No. _____

In the
Supreme Court of the United States

BIG HORN COUNTY ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

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

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

PETITION FOR WRIT OF CERTIORARI

JAMES E. TORSKE
TORSKE LAW OFFICE
314 North Custer Ave.
Hardin, MT 59034
(406) 665-1902
torskelaw@tctwest.net

NEIL G. WESTESEN
Counsel of Record
DALE SCHOWENGERDT
CROWLEY FLECK PLLP
900 N Last Chance Gulch
Suite 200
P.O. Box 797
Helena, MT 59624-0797
(406) 449-4165
nwestesen@crowleyfleck.com

Counsel for Petitioner

July 19, 2022

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED FOR REVIEW

Indian tribes inherently lack jurisdiction to regulate and then adjudicate claims against nonmembers. In *Montana v. U.S.*, 450 U.S. 544 (1981), this Court identified two narrow exceptions. The first relates to regulation of nonmembers who enter private, voluntary, consensual, commercial relationships with the tribe or its members. The second relates to activity that imperils the tribe's political integrity, economic security, health, or welfare. This Court has never upheld tribal-court, civil-adjudicatory jurisdiction over a nonmember defendant under the first *Montana* exception, and expressly left this question open in *Nevada v. Hicks*, 533 U.S. 353, 360 (2001).

The question now presented is:

Whether an Indian tribal court has subject-matter jurisdiction to adjudicate a tribally created claim as an "other means" of regulating a nonmember federally funded and federally regulated electric cooperative tasked with providing electrical service to all customers within its service territory, including tribal members on Indian reservations?

PARTIES TO THE PROCEEDING

Petitioner Big Horn County Electric Cooperative, Inc. ("BHCEC") is a Montana corporation with corporate offices at 303 S. Mitchell Avenue, P.O. Box 410, Hardin, Montana, 59034.

Respondent is Alden Big Man.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Big Horn County Electric Cooperative, Inc. states that it has no parent companies or publicly held company owning 10% or more of its stock.

RELATED PROCEEDINGS

United States District Court for the District of Montana:

Big Horn County Electric Cooperative, Inc. v. Alden Big Man, et al., No. 17-cv-00065-SPW-TJC (Mont. Feb. 26, 2021) (reported at 526 F.Supp. 3d 756 (D. Mont. 2021))

Ninth Circuit Court of Appeals:

Big Horn County Electric Cooperative, Inc. v. Alden Big Man, et al., No. 21-35223 (Mar. 11, 2022) (reported at 2022 WL 738623)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

PETITION FOR WRIT OF CERTIORARI

BHCEC respectfully petitions this Court for a writ of certiorari to review the March 11, 2022 Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit. The circuit court affirmed the district court's grant of summary judgment for Respondent, holding that the Crow Tribal Court has subject matter jurisdiction over Respondent's tribal law claims against Petitioner because of the Crow Tribe's inherent authority to regulate a nonmember electric cooperative's sale of electricity to a tribal member.

OPINIONS BELOW

The March 11, 2022 Opinion of the Court of Appeals, whose judgment is sought to be reviewed, is reported at *Big Horn County Electric Coop., Inc., v. Alden Big Man; et al.*, 2022 WL 738623, and is reprinted in the Appendix to this Petition, pp. App.1 through App. 4. The February 26, 2021 opinion of the United States District Court for the District of Montana is reported at *Big Horn County Electric Coop., Inc. v. Big Man*, 526 F.Supp. 3d 756 (D. Mont. 2021), and is reprinted in the Appendix to this Petition, pp. App. 5 through App. 18. The July 21, 2020 Findings and Recommendations of the U.S. Magistrate Judge is reported at 2019 WL 7461754 (December 13, 2019), and is reprinted in the Appendix to this Petition, pp. App. 19 through App. 42. The April 15, 2017 decision of the Crow Tribal Court of Appeals, case number AP-2013-001, is unreported and is reprinted in the Appendix to this Petition at pp. App. 46 through App. 90. The May 24, 2013 decision of the Crow Tribal Court, civil case number 2012-118, is unreported, and is reprinted in

the Appendix to this Petition at pp. App. 93 through App. 103.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 2022. The petition for rehearing was denied on April 21, 2022. App. 43 through App. 44. Accordingly, the petition for certiorari is due no later than July 20, 2022. On May 2, 2022, the Court of Appeals stayed the issuance of its mandate. App. 45. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Federal courts have jurisdiction to review tribal jurisdiction pursuant to 28 U.S.C. § 1331, which provides: The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. See *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852-853 (1985). The Rural Electrification Act of 1936 is found at 49 Stat. 1363, 7 U.S.C. §§ 901 et. seq.

INTRODUCTION

The Ninth Circuit held that a tribe can regulate a quasi-governmental rural electric cooperative, even though the cooperative operates on the equivalent of fee land and the tribe has no power to exclude it from the Reservation. The Ninth Circuit's conclusion ignores the plain language of the very contract used to

justify the assertion of tribal regulatory and adjudicatory jurisdiction. It equates an agreement to provide power to fulfill the Rural Electric Administration's federal mandate as the equivalent of a private, voluntary, consensual, commercial relationship. It allows the Crow Tribe and its members to directly control whether a nonmember instrumentality of the United States can repay the federal dollars advanced to fulfill its federal mission. And it exposes a non-Indian electric cooperative, and all of its non-Indian members, to the vagaries of tribal regulation and Crow Tribal Court proceedings without any ability to control either process. If the Ninth Circuit analysis is accepted, the Crow Tribe can dictate electrical rates, usage, who is served, who is not, and any resulting dispute arising from that regulation will be litigated exclusively in the Crow Tribal Court. The decisions of this Court and those from other Circuits require a different outcome.

STATEMENT OF THE CASE

Petitioner BHCEC is a non-profit electric cooperative organized pursuant to federal and state law to provide electrical service to its owner-members in rural areas of Southeastern Montana and Northern Wyoming. BHCEC is a voluntary organization open to all persons able to use its services "and willing to accept the responsibilities of membership without gender, social, racial, political or religious discrimination."[1] As a rural electric cooperative,

[1] BHCEC Cooperative Principles, https://www.bhcec.com/about-us/cooperative-principles/ (last visited July 6, 2022).

BHCEC is "more than [a] public utilit[y]"; it has been characterized as an "instrumentalit[y] of the United States … chosen by Congress for the purpose of bringing abundant, low cost electric energy to rural America." *Alabama Power Co. v. Alabama Elec. Co-Op, Inc.*, 394 F.2d 672, 677 (5th Cir. 1968); s*ee also Public Utility Dist. No. 1 of Pend Oreille County v. U.S.*, 417 F.2d 200, 202 (9th Cir. 1969). Like all "customer-owned rural power cooperatives," BHCEC was "established with loan funds and technical assistance provided by the federal Rural Electrification Administration (REA) in order to bring electric power to parts of the country not adequately served by commercial utility companies." *Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Com'n*, 461 U.S. 375, 380-381 (1983).

There are now approximately 1000 rural electric cooperatives like BHCEC, which own and operate electric systems financed by the United States, acting through the Rural Electric Administration (REA), pursuant to the Rural Electrification Act of 1936. 7 U.S.C. § 901 et. seq.

> The [REA] was first established by executive order in 1935 to "initiate, formulate, administer, and supervise a program of approved projects with respect to the generation, transmission, and distribution of electric energy in rural areas." The objective was to provide electricity to those sparsely settled areas which the investor-owned utilities had not found it profitable to service. To this end, REA makes long-term low-interest loans to approved non-

> profit cooperatives organized and owned by their consumer members, usually farmers, who have been unable to obtain electricity from any other source.

Salt River Project Agr. Imp. And Power Dist. v. Federal Power Comm'n, 391 F.2d 470, 473 (D.C. Cir. 1968). Cooperatives like BHCEC serve an important federal function—the electrification of rural America.

> Quite simply the REA was designed to guide and control the process of bringing electricity to sparsely populated rural areas that would not otherwise receive electricity. Congress and the President designed a system by which the REA would accomplish these goals by loaning money to state entities, which would carry out these objectives under the REA's close supervision. The federal government, using low-interest loans, funds its objective of providing rural electricity through these cooperatives such as CAEC. *These rural electric cooperatives exist to provide a public function conceived of and directed by the federal government.*

Caver v. Central Alabama Electric Cooperative, 845 F.3d 1135, 1143-1144 (11th Cir. 2017) (emphasis added).

In 1939, Montana enacted the "Rural Electric and Telephone Cooperative Act," which provided for the creation of cooperative, nonprofit corporations. Mont. Code. Ann. § 35-18-101. BHCEC was subsequently incorporated:

> 1) For the purpose of supplying electric energy and promoting and extending the use of electrical energy in rural areas, as provided in this chapter . . . and . . .
>
> 3) For the purposes allowable under federal authorization, including rural economic development activities.

M.C.A. § 35-18-105. Since incorporation, BHCEC has assisted the REA by fulfilling "a basic governmental task that the government otherwise would have had to perform." *Caver*, 845 F.3d at 1143 (citing *Watson v. Phillip Morris Cos.*, 551 U.S. 142, 150 (2007)).

Like all rural electric cooperatives, BHCEC is "completely owned and controlled by their consumer-members, and only consumers can become members. They are non-profit. Each member has a single vote in the affairs of the cooperative, and service is essentially limited to members." *Salt River Project*, 391 F.2d at 473. BHCEC is not a member of the Crow Tribe, but its service area includes the Crow Indian Reservation, thousands of sparsely populated acres in Montana and Wyoming, as well as the Northern Cheyenne Indian Reservation.

The Crow Reservation was established by the May 7, 1868 Treaty of Fort Laramie. 15 Stat. 649 (1868). Following the 1887 General Allotment Act, ch. 119, 24 Stat. 388, and the Crow Allotment Act of 1920, 41 Stat. 751, the Reservation was checkerboarded with various parcels now owned by individual tribal members, non-members, and the Crow Tribe. "Today, roughly 52 percent of the reservation is allotted to members of the

Tribe and held by the United States in trust for them, 17 percent is held in trust for the Tribe itself, and approximately 28 percent is held in fee by non-Indians." *Montana v. U.S.,* 450 U.S. 544, 548 (1981). BHCEC has been tasked by the federal government with providing electricity to this rural checkerboard. BHCEC achieves this objective by transmitting power along perpetual rights of way granted by the Secretary of the Interior pursuant to 25 U.S.C. §§ 323-328.

Respondent Big Man is a member of the Crow Tribe. He is also a member of BHCEC. On February 15, 1999, his application for membership in the cooperative was approved. Because BHCEC receives federal low-interest loans for its operations, it is prohibited from denying service to anyone on the basis of race, color, or national origin. 7 C.F.R. § 15.3. As a matter of federal law, BHCEC was legally required to extend service to Big Man.

The Montana Supreme Court has concluded that "the relationship between the electric cooperative and each of its members is contractual in nature, as defined by the cooperative's bylaws, rules, and regulations[.]" *Granbois v. Big Horn Elec. Co-Op., Inc.,* 986 P.2d 1097, 1101-02 (Mont. 1999). Similarly, the Ninth Circuit has previously characterized the agreements between BHCEC and its members as "consensual relationships." *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 951 (9th Cir. 2000) (citations omitted).

The membership agreement between BHCEC and Big Man set forth each parties' expectations regarding choice-of-law and a forum for dispute resolution. Big Man contractually agreed that "the laws of the State of

Montana shall control and be exclusively applied for the purpose of determining the rights of the Cooperative and Applicant hereunder and the Montana Thirteenth Judicial District Court, Big Horn County, shall have exclusive jurisdiction and venue for the purpose of actions or proceedings brought to determine the rights of either the Cooperative or the Applicant arising by reason of membership in the Cooperative or delivery of electric energy to said member." ER 179.[2]

On July 12, 1986, the Crow Tribal Council ("Tribe") adopted Title 20 Utilities, Chapter 1, Termination of Electric Service, as part of the Crow Law and Order Code. The tribal legislation contains extensive provisions regarding the termination of electrical service. ER 133-143. The tribal code first establishes a "Crow Tribal Health Board" to oversee the termination process. 20-1-101(b). Any "utility" providing service anywhere on the Reservation, including rural electric cooperatives like BHCEC, is required to comply with the legislation, regardless of tribal member status. 20-1-101(l). Similarly, every "customer" on the Reservation, regardless of tribal member status, is governed by the regulation. 20-1-101(c). Every utility "shall have an employee available during normal business hours to orally explain the utility's termination policy. The oral explanation must be available in both the Crow and English languages." 20-1-105(2). Most importantly for this case, "No termination of service may take place during the period

[2] All record citations are to the Excerpts of Record provided to the Ninth Circuit and attached to BHCEC's Opening Brief in Appeal No. 21-35223, DktEntry 8, August 2, 2021.

of November 1st to April 1st except with specific prior approval of the Board." 20-1-110.

The Board, and any customer or tenant "harmed by a utility's failure to follow this chapter are each entitled to recover twice any actual damage but in no event less than twice the amount of a delinquent bill or other charge sought to be collected by the utility. The utility shall be barred from recovery of any charge due at the time it takes action in violation of this chapter." 20-1-120(2). The Crow Tribal Court "may order continuation or restoration of service during the pendency of any action" as well as "attorney's fees to the prevailing party in any action brought under this section." 20-1-120(4). Accordingly, if a non-member utility terminates service for the failure to pay, but in violation of a tribal regulation the utility had no role in enacting, the utility is liable for no less than twice the amount of the outstanding bill, plus attorney's fees.

In January of 2012, Respondent became delinquent on his account. On January 11, 2012, he was given written notice of the delinquency in accordance with BHCEC policy. ER-219. The notice included an invitation to "Please contact one of our offices to see if you would qualify for a payment arrangement." Hearing nothing, on January 26, 2012, BHCEC terminated Respondent's electrical service for failure to pay for the power he had been receiving. ER-195. In May of 2012, Big Man filed suit in Crow Tribal Court against BHCEC, alleging a violation of Title 20. The Crow Tribal Court initially dismissed the claim for lack of jurisdiction. App. 103. Big Man appealed. Several years later, the Crow Court of Appeals reversed,

concluding that the Crow Tribe had inherent authority to regulate BHCEC's activities on the Reservation and that the membership agreement by which BHCEC provided power to Big Man constituted a consensual, commercial relationship under *Montana*. App. 46-90. The Crow Court of Appeals remanded the case for further tribal court proceedings consistent with the tribal legislation. *Id.*

BHCEC filed suit in the federal district court for the district of Montana to enjoin the Tribe's assertion of jurisdiction over it. The United States Magistrate Judge concluded the Crow Tribe had jurisdiction to adjudicate the claim based on its inherent sovereign authority to exclude BHCEC from the Crow Reservation, "as well as both *Montana* exceptions." App. at 41. The federal district court adopted the Magistrate's recommendations in full, despite the fact that BHCEC operates on perpetual rights of way that have been judicially determined to be the equivalent of fee land and the Tribe has no power to exclude BHCEC, and despite the plain language of the membership agreement. App. at 6. Relying on its statement in *Big Horn County v. Adams* that agreements to provide power constitute a consensual commercial relationship under *Montana*, the Ninth Circuit affirmed. App. at 4. The Ninth Circuit found, "BHCEC provides electrical service to tribal members on the reservation and the Tribe is seeking to regulate the manner in which BHCEC provides, and stops providing, that service." App. at 3-4. Given the power to regulate, the tribal court had the related power to adjudicate any dispute arising from that regulation.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision conflicts with the decisions of this Court and creates a split among the Circuits regarding tribal jurisdiction over a federally regulated quasi-governmental entity, broadly expanding tribal jurisdiction over non-Indians.

A. The Ninth Circuit's decision impermissibly expands the first *Montana* exception.

Tribal jurisdiction over non-Indians is limited. This Court announced this bedrock principle over 40 years ago in *Montana*. "Through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty." 450 U.S. at 563. "[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565. 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." *Id.* at 564.

These core concepts have been reaffirmed many times. "[A]fter *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' and is therefore *not* inherent." *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) (citations omitted) (emphasis in original). "Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited

circumstances." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). "Where nonmembers are concerned, 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." *Nevada v. Hicks*, 533 U.S. 353, 359 (2001) (citation omitted). "[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 328 (2008). "[T]he tribes have, by virtue of their incorporation into the American republic, lost 'the right of governing . . . persons within their limits except themselves.'" *Id.* at 328 (quoting *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209 (1978)).

Montana recognized two exceptions to this general presumption:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. 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. 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, 544 U.S. at 565-566 (citations omitted).

The exceptions, however, must be narrowly construed. "[E]fforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" *Plains Commerce*, 554 U.S. at 330 (quoting *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 659 (2001)). The exceptions are "limited," and they cannot be construed in a manner that would "swallow the rule" or "severely shrink" it. *Strate*, 520 U.S. at 458. "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." *Plains Commerce*, 554 U.S. at 330. The exceptions apply "only to the extent they are 'necessary to protect tribal self-government or to control internal relations.'" *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019) (quoting *Nevada v. Hicks*, 533 U.S. 353, 359 (2001)).

In *Plains Commerce*, this Court emphasized that the consensual relationship exception is limited to regulating conduct that implicates a tribe's sovereign interests:

> *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,' allowing these to be regulated to the extent

> necessary 'to protect tribal self-government [and] to control internal relations.

Plains, 554 U.S. at 332. There is nothing about regulating the sale of electricity by a non-member cooperative that implicates tribal self-government or internal relations.

The Court's treatment of the sale of fee land in *Plains* is similar to BHCEC's sale of electricity. In *Plains,* the lower courts erred in concluding that because there was a contract between the non-Indian bank and the tribal member Longs, the Tribe could regulate *all* aspects of that relationship, including the sale of land formerly owned by the Longs. The Ninth Circuit made the same mistake here. While the membership agreement between BHCEC and Big Man provides for the sale of electricity transmitted along perpetual rights of way, that agreement does not justify tribal court jurisdiction over *all* aspects of the relationship or over BHCEC in general, especially when the agreement creating the relationship expressly provides otherwise. As this Court has "emphasized repeatedly in this context, when it comes to tribal regulatory authority, it is not in for a penny in for a Pound." *Id.* at 338 (quotation omitted).

Like the lower courts in *Plains*, the Ninth Circuit here based its decision entirely on the existence of the membership agreement between BHCEC and Big Man. For such a relationship to satisfy the first *Montana* exception, it must be voluntary, commercial, and truly consensual. Providing electricity in a non-discriminatory fashion to large portions of rural Montana and Wyoming and including areas that

happen to be on an Indian Reservation to fulfill the federal purposes of the Rural Electrification Act hardly qualifies.

B. The quasi-governmental nature of providing electrical service distinguishes this case from *Montana's* first exception and illustrates the Circuit split.

Courts examining the first *Montana* exception have concluded that it is only applicable to a certain type of relationship. The consensual relationship exception requires a "private consensual relationship, from which the official actions at issue in this case are far removed." *Hicks*, 533 U.S. at 359 n. 3. "The [*Montana*] Court . . . obviously did not have in mind States or states officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into." *Id.* at 372.

The Ninth Circuit's decision completely ignored the type of entity BHCEC is and results in a conflict with decisions from the Tenth and Eighth Circuits. In *MacArthur v. San Juan County*, 497 F.3d 1057, 1070 (10th Cir. 2007), the Tenth Circuit considered a Tribe's attempts to regulate an employment contract with a non-Indian health care provider. The Court noted, "[T]his case is unique in that the consensual relationship at issue involves a political subdivision of the State of Utah, and it was entered into pursuant to an exercise of the police power on non-Indian land." *Id.* at 1072. The Court held that the first *Montana* exception only applies to private individuals or entities

who voluntarily submit themselves to tribal jurisdiction. "We too adhere to the distinction between private individuals or entities who voluntarily submit themselves to tribal jurisdiction and 'States or state officers acting in their governmental capacity.'" *Id.* at 1073-1074 (citations omitted).

The consensual relationship in *MacArthur* was between the San Juan Health Services District, a creature of Utah state law, and employees where the "employment relationships at issue were entered into exclusively in SJHSD's governmental capacity, and those relationships were part and parcel of SJHSD's duty to provide medical services to residents of San Juan County." *Id.* at 1074. After reviewing the type of contract involved, and the relationship between that conduct and the legitimate exercise of the State's police power, the *MacArthur* Court concluded, "Accordingly, the employment relationships between SJHSD and Mr. Riggs and Mr. Dickson were not 'private consensual relationships' in any sense of the term and do not fall within the first *Montana* exception." *Id.*

The same can be said of providing electricity to rural Americans. The Rural Electrification Act was designed to empower cooperatives like BHCEC to provide electricity to areas like the checkerboarded Crow Reservation. The electrical cooperatives created to further that objective are in the nature of a quasi-governmental entity, subject to extensive federal regulation and contractual mortgage requirements reflecting the legitimate exercise of the federal government's police power. Consensual relationships

arising from that situation are not the type of relationship the *Montana* court envisioned would suffice to create tribal regulatory and adjudicatory jurisdiction over a non-Indian entity like BHCEC.

The Eighth Circuit in *Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662 (8th Cir. 2015) similarly recognized this "provision of government service" exception to the first *Montana* exception. There, the parents of a tribal member student filed a tribal court complaint against the nonmember school district. While there was an agreement between the Tribe and the school district to educate tribal members, it was not the type of commercial, consensual relationship sufficient to confer jurisdiction over a nonmember.

The School District in *Fort Yates* had entered into an agreement with the Tribe to provide administrative and educational services for students, both Indian and non-Indian, residing on the Reservation. The Eighth Circuit found that the school district was prohibited by North Dakota law from accepting tribal jurisdiction over its operations. More importantly, even if the School District could agree to such jurisdiction, the agreement would still not be the type of "private consensual relationship" required after *Hicks*. *Id.* at 668. "The [Montana] Court (this is an opinion, bear in mind, not a statute) *obviously did not have in mind States or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction* by the arrangements that they (or their

employers) entered into." *Fort Yates*, 786 F.3d at 668 (quoting *Hicks*, 533 U.S. at 372) (emphasis in original).

The Eighth Circuit in *Yates* referenced both *MacArthur* and *County of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998) and concluded, "We agree with these well-reasoned decisions. The School District in this case acted in its official capacity and, specifically, in furtherance of its obligations under the Constitution of North Dakota to make public education 'open to all children of the state of North Dakota' when it entered into the Agreement. The Agreement therefore does not fall within the ambit of the first *Montana* exception." *Fort Yates*, 786 F.3d at 669.

The Eighth Circuit recently reiterated these concepts when considering another federally regulated activity—the leasing of oil and gas. In *Kodiak Oil & Gas (USA) Inc., v. Burr*, 932 F.3d 1125 (8th Cir. 2019), the Court concluded that federal rather than tribal law governed a suit brought in tribal court arising out of a non-Indian's lease of oil and gas lease on allotted trust land within the Fort Berthold Reservation. Plaintiffs sought royalties arising from natural gas flared from oil wells on Indian owned lands. The Eighth Circuit concluded:

> The first *Montana* exception does not apply here. The oil and gas companies' leases are consensual relationships with tribal members, but the entire relationship is mediated by the federal government. A consensual relationship alone is not enough. Even where there is a consensual relationship with the tribe or its members, the tribe may regulate non-member activities only

> where the regulation 'stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 554 U.S. at 336, 128 S.Ct. 2709. The complete federal control of oil and gas leases on allotted lands—and corresponding lack of any role for tribal law or tribal government in that process—undermines any notion that tribal regulation in this area is necessary for tribal self-government.

Kodiak Oil and Gas, 932 F.3d at 1138.

BHCEC's provision of electrical service is subject to extensive federal regulation. Just as "suits over oil and gas leases on allotted trust lands are governed by federal law, not tribal law," the delivery of electrical service by an REA federally financed cooperative is "governed by federal law, not tribal law." *Id.* at 1129-1130.

The split between the Ninth, Tenth, and Eighth Circuits is entrenched. The Eighth Circuit's 2015 decisions in *Fort Yates* and *Kodiak Oil*, the Ninth Circuit's decision in *County of Lewis v. Allen*, and the Tenth Circuit's decision in *MacArthur* are all directly contrary to the Ninth Circuit's decision here and its 2017 decision in *Window Rock Unified School District v. Reeves*, 861 F.3d 894 (9th Cir. 2017). There, the Ninth Circuit concluded that tribal court exhaustion was required where a school district that operated a public school on land leased from an Indian tribe was subjected to tribal court jurisdiction over employment decisions despite the "quasi-governmental" nature of

the educational services provided. *Window Rock*, 861 F.3d at 906 (citing *Nevada v. Hicks*, 533 U.S. at 360). The dissent pointed out that the school districts in fact were "non-tribal-member political subdivisions of the State of Arizona with statutory and state constitutionally imposed mandates to provide a uniform public school system to all Arizona's children." *Window Rock*, 861 F.3d at 907. As such, tribal jurisdiction to regulate their activities was "neither colorable nor plausible." *Id.*

Rural electric cooperatives like BHCEC provide a federally sanctioned, quasi-governmental service. They have been referred to as instrumentalities of the United States. They provide a necessary public function—reliable and affordable power for rural America so the federal government does not have to.

> "[R]ural electric cooperatives exist to provide a necessary public function conceived and directed by the United States." *Caver*, 2015 U.S. Dist. LEXIS 104899, at *5, 2015 WL 4742490. In this regard, they "assist the federal government by carrying out the rural electrification program, providing electric power supply and distribution services that RUS would otherwise have to undertake to provide itself." *Id.* at *5-6. The objective of the Rural Electrification Administration "was to provide electricity to those sparsely settled areas which the investor-owned utilities had not found it profitable to service" through the use of non-profit cooperatives. *Salt River Project Agricultural Improvement and Power Dist. v. Fed. Power*

> *Comm'n*, 391 F.2d 470, 473 (D.C. Cir. 1968). The Fifth Circuit Court of Appeals has explained that "rural electric cooperatives are something more than public utilities; they are instrumentalities of the United States. They were chosen by Congress for the purpose of bringing abundant, low cost electric energy to rural America." *Alabama Power Co. v. Alabama Elec. Coop., Inc.*, 394 F.2d 672, 677 (5th Cir. 1968) (internal quotations omitted); *see also Fuchs v. Rural Elec. Convenience Coop. Inc.*, 858 F.2d 1210, 1217 (7th Cir. 1988) ("[R]ural electric cooperatives are in some sense instrumentalities of the United States.") (internal quotations omitted).

Leonard Cessna v. Rea Energy Cooperative, Inc., 2016 WL 3963217, *5 (W.D. Penn. 2016); *see also Caver v. Central Alabama Electric Cooperative*, 845 F.3d 1135, 1138 (11th Cir. 2017).

By regulating when and how BHCEC can terminate service, the Crow Tribe is effectively regulating activities undertaken to fulfill the congressional objective of providing "a public function conceived of and directed by the federal government." *Caver,* 845 F.3d at 1144. By subjecting BHCEC to tribal court jurisdiction and a tribally imposed fine for terminating the electricity of someone who refused to pay for it, the Crow Tribe is interfering with a public function conceived of, regulated, and directed by the United States. The first *Montana* exception was never intended to apply to this type of situation and the conflict between the Circuits should be addressed.

C. The membership agreement's forum selection and choice of law clauses distinguish this case from *Montana's* first exception and further highlights the Circuit split.

The Ninth Circuit's analysis below was grossly oversimplified. The Court concluded that simply because BHCEC had agreements to provide electricity to tribal members, the cooperative's operations could be regulated, and adjudicated, by the Crow Tribe. The Court of Appeals never considered the actual language in the agreements that purportedly created jurisdiction in the first place. The Eighth Circuit in *Fort Yates* at least noted that the *right* contract, perhaps even one involving state interests, could possibly provide for tribal court jurisdiction. "To be clear, we are not ruling out the possibility that a state and a tribe could enter into an agreement that confers jurisdiction upon the tribe—such as an agreement that expressly provides for such jurisdiction. But no such agreement is at issue in the instant case." *Fort Yates*, 786 F.3d at 669, n.5.

The membership agreement between BHCEC and Big Man *does* expressly address jurisdiction. It reflects consent to a particular forum for dispute resolution based on a particular choice of law. Big Man agreed that "the laws of the State of Montana shall control and be exclusively applied for the purpose of determining the rights of the Cooperative and Applicant hereunder and the Montana Thirteenth Judicial District Court, Big Horn County, shall have exclusive jurisdiction and venue for the purpose of actions or proceedings brought to determine the rights of either the Cooperative or the

Applicant arising by reason of membership in the Cooperative or delivery of electric energy to said member." The parties consented to Montana law and Montana state court jurisdiction. There was no "consent" to tribal regulation and tribal court adjudication and the mere existence of an agreement to provide power cannot establish otherwise.

Those few lower court cases that have found jurisdiction over non-Indians based on the first *Montana* exception have focused on the reasonable expectations of the contracting parties. In *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1206 (9th Cir. 2013), the Ninth Circuit concluded that GCSD "should have reasonably anticipated being subjected to the Tribe's jurisdiction" because the agreement creating the commercial consensual relationship specified that the project would be developed, managed and operated "in compliance with all applicable federal [Hualapai] Nation, state, and local laws, ordinances, rules, and regulations." *Grand Canyon*, 715 F.3d at 1206. "Thus, the necessary corollary would be that if GCSD operated in violation of the Tribe's laws, it could be subjected to its jurisdiction. GCSD consented to be bound by this language when it signed the agreement with SNW." *Id.*

Similarly, in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 174, n.4 (5th Cir. 2014), the non-Indian lessee entered into a commercial lease agreement in which it agreed to "comply with all codes and requirements of all tribal and federal laws and regulations" pertaining to the leased premises.

The agreement also provided that it would be "construed according to the laws of the Mississippi Band of Choctaw Indians and the state of Mississippi," that it would be "subject to the Choctaw Tribal Tort Claims Act," and that the "exclusive venue and jurisdiction shall be in the Tribal Court of the Mississippi Band of Choctaw Indians." *Id.*

These cases all reflected some consent to tribal regulation and adjudication. Without such consent, the first *Montana* exception cannot be satisfied.

> [A]n Indian tribe does not gain plenary jurisdiction over all activities of a non-member simply by having some contractual relationship with him—the exercise of jurisdiction must have a nexus to the parties' relationship. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). The dispute must relate to the parties' contractual relationship such that the nonmember can fairly be said to have consented to tribal-court jurisdiction by contracting with the Tribe. *See id.* at 656-657 (holding the first *Montana* exception inapplicable because a non-Indian could not have consented to a tribal regulation by entering an unrelated agreement with the tribe).

Ute Indian Tribe of Uintah and Ouray Reservation v. McKee, 32 F.4th 1003, 1009 (10th Cir. 2022). BHCEC has no "contract" with the Crow Tribe or tribal members besides membership agreements by which all cooperative members, tribal or not, receive power in a non-discriminatory fashion. The membership agreements expressly provide for State jurisdiction and

State regulation. BHCEC never contractually consented to be regulated by the Crow Tribe.

As this Court has held, appropriate consent is required to permit application of tribal law and a tribal forum to a non-member actor.

> Not only is regulation of fee land sale beyond the tribe's sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. Tribal sovereignty, it should be remembered, is "a sovereignty outside the basic structure of the Constitution." The Bill of Rights does not apply to Indian tribes. Indian courts "differ from traditional American courts in a number of significant respects." And nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.

Plains Commerce Bank, 554 U.S. at 337. This Court reaffirmed these concepts just last year. "We also note that our prior cases denying tribal jurisdiction over the activities of non-Indians on a reservation have rested in part upon the fact that full tribal jurisdiction would require the application of tribal laws to non-Indians who do not belong to the tribe and consequently had no

say in creating the laws that would be applied to them." *United States v. Cooley*, 141 S.Ct. 1638, 1644 (2021) (citations omitted).

BHCEC operates on federal rights of way that have already been determined to be the equivalent of non-Indian fee land. *Big Horn v. Adams*, 219 F.3d at 950 ("Under *Red Wolf* and *Strate*, therefore, Big Horn's rights-of-way are the equivalent of non-Indian fee land for the purpose of considering the limits of the Tribe's regulatory jurisdiction.") The Crow Tribe has no power to exclude BHCEC from the Reservation. As the recipient of federal low-interest loans designed to achieve the federal objective of rural electrification, BHCEC is legally obligated to serve both members and non-members alike in a non-discriminatory fashion. Federal regulations prohibit it from refusing to provide service to customers based on their race or national origin. 7 C.F.R. § 15.3. BHCEC's first "cooperative principle" is that the cooperative is open all persons "willing to accept the responsibilities of memberships without gender, social, racial, political or religious discrimination." *Infra n. 1.*

In other words, BHCEC *must* offer membership to all who agree to the terms of its membership agreements. Those agreements set forth the only conditions cooperative members must accept, and they plainly provide for exclusive jurisdiction in *State* court and the controlling applicability of *State* law. The reasonable expectation of both BHCEC and its members is surely not that the sale of power by an instrumentality of the United States will be regulated by the Crow Tribe, and BHCEC will find itself sued in

Crow Tribal court for violating a Crow Tribal regulation it had no role in enacting and where its conduct is only judged by tribal members.

The Ninth Circuit found jurisdiction under the consensual relationship exception, but completely ignored the nature of that relationship and the language in the very contract giving rise to the purported relationship. It "defies common sense" that a consensual relationship that precludes tribal court jurisdiction can be used to justify the assertion of such jurisdiction over BHCEC.

CONCLUSION

If the Ninth Circuit decision is allowed to stand, any provider of goods or services to tribal members within the exterior boundaries of any reservation, whatever the nature of those services or their importance to the federal government, and regardless of the language in the agreement by which those services are provided, will be subject to open-ended tribal regulation and adjudication in a tribal court. For these reasons, this Court should grant the Petition for Certiorari.

Respectfully submitted,

JAMES E. TORSKE
TORSKE LAW OFFICE
314 North Custer Ave.
Hardin, MT 59034
(406) 665-1902
torskelaw@tctwest.net

NEIL G. WESTESEN
Counsel of Record
DALE SCHOWENGERDT
CROWLEY FLECK PLLP
900 N Last Chance Gulch
Suite 200
P.O. Box 797
Helena, MT 59624-0797
(406) 449-4165
nwestesen@crowleyfleck.com

Counsel for Petitioner

Dated this 19th day of July, 2022.