

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Memorandum in the United States Court of Appeals for the Ninth Circuit (March 11, 2022) App. 1

Appendix B Order Adopting Findings and Recommendations in the United States District Court for the District of Montana Billings Division (February 26, 2021) App. 5

Appendix C Findings and Recommendations of U.S. Magistrate Judge in the United States District Court for the District of Montana Billings Division (July 21, 2020). App. 19

Appendix D Order Denying Rehearing en banc in the United States Court of Appeals for the Ninth Circuit (April 21, 2022) App. 43

Appendix E Mandate in the United States Court of Appeals for the Ninth Circuit (May 2, 2022). App. 45

Appendix F Opinion, Order, Mandate in the Apsaalooke Appeals Court Apsaalooke (Crow) Indian-Reservation Crow Agency, Montana (April 15, 2017 and April 17, 2017). App. 46

Appendix G Order in the Crow Tribal Civil Court (May 24, 2013). App. 93

App. 1

APPENDIX A

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 21-35223

D.C. No. 1:17-cv-00065-SPW-TJC

[Filed March 11, 2022]

BIG HORN COUNTY ELECTRIC)
COOPERATIVE, INC., a Montana)
Corporation,)
)
Plaintiff-Appellant,)
)
v.)
)
ALDEN BIG MAN; et al.,)
)
Defendants-Appellees.)

Appeal from the United States District Court
for the District of Montana
Susan P. Watters, District Judge, Presiding

Argued and Submitted February 8, 2022
Seattle, Washington

MEMORANDUM*

Before: BYBEE, BEA, and CHRISTEN, Circuit Judges.

Big Horn County Electric Cooperative (BHCEC) appeals the district court's grant of summary judgment for all defendants, holding that the Crow Tribe has regulatory and adjudicatory authority over BHCEC's activities on the land where Big Man resides. The district court determined that Big Man resides on tribal trust land and that BHCEC had not met its burden of showing that Congress intended to divest Crow of its tribal jurisdiction over BHCEC's actions on that land. In the alternative, the district court concluded that both exceptions detailed in *Montana v. United States*, 450 U.S. 544 (1981), apply: 1) BHCEC formed a consensual relationship with the Tribe and there is a sufficient nexus between the regulation and that relationship, and 2) BHCEC's conduct has a direct effect on the health and welfare of a tribal member. We conclude that the first *Montana* exception is sufficient to sustain tribal jurisdiction over the dispute. We affirm the district court's grant of summary judgment on that ground.

The Tribal Council of the Crow Tribe adopted as part of the Crow Law and Order Code, Title 20 Utilities, Chapter 1, Termination of Electric Service. One provision of that chapter prohibits, for any reason, termination of electric service from "November 1st to April 1st except with specific prior approval of the [Crow Tribe Health] Board." In January 2012, Big Man

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

became delinquent under the payment provisions of his membership agreement with BHCEC. Big Man was given notice of his delinquency in accordance with BHCEC's rules and governing policy. The termination notice invited Big Man to "contact one of our offices to see if you would qualify for a payment arrangement." Having received no communication from Big Man, BHCEC disconnected his electric service in late January, without prior approval of the Tribe.

In *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000), we determined that the BHCEC's "voluntary provision of electrical services" on the Tribe's reservation and its contracts with tribal members to provide electrical services created a consensual relationship, within the meaning of *Montana*. 219 F.3d at 951. In *Adams*, we did not limit the tribal court's jurisdiction to suits on the contract, but merely reaffirmed that the regulation/suit must arise out of the *activity* that is the subject of the contracts/consensual relationship—the provision of electric services. *Id.*

As the district court correctly noted, and the tribal defendants have argued, the regulation has a nexus to the activity that is the subject of the consensual relationship between BHCEC and the Tribe: "Title 20 prevents termination of electrical service during winter months without approval of the tribal health board." The unlawful termination of Big Man's electricity services is directly related to the consensual relationship. BHCEC provides electrical service to tribal members on the reservation and the Tribe is seeking to regulate the manner in which BHCEC

App. 4

provides, and stops providing, that service. Put simply, the winter electric regulation conditions one aspect of the consensual relationship. Finding that the first *Montana* exception applies, we need not reach the other grounds for summary judgment.

AFFIRMED.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

CV 17-65-BLG-SPW

[Filed February 26, 2021]

BIG HORN COUNTY ELECTRIC)
COOPERATIVE, INC.,)
)
Plaintiff,)
)
vs.)
)
ALDEN BIG MAN, <i>et al</i> ,)
Defendants.)

**ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS**

Before the Court are U.S. Magistrate Judge Cavan’s Findings and Recommendations (Doc. 129) on the parties’ cross-motions for summary judgment. (Doc. 83, 84, 87). Plaintiff Big Horn County Electric Cooperative (“BHCEC”) filed this action against Big Man and several Judges and Justices of the Crow Tribal Courts and Unknown Members of the Crow Tribal Health Board (“Tribal Defendants”) seeking declaratory and injunctive relief in response to a civil action Big Man

App. 6

brought against BHCEC in Crow Tribal Court. (*See* Doc. 1-2). Big Man sued BHCEC in Tribal Court for terminating his electrical service in January 2012, alleging that BHCEC's actions violated Title 20 of the Crow Law and Order Code, which bars winter termination of electrical service except with notice and approval by the Tribal Health Board. (Doc. 1-2). Judge Cavan recommended that BHCEC's motion for summary judgment be denied, Tribal Defendant's motion for summary judgment be granted, and Big Man's motion for summary judgment on the issue of whether his membership agreement waived the Crow Tribe's power to regulate BHCEC be granted.

BHCEC timely objected. (Doc. 132). BHCEC makes eight objections, falling into three buckets. BHCEC objects to Magistrate Judge Cavan's findings that the land at issue, Big Man's homesite, is tribal trust land and subject to tribal jurisdiction, and that, even if the land was alienated to non-tribal members, both of the *Montana* exceptions allow the Tribe to exercise jurisdiction. (Doc. 133). Big Man and Tribal Defendants filed responses to BHCEC's objections. (Doc. 135 and 136). The Court will address each area of objection in turn after summarizing the applicable factual and legal background. For the reasons stated hereafter, Judge Cavan's Findings and Recommendations are adopted in full.

I. Standard of Review

The parties are entitled to *de novo* review of those findings or recommendations to which they object. 28 U.S.C. § 636(b)(1). When neither party objects, this Court reviews the Magistrate's Findings and

Recommendation for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981).

II. Factual and Procedural Background

The Crow Reservation was established in 1886 by the Second Treaty of Fort Laramie and was set apart for the absolute and undisturbed use and occupation by the Crow Tribe. *Montana v. United States*, 450 U.S. 544, 548 (1981). Congress subsequently reduced the size of the reservation to 2.3 million acres. *Id.* Under the General Allotment Act of 1887 and the Crow Allotment Act of 1920, Congress authorized certain divisions and conversions of tribal land into fee and then, eventually, alienation of Reservation land to non-Indians. *Id.* This created a patchwork of ownership, with portions of the Reservation owned by the federal government in trust for the Tribe and its members, as well as fee land owned by tribal members and non-tribal members. *Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 948 (9th Cir. 2000).

BHCEC provides electrical service to Southeastern Montana and Northern Wyoming and has been judicially-recognized as the primary provider of electrical services on the Crow Reservation. (Doc. 101 at 1); *Adams*, 219 F.3d at 948. In 2000, the Tribe and its members made up approximately half of BHCEC's membership. *Id.* Big Man was one such member. (Doc. 101 at 2). Big Man, an enrolled member of the Crow Tribe, lives on trust land leased to him by the Tribe. (Doc. 116 at 1). He signed up for electrical service to his residence in 1999, and, when he joined BHCEC, he signed a BHCEC Application for Membership and for

App. 8

Electrical Service, which contained a choice of law provision. (Doc. 1-6; 101 at 1).

On January 11, 2012, BHCEC notified Big Man that his account was delinquent, and that it would terminate service if non-payment continued. (Doc. 101 at 6-7). Big Man did not pay and BHCEC disconnected Big Man's service on January 26, 2012. (Doc. 101 at 7). Big Man sued BHCEC in Crow Tribal Court alleging that BHCEC's termination violated Title 20, Chapter 1 of the Crow Law and Order Code, which provides that "no termination of residential service shall occur between November 1 and April 1 without specific prior approval of the Crow Tribal Health Board." (Doc. 1-2). Initially, the Crow Tribal Court dismissed the action based on lack of jurisdiction, but the Crow Court of Appeals held that the Tribal Courts had jurisdiction and remanded the case. (Doc. 1-4; 1-5; 1-7). BHCEC then filed this suit seeking declaratory and injunctive relief. (Doc. 1).

BHCEC asserts that the Crow Tribal Court lacks jurisdiction over BHCEC as relating to Big Man's suit. Each party moved for summary judgment on the undisputed material facts. (Doc. 83, 84, 87). Judge Cavan found that Defendants were entitled to summary judgment on both the Tribe's jurisdiction to regulate and adjudicate BHCEC's conduct as it relates to Big Man as well as on the issue of the enforceability of BHCEC's choice of law provision in its membership agreement.

III. Discussion

A. Objections

The primary question governing each of BHCEC's objections is whether the Crow Tribe has legislative and adjudicative authority over BHCEC, a non-Indian entity, and its conduct on Big Man's land. If the Tribe has retained the right to exclude, then it may regulate BHCEC's conduct. If the Tribe has been divested of its right to exclude BHCEC on Big Man's land, then it may only regulate BHCEC under the narrow *Montana* exceptions. The first exception applies to the activities of non-members who enter consensual relationships with the Tribe. *Montana*, 450 U.S. at 565. However, the dispute between the non-member and the Tribe must have a nexus with that consensual relationship. The second exception applies where a tribe maintains jurisdiction over a non-member's conduct because that conduct has a direct effect or poses a threat to the political integrity, economic security, or health and welfare of the tribe. *Montana*, 450 U.S. at 566.

1. Right to exclude

Inherent sovereign tribal powers, such as the ability to exercise regulatory and adjudicative jurisdiction, do not typically extend to non-members of the tribe. *Montana*, 450 U.S. at 565. This prohibition on tribal regulation is strongest when that non-member's activity occurs on fee simple land (as opposed to land held in trust) owned by non-Indians. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008); *see also Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997). Determining the status of the land at

issue is key; if the land has not been alienated (that is, if a tribe has retained the right to exclude), then the tribe retains “considerable control” over non-member conduct on tribal lands. *Strate*, 520 U.S. at 454.

To determine whether land has been alienated from tribal control, the first step is to look to the fee-status of the land. *Adams*, 219 F.3d at 949. If the land is held in fee simple by non-members, the land has been alienated and the tribe has lost the right to exclude. *Montana*, 450 U.S. at 562. If the land is still held by the tribe in trust, the court must determine whether the property should be considered the equivalent of non-Indian fee land, looking to whether the tribe has retained “dominion and control” over the land. *Adams*, 219 F.3d at 950. Rights-of-way created through grants of Congress and with the consent of the tribe generally are considered equivalent to non-Indian fee land; even where the land is not open to the public nor under state control, under *Strate* and its 9th Circuit progeny, the grant of the right-of-way and the corresponding loss of control divests the tribe of legislative and adjudicative authority. 520 U.S. at 454-56; see *Red Wolf*, 196 F.3d at 1063, and *Adams*, 219 F.3d at 950. In *Adams*, the 9th Circuit determined that BHCEC’s rights-of-way for transmission and distribution systems were effectively non-Indian land for jurisdictional purposes. 219 F.3d at 950.

Where tribes possess authority to regulate the activities of non-members, civil jurisdiction presumptively lies in tribal courts unless affirmatively limited by a specific treaty section or federal statute. *Strate*, 520 U.S. at 453.

Judge Cavan determined, relying on Bureau of Indian Affairs (“BIA”) documents, including the Title Status Report, that Big Man’s homesite is designated tribal trust land owned by the Crow Tribe and held in trust by the United States. (Doc. 129 at 10). From that determination, Judge Cavan found that, unless abrogated by a treaty provision or federal statute, the Tribe may regulate non-member conduct on the land. Judge Cavan rejected BHCEC’s argument that the Tribe’s authority was divested by the General Allotment Act of 1887, the Crow Allotment Act of 1920, or the Tribe’s prior designation of the land for public purposes because those acts are insufficiently explicit to abrogate jurisdiction. (Doc. 129 at 13).

Judge Cavan further determined that, although BHCEC’s easement allowed them to access and service the Tribal land, Title 20 acts as a valid condition on that conduct, “separate and unrelated to BHCEC’s easement over Tribal lands to provide electrical service,” rather than a loss of the right to exclude. (Doc. 129 at 14). Judge Cavan relied on the Supreme Court’s holding in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982), that the “lawful property right to be on Indian land [does not] also immunize the non-Indian from the tribe’s lesser included power [...] to place conditions on the non-Indian’s conduct or continued presence on the land.” Lastly, Judge Cavan decided that BHCEC’s arguments regarding whether the Tribe’s authority to apply Title 20 extends beyond tribal land and to non-members or to lands held in trust for individual members by non-Indians are inapplicable to the issue presented in this suit because

Big Man's property does not fall into those categories. (Doc. 129 at 14-15).

BHCEC registers six objections to Judge Cavan's findings on this issue. BHCEC first contends that Congress's division of the reservation under the Allotment Acts and subsequent easements limited the rights of the Tribe to the same land in such a way that the rights-of-way represent Congressional defeasance over the entire parcel, rather than just the easements. (Doc. 133 at 4-6). Specifically, BHCEC bristles at Judge Cavan's finding that "BHCEC offers no authority for the proposition that a tribe is divested of its right to exclude nonmembers from tribal lands because certain areas of the reservation are held in trust for individual members or owned by non-Indians." (Doc. 129 at 11; 133 at 3). In support of this objection, BHCEC cites to *Montana* and *Phillip Morris, USA v. King Mountain Tobacco Co.*, 569 F.3d 932, 412 (9th Cir. 2009), for the proposition that a nexus is required to regulate non-member conduct under the consensual relationship exception. While that is a true and correct statement of the law, Judge Cavan correctly noted that the authority cited is not useful for this section of the analysis. Analyzing the land status does not require a nexus or a consensual relationship. This objection is therefore irrelevant and without merit on this point. The substance of the objection, if it were properly made, is discussed and addressed in Section III.A.2.ii, *infra*.

Likewise, BHCEC complains that Defendants only submitted the partial Title Status Report to the Magistrate, and that BHCEC had to supplement the record with the full metes and bounds description.

(Doc. 133 at 6-7). The Court fails to see the purpose of this objection. While it is true that BHCEC provided a more complete Title Status Report, Judge Cavan mentions and relies on the complete report. (Doc. 129 at 10-11). Judge Cavan properly considered the full report and BHCEC's objection on this specific point is without merit.

BHCEC's final four objections on this point concern Judge Cavan's finding that the Tribe has the power to exclude and therefore the Tribe has regulatory authority to apply Title 20 and the adjudicative authority to enforce violations of Title 20. BHCEC asserts that the complete Title Status Report intrinsically demonstrates that the tract should be considered equivalent to non-Indian fee land because it reflects the rights-of-way bounding Big Man's tract. (Doc. 133 at 7). BHCEC also states that *Adams* resolved the issue of whether the Tribe can regulate the utility easement property and that Judge Cavan erred in distinguishing the present case. These objections fail to recognize the distinction between the present case and *Adams*, *Strate*, and *Red Wolf*. Those cases all concerned non-Indian land that had been alienated through a grant of right-of-way. *Strate* and *Red Wolf* involve accidents that occurred directly on the right-of-way and therefore occurred on alienated land. 520 U.S. 438 and 196 F.3d 1059. *Adams* concerned a tax on non-member property. This case regulates non-member actions on trust property. BHCEC attempts to argue that the presence of an electrical easement means the entire property the easement services should be considered fee-equivalent. To hold that the presence of electrical service easements defeats tribal

jurisdiction would render the entire Reservation (at least the portions with power) outside of Tribal control—a result clearly in conflict with the purpose of the doctrine that express Congressional intent is required to divest a tribe of jurisdiction over tribal lands. *See McGirt v. Oklahoma*, ___ U.S. ___, 140 S. Ct. 2452, 2462-63 (2020).

BHCEC continues to object that the issue of whether the Crow Tribe has authority to apply Title 20 to non-members on non-tribal fee land is before the Court in this matter. (Doc. 133 at 9). Given the Court’s conclusion that Judge Cavan did not err in determining that Big Man’s homesite is properly considered tribal land, and that the Tribe correspondingly had the right to condition BHCEC’s conduct such as with Title 20, BHCEC’s objection is likewise resolved. However, even if the land were alienated from Tribal control, as the Court explains below, the Tribe still possesses jurisdiction to regulate and adjudicate the dispute under both *Montana* exceptions.

2. The *Montana* exceptions

Judge Cavan found that both *Montana* exceptions apply. Therefore, even if Big Man’s homesite is considered alienated, the Tribe would still possess jurisdiction. BHCEC objects to both findings. (Doc. 133 at 12-13).

i. Consensual relationship

Judge Cavan found that BHCEC and the Tribe had a consensual relationship because BHCEC entered contracts with tribal members (specifically Big Man) and that a nexus existed between that relationship and

the regulation sought to be enforced. (Doc. 129 at 15); *see Adams*, 219 F.3d at 951. BHCEC argues that BHCEC's provision of electrical service cannot be related to the regulation because the underlying Tribal suit is centered on BHCEC's violation of Title 20, which BHCEC asserts is unrelated to its "actual provision of service" to Big Man. BHCEC insists that because the consensual relationship involves contracts, only regulations concerning those contracts have a nexus as contemplated by the first *Montana* exception, and further insists that Title 20 does not regulate those contracts. BHCEC also asserts that if a nexus exists between the consensual relationship and Title 20, it will somehow eliminate the need for Tribal members to adhere to their service contracts.

Each of these positions is illogical. Title 20 prevents termination of electrical service during winter months without approval of the tribal health board. BHCEC has chosen to avail itself of the Tribe's customer base and in doing so created a consensual relationship. The Tribe then conditioned one aspect of that service with Title 20. This is exactly the nexus required by the first exception.

Unlike in *Phillip Morris*, where a tribe sought to exercise jurisdiction over a trademark suit when the consensual relationship arose from stores on the reservation that sold Marlboro cigarettes, here the connection is direct. 569 F.3d at 941. Here, the issue directly arises from the association between a tribe and a non-member: the relationship arises from BHCEC's decision to provide electrical service to tribal members on the reservation and the Tribe is seeking to regulate

the manner in which BHCEC provides (and stops providing) electrical service. This is not the scenario warned of in *Atkinson Trading Co. v. Shirley* (holding that a tribe could not impose a hotel occupancy tax on a non-member because the connection between the tribe and hotelier stemmed from business dealings separate from hotel use), where the Supreme Court declared that non-members are not “in for a penny, in for a pound,” and cautioned that a consensual relationship in one area does not trigger civil tribal authority in another area. 532 U.S. 645, 656 (2001).

The Court also fails to see any merit in BHCEC’s contention that the application of Title 20 will allow recipients to cease performing contractual obligations. Title 20 does not allow customers to receive free electrical service; Title 20 merely requires that, for four months of the year, a provider must obtain permission from the Tribe before terminating that service.

ii. Direct effects

Judge Cavan concluded that termination of electric service during the winter months has a direct effect on the health and welfare of the Tribe and therefore satisfies the second *Montana* exception. (Doc. 129 at 19). BHCEC declares that this determination “unquestionably exceeds” the scope of that exception. (Doc. 133 at 13). BHCEC claims that, because the absence of tribal authority to enforce Title 20 would not menace the Tribe’s ability to govern its members or its internal relations, *Montana*’s second exception does not apply.

This argument ignores the “health and welfare” provision of the exception and selectively quotes from cases where that portion of the exception was not at issue. The conduct at issue here imperils tribal health and welfare on a much greater scale than generalized safety concerns on roadways or railroads as in *Strate* and *Redwolf*. Winter in Montana can be bitterly cold and electric service provides the necessary power to keep the heat on. Termination of that service clearly imperils the health and welfare of any Tribal member who obtains service from BHCEC—a class of approximately 1,700 members—and therefore the Tribe itself. The second *Montana* exception applies.

B. Unobjected to portions

The Court has reviewed Judge Cavan’s Findings and the parties’ briefing. Unobjected portions are subject to clear error review. *See* Section I, *supra*. Neither party objects to Judge Cavan’s Finding that the choice of law provision in the BHCEC membership agreement did not constitute a waiver of Tribal sovereign authority and therefore it is not at issue in the instant case. (Doc. 129 at 20-24). The Court finds no error in Judge Cavan’s analysis on the issue and adopts those findings.

IV. Conclusion

Judge Cavan properly determined that under the undisputed material facts, Big Man and the Tribal Defendants are entitled to summary judgment in their favor. Judge Cavan also correctly determined that BHCEC is not entitled to summary judgment in its favor. Accordingly, Judge Cavan’s Findings and

App. 18

Recommendations (Doc. 129) are ADOPTED in their entirety. IT IS ORDERED THAT:

1. Tribal Defendants' motion for summary judgment (Doc. 87) is GRANTED;
2. Big Man's motion for summary judgment (Doc. 84) is GRANTED on the issue of whether the membership agreement constituted a waiver of the Crow Tribe's sovereign power to regulate BHCEC; and
3. BHCEC's motion for summary judgment (Doc. 83) is DENIED.

DATED this 26th day of February 2021.

s/_____
SUSAN P. WATTERS
United States District Judge

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

CV 17-65-BLG-SPW-TJC

[Filed July 21, 2020]

BIG HORN COUNTY ELECTRIC)
COOPERATIVE, INC.,)
)
Plaintiff,)
)
vs.)
)
ALDEN BIG MAN, <i>et al</i> ,)
Defendants.)
)

**FINDINGS AND RECOMMENDATIONS OF
U.S. MAGISTRATE JUDGE**

Plaintiff Big Horn County Electric Cooperative, Inc. (“BHCEC”) filed this action against Defendant Alden Big Man (“Big Man”), together with several Judges and Justices of the Crow Tribal Courts and Unknown Members of the Crow Tribal Health Board (“Tribal Defendants”), in response to a civil action brought by Big Man against BHCEC in Crow Tribal Court. (Doc. 1.) Big Man’s suit alleged BHCEC violated the Crow Law and Order Code section restricting the

termination of electric service during winter months. (See Doc. 1-2.) BHCEC now seeks declaratory and injunctive relief to bar the prosecution of Big Man's action in Tribal Court. (Doc. 1.)

All parties have filed motions for summary judgment. (Docs. 83, 84, 87.) Responses and replies have been filed and the matter is fully briefed. (Docs. 99, 100, 102, 104-106.) Having considered the parties' submissions, the Court recommends BHCEC's motion be DENIED; the Tribal Defendants' motion for summary judgment should be GRANTED; and Big Man's motion should be GRANTED on the issue of whether the BHCEC/Big Man membership agreement constituted a waiver of the Crow Tribe's sovereign power to regulate BHCEC.

I. Factual Background

The Crow Indian Tribe's territory in Montana was originally recognized in the First Treaty of Fort Laramie of 1851 as consisting of approximately 38.5 million acres. *Montana v. U.S.*, 450 U.S. 544, 548 (1981). When the Crow Reservation was later established in the Second Treaty of Fort Laramie in 1868, however, it consisted of approximately 8 million acres. *Id.* Subsequent Acts of Congress further reduced the size of the reservation to less than 2.3 million acres. *Id.*

The ownership of the lands on the reservation was also fragmented by the General Allotment Act of 1887, ch. 119, 24 Stat. 388, and the Crow Allotment Act of 1920, 41 Stat. 751. *Id.* Those Acts authorized patents in fee to be issued to individual Indian allottees on the

reservation. *Id.* After holding the land for 25 years, the allottees could then alienate the land to non-Indians. *Id.* This has resulted in a patchwork of land owned by the Tribe, by individual members of the Tribe, and by non-Indians. At the time of the *Montana* decision in 1981, approximately 52 percent of the reservation was allotted to members of the Tribe and held in trust by the United States; 17 percent was held in trust for the Tribe; 28 percent was owned in fee by non-Indians; and 2 percent was owned by the State of Montana and less than 1 percent by the United States. *Id.*

BHCEC is a non-Indian, non-tribal entity that delivers electrical services in Southeastern Montana and Northern Wyoming, including to customers on the Crow Indian Reservation. (Doc. 101 at ¶ 1.) The Ninth Circuit has previously noted that BHCEC is the primary provider of electrical services on the reservation, serving more than 1,700 customers within its boundaries. *Big Horn County Elec. Co-op, Inc. v. Adams*, 219 F.3d 944, 948 (9th Cir. 2000). The Tribe and its members constitute approximately half of BHCEC's total membership. *Id.*

Big Man is an enrolled member of the Crow Tribe, and lives on land leased from the Tribe. (Docs. 101 at ¶ 2; 116 at ¶¶ 2, 7.) The land is owned by the Tribe and held in trust by the United States. (Doc 116 at ¶¶ 2, 7; 114-3 at 4.) Big Man has received electrical service to his residence from BHCEC since 1999. (Docs. 73 at ¶ 4; 101 at ¶ 2.) To establish electrical service, Big Man signed a BHCEC Application for Membership and for Electrical Service, which contains a choice of law provision. (Docs. 1-6; 101 at ¶¶ 2-3.) The provision

stated that Montana law would control in determining the rights of the parties to the agreement, and it designated the state district court in Big Horn County to have exclusive jurisdiction over any legal proceeding. (Doc. 1-6.)

In January 2012, Big Man was delinquent on his account with BHCEC. (Docs. 101 at ¶ 6; 103 at ¶ 6.) BHCEC gave Big Man a termination notice on January 11, 2012 and disconnected his service on January 26, 2012. (Docs. 101 at ¶ 7; 103 at ¶ 7.) Big Man subsequently sought relief in Tribal Court under Title 20, Chapter 1 of the Crow Law and Order Code, which restricts the termination of electrical service during winter months except with notice and specific prior approval of the Tribal Health Board. (Doc. 1-2.) Big Man alleged BHCEC's notice was improper and lacked approval of the Board. (*Id.* at 3.)

The Crow Trial Court dismissed Big Man's lawsuit for lack of jurisdiction, but the Crow Court of Appeals reversed and remanded, holding jurisdiction existed over BHCEC to enforce Tribal law. (Docs. 1-4; 1-5; 1-7.) BHCEC then filed the instant suit, seeking a declaratory judgment that "the Tribal Court lacks subject matter and personal jurisdiction over [BHCEC] in [Big Man's] Lawsuit." (Doc. 1 at ¶ 38.) BHCEC also seeks an injunction prohibiting Defendants "from prosecuting and maintaining the [Big Man] Lawsuit in Tribal Court against [BHCEC]." (*Id.* at ¶ 43.)

II. Legal Standard

Summary judgment is appropriate where the moving party demonstrates the absence of a genuine

issue of material fact and entitlement to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable factfinder to return a verdict for the nonmoving party. *Id.* “Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party fails to discharge this initial burden, summary judgment must be denied, and the court need not consider the non-moving party’s evidence. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party must “go beyond the pleadings and by ‘the depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). The opposing party cannot defeat summary judgment merely by demonstrating “that there is some

metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586; *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (“The mere existence of a scintilla of evidence in support of the nonmoving party’s position is not sufficient.”) (citing *Anderson*, 477 U.S. at 252).

When making this determination, the Court must view all inferences drawn from the underlying facts in the light most favorable to the non-moving party. *See Matsushita*, 475 U.S. at 587. “Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment.” *Anderson*, 477 U.S. at 255.

When parties file cross-motions for summary judgment, the Court reviews each motion on its own merits. *Fair Housing Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001).

When reviewing a decision of an Indian tribal court regarding jurisdictional issues, questions of law are reviewed de novo, while the clearly erroneous standard is applied to factual questions. *Big Horn County Electrical Co-op, Inc. v. Adams*, 219 F.3d 944, 949 (9th Cir. 2000) (“Questions about tribal jurisdiction over non-Indians is an issue of federal law reviewed de novo.”)

III. Discussion

The underlying issue common to BHCEC and Tribal Defendants’ motions for summary judgment is whether, and to what extent, the Crow Tribe has

legislative and adjudicative authority over BHCEC, a non-Indian entity. BHCEC argues that the Crow Tribe has neither legislative nor adjudicative jurisdiction over its on-reservation operations. (Doc. 83-4 at 8.) Tribal Defendants argue that the Tribe has the authority to regulate BHCEC activities on the reservation, and that BHCEC is subject to the Crow Tribal Court's jurisdiction of Big Man's claim. (Doc. 88 at 17.)

Big Man defers to Tribal Defendants' arguments on the jurisdictional issue and instead focuses his motion for summary judgment on the enforceability of BHCEC's membership application. (Doc. 85 at 2.)

The Court will first address tribal jurisdiction and then turn to the enforceability of BHCEC's membership application.

A. Tribal Jurisdiction

The Ninth Circuit "has long recognized two distinct frameworks for determining whether a tribe has jurisdiction over a case involving a non-tribal-member defendant." *Window Rock Unified District v. Reeves*, 861 F.3d 894, 898 (9th Cir. 2017). The distinction is based on the status of the land. If the nonmember conduct occurs on tribal land, a tribe's right to exclude generally "imparts regulatory and adjudicative jurisdiction over conduct on that land." *Id.* at 899. The Ninth Circuit has recognized that "because tribes generally maintain the power to exclude and thus to regulate nonmembers on tribal land, tribes generally also retain adjudicative jurisdiction over nonmember conduct on tribal land." *Id.*

With respect to non-tribal land, however, a tribe does not generally possess the right to regulate non-member conduct, even if the land falls within the boundaries of the reservation. *Id.* To exercise regulatory or adjudicative authority on non-tribal land, the case must fall within two exceptions to the general rule established in *Montana v. United States*, 450 U.S. 544 (1981). First, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements.” *Montana*, 450 U.S. at 565. Second, “[a] tribe may . . . retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 566.

BHCEC asserts that the Crow Tribe does not have the right regulate its activities under either framework. First, while BHCEC concedes that Big Man’s home is situated on Tribal trust land, it nevertheless contends that the right to exclude does not exist. (Docs. 83-4 at 16; 116 at ¶ 2.) BHCEC argues that the General Allotment Act of 1887 and the Crow Act of 1920 divested the Crow Tribe of absolute and undisturbed use and occupation of reservation lands by virtue of allotment, thus any regulatory authority predicated on the Tribe’s right to exclude was likewise divested. (Doc. 83-4 at 16.) Second, BHCEC argues it did not give implicit consent to Tribal jurisdiction under the first *Montana* exception, because there is no nexus between any consensual relationship and the

regulation at issue. (*Id.* at 17-19, 22-23.) Last, BHCEC asserts its conduct on fee lands within the Crow Reservation does not imperil the Crow Tribe, thus the second exception under *Montana* does not apply. (*Id.* at 27.)

The Tribal Defendants counter that it has the power to regulate BECEC's conduct on Big Man's land under each available avenue. They contend that (1) Big Man's residence is located on Tribal lands and the Tribe retains the right to exclude; (2) BHCEC entered into a consensual relationship with the Tribe by entering into contracts with its members and voluntarily providing electrical services on the reservation; and (3) the termination of residential electrical services during the winter months in Montana has a direct effect on the health and welfare of the Tribe. (Docs. 88 at 17-32.)

1. Right to Exclude

As discussed above, the right to exclude is one of two frameworks employed to determine tribal jurisdiction over a non-tribal member's conduct on tribal land. *Window Rock*, 861 F.3d at 898. The general rule is that "absent contrary provisions in treaties or federal statutes, tribes retain adjudicative authority over nonmember conduct on tribal land – land over which the tribe has the right to exclude." *Id.*

The Court previously found that the record was insufficient to determine the location and land status of Big Man's residence and ordered the parties to submit supplemental statements of fact with supporting documents. (Doc. 112.) The submissions included two U.S. Department of the Interior, Bureau

of Indian Affairs (“BIA”) documents for the Big Man property, which is designated as Allotment No. T-7011-W: the Homesite Lease and a partial Title Status Report. (Docs. 114-2 at 4; 114-3 at 4.) Plaintiff also submitted the BIA metes and bounds description referenced in Big Man’s Homesite Lease, and subsequently submitted the complete BIA Title Status Report for the tract. (Docs. 124; 128; and 128-1.)

In reviewing the submitted materials, the Court finds that Big Man’s property is designated tribal trust land. (*See* Doc. 114-3 at 4-6.) The BIA Title Status Report shows that the owner of Tract 7011-W is the Crow Tribe, and that title is held in trust by the United States. (*Id.*) The report further reflects that the entire tract is held in trust, with “.0” percent held in fee. (*Id.*) Therefore, in the absence of a treaty provision or federal statute to the contrary, the Tribe retains regulatory and adjudicative authority over nonmember conduct on this land.

BHCEC argues, however, that the effect of the General Allotment Act of 1887 and the Crow Allotment Act of 1920 – whereby certain lands were allotted to individual Tribal members and some tracts subsequently sold to non-Indians – divested the Crow Tribe of absolute and undisturbed use and occupation of reservation lands. (Docs. 83-4 at 15-16.) Thus, BHCEC contends any regulatory authority predicated on the Tribe’s right to exclude non-members was divested. (*Id.* at 16.)

The Court disagrees. BHCEC offers no authority for the proposition that a tribe is divested of its right to exclude nonmembers from tribal lands because certain

areas of the reservation are held in trust for individual members or owned by non-Indians. While the federal government can limit a tribe's power by treaty or statute, "[i]n interpreting the extent of any such limits, courts do not 'lightly assume that Congress . . . intend[ed] to undermine Indian self government.'" *Window Rock*, 861 F.3d at 899 (quoting *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)). Thus, a presumption of civil jurisdiction over non-Indian activities on tribal land lies "unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual Ins. Co.*, 480 U.S. at 18. There is nothing in the General Allotment Act or Crow Allotment Act which specifically limits the Crow Tribe's civil jurisdiction over non-Indian activities on Tribal land.

In its reply, and with its supplemental filings, BHCEC also argues that Tract 7011-W is located within a tract of land that was withheld from allotment in the Crow Allotment Act of 1920, and reserved for agency, school, cemetery, or religious purposes.¹ (Doc. 113-1 at 3.) Title to the land was to be held by the

¹ Sections 5 and 17 of the Crow Allotment Act of 1920 reserved from allotment lands for the benefit of the tribe and in the public interest for such purposes as schools, cemeteries, religious institutions, administration, and townsites. Crow Allotment Act, Pub. L. No. 239, §§ 5, 17, 41 Stat. 751, 753, 757 (June 4, 1920). Section 5 emphasizes that reserved unallotted lands be "maintained for the benefit of the tribe," which comports with Big Man's property being held in trust. *Id.* at 753 (*see also* Doc. 114-3 at 4). Section 17 mandates that "patents shall be issued for the lands so set apart and reserved for school, park, and other purposes to the municipality or school district legally charged with the care and custody of lands donated for such purposes." *Id.* at 757.

United States in trust “for the benefit of the tribe.” (*Id.*) BHCEC argued in briefing and at oral argument that because the land was reserved for a specified public purpose, the Crow Tribe had no right to exclusively occupy the land or exclude Big Horn. (Docs. 104 at 7; 127.) Again, however, BHCEC offers no authority to support its argument that a tribe loses its right to exclude – and thus to regulate – non-Indians from tribal trust land which has been designated for a particular purpose. BHCEC would have the Court establish a new land status subcategory for tribal trust lands and create an exception to the well-established general rule that Indian tribes have the sovereign power to exclude non-tribal members from tribal lands, as well as the jurisdiction to regulate conduct on that land. The Court declines to do so. The Act’s statutory provisions do not disturb the Crow Tribe’s absolute and undisturbed use and occupation of Tribal trust lands, hence, its right to exclude.

BHCEC also argued during oral argument that BHCEC holds an easement over Tribal lands for the purposes of providing electricity; thus, the Crow Tribe no longer has the right to exclude it from Big Man’s property. (*See* Doc. 128-1 at 4.) It follows in BHCEC’s logic that because it is an easement holder and the Crow Tribe does not have the right to exclude it from Big Man’s property, then the Tribe has waived its regulatory powers to enforce Title 20. This argument also fails.

The Crow Tribe’s authority to regulate and adjudicate derives from its sovereign powers. *Window Rock*, 861 F.3d at 899. In *Window Rock*, the Ninth

Circuit reviewed U.S. Supreme Court precedent relating to tribal regulatory powers and emphasized the Court's explanation in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982):

When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power to tax or to place other conditions on the non-Indian's conduct or continued presence on the reservation.

Merrion, 455 U.S. at 144-145; *Window Rock*, 861 F.3d at 899. Here, Title 20's prohibition on terminating electrical service during winter months is clearly an "other condition on the non-Indian's conduct," separate and unrelated to BHCEC's easement over Tribal lands to provide electric service. Thus, while the easement allows BHCEC's access to Tribal lands to provide electric service to Tribal members, Title 20 governs the termination of that same service on Tribal lands.

Finally, BHCEC argues that Title 20 of the Crow Law and Order Code, as written, applies to Tribal members and non-members, and Tribal lands and non-Tribal fee lands alike. (Doc. 83-4 at 14.) BHCEC argues that, since the scope of the section can extend beyond Tribal land and to nonmembers, it exceeds the Crow Tribe's jurisdictional authority under federal common law. (*Id.*) But the issue of whether the Crow Tribe has

regulatory and adjudicative jurisdiction to apply this code section on non-Tribal fee lands is not before the Court. BHCEC seeks to enjoin Big Man's lawsuit in Tribal Court, and the issue presented is whether the Crow Tribe has regulatory authority to enforce this provision on Big Man's residence on Tribal trust land, and whether the Tribal Court has adjudicative jurisdiction to enforce the provision on that land. (*See* Doc. 1.) To determine the issues presented by BHCEC's declaratory judgment action, it is not necessary to consider whether the Tribe's authority to regulate BHCEC's activities based on its right to exclude would also extend to lands held in trust for individual members, by non-Indians, or by the state or federal government.

Therefore, the Court finds the Crow Tribe has regulatory and adjudicative jurisdiction over Big Man's Tribal trust property; has maintained the right to exclude BHCEC from Big Man's property; and has regulatory and adjudicative authority over BHCEC's conduct on that property.

2. *Montana* Rule Exceptions

In addition, even if the Crow Tribe has been divested of the right to exclude from Big Man's tract of land, the Court further finds that the Tribe has the right to regulate BHCEC's activities under both *Montana* exceptions.

a. *Montana's* First Exception: Consensual Relationship

As discussed above, the first exception under *Montana* holds that a tribe may regulate the activities

of nonmembers who enter consensual relationships with the tribe or its members. *Montana*, 450 U.S. at 565. This exception also requires “a nexus to the consensual relationship between the nonmember and the disputed commercial contacts with the tribe” in order to establish tribal jurisdiction over a nonmember. *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 942 (9th Cir. 2009). The Crow Court of Appeals held the tribe had jurisdiction over BHCEC under the first *Montana* exception, to which BHCEC disagrees. (*Cf.* Docs. 1-5 at 9-10; 83-4 at 22.)

BHCEC first argues that the mere fact that it delivers service to cooperative members on the Crow Reservation does not justify the conclusion that it gave implicit consent to Tribal regulation. (Doc. 83-4 at 17.) While BHCEC acknowledges the Ninth Circuit’s holding in *Big Horn County Electric Cooperative v. Adams*, 219 F.3d 944, 951 (9th Cir. 2000) (“*Adams*”), recognizing a consensual relationship between the Tribe and BHCEC, it asserts that no nexus exists between the relationship and the regulation at issue. (*Id.* at 22.) Thus, BHCEC asserts that the Crow Court of Appeals’ reliance on a consensual relationship to establish jurisdiction under the first *Montana* exception is erroneous. (*Id.*)

Tribal Defendants respond that the Ninth Circuit’s holding in *Adams* resolved the issue of whether BHCEC has a consensual agreement with the tribe or its members. (Doc. 102 at 18.) Thus, Tribal Defendants argue that the doctrine of collateral estoppel, or issue preclusion, precludes Big Horn from re-litigating the issue. (*Id.*)

In *Adams*, BHCEC brought an action against officials of the Crow Tribe, challenging the tribe's imposition of a 3% ad valorem tax on "utility property"² located on Tribal or trust lands within the reservation. *Adams*, 219 F.3d at 948. The Ninth Circuit held that the utility property subject to the tax was located on BHCEC's right-of-way, which was the equivalent to non-Indian fee land. *Id.* at 950. Therefore, for the Tribe's regulatory jurisdiction to exist, one of the *Montana* exceptions had to apply. *Id.*

In analyzing the first exception, the *Adams* Court found that BHCEC's activities on the reservation were sufficient to establish a consensual relationship, stating "[t]he district court correctly concluded that Big Horn formed a consensual relationship with the Tribe because Big Horn entered into contracts with the tribal members for the provision of electrical services." *Id.* at 951. Thus, while the Court found the agreements creating BHCEC's rights-of-way did not create a consensual relationship, it concluded that "Big Horn's voluntary provision of electrical services on the Reservation did create a consensual relationship." *Id.*

Nevertheless, the Ninth Circuit found the first *Montana* exception did not apply. *Id.* The Court pointed out that "*Montana* limits tribal jurisdiction under the first exception to the regulation of 'the *activities* of nonmembers who enter [into] consensual

² Defined as "all property used for utility purposes under an agreement conferring rights to use or possess trust land on the reservation ... including, but not limited to, a lease, right of way ..." *Adams*, 219 F.3d at 948 (citing Railroad and Utility Tax Code § 202(H)).

relationships.” *Id.*, (citing *Montana*, 450 U.S. at 565) (emphasis added). It found that that the tax the Tribe sought to impose was not a tax on “activities,” but was instead a tax of the value of “utility property.” *Id.*

That is not the case here. As in *Adams*, BHCEC’s voluntary provision of electrical services on the Crow Reservation created a consensual relationship with the Big Man and the Tribe. (See Doc. 106.) Unlike the tax in *Adams*, however, the prohibition against discontinuing electrical service in the winter months is a regulation on the activities of BHCEC, and thus squarely within the consensual relationship exception.

The Court further finds a sufficient nexus exists between the consensual relationship and the disputed regulation. BHCEC’s conduct – terminating Big Man’s electric service for non-payment – that the Crow Tribe seeks to regulate arises directly out of the consensual relationship created by Big Horn’s provision of electrical services on the Reservation. Even looking at the issue more narrowly, there is also a nexus between the BHCEC/Big Man contract and the activity being regulated. But for the contract between BHCEC and Big Man, BHCEC would not have the right to terminate service for non-payment and Big Man would never have obtained electricity in the first place. Thus, the Court finds a nexus between BHCEC’s consensual relationship and Big Man’s underlying claim in Crow Tribal Courts.

Therefore, the Court finds that the first *Montana* exception is satisfied.

**b. Montana's Second Exception:
Direct Effects**

The second exception under the *Montana* framework holds that a tribe retains civil authority over non-Indian conduct when that conduct threatens or has some direct effect on the political integrity, economic security, or health and welfare of the tribe. *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 904 (9th Cir. 2019); *Montana*, 450 U.S. at 566. The non-member's "conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Plains Commerce Bank*, 554 U.S. at 341; *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 935 (9th Cir. 2019).

BHCEC argues that the case does not involve conduct on fee land that imperils the subsistence of the Crow Tribal community and thus the second *Montana* exception is inapplicable. (Doc. 83-4 at 27.)

Tribal Defendants argue that BHCEC's activities and conduct seriously threaten the health and welfare of the Crow Tribe. (Doc. 102 at 28.) In support, Tribal Defendants cite to *Glacier Elec. Coop. v. Gervais*, 2015 WL 13650531, at *4 (D. Mont. Apr. 24, 2015).

The Court agrees with Tribal Defendants and the finding in *Glacier Elec. Coop.* that "winter shut-off[] undoubtedly has a direct effect on the health or welfare" of the tribe. *Glacier Elec. Coop.*, 2015 WL 13650531, at *4. Here, the parties agree that Big Man's power was shut off at the end of January 2012, which is the dead-middle of Montana's winter. (Docs. 1 at ¶ 15; 1-2 at 2.) At oral argument, the parties agreed

that the Administrative Rules of Montana regulating and restricting termination of service during winter months does not apply to electric cooperatives. (*Cf.* Mont. Code Ann. § 35-18-104 and A.R.M. § 38.5.1410.) Thus, any BHCEC customer who is a Tribal member and lives within the exterior boundaries of the Crow Reservation, regardless of the land status of their property, is implicated by BHCEC's on-reservation activities or conduct. The termination of heat in the middle of the winter clearly poses a danger to the health and welfare of Big Man, and potentially to any Tribal member who obtains electrical services from BHCEC within the reservation boundaries, and thus the Crow Tribe itself.

Therefore, the Court finds that BHCEC's conduct of terminating electrical service during winter months has a direct effect on Tribal members and the Tribe, satisfying the second *Montana* exception.

B. Enforceability of the Membership Agreement

BHCEC argues that when Big Man (or the Crow Tribe) became a cooperative member, the choice of law provision identifying "the laws of the State of Montana," as well as the related-forum provisions naming the "Thirteenth Judicial District"³ in Big Horn County, is an unmistakable waiver of Tribal jurisdiction. (Doc. 83-4 at 24-25; Doc. 1-6 at ¶ 4.)

Big Man responds that the BHCEC membership agreement's choice of law and forum provisions are

³ Now the Twenty-Second Judicial District.

unenforceable. (Doc. 100 at 10.) Big Man's cross-motion for summary judgment further argues that the Court should refrain from addressing enforceability and affirm the Crow Court of Appeals decision. (Doc. 85 at 6.)

BHCEC responds that the choice of law and forum provisions are reasonable and enforceable and were wholly ignored by the Crow Court of Appeals. (Doc. 99 at 23.) BHCEC asserts that the membership provisions should have precluded Big Man's action in the Crow Courts in the first place, just as the Crow Trial Court found. (*Id.* at 23-24.)

The Court finds that the enforceability of the membership agreement is not at issue in this case and therefore will not address the merits of the parties' arguments. BHCEC appears to recognize this in its briefing and conceded the point during the motions hearing. (*Id.* at 23) ("Though the contract between Mr. Big Man and Big Horn is not directly at issue in this matter ..."). BHCEC sought specific declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, relating to Tribal legislative and adjudicative jurisdiction. (*See* Doc. 1 at 5-6, 12-15.) The present case is thus confined to matters involving tribal jurisdiction. If it chooses to do so, BHCEC may raise the choice of law issue in Tribal Court.

BHCEC also argues, however, that the choice of law and forum provision constitutes a waiver of Tribal authority. Whether the forum provision constitutes a waiver of Tribal authority is relevant to the issue of Tribal jurisdiction raised by BHCEC in this declaratory action.

BHCEC asserts that the choice of law and forum provisions of the Big Man's membership agreement effectively operates as a waiver of sovereign power to regulate BHCEC. (Doc. 83-4 at 24-25.) In support, BHCEC relies on *Arizona Public Service Co. v. Aspaas*, 69 F.3d 1026, 1034-35 (9th Cir. 1995),⁴ for the proposition that a sovereign can waive their power to regulate in "sufficiently clear contractual terms." (*Id.* at 24.)

In *Aspaas*, the terms of a power plant lease on Tribal trust land between (non-Indian electric utility) Arizona Public Service Company ("APS") and the Navajo Nation were directly at issue in the federal district court action. *Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1129-1130 (9th Cir. 1995). The defendants were officials of the Navajo Nation, which included signatories of the lease at issue as well as judicial officers adjudicating the alleged violation of Tribal law. *Id.* at 1130, 1132. The issue presented was whether the Navajo Nation could regulate APS's employment policies. *Id.* at 1130. The explicit terms of the power plant lease waived the Tribe's right to regulate employment practices at the power plant, which ultimately conflicted with the subsequent enactment of the Navajo Preference in Employment Act, a Tribal anti-discrimination employment law. *Id.* After exhaustion in Tribal court, APS filed suit in federal district court contending waiver of Tribal regulatory authority. *Id.* The district court agreed and entered judgment for APS. *Id.* at 1131-32.

⁴ Amended and superseded on denial of rehearing by *Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995).

The Ninth Circuit affirmed on appeal. *Id.* at 1135. The court pointed out that an Indian tribe “can waive sovereign power if they do so in sufficiently clear contractual terms.” *Id.* The court found that agreement between APS and the Navajo Nation contained the requisite unmistakable waiver. *Id.* The court further found that the Navajo Tribal Council, as the governing body of the Navajo Nation, had the authority to waive sovereign police powers in the lease agreement. *Id.*

Aspaas is clearly distinguishable from the present case. First and foremost, this is not a situation where the Crow Tribal Council has contracted to waive its sovereign powers. The contract at issue is a contract between Big Man and BHCEC. Big Man, for his part, does not have the power or authority to waive sovereign police power in the way that the Navajo Tribal Council had authority to sign a waiver. See *Id.* Further, the membership agreement does not include the same explicit language at issue in *Aspaas*, which read: “The Tribe covenants that, other than as expressly set out in this agreement, it will not directly or indirectly regulate or attempt to regulate the Company ... or its ...operating practices, procedures... or other policies or practices.” *Id.* at 1130. Here, the membership agreement applies the laws of Montana “for the purpose of determining the rights of the Cooperative and the Applicant hereunder” and designates the county district court the jurisdiction and venue “for the purpose of actions or proceedings brought to determine the rights of the Cooperative or the Applicant ...” (Doc. 1-6 at ¶ 4.) This language, even if applicable to the Crow Tribe, does not constitute an unmistakable waiver of sovereign authority. See

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982) (“Without regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign’s jurisdiction, and will remain intact unless surrendered in unmistakable terms.”)

Thus, the Court finds that the choice of law and forum selection provisions contained in Big Man’s membership agreement with BHCEC does not constitute a “unmistakable” waiver of sovereign authority.

IV. Conclusion

In sum, the Court finds that the Crow Tribe has jurisdiction over Big Man’s claim against BHCEC under its inherent sovereign right to exclude, as well as both *Montana* exceptions. Therefore,

IT IS RECOMMENDED that Tribal Defendants motion for summary judgment (Doc. 87) should be **GRANTED**; Big Man’s motion for summary judgment (Doc. 84) should be **GRANTED** on the issue of whether the membership agreement constituted a waiver of the Crow Tribe’s sovereign power to regulate BHCEC; and BHCEC’s motion for summary judgment (Doc. 83) should be **DENIED**.

NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendation of United States Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to the findings and recommendation must be filed with the Clerk of Court and copies served on opposing counsel within fourteen

App. 42

(14) days after entry hereof, or objection is waived. D.
Mont. Local Rule 72.3.

IT IS ORDERED.

DATED this 21st day of July, 2020.

s/ _____
TIMOTHY J. CAVAN
United States Magistrate Judge

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 21-35223

**D.C. No. 1:17-cv-00065-SPW-TJC
District of Montana, Billings**

[Filed April 21, 2022]

BIG HORN COUNTY ELECTRIC)
COOPERATIVE, INC., a Montana)
Corporation,)
)
Plaintiff-Appellant,)
)
v.)
)
ALDEN BIG MAN; et al.,)
)
Defendants-Appellees.)

Before: BYBEE, BEA, and CHRISTEN, Circuit Judges.

Judge Christen have voted to deny the petition for rehearing en banc, and Judges Bybee and Bea so recommend.

App. 44

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

APPENDIX E

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 21-35223

**D.C. No. 1:17-cv-00065-SPW-TJC
District of Montana, Billings**

[Filed May 2, 2022]

BIG HORN COUNTY ELECTRIC)
COOPERATIVE, INC., a Montana)
Corporation,)
)
Plaintiff-Appellant,)
)
v.)
)
ALDEN BIG MAN; et al.,)
)
Defendants-Appellees.)

DOCKET ENTRY ORDER

05/02/2022 45 Filed text clerk order (Deputy Clerk:
OC): The motion to stay the mandate
[44], is granted. [12436102] (OC)
[Entered: 05/02/2022 02:02 pm]

APPENDIX F

**IN THE APSAALOOKE APPEALS COURT
APSAALOOKE (CROW) INDIAN-RESERVATION
CROW AGENCY, MONTANA**

**Case No. 12-118
AP-2013-001**

[Filed April 15, 2017]

ALDEN BIG MAN,)
)
Petitioner/Appellant,)
)
v.)
)
BIG HORN COUNTY ELECTRIC)
COOPERATIVE, INC.,)
)
Respondent/Appellee.)

OPINION

**Appeal from the Tribal Court of the Crow Nation
Honorable Jonni Dreamer-Big Hair, Presiding.**

Appearances:

**Joe Hardgrave, Attorney for the Appellant, Alden
Big Man**

James E. Torske, Attorney for the Appellee, Big Horn County Electric cooperative, Inc.

**Before Chief Justice Joey Jayne, Justice Leroy Not Afraid, Justice Kari Covers Up
Chief Justice Joey Jayne delivers the opinion of the Court.**

SUMMARY

On January 26, 2012 Big Horn County Electric Cooperative, Inc., a rural nonprofit cooperative incorporated with the State of Montana, disconnected electrical services to Alden Big Man, an enrolled member of the Crow Tribe who lived on the Crow Indian Reservation. The Crow trial court held that it did not have subject matter jurisdiction over this matter, denied Alden Big Man's motion for summary judgment, and dismissed the case. In reviewing the Crow trial court's dismissal of this matter de novo, we reverse and remand to the Crow trial court with instructions.

I. INTRODUCTION

The Petitioner/Appellant, Alden Big Man (herein after "Big Man"), filed a Complaint on May 2, 2012. The Respondent/Appellee, Big Horn County Electric Cooperative, Inc. (herein after "BHCEC"), filed an Answer to the Complaint on May 14, 2012. Thereafter, Big Man filed a Motion and Brief for Summary Judgment on July 11, 2012. BHCEC filed a Response to summary judgment on July 24, 2012. Next, Big Man filed a Rely Brief on October 22, 2012 with a final response by BHCEC on December 6, 2012. The Crow trial court issued an Order denying Appellant's Motion

for Summary Judgment and dismissed the case on May 6, 2013. On May 24, 2013, the trial court issued another Order dismissing this case.

From this decision, Big Man appealed the lower court decision on May 28, 2013. He subsequently filed a Brief in support of his appeal on June 27, 2013. BHCEC filed a responsive appeal brief on July 15, 2013.

This matter remained dormant until a new chief appeals court judge scheduled oral arguments on September 26, 2016. A three (3) panel appeals justices heard Big Man and BHCEC present their appellant briefs.

II. BACKGROUND

Big Man became a BHCEC member on February 15, 1999. *Appellee Reply Brief, Exhibit A, Application for Membership and for Electric Service*. On that date, he agreed to purchase electric energy from BHCEC on a monthly basis until such time that either party gave a thirty (30) day notice to the other for disconnection of service. BHCEC provides electrical service on the Crow Reservation, Montana. It provides electrical service through a membership cooperative. Big Man is an enrolled member of the Crow Nation who resides within the Crow Reservation and within the area serviced by BHCEC.

After obtaining electrical service for thirteen (13) years, BHCEC disconnected the electrical service to Big Man's residence on January 26, 2012 for alleged non-payment. Several types of notices for disconnection of electrical service are on record. On January 24, 2012,

BHCEC sent a Disconnect Notice to Big Man's mailing address of P.O. Box 271, Crow Agency, MT. 59022-027. *Appellant's Exhibit A, Complaint*. The message within this Disconnect Notice stated, "Your service with Big Horn County Electric Cooperative is subject to Disconnect Action because of an unpaid or a returned check. An additional charge of \$ 100 has already been added to your account for collection services. Your service (s) will be disconnected after 24 hours unless full payment is received. If the service is disconnected, there will be an additional fee to reconnect the service." *Id.* The collectible amount on the Disconnect Notice was \$ 496.47 which was due on January 25, 2012, the day before the electricity was actually disconnected.

Big Man made attempts to pay his electric bill through assistance of the Human Resources Development Council (HRDC), Billings, Montana. *Petitioner's Complaint, Exhibit B*. He filed a Low Income Energy Assistance Program application on January 20, 2012. *Id.* Big Man called an HRDC supervisor on January 23, 2012 stating he was in "threat of disconnect." Due to procedural policies, Big Man was unable to make payment. *Id.* HRDC called BHCEC on January 26, 2012 at 2:03 p.m. to inform BHCEC that Big Man qualified for a certain amount (a benefit of \$ 485.00) to be applied to his electric bill. BHCEC advised the HRDC representative that Big Man's electricity had already been shut off by that time. *Id.* On the other hand, BHCEC provided a Termination Notice dated January 11, 2012 which listed a Disconnect Date for January 23, 2012. *Respondent's Answer, Exhibit 2*. Big Man filed a Motion for Summary Judgment on July 11, 2012, *supra*.

A. BIG MAN ARGUMENT

Big Man initially argued in his motion for summary judgment that there were no genuine issues of material fact and that the lower court should grant summary judgment in his favor. The lone fact Big Man presented was that BHCEC disconnected his electrical service on January 26, 2012. BHCEC agreed that it disconnected the electrical power on January 26, 2012. Next, Big Man addressed BHCEC's affirmative defense that the Crow Tribal court had no jurisdiction over this matter because the correct forum was Montana State district court. Big Man argued that Crow tribal court should have jurisdiction under both the "substantial relationship" and the "fundamental policy of a state" prongs of the forum clause analysis. *Petitioner's Brief, Page 2*. Thirdly, Big Man brought in a "consensual relationship" analysis for the proposition that BHCEC formed a consensual relationship with Big Man, and that therefore, the correct forum was Crow Tribal Court. *Id.* After BHCEC replied, the Crow Tribal Court entered an order in favor of BHCEC and dismissed the case. Big Man appealed.

Big Man presented three (3) issues on appeal. Big Man summarized the issues on appeal as 1) whether the Crow Tribe has jurisdiction to enact and enforce the Crow Tribal Law and Order Code (CLOC) dealing with termination of electrical services (herein after "Title 20") against BHCEC under the *first* Montana exception (*Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L.Ed.2d 398 (1981)*) which states that "a tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter

consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements,” 2) whether the Crow Tribe has jurisdiction to enact and enforce Title 20 against BHCEC under *Montana*’s second exception which states that jurisdiction exists when nonmember conduct “threatens or has some direct effect on the tribe’s political integrity or economic security or health or welfare of the tribe,” and 3) whether the Crow Tribe’s inherent authority to exclude BHCEC includes a lesser authority of regulatory and adjudicative jurisdiction not bound by *Montana*.

Big Man began his argument by citing a federal case *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000) which adopted certain aspects of *Montana v. United States*, *supra*. He stated that in the *Adams* case, the federal court ruled that a district court correctly concluded that “Big Horn (BHCEC) formed a consensual relationship with the Tribe (Crow) because Big Horn entered into contracts with tribal members for the provision of electrical services... Big Horn’s voluntary provision of electrical services on the Reservation did create a consensual relationship.” *Adams* 219 at 951. Thus, and since Big Man signed a cooperative agreement with BHCEC for electrical service in 1999, that this created a consensual relationship between them. *Appellant Brief*, page 6. (*Adams* involved the Crow Tribe enacting a utility valorem tax upon BHCEC’s utility property. The federal court ruled the tribe did not have jurisdiction because the tax was not a tax on the “activities of a nonmember” but a tax on a nonmember’s property which did not equate to a *Montana* first exception.)

Despite the ruling in *Adams*, Big Man proposed and relied on the 1981 United States Supreme Court, *Montana*, who ruled that tribal jurisdiction applied to “activities of nonmembers who enter into consensual relationships” under the *first* exception to *Montana*.” Big Man reasoned that BHCEC’s affirmative action to turn off his electrical service was an “activity” which fell within the *first* exception of *Montana*. *Appellant Brief, page 6*. Big Man stated that the *first* exception existed because when non-Indians “enter consensual relationships with the tribe or its members” that a consensual relationship was established between Big Man and BHCEC through a cooperative agreement. Big Man argued that when he entered into a consensual contractual relationship with BHCEC for electrical service BHCEC acquiesced to regulatory and adjudicative jurisdiction of the Crow Tribal court. *Id.*

Armed with his conviction that the Crow Tribal court had jurisdiction over BHCEC under the *first* exception to *Montana*, Big Man turned to his proposal that *Montana*’s second exception also applied. He argued that the *second* exception to *Montana* existed here because the conduct of a non-Indian (BHCEC) “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare” of the Crow Tribe and its members. *Montana, 450 U.S. at 566, 101 S. Ct. 1245*. Big Man argued that “The purpose of the Crow law regarding winter month termination of power that specifically applies to cooperatives is designed to protect the health and safety of elderly and disabled tribal members just like Mr. Big Man.” *Petitioner’s Motion for Summary Judgment, page 3*.

Big Man relied on these two (2) exceptions to the United States Supreme Court case *Montana v. United States, supra*, for his proposition that the Crow Tribal court had jurisdiction to hear his complaint. *Montana* has been called a “path marking case concerning tribal civil authority over nonmembers,” *Strate v. A-1 Contractors, 520 U.S. 438, 117 S. Ct. 1404 (1997)*. The two exceptions were carved out from the main rule that “the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” *Montana, 450 U.S. 564, 101 S. Ct. 1245*. In *Montana*, the court had before it the Crow Tribe’s authority for regulatory jurisdiction over on-reservation non-Indian activity on non-Indian land. *Id.*

Big Man’s reliance on the *first* exception to *Montana* narrowed in on the Crow Tribe’s power to “regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements.” *Appellant Brief, page 5*. Big Man emphasized that he is in a class (“a member”) covered by the *first* Montana exception without reference to the Crow Tribe, that BHCEC is a nonmember, and that BHCEC entered into a consensual agreement (relationship) with Big Man for a commercial dealing (supplying electricity). *Appellant Brief page 6*. Big Man further argued he fulfilled the requirements of the *first* exception to *Montana* through *Adams, supra*, which

held that BHCEC's supplying electricity on the Crow Reservation is an activity. *Id.*

Now turning to the *second* exception of *Montana*, Big Man argued that the Crow tribal court has jurisdiction in this matter because electricity in homes has "obvious and recognized" effects on the health or welfare of Big Man. *Appellant Brief, page 7*. The *second* Montana exception states that "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana at 565, 101 S. Ct. 1245*. Big Man drew a parallel with consumer natural gas consumption regulation. In 1997 United States Supreme Court ruled that "state regulation of natural gas to consumer serves important interests in health and safety...with the purpose that buyers are not frozen out of their houses in cold months. *General Motors Corp. v. Tracy, Tax Commissioner, Ohio, 519 U.S. 278, 306-07 (1997)*. Big Man argued that BHCEC's conduct of shutting electricity off in the middle of winter is "conduct which threatens to freeze people out of their homes for months on end" which constitutes a threat that has direct effect on the political integrity, economic security or the health and welfare of the tribe in protecting tribal members. *Appellant Brief, page 9*.

With the interest of protecting tribal members, Big Man brought to the Crow trial court's attention a case decided in Crow Tribal Court dealing with a Crow Tribal member, Jerry Harris, who filed a complaint

against BHCEC for nearly identical reasons as the instant case. *Harris v. Big Horn County Electric Cooperative, No. 86-223 (Crow Tr. Ct., Dec. 9, 1986) 14 ILR 6023*. In the *Harris* case, BHCEC shut off Harris' electrical service during the winter month, an act which was prohibited by Title 20. Harris was without running water because the water pump operated by electrical power. He had a propane heater which operated with an electric fan. The court in *Harris* opined that Title 20 was the regulation which the Crow Tribe implemented to protect consumers in the winter months. *Id.*

Big Man's final argument centered on his proposition that the Crow Tribe possesses inherent power to exclude. He argued that the exclusion power included "the lesser authority of regulatory and adjudicative jurisdiction" independent of *Montana*. *Appellant Brief, page 9*. Big Man relied heavily on a web of United States Supreme Court and federal court cases for the proposition that the Crow Tribe's power to exclude is the Crow Tribe's power to regulate. *Appellant Brief, page 9*. He commenced with another path making case *South Dakota v. Bourland, 508 U.S. 679, 113 S. Ct. 2309 (1993)*. Citing *Bourland*, Big Man stated that a "simple way to describe *Montana* would be the exceptions were carved out to allow a Tribe's inherent authority to regulate the conduct of non-members even on non-member owned fee land." *Id.* He went a step further with *Bourland* stating that *Montana* did not eliminate inherent sovereignty but that from a tribe's "inherent power to exclude flow lesser powers, including the power to regulate non-Indians on tribal land." *Id.*

Big Man created this nexus between *Montana* and *Bourland* in his argument. He essentially stated that, in a span of twelve (12) years between *Montana* and *Bourland*, that the United States Supreme Court was consistent with its opinion 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.” *Appellant Brief, page 9*. Based on this rationale, Big Man requested the lower court to conclude that it had jurisdiction in this matter because the land upon which BHCEC delivered electrical power was on Crow tribal land citing that nonmembers on “tribal lands are subject to the tribe’s power to exclude them, including the lesser power to place conditions on entry, on continued presence, or on reservation conduct.” *Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982)*.

Big Man claimed that the Crow trial court failed to acknowledge that a tribe retains inherent authority independent from *Montana* citing *Bourland, supra, and Water Wheel Camp Rec. Area, Inc. v. LaRance, 642 F.3d 802, 805 (9th Cir. 2011)*. *Appellant Brief, page 10*. Big Man stated the court in *Water Wheel* affirmed *Montana* by holding that the Colorado River Indian Tribes (CRIT) had regulatory jurisdiction through its inherent authority to exclude *Water Wheel* independent of *Montana. Id.* Implicitly, Big Man argued that he (and the Crow Tribe) stand in the same shoes as the Colorado River Tribes – and that the Crow trial court has jurisdiction over BHCEC. *Appellant Brief, page 10*. Big Man argued that, based on the principle in *Water Wheel*, that the Crow Tribe’s inherent sovereign power

to exclude gave the Crow Tribe both regulatory and adjudicatory powers over BHCEC. *Appellant Brief*, page 11.

Big Man succinctly requested the Crow trial court adopt *Water Wheel* as authority because of the following:

In *Water Wheel*, the Court held “the tribe has regulatory jurisdiction through its inherent authority to exclude, independent from the power recognized in *Montana*. The *Water Wheel* Court reasoned: “As a general rule, both the Supreme Court and the Ninth Circuit have recognized that *Montana* does not affect this fundamental principle as it relates to regulatory jurisdiction over non-Indians on Indian land.” *642 F.3d at 812*.

Appellant Brief, page 10.

Finally, Big Man cited a 2013 federal case *Grand Canyon Skywalk Development, LLC v. ‘Sa’ Nyu Wa, Inc.*, 2013 U.S. App. LEXIS 8512 (9th Cir. Ariz. April 26, 2013) to underscore his position that “*Strate* exception does not apply here to deny the tribal court of its initial jurisdiction. The tribal court does not plainly lack jurisdiction because *Montana*’s main rule is unlikely to apply to the facts of this case.” *Appellant Brief*, page 10. Big Man proposed to the Crow trial court that the federal court in *Grand Canyon Sky Walk* affirmed *Water Wheel* (providing for tribal jurisdiction without the application of *Montana*.) *Id.*

B. BHCEC ARGUMENT

BHCEC responded to the motion for summary judgment on July 24, 2012. BHCEC's argument is two-fold. First, it objects to Big Man's motion for summary judgment based on Federal Rule 56 (C)(2) which provides that "a party may object that the material cited to support... a fact cannot be presented in a form that would be admissible in evidence." *Respondent's Response Brief to Motion for Summary Judgment, page 1*. Since Big Man filed a motion for summary judgment at the onset of the case, BHCEC urged the Crow trial court to recognize that "appellant courts rely upon tribal courts to fully develop the record in justification of assumption of jurisdiction over non-members." *Id. at page 2*. BHCEC relied on *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 105 S. Ct. 2447 (1985) for the proposition that it is "necessary and appropriate for the parties and the tribal court to ensure that a full record is developed in tribal court" when there is a question of an assumption of jurisdiction over non-members. *Id.*

Secondly, BHCEC stated it was "incumbent upon the court to first engage in a good faith inquiry into the regulatory authority of the Crow Tribe over the activities or conduct of the Defendant before it can be decided whether the Court has adjudicatory jurisdiction in this case." *Id.* BHCEC objected to Big Man's assertion that Title 20 is enforceable against BHCEC. BHCEC argued that Title 20 is not admissible evidence of enforceability against BHCEC since there are "many genuine issues of material fact not now before the court." *Id.*

BHCEC argued that the motion for summary judgment should be dismissed on the basis that Crow Tribal Court lacks jurisdiction in this case. BHCEC's position is that there must be admissible factual basis to support the Crow Tribes' legislative authority to exclude, by regulation, BHCEC from "engaging in activities on the reservation and set conditions on entry to the land." BHCEC further stated that this regulation must justify the preservation of tribal self-government and territorial management ascribed by the court in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008). BHCEC alleged that Big Man could not point to clear error in the Crow trial court's findings of fact. *Appellee Brief, page 2.*

BHCEC raised the issue of whether the Crow Tribe may regulate the conduct and activities of BHCEC through Title 20 of the Crow Law and Order Code (CLOC). It was Big Man's assertion that BHCEC violated the terms of Title 20. The Crow Tribal Legislature adopted Title 20 in 1986 which states in pertinent part, "that during the period of November 1st to April 1st ... no termination of residential service may take place except with specific prior approval of the board." *CLOC 20-1-110*. Title 20 specifically states that a utility is required to notify a customer, in writing by personal service or certified mail at least ten (10) days before an anticipated termination date with notice to the board. *CLOC 20-1-105 (2)(a), 20-1-117.*

BHCEC believed, first, that an analysis must be made on Title 20 to reach the ultimate issue of whether the Crow Tribe has adjudicatory authority over BHCEC. BHCEC offered decisive federal cases to

determine whether the Crow Tribe has authority to adjudicate a complaint against a nonmember. BHCEC began with *Nevada v. Hicks*, 533 U.S. 353, 361, 121 S. Ct. 2304 (2001) to argue that this case “involves tribal interference in the contractual relations between Plaintiff and Big Horn which have nothing whatsoever to do with the tribe’s right of self-government and right to control internal relations between the tribe and its members.” (The holding in *Hicks* was that “this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.” *Hicks*, 353 U.S. at 358.)

BHCEC next argued and relied on *Hicks* who opined that “tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.” *Hicks*, *supra*, at 361, 121 S. Ct. 2304. BHCEC then turned to Big Man’s assertion that he fulfilled the 2 exceptions to *Montana*. *Appellee Brief*, page 3.

BHCEC disagreed that Big Man fulfilled the requirements of either *Montana* exception. BHCEC planted tribal regulatory authority within the realms of *Montana*’s main rule. He began his analysis with the instructive language of *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 544 U.S. 316, 128 S. Ct. 2709 (2008) (the enforcement of a tribal anti-discrimination tort ordinance upheld by a tribal court.) BHCEC relied on the *Plains* case to disagree with Big Man’s assertion that consensual agreement alone can give a tribe regulatory authority and adjudicatory authority to regulate nonmembers on

non-Indian fee land. *Appellee's Brief, page 3*. The United States Supreme Court in *Plains Commerce* quoted its previous landmark case that in (dealings with tribes and given *Montana's* main rule "that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,") a tribe's authority to regulate nonmembers are invalid. *Atkinson Trading Co. v. Shirley, 532 U.S. 645, 121 S. Ct. 1825 (2001)*.

BHCEC agreed with the Crow trial court's Conclusion of Law # 4 (that the issue before the court is whether *Montana* and *Strate* govern the Crow Tribe's power to regulate BHCEC in relation to shutting off the electric power to Big Man.) *Appellee Brief, page 2*. With that backdrop, BHCEC began its analysis that the starting point ". . . must start by acknowledging the main rule that an Indian tribe's power does not extend to the activities of nonmembers." *Id.* BHCEC relied on the 2008 United States Supreme Court case that held that tribal courts did not have jurisdiction over a tribal family's discrimination claim against a non-Indian bank because neither exception to *Montana* applied. *Plains Commerce, 544 U.S. at 318*. BHCEC offered instructive language from *Plains Commerce* which defined tribal regulatory authority. *Appellee Brief, page 3*.

BHCEC requested the Crow trial court give deference to the following language in *Plains Commerce*:

Given *Montana's* "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of an

Indian tribe,” *Atkinson, supra*, at 651, 121 S. Ct. 1825 (quoting *Montana, supra*, at 565, 101 S. Ct. 1245), efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are “presumptively invalid,” *Atkinson, supra*, at 659, 121 S. Ct. 1825. The burden rests on the tribe to establish one of the exceptions to *Montana’s* general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. *Atkinson*, 532 U.S. at 654, 121 S. Ct. 1825. These exceptions are “limited” ones, *Id.*, at 647, 121 S. Ct. 1825, and cannot be construed in a manner that would “swallow the rule,” *Id.*, at 655, 121 S. Ct. 1825, or “severely shrink” it, *Strate*, 520 U.S. at 458, 117 S. Ct. 1404..”

With that setting, BHCEC attacked Big Man’s argument’s that Big Man fulfilled *Montana’s first* and *second* exceptions. BEHCEC argued that *Montana’s first* exception was inapplicable to this matter. BHCEC disagreed with Big Horn’s pronouncement that the Crow Tribe had tribal regulatory and judicatory authority because the “parties entered into a consensual and contractual relationship.” BHCEC agreed with the holding in *Plains Commerce* which defined the extent of tribal power as:

Montana and its progeny permit tribal regulation of nonmember conduct inside the reservation that implicates the tribe’s sovereign interests. *Montana* expressly limits, its first exception to the “activities of nonmembers,” 450 U.S. 565, 101 S. Ct. 1245, allowing these to be

regulated to the extent necessary to protect tribal self-government and to control internal regulations,” *Id.*, at 564. See *Big Horn County Elec. Cooperative Inc. v. Adams*, 219 F.3d 944, 951, [27 Indian L. Rep. 2207] (9th Cir. 2000) (“*Montana* does not grant a tribe unlimited regulatory or adjudicative authority over a nonmember. Rather, *Montana* limits tribal jurisdiction under the first exception to the regulation of the activities of nonmembers”... (Emphasis supplied.)

Appellee Brief, page 5.

Next, BHCEC argued that *Montana*’s second exception did not apply to this case. It stated that Big Man never offered facts to rebut the Crow trial court’s conclusion that “there was no allegation or circumstances demonstrating potential catastrophic consequences in absence of enforcement of the regulation.” *Order*, page 9. BHCEC, again, relied on *Montana*’s holding that “the second exception authorizes the tribe to exercise civil jurisdiction when non-Indians’ conduct menaces the political integrity, the economic security, or the health or welfare of the tribe. The conduct must do more than injure the tribe, it must imperil the subsistence of the tribal community.” *Montana*, 450 U.S. at 566, 101 S. Ct. 1245. BHCEC, then added an Indian law commentator’s (Cohen) suggestion that “the elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.” *Appellee Brief*, page 6.

Lastly, BHCEC countered Big Man's assertion that "the power to exclude is the power to regulate." BHCEC agreed with Big Man that the "power to exclude is the source of tribal power to regulate" but the court must examine the facts to determine if "tribal sovereign interest is at stake to justify regulation." *Appellee Brief page 6*. BHCEC argued that tribal power to exclude, and thus the power to regulate the conduct of nonmembers entering a reservation, is limited by *Montana, supra*, and other cases. *Id.* BHCEC rejected Big Man's reliance on *Water Wheel, supra*. BHCEC said *Water Wheel* was distinguishable to the instant case because that case concerned an "unlawful detainer action for breach of a lease of tribal lands and trespass by a nonmember over which obviously the tribe had retained regulatory power in order to protect its most valuable assets and to preserve tribal self-government." *Appellee Brief, page 7*. On the other hand, BHCEC highlighted *Water Wheel's* holding that the Colorado River Indian Tribes possessed both regulatory and adjudicative jurisdiction over nonmembers. *Id.*

BHCEC acknowledged (but disagreed with *Water Wheel*) that the basis for the federal court decision in *Water Wheel* was that it saw "important sovereign interests at stake, the existence of regulatory jurisdiction, and long standing Indian law principles recognizing tribal sovereignty all support finding adjudicative jurisdiction here. Any other conclusion would impermissibly interfere with the tribe's inherent sovereignty, contradict long-standing principles the Supreme Court has repeated recognized, and conflict with Congress' interest in promoting tribal self-government." *Id.*

Finally, BHCEC used a 1995 federal court case *Devil's Lake Sioux Tribe v. North Dakota Public Service Commission*, 895 F. Supp. 955 (1995) for that court's holding that "the promulgation and enforcement of a reservation wide utility regulation scheme, without regard to land ownership, occupancy or use is beyond the sovereign authority of the tribe-under the fact specific situation present here." *Appellee Brief*, page 8. BHCEC stated that *Devil's Lake* judgment would hold Title 20 "fatally flawed." *Id.* BHCEC alleged that "a thorough review of Title 20 reveals it contains no limitation upon its application based upon whether the land served by electricity is fee or trust land owned by members or nonmembers. As enacted it purports to apply to all customers who are defined as purchasers of gas or electric service for residential purposes." *Appellee Brief*, page 9.

C. LOWER COURT DECISION

The Crow trial court opined that this case is "about whether the tribe may deny Defendant the right to deliver electric service to tribal cooperative members unless Defendant agrees to the non-disconnect provisions of Title 20." *Order*, page 7. Relying on *Plains Commerce*, *supra*, the lower court, in dicta, advised Big Man that "tribal jurisdiction depends upon what non-Indians "reasonably" should "anticipate" from their dealings with a tribe or its members in connection with activities on a reservation." The Court, citing *Hicks*, *supra*, at 361, 121 S. Ct. 2304, stated that this case was not about tribal self-government nor of tribal rights to control internal relations between the Crow Tribe and its members. *Order*, page 8. It reasoned that there

must be a “nexus” between tribal regulatory authority over non-tribal members and the “right of the Indians to make their own laws and be governed by them.” *Hicks, supra*, at 361, 121 S. Ct. 2304. And since there is no contractual dispute between Big Man and BHCEC this case involved Crow tribal government interference. *Order, page 8.*

In a conclusion of law, the lower court acknowledged that this case was not about tribal regulatory authority over nonmember “fee land within the reservation,” as addressed in *Montana*. Rather, the lower court labeled *Montana* as setting the “outer limits of tribal civil jurisdiction, both regulatory and adjudicatory, over nonmember activities on tribal trust and nonmember fee land.” *Order, page 4.* It went a step further by adopting both *Strate v. A-1 Contractors, 520 U.S. 438, 117 S. Ct. 1404 (1997)* and *Hicks, supra*. The United States Supreme Court in *Strate* held that “a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.” *Strate, 520 U.S. at 453, 117 S. Ct. 1404.* In essence, then BHCEC contended that tribal court jurisdiction only turns on “regulable” tribal action relying on *Hicks. Order, page 4.*

Based on those conclusions and established case law, the Crow trial court ordered that Big Man must prove one of the *Montana* exceptions. It opined that Big Man had to overcome the presumptive absence of “tribal civil authority over Defendant’s (BHCEC) enforcement” of Big Man’s cooperative membership agreement with BHCEC. *Order, page 5.*

Furthermore, the Crow trial court ordered that if Big Man was unable to rebut the above conclusion, that

Big Man had to prove that the Crow Tribe possessed power to enforce Title 20 over BHCEC. *Id.*

The Crow trial court took note of BHCEC's argument that two (2) relationships existed under a *first* Montana exception application. The court categorized the first relationship as between Big Man and BHCEC under the Application for Membership and for Electric Service signed on February 15, 1999. *Order, Page 6, Defendant's Response to Plaintiff's Motion for Summary Judgment, Exhibit A.* The lower court stated that Big Man's complaint was not based on the "commercial relationship" between Big Man and BHCEC under the service agreement nor of any violation of the agreement between the parties. *Order, page 6.* Rather, that Big Man's complaint involved the "relationship" between the Crow Tribe and BHCEC regarding the enforcement of Title 20. *Id.*

The Crow trial court rejected Big Man's *first* Montana exception analysis by concluding that since the complaint is between the Crow Tribe and BHCEC, the "continuing consensual" requirement under Montana's *first* exception was eliminated. The court concluded that Big Man and BHCEC had no "continuing relationship" as required under the *first* exception of *Montana* citing a 1999 case. *Burlington N.R.R. v. Red Wolf, 196 F.3d 1059, 1064 (9th Cir. 1999).* *Order, page 6.* The court further concluded that this complaint involved Crow Tribal "interference" between Big Man and BHCEC that did not infringe on the tribe's right of "self-government and right to control internal relations between the tribe and its members" as required by *Hicks, supra.* Under *Hicks*, any tribal

command of regulatory authority over nonmembers must have a nexus of tribal right to make their own “laws and be governed by them.” *Id.*

The Crow trial court eliminated the *second* Montana exception quickly with its reliance on the *Plains Commerce, supra*, (who quoted *Montana*). In *Plains Commerce*, the United States Supreme Court cloaked the second exception with tribal civil jurisdiction over non-Indians only when non-Indian “conduct” affected the “political integrity, the economic security, or the health or welfare of the tribe.” *Montana at U.S. 566, 101 S. Ct. 1245*. The Supreme court stated that any non-Indian conduct must “imperil the subsistence” of a tribal community. *Id.*

Without any findings of fact, the Crow tribal court ruled that *Montana*’s second exception was inapplicable in the instant case. It eliminated the *second* Montana exception by stating “no allegation has been made that regulation of Defendant is necessitated by circumstances involving catastrophic consequences. As none exists...” *Order, page 9*.

Without hesitation, the lower court moved in and out of an “exclusion” analysis but ended with its conclusion that the “Crow Tribe” had no power to exclude as the basis for enforcing tribal regulations over Defendant’s activities and therefore, the first exception did not apply to the case. *Order, page 8*. Under *Hicks, supra*, the United States Supreme Court reviewed the conditions a tribe could authorize on a nonmember’s right of entry (onto tribal lands). *Hicks, 533 U.S. at 359, 121 S. Ct. 2304*. Previously, tribes

possessed traditional, unlimited regulatory authority to exclude persons from the reservation. *Id.*

Initially, the Crow trial court began its “exclusion” analysis by stating that this case did not involve a “right of entry” scenario. The lower court agreed with BHCEC that this case involved activities on “land” rather than a “right of entry” under *Hicks, supra*. Thus, this case fell into the realm of a *Montana* and *Strate* screenplay. The court did not analyze the “right of entry” as it applied to Big Man. Rather, the lower court concluded that BHCEC engaged the Crow Tribe and its members with benefits of electrical service through a cooperative agreement “without prior expectation or notice of regulation of the Title 20 type, nor notice the tribe reserved a gatekeeping right to exclude Defendant from the reservation.” *Order, page 7.*

The Crow trial court relied on *Plains Commerce* to conclude that this case is “about whether the tribe may deny Defendant the right to deliver electric service to tribal cooperative members unless Defendant agrees to the non-disconnect provisions of Title 20.” The court cited *Plains, supra*, to agree with BHCEC that “tribal jurisdiction depends upon what non-Indians “reasonably” should “anticipate” from their dealings with a tribe or its members in connection with activities on a reservation. *Id.*

Interestingly, the Crow lower court cited a non-case law “commentator” (Cohen) for the proposition that the application of the second exception to *Montana* must rise to an “elevated threshold” wherein tribal power must be necessary “to avert catastrophic consequences.” *Order, page 9.* The Crow lower court

stated that because there was no catastrophic consequence in this matter, that the second exception to *Montana* did not apply. *Id.*

The Crow trial court ordered that the “Crow Tribe is without legislative jurisdiction to adopt and enforce Title 20 regulation over the activities of Defendant and as this Court’s adjudicative jurisdiction does not exceed the Crow Tribe’s legislative jurisdiction.” The court dismissed this case.

III. STANDARD OF REVIEW

The inquiry of tribal court jurisdiction is a question of federal law reviewed *de novo*. *United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 905 (9th Cir. 1994). *National Farmers Union Ins. Cos. V Crow Tribe of Indians*, 471 U.S. 845, 852-53, 105 S. Ct. 2447, 85 L.Ed.2d 818 (1985). We review findings of fact for clear error. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (9th Cir. 2006).

IV. ANALYSIS

This Court determines whether the Crow trial court correctly applied the relevant Crow Tribal, federal, or case law. Big Man, as the moving party for summary judgment, must demonstrate error by the Crow trial court. Also, since BHCEC, a nonmember, raised the defense that Crow Tribal Court had no jurisdiction over it, we conduct an analysis on subject matter jurisdiction.

The Crow trial court did not acknowledge the Crow Law and Order Code (CLOC) in its order. It simply used federal law and other case law for its conclusions

of law. This Court, however, chooses to apply Crow fundamental law, first, before moving on to an analysis of tribal court jurisdiction as decided by the United States Supreme Court and federal courts.

A. FINDINGS OF FACT

The Court begins its analysis with the Crow Tribal Court fundamental law under Title 5, Rules of Civil Procedure. Rule 1 states that all civil matters “shall govern the procedures in the Crow Tribal Court in all suits of a civil nature.” *Rule 1, Rules of Civil Procedure*. Of particular interest for the Court is Rule 15 which states as follows (in pertinent part):

RULE 15. Findings by The Court. In all civil actions tried by the court without a jury, the court shall specifically decide the facts of the case and state separately its conclusions of law based on those facts. The findings of facts and conclusions of law shall be set forth in writing, signed by the trial judge, and made a part of the permanent record of the trial...

The Court is vested with the appellate authority to review the Crow trial court’s findings of fact and conclusions of law in a civil judgment. *CLOC, 3-3-308* (It shall be the duty and responsibility of the Appellate Judge to ensure that all appellate matters are decided solely on the basis of the law and facts presented...). Thus, the Court’s analysis will include whether the Crow trial court’s judgment was decided on the substantive law and facts presented pursuant to Rule 15.

B. JURISDICTION

To some degree a tribal court's jurisdiction is given deference because they are competent law-applying bodies. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66, 98 S. Ct. 1670 (1978). To this extent, the United States Supreme Court is cognizant of federal policies of deference to tribal courts in determining the question of protecting significant tribal interests. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17, 107 S. Ct. 971 (1987), *United States v. Wheeler*, 435 U.S. 313, 332, 98 S. Ct. 1079 (1978). This Court recognizes the Crow Tribal Court's competence to render just decisions by applying the laws promulgated by the Crow legislature. This Court places great deference on the Constitution and Bylaws of the Crow Tribe as well as the Crow Law and Order Code (CLOC) notwithstanding case law or federal statutes.

Our analysis continues with the Preamble of the 2001 Constitution and Bylaws of the Crow Tribe of Indians (Constitution). The Crow Indian Reservation was established by the Fort Laramie Treaties of 1851 and 1868. The Constitution was created to enforce and exercise treaty rights, retain inherent sovereign rights, secure certain privileges, retain inherent powers, create a governing body to represent the members of the Crow Tribe of Indians, promote the general welfare of the Crow Tribe, and to provide for the lawful operation of government. *Crow Constitution and Bylaws, 2001*. Article II of the Constitution declares that "The jurisdiction of the Crow Tribal General Council shall extend to all lands within the exterior boundaries of the Crow Indian Reservation including

those lands within the original boundaries of the Crow Indian Reservation as determined by federal statutes and case law and to such other lands as may hereafter be acquired by or for the Crow Tribe of Indians.” *Id. at Article II*. The Constitution created a Judicial Branch of Crow Tribal government which:

“shall consist of all courts established by the Crow Law and Order Code and in accordance with this Constitution. The Judicial Branch shall have jurisdiction over all matters defined in the Crow Law and Order Code. The Judicial Branch shall be a separate and distinct branch of government from the Legislative and Executive Branches of Crow Tribal Government...” *Id. at Article X*.

The Crow Law and Order Code (CLOC) contains statutory language enumerating the authority of the Crow Judicial Branch to exercise its jurisdictional power. *Chapter II, CLOC*. The Constitution’s founders reserved to the Crow Judicial Branch the authority to be a court of general jurisdiction. *CLOC, 3-2-201*. It was the intention of the Crow Tribe of Indians “to exercise that jurisdictional authority which has not otherwise been abrogated by the United States Supreme Court or by legislation by the United States Congress. The failure of the United States Congress to legislate in a particular area shall not be deemed a waiver of the jurisdictional authority of the Crow Tribe. The jurisdiction of the Crow Tribal Court shall be used to insure due process and equal protection of the law for all persons, as defined herein.” *Id.*

Under the CLOC, the Crow Tribal Court has personal jurisdiction over:

“all persons who reside, enter, and/or transact business within the exterior boundaries of the Crow Indian reservation, provided that the Court shall not exercise criminal jurisdiction over non-Indians, unless such jurisdiction is granted by laws of the United States Congress. (2) For purposes of jurisdiction, “persons” shall include individuals, businesses, partnerships, associations, cooperatives, and corporations.” *CLOC, 3-2-203.*

... and territorial jurisdiction “to any and all lands within the exterior boundaries of the Crow Indian Reservation as the same may exist from time to time including all easements, rights-of-way and fee patented lands within such boundaries.” *CLOC, 3-2-202.*

This Court’s attention is centered on subject matter jurisdiction. The CLOC contains subject matter jurisdiction language as follows: “The Crow Tribal Court shall have jurisdiction over all causes of action arising within the exterior boundaries of the Crow Indian Reservation and over all criminal offenses which are enumerated in Title 8 of the Crow Tribal Code and which are committed within the exterior boundaries of the Crow Indian Reservation. *CLOC, 3-2-205.*

With the framework of Crow Tribal court jurisdiction, *supra*, as enumerated through its Constitution and Bylaws and the CLOC, this Court

begins its analysis simply with the personal, land, and activity status of Big Man and BHCEC. It is not disputed that Big Man is a Crow tribal member who receives electrical power from BHCEC as a cooperative member through a purchase agreement signed between the parties in 1999. Big Man lived within the exterior boundaries of the Crow Indian Reservation since 1999.

BHCEC is an electric cooperative who provides electricity to Big Man and other cooperative members on the Crow Indian Reservation. Because there is no record established in the proceedings below, this Court is without knowledge on the number of cooperative members BHCEC serves on the Crow Indian Reservation. The number of electrical customers is critical in the context of the *first* Montana exception because it would provide the number of “consensual” agreements between cooperative members and BHCEC. It is also unknown by what instrument or the year the Crow Tribe and BHCEC established electrical services for residents of the service area. What is known is that BHCEC is a non-profit electric cooperative incorporated by the State of Montana. *Order, page 1.*

There is no record below establishing the land status of BHCEC within the Crow Indian Reservation. It is the responsibility of the parties to establish the record with the lower court. BHCEC’s land status is pivotal in determining the application of case law in this matter. Before moving on to case law, this Court now applies, first, the Crow tribal law on jurisdiction as found in the CLOC.

Based purely on the CLOC, the Crow Tribal Court has personal jurisdiction over Big Man who is a Crow tribal member who lived in Crow Agency, Montana at or about the time of his Complaint. *CLOC, 3-2-203*. By the same statute, the Crow Tribal Court has personal jurisdiction over BHCEC since BHCEC, a cooperative, transacted business within the exterior boundaries of the Crow Indian Reservation. *Id.* For purposes of jurisdiction, “persons” shall include individuals, businesses, partnerships, associations, cooperatives, and corporations.” *Id.* Since the cause of action arose within the exterior boundaries of the Crow Indian Reservation, the Crow tribal court has subject matter jurisdiction over this matter. *CLOC, 3-2-205*.

C. MONTANA MAIN RULE

This Court, due to three (3) decades of political activism by the United States Supreme Court and federal courts regarding the umbrella of tribal court jurisdiction, recognizes there is now the necessity that a jurisdictional analysis is conducted when tribal courts assert jurisdiction over non-Indians. In so doing, this Court now turns to case law analysis to determine whether the Crow Tribal Court has subject matter jurisdiction over this matter since BHCEC raised a defense of subject matter jurisdiction. This analysis is paramount because the Crow trial court agreed with BHCEC that the “Crow Tribe is without legislative jurisdiction to adopt and enforce Title 20 regulation over the activities of Defendant and as this Court’s adjudicative jurisdiction does not exceed the Crow Tribe’s legislative jurisdiction relying on *Strate, 520*

U.S. at 455.” The lower court dismissed the complaint and Big Man appealed.

The Crow lower court’s dismissal was based upon its conclusion that this case was about whether the Crow Tribe may deny BHCEC the right “to deliver electric service to tribal cooperative members” unless BHCEC agrees to the “non-disconnect provisions of Title 20.” The Crow trial court relied, in part, on both *Plains Commerce* (“tribal jurisdiction depends upon what non-Indians reasonably should anticipate from their dealings with a tribe or its members in connection with activities on a reservation”); and *Hicks* (“right of the Indians to make their own laws and be governed by them”) for its rationale that this case had nothing to do with the Crow Tribe’s right of self-government and the right “to control internal relations” between the Crow Tribe and its members.

This Court disagrees with the lower court’s rationale. We find that the lower court made an error when it concluded there was Crow Tribal “interference” with the cooperative agreement between Big Man and BHCEC. The lower court provided no contract terms on the initial agreement between the Crow Tribe and BHCEC (to establish electrical service on the Crow Reservation). A review of this contract would have shed light on the rights and limitations on the Crow Tribe or BHCEC in providing future electrical service. Since there was no finding of fact, this Court holds that the Crow trial court erred. We hold that the Crow trial court’s reliance on *Plains Commerce* and *Hicks* is misplaced because the United States Supreme Court has never overruled its decision in *Montana*.

Our examination of tribal court jurisdiction, then, turns to the United States Supreme decision in *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245 (1981). Pressed with growing questions of tribal court jurisdiction over nonmembers, the United States Supreme Court, in 1981, decided that tribes possessed a couple of bases for their authority. First, tribes only had partial inherent power “necessary to protect tribal self-government and to control internal relations.” *Id.* 564, 101 S. Ct. 1245. It contemplated a narrow set of attributes such as the power to “determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.” *Id.* Secondly, the Supreme Court touched on the Congressional relationship between tribes and the federal government by including in their decision that tribes only possessed “such additional authority as Congress may expressly delegate.” *Id.*

Even though the United States Supreme Court in *Montana* concluded that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of a tribe,” it recognized that Indian tribes retained “inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee land.” *Montana*, 450 U.S. at 565-66, 101 S. Ct. 1245. Since it was known that tribal members interact with, married or otherwise have relationships with non-Indians, the Supreme Court carved out two (2) exceptions. *Id.*

The Crow trial court concluded that *Montana* “set the outer limits of tribal jurisdiction, both regulatory and adjudicatory, over nonmember activities on tribal

trust and nonmember fee land.” It adopted *Strate* and *Hicks*. First, it upheld *Strate* by holding that the Crow Tribal Court could not exceed the Crow Tribe’s legislative jurisdiction. Secondly, it cited *Hicks* for the proposition that Crow court jurisdiction “turns upon whether the actions at issue in the litigation are regulable by the tribe.” Lastly, the Crow trial court conceded that “*Montana* applies to both Indian and non-Indian land” citing *Hicks at 360, 121 S. Ct. 2304*. The lower court added, however, that BHCEC’s delivery of electrical service to Big Man on trust land “may not be relied upon alone” on the issue of whether Crow Tribal court had regulatory or adjudicatory authority over Big Man. Based on that, the Crow trial court concluded that Big Man had to prove one of the *Montana* exceptions.

The Crow trial court erred when it did not inquire into BHCEC’s land status within the Crow Indian Reservation since *Montana*’s general rule is that “tribes do not possess authority over non-Indians who come within their borders” (*Montana at 450 U.S. 564*) and “is particularly strong when the nonmember’s activity occurs on land owned in fee simple by non-Indians. *Strate v. A-1 Contractors, 520 U.S. 438*. Once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it. See *County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251 (1992)*. The Crow trial court erred when it applied *Montana*’s general rule to none-existent facts since it did not have a finding of fact on BHCEC’s land status. With that backdrop, the Crow trial court proceeded to analyze the *first* and *second* exceptions to *Montana* as it applied to Big Man. This Court,

consequently, begins an analysis of these exceptions, even in light of the error of the Crow trial court on *Montana's* general rule.

1. *Montana* First Exception Analysis

The *first* Montana exception centers on the consensual relationships between nonmembers with the tribe or its members. In an era of rapid Indian tribal business and economic expansion, the Supreme Court fashioned this exception to recognize that, “a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Id.* The Crow trial court’s opinion is that it is the relationship between the Crow Tribe and BHCEC which controls this case – not the cooperative agreement between Big Man and BHCEC. It reasoned that the enforcement of Title 20 fell upon the Tribe over BHCEC. The lower court stated Big Man’s complaint did not allege a violation of the terms of the cooperative agreement between the parties nor was Big Man’s complaint based on a “commercial relationship” between the parties. Therefore, the requirement of a consensual relationship under a *first* Montana exception was eliminated citing *Burlington N.R.R. v. Red Wolf*, 196 F.3d 1059, 1064 (9th Cir. 1999). We disagree with the lower court’s conclusion.

This Court disagrees with the Crow trial court’s interpretation of Big Man’s complaint. The core of Big Man’s complaint was that Big Man and BHCEC entered into a “consensual relationship” through a cooperative agreement placing jurisdiction in the hands

of Crow tribal court due to a violation of Title 20 by BHCEC. We agree with Big Man that a consensual relationship was created between Big Man and BHCEC when the parties signed a cooperative agreement in 1999. A consensual relationship is a pivotal element of the *first* Montana exception as are commercial dealings and contracts. *Montana, supra*. This Court disagrees with the Crow trial court when it stated that “this case involves tribal interference in the contractual relations between Plaintiff and Defendant which have nothing whatsoever to do with the tribe and its members (relying on *Hicks*).

In 2016, the United State Supreme Court affirmed a 5th Circuit Court of Appeals decision in *Dolgencorp, Inc.; Dollar General v. Mississippi Band of Choctaw Indians; The Tribal Court of the Mississippi Band of Choctaw Indians*, 732 F.3d 409, 419-24 (5th Cir. 2013). The United States Supreme Court upheld the Fifth Circuit of Appeals which upheld the jurisdiction of the Mississippi Band of Choctaw Tribal Courts over a tort claims brought by a tribal member against a non-Indian corporation doing business on the reservation. *Id.* That decision affirmed that “tribal courts have civil jurisdiction over non-Indian conduct arising from consensual relations on Indian reservations. *Id.* This Court finds that the *General Dollar* decision is persuasive for cases arising on the Crow Indian Reservation as well as the case before us.

The Crow trial court’s reasoning is not logical. It cannot eliminate the *first* Montana exception because first, a consensual relationship was established between the Crow Tribe and BHCEC when BHCEC

established itself on the Crow Indian Reservation, and secondly, BHCEC created a consensual relationship with cooperative members through a cooperative agreement. The *first* Montana exception allows the Crow Tribal Court jurisdiction over BHCEC because BHCEC entered consensual relationships, through a commercial contract, with the Crow Tribe (when it entered into some type of contract to establish electricity on the reservation) and its members (Big Man) through a cooperative agreement. The Crow trial court erred in holding that, in the absence of a “continuing relationship” between the Crow Tribe and BHCEC, the *first* Montana exception was eliminated (based on *Burlington N.R.R.*). To buttress this Court’s conclusion that the lower erred by dismissing the *first* Montana exception is demonstrated by our adoption of the 2000 *Adams* case in reference to consensual or contractual relationships. The federal court in *Adams* established that BHCEC created a consensual relationship with the Crow Tribe by “entering into contractual relationships with tribal members in order to supply electricity.” *Adam, supra*. This Court, relying on *Adams*, also concludes that BHCEC created a consensual relationship with the Crow Tribe and Big Man notwithstanding *Adams* which concerned a valorem tax on BHCEC’s utility property. This Court draws a different conclusion than the Crow trial court in that, for purposes of the *first* Montana exception, a consensual relationship was created between Big Man and BHCEC.

Moreover, BHCEC’s reliance on *Plains Commerce* is misplaced since that case involved tribal regulation of a nonmember’s sale of fee land located on a reservation.

That Court found that Montana did not authorize a tribe to regulate the sale of such land and “nor can regulation of fee land sales be justified by the Tribe’s interest in protecting internal relations and self-government.” *Plains Commerce, supra. Plains Commerce* is distinguishable from this case since it concerned the regulation of land sales. The *Plains Commerce* court had before it the land status of the parties unlike the Crow trial court which never established BHCEC’s land status. Land status is paramount in the instant case. In order for the Crow trial court to determine whether the Crow Tribe’s enforcement of Title 20 is an “interest in protecting internal relations and self-government” the Crow trial court must first establish land status and the conditions of entry by BHCEC. The lower court did not establish findings of fact of land status and entry conditions in its order.

This Court dismisses *Plain Commerce* as the precedent for this case, however, we continue our reliance on *Montana* since the United States Supreme Court has not overruled its general rule nor its exceptions.

It was error for the Crow trial court to conclude that it did not have jurisdiction over BHCEC to adjudicate the matter before it under the *first Montana* exception. The Crow trial court decision would place Big Man’s complaint squarely in Big Horn County 13th district court. This is not logical because it would have the Crow Tribal government, its tribal members, members of other tribes, or non-tribal residents stand in line to appear before a foreign court for nonmember actions

occurring within the exterior boundaries of the Crow Indian Reservation.

2. Montana Second Exception Analysis

The United States Supreme Court moved towards an intra- personal stance with the *second* Montana exception. This latter exception wove together inward relationships with activity that affected a tribe's "political integrity, economic security, health, or welfare." *Strate*, 520 U.S. at 446, 117 S. Ct. 1404. The Supreme Court delegated additional power to tribes by giving them inherent power to exercise civil authority over the activities of non-Indians or fee lands within its reservation "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66, 101 S. Ct. 1245.

The Crow trial court opined that since Big Man did not make an allegation that the conduct of BHCEC created "catastrophic consequences," the *second* Montana exception did not apply. This Court is not persuaded by the lower court's conclusion that there must be "catastrophic consequences" because this Court will not rely on Cohen, a commentator. In *Plains Commerce*, the Supreme Court quoted itself by stating "the second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' conduct menaces the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. 566, 101 S. Ct. 1245. "The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community." *Id.* The court in *Plains Commerce* stated that the resale of fee land by a non-Indian to another

non-Indian hardly “imperil[s] the subsistence or welfare of the tribe.” *Ibid.*

This Court views the facts in *Plains Commerce* as distinguishable from the instant case wherein the involuntary shut-off of electricity in the middle of January in Montana imperils the health and welfare of the Crow Tribe’s responsibility in protecting its members. Big Man argued that when BHCEC disconnected his electrical service in the “middle of winter” this was conduct “which threatens to freeze people out of their homes for months on end.” This Court agrees with Big Man. The Crow trial court erred when it concluded that the *second* Montana exception is inapplicable because no catastrophic consequences existed.

3. Exclusion

A year after *Montana* was decided the United States Supreme Court was confronted with another issue: exclusion of non-Indians from reservations. This Court begins with the 1982 case, *Merrion*, to analyze the Crow Tribe’s inherent authority to exclude non-Indians from tribal land, without applying *Montana*. *Merrion*, 455 U.S. 130, 144-145, 102 S. Ct. 894 (1982). In *Merrion*, the court ruled that nonmembers who lawfully “enter tribal lands remain subject to the tribe’s power to exclude them.” *Id.* It added that “when a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry.” *Id.* at 455 U.S. 144-145. The *Merrion* court held that, “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." *Id. at 455 U.S. 141-144*. The Crow trial court chose not to include *Merrion* in its order. However, this Court states that *Merrion* establishes the initial framework for exclusion cases on tribal reservations.

Of particular importance to this Court is the language from *Merrion* which stated that, "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." *Id. at 455 U.S. at 142, 102 S. Ct. 894*. This Court agrees with the *Merrion* court. BHCEC is subject to Crow tribal regulation, such as Title 20, because it entered the Crow Reservation to engage the Crow Tribe in commerce (setting up an electrical company to serve residents of the Crow Reservation).

Before moving to recent exclusion cases, this Court draws attention to the early stance of the United States Supreme Court in its pivotal decision on tribal lands and sovereignty. *Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18, 107 S. Ct. 971, (1987)*("... tribal authority over non-Indian activities on reservation lands is an important part of tribal sovereignty). In that same case on non-Indian activity on tribal lands, the court stated that "... civil jurisdiction lies in tribal courts unless

limited by a specific treaty provision or federal statute.”
Id. *Iowa* has never been overruled.

The Crow trial court overlooked the Crow Tribe’s sovereignty in its order. Big Man and BHCEC agreed that the “power to exclude is the power to regulate” but there must be an examination of facts “to determine if tribal sovereignty interest is at stake to justify regulation.” *Appellee Brief, page 6*. The lower did not examine any facts to ascertain whether tribal sovereignty was at stake to justify Title 20. However, this Court places great respect on the sovereign status of the Crow Tribe’s Treaty rights, Constitution, tribal customs and traditions, and the Crow Law and Order Code. Crow Tribal sovereignty serves as a basis for its power to regulate and exclude. (relying on *Iowa Mutual Ins. Co. v. LaPlante, supra.*)

The “power to exclude is the power to regulate.” *South Dakota v. Bourland, 508 U.S. 679, 689, 113 S. Ct. 2309 (1993)* (a tribe’s power to exclude includes the incidental power to regulate). The court in *Bourland* stated that *Montana* proposed that “when an Indian Tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands and hence, loses “the incidental regulatory jurisdiction formerly enjoyed by the tribe.” *Bourland, 508 U.S. at 689.*

In order to come to any conclusion on whether the Crow Tribe has ever lost regulatory jurisdiction over BHCEC, it was necessary for the Crow trial court to make findings on BHCEC’s land status, date and initial entry conditions onto the Crow Indian

Reservation. The lower court made no such findings. The court in *Hicks*, found that “ownership status of land” is a significant factor to consider since *Montana* “applies to both Indian and non-Indian land.” *Nevada v. Hicks*, 353 U.S. at 360, 121 S. Ct. 2304 (2001). (“We leave open the question of tribal-court jurisdiction over nonmember defendants in general.” *Hicks*, 353 U.S. at 358. The Crow trial court erred when it concluded that the “Crow Tribe has no power to exclude as the basis for enforcing tribal regulation over Defendant’s activities.”

In addition to *Bourland*, *supra*, this Court finds a 2011 federal court persuasive on the issue of exclusion. The federal court, in *Water Wheel Camp Rec. Area, Inc. v. LaRance*, 642 F.3d 802, 805 (9th Cir. 2011), held that the Colorado River Indian Tribes (CRIT) has “regulatory jurisdiction through its inherent authority to exclude, independent from the power recognized in *Montana. Water Wheel*, 642 F.3d at 804. The court added that the CRIT had both regulatory jurisdiction and adjudicative jurisdiction over a nonmember on tribal land. That court found that there was “important sovereign interests at stake, the existence of regulatory jurisdiction, and long standing Indian law principles recognizing tribal sovereignty all support finding adjudicative jurisdiction here. Any other conclusion would impermissibly interfere with the tribe’s inherent sovereignty, contradict long-standing principles the Supreme Court has repeatedly recognized, and conflict with Congress’ interest in promoting tribal self-government.” *Water Wheel Camp Rec. Area, Inc. v. LaRance*, 642 F.3d 802, 805 (9th Cir. 2011). The conditions of entry by BHCEC onto the Crow Indian

Reservation was unknown to the Crow trial court. The lower court erred by applying *Plains Commerce* to non-existent facts to justify its dismissal of this matter.

This Court addresses the Crow trial court's reliance on *Plains Commerce* for its conclusion that "tribal jurisdiction depends on what non-Indians "reasonably" should "anticipate" from their dealings with a tribe or tribal members on a reservation. *Plains Commerce, supra*. It has long been held that regulation of the affairs of non-Indians "must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce, 554 U.S. 316, 337* (citing *Montana, 450 U.S. at 564*).

Since there was no record established in the Crow trial court in regard to what BHCEC reasonably should anticipate from their dealing with Crow tribal cooperative members or the Crow Tribe, it was error for the Crow tribal court to make a decision without proper findings of fact. Thus, unless there is a full record established in the Crow trial court, this Court finds it improper and in error for the lower court to make assumptions on the merits of this case. *National Farmer's Union Ins. Cos. v. Crow Tribe, 471 U.S. 856, 105 S. Ct. 2447 (1985)*("...the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the tribal court before either the merits or any question concerning appropriate relief is addressed.) Without findings of fact, the Crow trial court erred when it concluded the Crow Tribe did not have the power to enforce Title 20 against BHCEC.

V. CONCLUSION

This Court rules that the Crow trial court has subject matter jurisdiction over this matter consistent with this opinion. This Court VACATES the Crow trial court Order of May 24, 2013 dismissing the case. Since this Court REVERSES the Crow trial court's Order based on subject matter jurisdiction, this Court did not address the merits of Appellant Alden Big Man's motion for summary judgment in this Opinion.

This case is REMANDED to the Crow trial court to rule on the non-jurisdictional merits of Appellant Alden Big Man's motion for summary judgment and conduct further proceedings consistent with the Crow Rules of Civil Procedure.

SO ORDERED this 15th day of April, 2017.

Respectfully,

s/ _____
Chief Justice, Joey Jayne

s/ _____
Justice, Leroy Not Afraid

s/ _____
Justice, Kari Covers Up

App. 92

**IN THE APSAALOOKE APPEALS COURT
APSAALOOKE (CROW) INDIAN-RESERVATION
CROW AGENCY, MONTANA**

**Case No. 12-118
AP-2013-001**

[Filed April 17, 2017]

ALDEN BIG MAN,)
)
Petitioner/Appellant,)
)
v.)
)
BIG HORN COUNTY ELECTRIC)
COOPERATIVE, INC.,)
)
Respondent/Appellee.)
_____)

MANDATE

TO: CHIEF CLERK, CROW TRIBAL COURT:

Pursuant to the Order dated April 15, 2017, the Appeal of this case has been REVERSED AND REMANDED WITH INSTRUCTIONS TO THE CROW TRIAL COURT. A certified copy of the Court of Appeal's Opinion is attached.

DONE and DATED this 17 day of April, 2017.

[Seal] s/ _____
Clerk of the Crow Appeals Court

APPENDIX G

**IN THE CROW TRIBAL CIVIL COURT
IN AND FOR THE CROW INDIAN RESERVATION
PO BOX 489
CROW AGENCY, MONTANA, 59022
(406) 638-7400; FAX (406) 638-7415**

CIVIL CASE NO. 2012-118

[Filed May 24, 2013]

ALDEN BIG MAN,)
)
Plaintiff,)
)
v.)
)
BIG HORN COUNTY ELECTRIC)
COOPERATIVE, INC.,)
a Montana Corporation,)
)
Defendant.)

ORDER

This case came before the Court for oral argument upon Plaintiff's Motion for Summary Judgment. After considering arguments made by the attorneys for the parties, both written and oral, together with the allegations set forth in the Complaint, the Answer to said Complaint, the affirmative defenses set forth

therein, the attached exhibits, and affidavit filed herein, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff is an enrolled member of the Crow Tribe of Indians and a member of the Defendant Big Horn County Electric Cooperative, Inc.

2. Defendant is a not for profit rural electric cooperative, incorporated under the laws of the State of Montana contained in the “Rural Electric and Telephone Cooperative Act”, M.C.A. § 35-18-101, which delivers electric services and energy to its members in southern Montana and northern Wyoming, including the Crow Indian Reservation.

3. A commercial relationship exists between Plaintiff and Defendant by virtue of a written membership agreement. The relationship is limited to on-premises delivery of electrical service to Plaintiff’s residence on the Crow Indian Reservation and Plaintiff’s obligation to pay for the service.

4. After notice of disconnect for non-payment, Defendant disconnected Plaintiff’s electrical service on January 26, 2012.

5. Plaintiff filed a Complaint alleging, as his cause of action, that Defendant terminated Plaintiff’s electrical service in violation of Crow law contained in Title 20 of the Crow Law and Order Code, which states: “During the period of November 1st to April 1st ... no termination of residential service may take place.” Additionally, Plaintiff alleged no termination may take place during these winter months “except with specific

approval of the board” [Crow Tribal Health Board] Crow Law and Order Code § 20-1-110(2).

6. Plaintiff’s Complaint requests award of damages and attorney fees.

7. Defendant answered the Complaint denying factual representations made by Plaintiff but admitted disconnecting Plaintiff’s electrical service on January 26, 2012, rather than January 24, 2012, as Plaintiff alleged.

8. Defendant raised numerous affirmative defenses in its Answer, including assertion this Court lacked jurisdiction over Defendant’s conduct in connection with the commercial relationship between it and Plaintiff as a member of the electric cooperative.

9. Plaintiff filed a Motion for Summary Judgment contending the criteria governing entry of summary judgment were satisfied by Defendant’s acknowledgment of disconnect of Plaintiff’s electrical service at a time prohibited by tribal law. Cognizant of the affirmative defense of lack of jurisdiction lodged by Defendant, Plaintiff acknowledged the necessity to address tribal jurisdiction over Defendant. A case decided over 26 years ago, *Harris v. Big Horn County Electric Cooperative*, No. 86-223 (Crow Tr. Ct. Dec. 9, 1986), was cited and relied upon by Plaintiff as authority for tribal court jurisdiction based upon consensual relationships between the tribe and its members and Defendant and a finding that delivery of power has a direct effect on the health and safety of the tribe and its members.

10. Defendant responded citing numerous federal cases, decided after the tribal court decision in the *Harris* case, addressing tribal authority over nonmember activities and conduct.

From the foregoing Findings of Fact the Court makes the following conclusions of law requiring denial of Plaintiff's Motion for Summary Judgment:

CONCLUSIONS OF LAW

1. The Rules of Civil Procedure set forth in the Crow Law and Order Code require this Court to use the provisions of Rule 56 of the Federal Rules of Civil Procedure in conjunction with the Motion for Summary Judgment filed by Plaintiff.

Defendant objected to Plaintiff's Motion for Summary Judgment referencing Federal Rule 56(2) to support its argument that the fact the Crow Tribe adopted Title 20 of the Tribal Code, prohibiting disconnect of tribal members' electrical service between November 1 and April 1, was not by itself admissible evidence of its enforceability as against Defendant.

2. Defendant's jurisdictional challenge requires the Court to engage in a particularized analysis of the facts and federal case law defining the extent of tribal governmental power over the activities of nonmembers. *Nat. Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

3. The federal principles which govern tribal civil jurisdiction over nonmembers were set out in *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 [8 Indian L. Rep. 1005] (1981),

and that decision remains the “pathmarking case’ on the subject.” *Nevada v. Hicks*, 533 U.S. at 358, 121 S. Ct. 2304 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 445, 117 S. Ct. 1404, 137 L. Ed. 2d 661 [24 Indian L. Rep. 1015] (1997)). In *Montana*, the Supreme Court concluded that the Crow Tribe lacked regulatory power to prohibit hunting and fishing by nonmembers on non Indian fee land within the reservation because “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes.” 450 U.S. at 564, 101 S. Ct. 1245. As a general matter, the Court held, “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Id.* at 565, 101 S. Ct. 1245.

4. Although the issue in the *Montana* case was about tribal regulatory authority over nonmember fee land within the reservation, *Montana*, 450 U.S. at 547, 101 S. Ct. 1245, *Montana’s* analytic framework now sets the outer limits of tribal civil jurisdiction – both regulatory and adjudicatory – over nonmember activities on tribal trust and nonmember fee land. The Supreme Court held in *Strate v. A-1 Contractors* that “[a]s to nonmembers . . . a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.” *Strate*, 520 U.S. at 453, 117 S. Ct. 1404. Tribal court jurisdiction thus “turns upon whether the actions at issue in the litigation are regulable by the tribe.” *Hicks*, 533 U.S. at 367 n.8, 121 S. Ct. 2304.

The threshold question with respect to the tribe’s power to regulate Defendant’s activities, extinguishing Plaintiff’s wintertime payment requirement associated

with Plaintiff's commercial relationship with Defendant, is whether the standards established in *Montana*, and reaffirmed in *Strate* with respect to both regulatory and adjudicatory inherent authority determinations, govern.

5. The United States Supreme Court in *Hicks* indicated that "*Montana* applies to both Indian and non-Indian land." *Hicks* at 360, 121 S. Ct. 2304; *see also id.* at 387, 121 S. Ct. 2304 (O'Connor, J., concurring in part) ("Today, the Court finally resolves that *Montana v. United States*, governs a tribe's civil jurisdiction over nonmembers regardless of land ownership.") (citation omitted); *MacArthur v. San Juan County*, 497 F.3d 1057, 1069-70 [34 Indian L. Rep. 2190] (10th Cir. 2007). Therefore, Defendant's delivery of electricity to Plaintiff's residence on trust land may not be relied upon alone to provide the basis for exercise of tribal authority, whether regulatory or adjudicatory, over Defendant.

APPLICATION OF MONTANA STANDARDS

For the reasons discussed above, Plaintiff must prove one of the *Montana* exceptions to; (a) rebut the presumptive absence of tribal civil authority over Defendant's enforcement of the terms of the membership agreement with Plaintiff or, alternatively, (b) to establish the Crow Tribe's power to enforce Title 20 regulations as against Defendant. Plaintiff has not carried this burden.

THE FIRST EXCEPTION

The first exception provides that "tribes may regulate, through taxation, licensing, or other means,

the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Montana* 445 U.S. at 565.

Here, two “relationships” require consideration to determine the first exception application: First, the relationship between Plaintiff and Defendant as set forth in Plaintiff’s membership agreement. Plaintiff’s Complaint is not based upon that commercial relationship or violation of the terms thereof whether by Plaintiff or Defendant. Instead, Plaintiff’s Complaint is based solely upon the second relationship, that which would exist as between Defendant and the Crow Tribe upon enforcement of the tribe’s Title 20 regulatory provision. The effect of the later relationship would indeed eliminate “a continuing consensual” relationship between Plaintiff and Defendant of the type contemplated by *Montana*’s first exception. See: *Burlington N. R.R. v. Red Wolf*, 196 F.3d 1059, 1064 (9th Cir. 1999). None exists of one party, here Plaintiff, need not perform contractual obligations.

Tribal regulatory authority is derived from traditional power, to exclude persons from the reservation, from which the tribe may set conditions on a nonmember’s right of entry. See, e.g., *Hicks*, 533 U.S. at 359, 121 S. Ct. 2304 (*Montana* and *Strate* concern “tribal authority to regulate nonmembers activities on land”). Thus, the Tribe’s Title 20 regulation, strictly applied would result in lack of nexus between a predicate relationship (between Plaintiff and Defendant) and the regulation’s intended application.

In support of the first *Montana* exception giving tribal jurisdiction over “activities” of nonmembers, the Supreme Court in *Montana* cited four cases. The first, *Williams v. Lee, supra*, involved a tribal court suit brought by a non-Indian over a contract dispute arising from a sale of goods to a tribal member on the reservation. The other three cases involved taxes associated with reservation based “activities” in which the tribe had an interest in the subject matter; (1) grazing livestock on trust land, (2) activities on trust land, and (3) severance tax on trust mineral production. In each tax case, the Court concluded the non-Indians’ right to engage in the “activities” on the reservation were conditioned upon payment of the tax. In other words, regulatory authority, in the form of taxation, flows directly from a tribe’s power to exclude i.e. deny the non-Indian the right to engage in the reservation based activity unless the condition, payment of tax, is satisfied.

Again, in each tax case cited as containing the type of consensual relationships giving rise to tribal regulatory authority, under *Montana*’s first exception, the tax directly related not only to the relationship giving rise to the consent, (tax on cattle grazing, cigarette sales, and tribal permit tax on privilege to do business on reservation land) but also the nonmember’s decision to enter into the arrangement with fair notice of the tax (regulation).

Here, Defendant has for generations constructed permanent infrastructure “to encourage the use of ... electric power . . . to facilitate the extension of these modern conveniences to sparsely settled Indian areas.

See, 25 CFR § 169-22(c) at 469. Defendant has engaged the tribe and its members in the benefits from cooperative membership and use of utility facilities without prior expectation or notice of regulation of the Title 20 type, nor notice the tribe reserved a gatekeeping right to exclude Defendant from the reservation. Thus, this case is about whether the tribe may deny Defendant the right to deliver electric service to tribal cooperative members unless Defendant agrees to the non-disconnect provisions of Title 20. The Supreme Court has indicated tribal jurisdiction depends upon what non-Indians “reasonably” should “anticipate” from their dealings with a tribe or its members in connection with activities on a reservation. *Plains Commerce Bank*, 554 U.S. at 337, 128 S. Ct. 2709.

Here, there is no contract dispute between Plaintiff and Defendant as in *Williams v. Lee*, nor voluntary submission to tribal court jurisdiction as in that case. This case involves tribal interference in the contractual relations between Plaintiff and Defendant which have nothing whatsoever to do with the tribe’s right of self-government and right to control internal relations between the tribe and its members. See, *Hicks, supra*, at 361, 121 S. Ct. 2304. (Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.)

Given the nature and extent of Defendant’s longstanding presence on the Crow Reservation, placed there without fair notice of tribal regulation as found in Title 20, the Court finds the Crow Tribe has no power

to exclude as the basis for enforcing tribal regulation over Defendant's activities. *Montana's* first exception does not apply.

THE SECOND EXCEPTION

Though Plaintiff's brief alleges the regulation "is designed to protect the health and safety of elderly and disabled tribal members...," (Plaintiff's Brief p. 3.) the second *Montana* exception does not apply here. The United States Supreme Court, in the *Plains Commerce Bank* case, clarified its limited application stating:

The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' "conduct" menaces the "political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566, 101 S. Ct. 1245. The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community. *Ibid.* 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.

35 ILR at 1017.

No allegation has been made that regulation of Defendant is necessitated by circumstances involving possible catastrophic consequences. As none exists, *Montana's* second exception is inapplicable.

App. 103

ORDER

The Court concludes the Crow Tribe is without legislative jurisdiction to adopt and enforce Title 20 regulation over the activities of Defendant and as this Court's adjudicative jurisdiction does not exceed the Crow Tribe's legislative jurisdiction, (*Strate*, 520 U.S. at 4537), this Court is without jurisdiction over this case and the Plaintiff's Complaint must be dismissed, and It Is So Ordered.

Dated this 24th day of May, 2013

[Seal]

s/ _____
TRIBAL JUDGE

****Certificates of Mailing omitted in these
appendices****