarding the access to Section 20 and compensation was tendered to the Plaintiffs.

The Plaintiffs refused however to accept the payments and contended from the inception that the 2010 purported contract was invalid and unenforceable. Slawson applied to the Department of Interior for a right of way through Section 20 and after a

delay on June 22, 2012 the BIA issued a right of way through Section 20 for an oil well over the objections of the Plaintiffs. The BIA essentially ruled that even though the Plaintiffs had not agreed to the right of way that they could not as surface owners essentially prevent mineral owners from gaining access to those minerals by refusing to enter into a right of way, but that they could claim reasonable compensation for that right of way.

It is critical to note that the BIA held that there was no 2010 right of way agreement between the Parties, but the BIA essentially held that as a matter of necessity one could be impressed upon the Plaintiffs by law. The BIA required Slawson to post a bond of $33,000 for right of way compensation. This action resulted in litigation in the United States District Court for the District of North Dakota in which Slawson attempted to have the federal court grant declaratory relief that the 2010 agreement had been reached and was enforceable. That matter was concluded by Slawson and the Plaintiffs negotiating an October 12, 2012 SUA that resulted in the dismissal of the suit and an agreement by Slawson to pay certain sums to the Plaintiffs. The SUA also contained a choice of forum provision stipulating that "any dispute arising under or in connection with the Agreement or related to any matter which is the subject of the Agreement shall be subject to the exclusive jurisdiction of the state and/or federal courts located in the State of North Dakota."

The BIA then issued a Grant Easement for Right of Way to Slawson and the federal litigation was dismissed. Slawson then assigned the same to White Butte who prepared the site for a well called the Panzer well site. There was an oil spill on that site

after assignment and the Plaintiffs assert that their surface rights have been impacted by the spill caused by the negligence of White Butte. They therefore commenced this action.

LEGAL ANALYSIS

The Court would like to address a couple of issues in contention before it begins its legal analysis. First, the Plaintiffs rely upon the 2010 purported agreement between the Parties to point out that there is no choice of forum provision in that agreement and also point out that it was the Defendants herein who commenced litigation in federal court to assert that that agreement was valid and enforceable even though the BIA held that it was not. This is somewhat of an estoppel argument they make.

However, this Court has no authority to second-guess the determinations of the Department of Interior pertaining to rights of way agreements because that agency is the legal owner of trust and allotted lands and this Court cannot overrule a federal agency's determinations on that issue. Although the United States Court of Appeals for the Eighth Circuit has recognized that in some contexts this Court can adjudicate interests in allotted or trust lands, see Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978), this Court lacks the jurisdiction to overturn or question DOI determinations pertaining to the rights to occupy those lands or to use those lands. Therefore to the extent that the Plaintiffs are arguing that a valid 2010 right of way agreement existed, this Court must disagree with that proposition because the determination of the DOI that one did not exist, and the subsequent litigation which did not result in a federal court determination overturning that DOI decision, is entitled to a certain degree of collateral estoppel in this Court. See United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966) where the Court held "that **administrative** proceedings may be given preclusive effect accorded to a

court 'when an **administrative** agency is acting ***in*** *a judicial capacity* and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.'

However, that does not mean that the 2010 attempted agreement is not relevant to this Court's inquiry on jurisdiction or the other issues at dispute here, but only that to the extent the Plaintiffs are arguing that the 2010 purported agreement should control the choice of forum issue this Court is not inclined to agree with that. [1]

JURISDICTION OF THIS COURT

Although the Defendants interpose their motion to dismiss first relying upon the choice of forum provision and then secondarily upon the asserted lack of jurisdiction, this Court opts to address those issues in reverse order of presentation. For a Court to address a choice of forum provision in a contract and assess its enforceability the Court has to itself have jurisdiction over the underlying dispute because a choice of forum provision is a contractual agreement to contractually deprive one Court of its rightful jurisdiction and only a Court of competent jurisdiction can interpret that agreement.

> "While **forum**-selection clauses historically were disfavored, such is no longer the case, so long as the clause is fair and reasonable: The right of an injured party to legal redress is jealously guarded by the **courts**. Formerly, no agreement confining the right of a party to sue **in** a particular **court** or tribunal or **in** the **courts** or tribunals of a certain **jurisdiction**, or to determine the venue of a suit **in** such a way as to deprive the defendant of his statutory privileges as to place of trial was enforced, unless perhaps where the agreement was made after the cause of action had arisen and was part of a fair compromise. A minority of **courts** still follow this older rule.
> During the past two decades, the rules governing the validity of various "**forum** selection" clauses have been relaxed considerably, the **courts** following a pattern similar to that which has already been discussed **in** connection with arbitration clauses. Thus, while it remains true today that a clause or **provision** *unreasonably or improperly* attempting to deprive a **court** of its **jurisdiction** will not be

> enforced, the modern trend is to respect the enforceability of **contracts** containing clauses limiting judicial **jurisdiction**, if there is nothing unfair or unreasonable about them. This trend is directly traceable to the landmark case of *M/S Bremen v Zapata Off-Shore Co.*, [407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)], **in** which the United States Supreme **Court** upheld the validity of a freely negotiated **forum** selection clause **in** a commercial **contract** between an American firm and a German concern, which specified that any dispute must be determined by the English **courts**. . . ."

See 7 Samuel Williston & Richard A. Lord, *A Treatise on the Law of* ***Contracts*** § 15:15, at 290-301 (4th ed. 1997) (footnotes omitted). *See also* 17A Am. Jur. 2d ***Contracts*** § 259, at 255-56 ("While there is contrary authority, generally modern **courts** will enforce **forum**-selection clauses entered into by parties to a **contract** provided that the clauses are not unfair, unreasonable, or unjust under [the] circumstances." (footnotes omitted))

Because the US Supreme Court clearly finds that forum selection clauses are provisions that "deprive a court of jurisdiction" this Court must first assess its jurisdiction to even hear this case before it may embark upon an examination of the applicability and enforceability of the forum selection provisions of the SUA.

Trying to determine when a tribal court may exercise civil jurisdiction over a dispute involving a non-Indian litigant is a little like trying to thread a needle in motion- the rules appear to change regularly and the United States Supreme Court jurisprudence on the subject is slightly incoherent because the Court itself seems to be torn over the subject, as its recent inability to render a decision in Dollar General v. Mississippi Band of Choctaw Indians, No 13-1496 demonstrates. That 4-4 split upheld tribal court jurisdiction in a tort case against a non-Indian corporation and is telling because the Fifth Circuit upheld tribal court civil jurisdiction over a non-Indian corporation that had a consensual relationship with the Tribe itself through a lease agreement to run a business on the reservation, even though the cause of action there- assault and battery- involving a

child being molested by the general manager of the Dollar General store did not relate directly to the commercial lease. It is difficult to speculate how that decision would have been resolved had the new US Supreme Court Justice, Neil Gorsuch, been on the Court, but many have speculated that Justice Gorsuch appears to be a strong proponent of tribal sovereignty and may be a deciding vote in favor of an expanded approach to tribal civil jurisdiction. [2]

Although on many reservations where non-Indian activity is minimal these types of cases may not represent a significant number of cases in their tribal courts, that is not the case on the Fort Berthold reservation. Due to the explosion of economic ventures related to oil extraction, and the necessary contractual relations to carry out that enterprise, this Court literally sees hundreds of disputes involving tribal members and non-member Indians and non-Indians. It must be difficult for these business ventures to operate in an environment where the jurisdictional rules are so confusing.

This case presents another situation where SCOTUS and federal court precedents do not clearly give an answer on whether this Court can exercise jurisdiction over a cause of action sounding in tort that flows from a commercial consensual relationship between a tribal member and non-Indian business pertaining to commercial conduct on Indian trust land and the cause of action is not directly related to the commercial relationship but certainly flows from that relationship.

It started out promising. In *Montana v. United States*, 450 U.S. 544 (1981) the United States Supreme Court severely proscribed the authority of Indian tribes to regulate

[2] See https://sct.narf.org/articles/gorsuch-indian-law.pdf for a description of Justice Gorsuch's Indian law jurisprudence which led many national native organizations to support his confirmation.

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

Montana seemed to lay out a clear rule for determining tribal authority over non—Indians. If the conduct pertained to the ownership or use of a non-Indian's fee lands within reservation boundaries the Tribe's jurisdiction was proscribed and could only be exercised under one of the two exceptions. Tribal authority over the actions of non-Indians on tribal or trust lands was unlimited however and indeed even as recently as the United States Supreme Court's decision in Plains Commerce, Chief Justice Roberts described tribal authority over activity on its own lands as being "plenary."[3]

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[3] Roberts commented on the legal impact of lands going out of trust and into fee status as follows: "Our cases have made clear that once tribal land is converted into fee simple, **the tribe loses plenary jurisdiction over it**. See *County of Yakima*, *supra*, at 267–268 (General Allotment Act permits Yakima County to impose ad valorem tax on fee land located within the reservation); *Goudy* v. *Meath*, 203 U. S. 146, 140–150 (1906) (by rendering allotted lands alienable, General Allotment Act exposed them to state assessment and forced sale for taxes); *In re Heff*, 197 U. S. 488, 502–503 (1905) (fee land

There was a former Chief Justice of the North Dakota Supreme Court named Ralph Erickstad, see https://www.ndcourts.gov/Court/Bios/Erickstad.htm, who was instrumental in creating the North Dakota State-Tribal Court Forum who would always tell us Tribal Judges that the United States Supreme Court's decision in Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877 (1986) would be the death knell for tribal court authority over non-Indians. On two separate occasions his North Dakota Supreme Court held that a North Dakota state court should not exercise subject matter jurisdiction over a dispute between the Tribes and a non-Indian litigant pertaining to commercial activity on the Fort Berthold reservation even when the Tribe was the party invoking state jurisdiction. Ralph always pointed out that Williams v Lee, 358 U.S. 217 (1959)(holding that a state court lacks jurisdiction over a commercial dispute between a reservation Indian and non-Indian) held that the state court exercise of jurisdiction over a commercial dispute on tribal lands involving a tribal member would infringe upon the right of the Tribe to make and enforce its own laws and that logic prevailed even when the Indian litigant was suing the non-Indian in state court. Ralph was right in its interpretation of that case and has proved prescient in his analysis. The United States Supreme Court disagreed with Ralph however and on two separate occasions in judicial opinions that are difficult to decipher the Court held that North Dakota state courts have

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subject to plenary state jurisdiction upon issuance of trust patent (superseded by the Burke Act, 34 Stat. 182, 25 U. S. C. §349) (2000 ed.)). Among the powers lost is the authority to prevent the land's sale, see *County of Yakima*, *supra*, at 263 (General Allotment Act granted fee holders power of voluntary sale)—not surprisingly, as "free alienability" by the holder is a core attribute of the fee simple, C. Moynihan, Introduction to Law of Real Property §3, p. 32 (2d ed. 1988). Moreover, when the tribe or tribal members convey a parcel of fee land "*to non-Indians*, [the tribe] loses any former right of absolute and exclusive use and occupation of the conveyed lands." *South Dakota* v. *Bourland*, 508 U. S. 679, 689 (1993) (emphasis added).

to open their doors to litigation arising on the reservations if brought by the Indian litigant against the non-Indian litigant even when it was clear under Williams v. Lee that subject matter jurisdiction was lacking.

Once United States District Court Judges realized that state courts may have some jurisdiction under Wold Engineering to entertain suits brought by tribal citizens against non-Indians for conduct subject almost exclusively to tribal regulatory authority, the floodgates to erode tribal adjudicatory authority were opened because no longer would federal courts have to view these disputes in the lens of no forum existing to hear the case if tribal court jurisdiction was overruled, but now they could second-guess tribal court jurisdiction knowing that state courts, and sometimes federal courts, are available to hear these disputes. That appears to be what has occurred.

But what about the fee-trust land distinction Montana seemed to lay out and Chief Justice Roberts may have endorsed in Plains Commerce. That too has apparently gone the way of the wagon wheel, although some Courts continue to recognize its continuing viability..

For example, in Water Wheel Camp Recreation Area v. Larance, 641 F.3d 802 (9th Cir. 2011) the Court rejected the Montana analysis to a case involving tribal court authority to evict a non-Indian from tribal lands. In so doing the Court held that Montana does not apply to a Tribe's attempt to regulate or adjudicate the conduct of non-Indians on tribal lands.

> *Montana* does not affect this fundamental principle as it relates to regulatory jurisdiction over non-Indians on Indian land. *See* *Bourland*, 508 U.S. at 688-89 (describing *Montana* as establishing that when tribal land is converted to non-Indian land, a tribe loses its inherent power to exclude non-Indians from that land and thereby also loses "the incidental regulatory jurisdiction formerly enjoyed by the Tribe"); *see also* *Merrion*, 455 U.S. at 144-45 (upholding a tribal tax on non-

> Indians operating a business on tribal land as a condition of entry derived from the tribe's inherent power to exclude, without applying *Montana*); Strate, 520 U.S. at 456 (noting that the land in question was equivalent to non-Indian land and that "*Montana*, accordingly, governs this case"); Mescalero Apache Tribe, 462 U.S. at 330-31 (determining that *Montana* did not apply to the question of a tribe's regulatory authority over nonmembers on reservation trust land because "*Montana* concerned lands located within the reservation but not owned by the Tribe or its members"); McDonald v. Means, 309 F.3d 530, 540 n.9 (9th Cir. 2002) [**25] (as amended) (rejecting the argument that *Montana* applies to tribal land because *Montana* limited its holding to non-Indian lands and *Strate* confirmed that limitation); Burlington N. R. Co. v. Red Wolf, 196 F.3d 1059, 1062-63 (9th Cir. 1999) ("The threshold question in this appeal is whether *Montana's* main rule applies, that is, whether the property rights at issue are such that the land may be deemed 'alienated' to non-Indians.")"
>
> Water Wheel at 812.

The United States District Court for the District of North Dakota similarly held that with regard to a tribal Court's exercise of jurisdiction that the many of the same principles that guided the Ninth Circuit in Water Wheel with regard to tribal authority over non-Indians on tribal land should control an assessment whether a tribal court could exercise jurisdiction over a non-Indian company that used the reservation's tribal courts to engage in business. See Ford Motor Corp v. Poitra, 776 F.Supp 2d 994 (D.N.D. 2011). There the Court noted this language in federal court precedents.

> The power to exercise tribal civil authority over non-Indians derives not only from the tribe's inherent powers necessary to self-government and territorial management, but also from the power to exclude nonmembers from tribal land." Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 592 (9th Cir. 1983) (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141-44, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982)). If the power to exclude implies the power to regulate those who enter tribal lands, the jurisdiction that results is a consequence of the deliberate actions of those who would enter tribal lands to engage in commerce with the Indians. It is true that "a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe," Merrion, 455 U.S. at 142, but we think that no lesser principle should govern those who voluntarily enter a tribal courtroom seeking compensation from tribal members. Indeed, there may be circumstances in which a nonmember plaintiff may have no forum other than the tribal courts in which to bring his claims. We hold that a

> nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a "consensual relationship" with the tribe within the meaning of Montana.

Ford Motor, at 959 citing Smith v. Salish Kootenai College, 434 F.3d 1127, 1139-40 (9th Cir. 2006).

So perhaps the Montana distinction between Indian and non-Indian lands on the reservation may continue to have some meaning, but later Supreme Court decisions dictate otherwise. The next reiteration of Montana seems to be *Nevada v. Hicks*, 533 U.S. 353 (2001), although the opinion in that case is not clear on whether it created an exception to Montana or whether the Court merely engaged in statutory interpretation to hold that a tribal court could not exercise jurisdiction over a cause of action premised on 42 U.S.C. §1983 brought by a tribal member against a "state" employee- a game warden. The vast majority of cases, with one *major* exception, simply restate the Court's holding in *Hicks* as an example of when a tribal court lacks civil jurisdiction and therefore may not exercise jurisdiction over the claim.[4] However, as noted, there is one case which appears to interpret the *Hicks* decision as establishing that the *Montana* exceptions do not apply to state or government entities. *See MacArthur v. San Juan County*, 497 F.3d 1057, 1073 (10th Cir. 2007) (citing *Montana*, 450 U.S. 544). Specifically, the Tenth Circuit cites Justice O'Connor's concurrence in *Hicks* as establishing "a per se rule that consensual relationships entered into between state governments and tribes, 'such as contracts for services or shared authority over public resources,' could no longer give rise to tribal civil jurisdiction." *Id.* (citing Hicks, 533 U.S. at 393-94). In addition, the circuit

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

court noted Justice Scalia's response that "[t]he [*Montana*] Court . . . obviously did not have in mind States or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into." *San Juan County*, 497 F.3d at 1073 (quoting *Hicks*, 533 U.S. at 372). When considering the language in *Hicks* that, at the very least, the first *Montana* exception cannot apply to States or state officers, Justice Scalia was surely implying that the exception could not pierce the sovereign immunity protection enjoyed by States and state officers.

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

The Supreme Court's latest pronouncement on the subject, Plains Commerce Bank v. Long Family Cattle Company, 554 U.S. 316 (2008) seems to preclude the exercise of tort jurisdiction over a cause of action arising on fee lands within Indian country if the cause of action relates to the ownership of fee land. It is telling that the fee lands in Plains Commerce were located on the Cheyenne River Indian reservation and were owned by a Bank and being sold to tribal members. Despite this the Court held that a tort action for discrimination was too attenuated from the underlying consensual relationship to condone tribal jurisdiction. The tribal court in the Plains Commerce Bank case had upheld tribal court jurisdiction over an action brought by Indian plaintiffs against a non-Indian Bank asserting that the Bank had discriminated against them by foreclosing on fee lands within a reservation and selling them to non-Indians on more favorable terms than those offered them. Even though the tribal court noted that the

transaction between the Bank and the Long Family Cattle Company was certainly a consensual one and it arose on the reservation, the Supreme Court nonetheless held that because the cause of action sounded in tort jurisdiction did not lie. The Court strongly suggested however that the reason the tribal Court lacked jurisdiction was because the cause of action pertained to ownership of fee land. This case has nothing to do with a dispute over ownership of fee land.

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

The Plains Commerce Court, however, started using language to narrow the first prong of Montana in an apparent attempt to limit tribal court civil jurisdiction over causes of action arising from purely private consensual relationships such as contracts or other commercial dealings. The Court held that the exercise of tribal jurisdiction "must stem

from the tribe's inherent sovereignty to set conditions on entry, preserve tribal self-government or control internal relations." 554 U.S. 337.

This language was seized upon by the United States District Court for the District of North Dakota in a case arising on the Fort Berthold reservation to enjoin this Court's exercise of jurisdiction over a suit brought by tribal members against non-Indian entities to address the flaring of gases from oil wells on trust lands in violation of leases. In Kodiak Oil and Gas et al v. Burr et al, Case No 14-cv-085(D.ND 2018) the Court held that in order for a Tribal Court to exercise jurisdiction over a dispute involving a non-Indian consensual relations with tribal members were not enough and the tribal member or party has to demonstrate that the conduct of the non-Indian implicates the tribe's "sovereign interests."

This is a rather extraordinary reiteration of the first prong of Montana and seems to be an attempt to superimpose the second prong of Montana[5] onto the first prong by ruling that the conduct of the non-Indian has to impact the "sovereign interests of the Tribe." Under this standard it is almost impossible to see how Tribal Courts can divorce a tribal member married to a non-Indian, order a non-Indian to pay child support, issue a

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

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

domestic violence protection order against a non-Indian, order a non-Indian to pay debts owed to tribal businesses, garnish wages of non-Indians who owe debts even when they work for tribal entities. These are the rather mundane things tribal and state courts do on a regular basis, which may not impress jurists in the federal system, but are part and parcel of what constitutes justice in this country. To strip Tribal courts of their jurisdiction over these things because they do not impact "sovereign interests" seems a bit arbitrary and will undoubtedly result in many situations where Indian litigants are left without a forum to gain relief. [6]

Ironically while the federal courts go about eviscerating tribal authority over non-Indians Congress continues to recognize the inherent authority of Tribes to assert jurisdiction over non-Indians. Recent amendments to the Indian Civil Rights Act, 25 U.S.C. §1302 recognize the inherent right of Indian tribal courts to assert criminal jurisdiction over non-Indians who commit domestic violence against tribal members in Indian country. In the civil arena Congress has clearly expressed in 18 USC §2265(e) that Tribes have **inherent** tribal civil adjudicatory authority to prevent the abuse of adults and children living in a common household both by the use of civil protection orders and by "other appropriate mechanisms."

The Defendants in this case quite naturally point out that the logic of Kodiak applies in this case and that if Tribes and their Courts cannot regulate the flaring of gases from oil wells on tribal trust lands, arising from private consensual relations between

[6] For example the North Dakota Supreme Court has ruled that its Courts lack jurisdiction to adjudicate paternity cases where conception occurred on the reservations and one of the parties is a tribal member. See McKenzie County Social Services Department v. V.G., 392 N.W.2d 399 (ND 1986). So if a Tribal Court cannot exercise jurisdiction over a non-Indian who has sex with a tribal member resulting in a child because that sex was not momentous enough to impact sovereign interests, no Court is left with jurisdiction.

non-Indians and tribal members, they certainly cannot regulate oil spills and adjudicate nuisance lawsuits seeking compensation for said spills in tribal courts. The Defendants omit one major distinction between this case and the flaring issue in Kodiak however and that is the extensive federal regulatory background that silhouettes the issue of flaring, while nothing in federal law preempts a tribal common-law nuisance suit for oil spills, even those occurring on federally-regulated lands, except for certain waterways, see In re Deepwater Horizon, 745 F.3d 157 (5th Cir. 2014)(common law nuisance suits for oil spill damages in outer continental shelf preempted by federal law) under the United States Supreme Court's precedent in Int'l Paper v. Ouellette, 479 U.S. 481 (1987).

The mere fact that the spill occurred on lands where a federal right of way was approved by the BIA does not foreclose this Court's jurisdiction, although the Department of Interior certainly may have administrative remedies to address the spill. As this Court has noted tribal courts have jurisdiction over causes of action pertaining to access to allotted or trust lands, provided the remedy sought would not deprive the United States of title. See Conroy v. Conroy.575 F.2d 175 (8th Cir. 1978).

In addition it does not appear that the Oil Pollution Act of 1990, the federal law that attempts to provide uniform standards and remedies for oil discharges on lands within the United States, precludes state or tribal court jurisdiction over common law nuisance actions because there is a provision of that law, Section 1018, frequently referred to as the savings clause, that indicates that nothing in the Act preempts additional remedies under state law. The same logic would apply to tribal law, it would seem to this Court, because state law cannot dictate the remedies for oil discharges on tribal trust lands. Therefore unlike Kodiak where federal law seems to preempt private state or tribal

court remedies, this case does not seem to be exclusively within the wheelhouse of Congress and federal agencies to regulate and adjudicate. [7]

But if Kodiak is not a federal preemption decision, but instead a decision sharply limiting the first Montana exception to the general rule that Tribes lack authority over non-Indian activity unless it implicates tribal interests, how is this lawsuit different from those commenced by the landowners in Kodiak? Do oil discharges matter more to the sovereign than gas discharges? The answer, of course, may only be resolved through an evidentiary hearing on the Tribe's interests in ensuring that oil spills do not occur on its lands and whether that interest is of more import than the flaring of gases. This Court is not going to order an evidentiary hearing on that because of its ruling on the choice of forum issue.

However, it is quite apparent from the history of the Fort Berthold reservation and how water has dictated that history that water is sacred to the Tribes and the potential devastation that oil discharges into the water basin, or the Missouri River, may cause the people implicates the very existence of the Tribes. The national attention fixated on the Dakota Access Pipeline protests, for example, demonstrates the legitimate concern native people have about oil discharges into their lands and waters. This Court has not seen similar protests regarding the discharge of gases into the atmosphere, although there are certainly tribal citizens and others who are trying to point out the potential dangers from flaring. Many of the creation stories for native persons emanate from the waters of lakes

[7] That is not to imply that federal administrative remedies are not available here. The Department of Interior has a trust responsibility to Indian landowners and heirs of allottees to abate trespasses and nuisances, but the existence of that remedy does not preclude other common-law nuisance actions.

and rivers. [8]It appears clear to this Court that the issue of accidental oil discharges implicates the sovereign interests of the Tribe and thus meets the Kodiak standard for the first prong of Montana. [9] It is also important to note that in many of the rights of way approved of by the Department of Interior to permit access to the mineral interests the Tribes have to approve of them when the Tribes have an interest in the trust lands in question. There has not been any factual development of that issue in this case, due to the current procedural posture of the case, but clearly it would be erroneous to conclude that the transaction in this case is purely a private consensual matter, rather than a small part of an extended right of way that the Tribes have an interest in. In any other circumstance this Court would conduct an evidentiary hearing on that issue to permit the federal court to review a record of how a particular dispute may implicate the sovereign interests of an Indian tribe, but in light of this Court's ruling on the choice of forum issue that would be a waste of judicial resources.

This Court therefore concludes that this Court has jurisdiction over a nuisance action filed by a tribal member against a non-Indian company or person alleging that there was a negligent discharge from an oil well that impacts the tribal member's surface interests in trust or allotted lands and that this ruling is consistent with the United States District Court's decision in Kodiak.

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[8] See for example *www.ehn.org/sacred_water_environmental_justice_in_indian_country-2497203327.h.*

[9] This Court is reading Kodiak to require proof that the subject matter of the consensual relationship involved implicates the interests of the sovereign not that the Tribe has to be a party to the consensual relationship itself as the Kodiak Court never states that this is required. It would seem to run contrary to the clear language of Montana that a consensual relationship between a tribal member and non-Indian is sufficient. Montana at 566.

IMPACT OF THE 2012 SUA ON THIS COURT'S EXERCISE OF JURISDICTION

The Defendants argue that even if this Court has subject matter jurisdiction it should decline to exercise it because the Parties have contracted for a forum to resolve disputes such as this in the 2012 Surface Use Agreement. They therefore ask this Court to yield its hand in favor of state or federal court jurisdiction.[10]

The Plaintiffs counter with the argument that this litigation really pertains to the right of way being transgressed by the Defendants and the right of way was entered into in 2010 in an "agreement" that did not contain a choice of forum clause. They also argue that under the United States Court of Appeals for the Eighth Circuit's decision in Bruce Lien Company v. Three Affiliated Tribes, 93 F.3d 1412 (8th Cir. 1996), in which that Court held that the tribal court exhaustion rule applied to a contract dispute over a casino, even though the purported agreement contained an arbitration clause, because the underlying dispute pertained to interpretation of the contract itself, jurisdiction properly lies in this Court.

This Court reiterates its previous determination that there was no actual right of way agreement between the Parties in 2010 and even though the Defendants herein commenced litigation in federal court in an attempt to have the federal court declare that a right of way existed, absent a federal court decision

[10] The Defendants correctly point out that diversity jurisdiction would seem to lie in federal court and that the amount prayed for in the complaint would trigger diversity jurisdiction.

reversing the Department of Interior's prior determination, this Court finds that the DOI's prior determination was correct and not subject to collateral attack in this Court. Even if an agreement did exist, the 2012 agreement forged to resolve the ongoing federal court litigation supplanted that prior agreement. The Court understands the Plaintiffs' argument that it was Defendant Slawson who actually argued in federal court that there was a 2010 right of way agreement and that it should not be permitted to argue that none existed in this litigation. The fact that the Defendant resolved the matter by the 2012 SUA and paid compensation to the Plaintiffs at that time leads this Court to believe that it conceded that there was no 2010 agreement in the federal court litigation and the 2012 SUA became the only clear agreement between the Parties.

In a business and legal environment where tribal court jurisdiction over non-Indian activity is extremely opaque, many commercial entities and tribal members resort to contracting the appropriate forum issue, possibly to avoid expensive litigation in multiple forums, but also to ensure certainty when a dispute does ensue. This happened between these parties when they stipulated to federal or state court jurisdiction over any dispute arising from the 2012 SUA. They could have stipulated to this Court's jurisdiction and this Court, and hopefully the federal and state courts, would certainly enforce this provision. If this Court were to ignore this part of the 2012 SUA it would only contribute further to the chaotic situation tribal members and non-Indians face when they try to contract in an environment where the federal courts have not provided much needed clarity to

the jurisdiction issues. The federal courts have recognized the rights of parties to contract for forum resolution methods and venues in a contract and this Court finds that those decisions are essential in the current business environment on the Fort Berthold reservation. The United States Supreme Court has held that such venue selection clauses are valid provided they are fundamentally fair and they select a forum with appropriate jurisdiction. See Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991).

The Plaintiffs contend that the Bruce Lien Company v. Three Affiliated Tribes , 93 F.3d 1412 (8th Cir. 1996) decision is on all fours with the current litigation and in that case the Court refused to compel arbitration without requiring first that the Parties exhaust their tribal court remedies if they were available. This Court has held that jurisdiction would properly lie in this Court, absent the choice of forum provisions of the SUA. This Court disagrees that the Bruce Lien case is apposite because the litigation in the Bruce Lien case involved the ultimate issue of whether the gaming contract there comported with federal and tribal law. If it did not then the arbitration provision was unenforceable because the contract was void and tribal court jurisdiction would lie. The SUA at question here was the result of a settlement of federal litigation, which was approved of by the federal court. This Court has no jurisdiction to decide whether the SUA agreement that was the result of federal litigation and approved of by the presiding federal Judge was of no legal effect. The Plaintiffs do not even argue that in this case, but instead that choice of forum clauses do not deprive tribal courts of jurisdiction.

That may very well be true, but again in a climate of jurisdictional uncertainty it is imperative both for tribal members and non-Indians that they be permitted to contract for a forum to resolve their disputes and have all courts of competent jurisdiction respect that choice.

However, for a forum selection clause to be enforceable the forum selected must have subject matter jurisdiction. This brings up the confusing issue of whether the Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987) decision would permit parties to stipulate to federal court jurisdiction – premised solely upon diversity of the Parties - when a Tribal court would otherwise have appropriate jurisdiction over the dispute. Iowa Mutual holds that before a federal court may entertain a dispute involving diverse parties arising in Indian country the Tribal Court must first have a chance to determine its jurisdiction and if it has jurisdiction the federal court must stay its hand. So in this case does Iowa Mutual mean that this Court may defer to federal court but then the federal court will have to defer back to this Court under Iowa Mutual? This would result in an intolerable example of renvoi where two Courts are deferring to each other and neither ever resolves the dispute.

This Court finds that there is an exception to Iowa Mutual when the parties to the dispute have contracted for a different forum than the tribal court. In addition Iowa Mutual does not hold that federal courts lack diversity jurisdiction over disputes in Indian country involving Indian and non-Indian litigants with diversity of state residences, but only that out of deference to the Tribal Court the

Tribal Court should first resolve whether it has jurisdiction. Again, this Court finds it has jurisdiction, but the Parties lawfully contracted it away in favor of federal or state court jurisdiction.

The Parties also stipulated to the jurisdiction of a North Dakota state court to resolve any dispute arising from the SUA of 2012. Under the United States Supreme Court's decision in Wold Engineering it appears that jurisdiction would also lie in state court for the Plaintiffs herein to sue the Defendants since Wold Engineering, 476 U.S. 877 (1986) stands for the proposition that a North Dakota state court may not deny to its Indian citizens access to its Courts even when the dispute arises in Indian country. Again, this decision appears strange to the undersigned because it certainly seems that the exercise of state court jurisdiction and the application of state law to a dispute arising in Indian country and involving an Indian litigant interferes with the right of the Tribe to make its own laws and be governed by them. For example, what if the MHA Nation passed a law imposing treble damages upon any party who, due to negligence, permitted an oil discharge into waters or allotted lands and an Indian landowner sues a non-Indian company in state court for a negligent discharge. This Court is not aware of any obligation on the part of the state court to apply the tribal treble damages provision and thus tribal law is preempted and state law is applied to a dispute arising in Indian country on Indian trust lands. This seems rather extraordinary and may again lead to economic uncertainty, but it is the authority of the US Supreme Court that must be respected, not necessarily its logic.

WHEREFORE based upon the foregoing it is hereby

ORDERED, ADJUDGED, AND DECREED that this Court denies the Defendants' motion to dismiss for lack of jurisdiction, but grants the motion to dismiss based upon the Parties' stipulation to another Court of competent jurisdiction to hear this dispute. This dismissal is without prejudice in case the state or federal court finds it lacks jurisdiction over the dispute.

So ordered this 27th day of June 2018.

B. J. Jones
ASSOCIATE JUDGE

ATTEST: Amanda Deville
CLERK OF COURTS