No. 22-62

In the

Supreme Court of the United States

BIG HORN COUNTY ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

ALDEN BIG MAN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

1. There has been no forfeiture or waiver of any argument 1

2. A Circuit split exists that this Court should resolve 4

3. The 2nd *Montana* Exception does not apply 6

4. *Plains Commerce Bank* controls 9

5. The generation, transmission, and sale of electricity is not for the Crow Tribe to regulate 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Alabama Power Company v. Alabama Electric Cooperative, Inc., et al., 394 F.2d 672 (5th Cir. 1968) 1

Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Com'n, 461 U.S. 375 (1983) 1, 10, 11

Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001) 6

Belcourt Public School Dist. v. Davis, 786 F.3d 653 (8th Cir. 2015) 7

Big Horn County Electric Cooperative, Inc. v. Adams, 219 F.3d 944 (9th Cir. 2000)...................... 9

Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) 7

Burlington Northern R. Co. v. Red Wolf, 196 F.3d 1059 (9th Cir. 1999) 7, 8

Carlson v. Green, 446 U.S. 14 (1980) 4

Chevron Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 4

El Paso v. Neztosie, 526. U.S. 473 (1999) 12

F.E.R.C. v. Electric Power Supply Ass'n, 577 U.S. 260 (2016) 11

Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B, 786 F.3d 662 (8th Cir. 2015) 5

Kodiak Oil & Gas (USA) Inc. v. Burr, 932 F.3d 1125 (8th Cir. 2019) 5

MacArthur v. San Juan County, 497 F.3d 1057 (10th Cir. 2007) 5

Montana v. U.S., 450 U.S. 544 (1981) .... *passim*

Nord v. Kelly, 520 F.3d 848 (8th Cir. 2008) 7

Oneok, Inc. v. Learjet, Inc., 575 U.S. 373 (2015) 10

Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008).......... 7, 8, 9, 10

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 6, 7, 8

Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997) 7, 8

STATUTES

16 U.S.C. § 824(b) 11

16 U.S.C.A. § 824(f) 12

ARGUMENT

Respondents never question what BHCEC is—a non-Indian rural electric cooperative "established with loan funds and technical assistance provided by the federal Rural Electrification Administration (REA) in order to bring electric power to parts of the country not adequately served by commercial utility companies." *Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Com'n*, 461 U.S. 375, 380-381 (1983). "[R]ural electric cooperatives are something more than public utilities; they are instrumentalities of the United States. 'They were chosen by Congress for the purpose of bringing abundant, low-cost electric energy to rural America.'" *Alabama Power Company v. Alabama Electric Cooperative, Inc., et al.*, 394 F.2d 672, 277 (5th Cir. 1968) (citation omitted). Unable to defend the Ninth Circuit's decision upholding Crow tribal regulatory and adjudicatory jurisdiction over BHCEC, Respondents resort to "waiver" and "forfeiture" and alternative grounds for denying the Petition. BHCEC previously raised all the arguments presented in the Petition. The Ninth Circuit improperly subjected BHCEC to tribal regulation and adjudication, and their decision conflicts with case law from other circuits and binding precedent from this Court.

1. There has been no forfeiture or waiver of any argument.

Respondents suggest that BHCEC never raised the type of entity it is and the service it provides.

Respondents are mistaken. To the District Court, BHCEC argued, "[U]nlike the reservation merchant, Big Horn must observe specific federal law and deliver electric service in a non-discriminatory manner to all willing to agree to the membership terms. 7 U.S.C. § 904, & CFR Part 15." District Court Doc. 83-4, page 14. In response to Respondent's motion for summary judgment, BHCEC argued that BHCEC, "like cooperatives throughout the rural United States, brought the modern convenience of electricity to the Crow Reservation in Montana and to an additional portion of southern Montana and northern Wyoming, however the provision of electric energy and service to members and consumers was not voluntary upon Big Horn's part. . . .[It] was always conditioned upon those wishing to receive the service agreeing to adhere, as a matter of written contract, to the requirements of Big Horn's bylaws and policies." Doc. 99 at page 17-18. BHCEC continued, "Big Horn's delivery of services occurs only through a system built primarily with funds obtained from mortgages to federal agencies for loans and thus Big Horn is subject to a fifth jurisdiction with legislative authority." *Id*. at page 21. In oral argument, BHCEC explained that it "borrows money and extensively is regulated by the United States of America. . . ." Transcript of June 24, 2020 hearing before Magistrate Timothy Cavan at 54. Finally, BHCEC's opening brief to the Ninth Circuit reiterated that BHCEC is a nonprofit electric cooperative organized under federal and state law to provide regulated service to its owner-members in

rural areas of Montana and Wyoming. Petitioner's Opening Brief at 5.

BHCEC never forfeited any arguments based on what it is, what it does, and how that structure fits into the federal, rather than tribal, regulatory scheme.

With respect to the membership agreement that provides for the application of State law and State Court dispute resolution never constituting a consensual relationship of the "qualifying kind" under *Montana*, the record is even more replete. In response to Respondent's motion to dismiss, BHCEC argued, "First and foremost, the cooperative agreement referenced by the Appeals Court contains choice of forum and law provisions which should have negated the tribal court lawsuit altogether." Doc. 39 at page 12. BHCEC continued, "[Respondents] have disregarded the plain contractual choice of law and forum selection provisions to which they have agreed and are bound." *Id*. at 15. "[A]ll of the membership agreements…adopt Montana substantive law and judicial forums for the purpose of determining the rights of the parties – a contractual undertaking inconsistent with application of tribal law evincing the parties' intent." Petitioner's Opening Brief at 16, n.1. BHCEC continued, "The contents of a contract with a tribe or tribal member are significant in respect to an evaluation of whether *Montana's* first exception applies." Reply Brief at 19. In its petition for rehearing en banc, BHCEC explained that the Ninth Circuit panel should have determined "the intention

of the parties as reflected by the terms of the Membership Agreement." Petition for rehearing at 12.

There has been no waiver or forfeiture of the arguments put forth in the Petition. Moreover, this lawsuit presents a challenge to the tribal court's subject matter jurisdiction and raises an Article III case or controversy. Even if the Ninth Circuit chose not to squarely address certain issues, "this Court reviews judgments, not opinions, [thus] we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment. . . ." *Chevron Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Finally, because the "question was presented in the petition for certiorari . . . the issue is squarely presented and fully briefed. It is an important, recurring issue and . . . the interests of judicial administration will be served by addressing the issue on its merits." *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). The scope of tribal regulatory and adjudicatory jurisdiction over BHCEC is properly before this Court.

2. A Circuit split exists that this Court should resolve.

BHCEC provides power to its members pursuant to state and federal law and the federal regulatory scheme established by the Rural Electrification Act. Federal law mandates that BHCEC sell power to tribal and non-tribal members in a non-discriminatory fashion. Contrary to the Ninth Circuit's decision, several circuit courts have

excluded similarly situated entities from tribal regulation. In *Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B*, 786 F.3d 662, 665 (8th Cir. 2015), the North Dakota Constitution required that the School District educate *all* children, including Indians who reside on Reservations. The Eighth Circuit held that a contractual arrangement to educate in a non-discriminatory fashion did not satisfy the first *Montana* exception because it was not a "private consensual relationship." *Id*. at 668. In *MacArthur v. San Juan County*, 497 F.3d 1057 (10th Cir. 2007), the Tenth Circuit concluded that an employment relationship between two members of the Navajo Nation and the San Juan Health Services District, a "special service district" organized pursuant to Utah Code Section 17A-2-1304 and tasked with providing health care services to the citizens of San Juan County was not a "consensual relationship" of the qualifying kind. *Id*. at 1073. Similarly, in *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019), the Eighth Circuit concluded that "The first *Montana* exception does not apply here. The oil and gas companies' leases are consensual relationships with tribal members, but the entire relationship is mediated by the federal government."

Here, the Ninth Circuit has upheld tribal regulatory and adjudicatory authority over BHCEC, a non-Indian entity that provides a federally mandated and regulated service—the provision of electrical power to rural Montana and northern Wyoming. Be it education, health care, police protection, or federally

mandated power, the service provided and the entity providing it is "quasi-governmental" and shielded from tribal jurisdiction. BHCEC never consented to tribal regulation or tribal court adjudication, and in fact, expressly contracted against it. The Ninth Circuit's decision is at odds with decisions from the Eighth and Tenth Circuits.

3. The 2nd *Montana* Exception does not apply.

Respondents suggest that even if jurisdiction was improper under the first *Montana* exception, it is permissible under the second. Respondents would have the exception swallow the rule. The exceptions to *Montana's* "'general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe'" are narrow. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 651 (2001) (citation omitted). The exceptions are "limited" and "cannot be construed in a manner that would 'swallow the rule.'" *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997).

In *Strate*, this Court rejected jurisdiction under the 2nd exception in a case involving actual physical injury. "Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana's* second exception requires no more, the exception would severely shrink the rule." *Strate*, 520 U.S. at 457–458. "If the possibility of injuring multiple tribal members

does not satisfy the second *Montana* exception under *Strate*, then, perforce, Wilson's status as a tribal member alone cannot. To invoke the second *Montana* exception, the impact must be 'demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the Tribe.'" *Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997) (quoting *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989)). *See also Burlington Northern R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999) (rejecting tribal court jurisdiction under the second *Montana* exception where two tribal members died in a collision with a train). "The Court in *Strate* expressly cautioned against reading the second *Montana* exception in isolation to apply to the personal health and welfare of a few individual members." *Nord v. Kelly*, 520 F.3d 848, 856 (8th Cir. 2008). "[A] lax application or overly broad reading of the second *Montana* exception would render meaningless *Montana's* general rule that 'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'" *Belcourt Public School Dist. v. Davis*, 786 F.3d 653, 660 (8th Cir. 2015) (citations omitted).

This Court's decision in *Plains Commerce Bank v. Long Family Land and Cattle Co.,* 554 U.S. 316 (2008), put even more restrictions on the scope of the second *Montana* exception. The conduct must do more than injure the tribe, it must "'imperil the subsistence' of the tribal community. 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.'" *Plains Commerce Bank*, 554 U.S. at 341 (citing Cohen Section 4.02[3][e] at 232 n. 220).

Requiring Respondent to pursue any potential claim in State court, as his membership agreement required, would not imperil the Crow Tribe's existence. BHCEC policies allow for payment plans, medical exemptions, and extensive notice before shutdown. Had Respondent accepted BHCEC's invitation to enter into an installment agreement, termination of his service would not have occurred. Notice of Respondent's latest delinquency and the risk of shut down was provided on January 11, 2012, and then again on January 24, 2012, before service was discontinued on January 26, 2012. "Catastrophic consequences" for the Tribe have not resulted. The repeated failure to pay followed by an end of service cannot be more impactful to the Tribe's political integrity, economic security, or health and welfare than the circumstances at issue in *Strate, Wilson*, or *Red Wolf*. BHCEC has been providing power to its members for several decades, and the lack of Crow tribal regulation of those operations has never been cataclysmic for the Tribe. A generalized concern that winter shutoffs might be problematic for a particular tribal member in a particular case cannot justify jurisdiction under the second *Montana* exception.

4. *Plains Commerce Bank* controls.

Respondents argue that this case is about "conduct" on "tribal land," unlike the sale of non-Indian land at issue in *Plains Commerce Bank*. Respondents are again mistaken. BHCEC operates exclusively on federally granted rights of way that are the equivalent of non-Indian land. Under this Court's precedent, BHCEC's rights of way are considered non-Indian fee land over which the Tribe has *no* power to exclude and very limited jurisdiction. *See Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944, 950 (9th Cir. 2000). This Court in *Plains* found that "*Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land." 554 U.S. at 332. Similarly, *Montana* does not permit Indian tribes to regulate the sale of electricity. BHCEC transmits and sells electricity on federally granted rights of way over which the tribe lacks inherent authority to exclude. The Crow Tribe is unmistakably attempting to regulate and adjudicate that transmission and sale and Respondent concedes as much. Respondent's brief at 29. Rather than a case involving "conduct" on "trust land," this case involves the transmission and sale of electricity on the equivalent of fee land, a distinctly non-tribal activity involving a unique commodity under BHCEC's exclusive control. Just as in *Plains*, where the "regulation of fee land sale" was "beyond the tribe's sovereign powers" and subjected "nonmembers to tribal regulatory authority without commensurate consent," here the regulation of the sale of electricity is beyond the Crow Tribe's sovereign powers and

would subject BHCEC to tribal regulation without commensurate consent. "There is no reason [BHCEC] should have anticipated that its general business dealings with [respondents] would permit the Tribe to regulate [BHCEC's] sale of [electricity]. . . ." *Plains Commerce Bank*, 554 U.S. at 338. Nothing in the record suggests BHCEC ever consented to tribal regulatory control. In fact, the BHCEC membership agreements provide for the opposite.

5. The generation, transmission, and sale of electricity is not for the Crow Tribe to regulate.

Respondents argue that BHCEC's activities should be subject to tribal regulation because the retail sale of power is subject to State law. Critically, there are no decisions suggesting that *tribal* law and *tribal* courts should have any role in regulating the transmission and sale of electricity whatsoever. Respondents cite *Oneok, Inc. v. Learjet, Inc.* 575 U.S. 373 (2015), for the proposition that the Tribe should regulate electricity sales. *Oneok* involved the sale of natural gas and the rate-setting authority of the Federal Energy Regulatory Commission. "The Act leaves regulation of other portions of the industry—such as production, local distribution facilities, and direct sales—to the States." *Oneok*, 575 U.S. at 379. Similarly, in *Arkansas Elec. Co-op. Corp v. Arkansas Public Service Com'n*, 461 U.S. 375, 377 (1983), this Court explained that "the regulation of utilities is one of the most important of the functions traditionally

associated with the police power of the States." The Court recognized, however, that even State regulation of electrical sales might be preempted by federal law when it comes to electric cooperatives. "[A]s Arkansas already recognizes, . . . the PSC can make no regulation affecting rural power cooperatives which conflicts with particular regulations promulgated by the REA. Moreover, even without an explicit statement from the REA, a particular rate set by the Arkansas PSC may so seriously compromise important federal interests, including the ability of the AECC to repay its loans, as to be implicitly pre-empted by the Rural Electrification Act." *Id.* at 389. Federal, not tribal, law applies to entities like BHCEC.

Notably absent from the case law or legislation is any suggestion that *Tribes* would have any role in the regulation of either intra or interstate electricity sales. This Court has plainly held that "the law places beyond FERC's power, and leaves to the States alone, the regulation of 'any other sale'—most notably, any retail sale—of electricity." *F.E.R.C. v. Electric Power Supply Ass'n*, 577 U.S. 260, 264 (2016) (quoting 16 U.S.C. Section 824(b)). "State utility commissions continue to oversee those transactions." *Id.* at 267.

Congress expressly exempted rural electric cooperatives from even State regulation. "No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, an electric cooperative

that receives financing under the Rural Electrification Act of 1936…" 16 U.S.C.A. § 824(f). BHCEC is not subject to State regulation. It is subject to federal regulation. More importantly, it is not subject to tribal regulation. The omission of tribes from these statutes is telling. As this Court noted in *El Paso v. Neztosie*, 526. U.S. 473, 487 (1999), "Now and then silence is not pregnant."

CONCLUSION

This case presents a suitable vehicle to address the scope of the first *Montana* exception and its applicability to a federally funded, rural electric cooperative which is required to sell power to Respondent by federal law. The membership agreement by which power was sold expressly precluded the tribal regulation now asserted. The record contains everything required to resolve this important issue. If the Court concludes that additional factual development is necessary, a GVR for that fact finding is certainly an option. The petition for certiorari should be granted.

Respectfully submitted,

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