

# Public Land & Resources Law Review

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Volume 0 Case Summaries 2018-2019

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## Big Horn County Electric Cooperative, Inc. v. Big Man

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### Recommended Citation

Berntsen, Brett (2018) "Big Horn County Electric Cooperative, Inc. v. Big Man," *Public Land & Resources Law Review*: Vol. 0 , Article 12.

Available at: <https://scholarship.law.umt.edu/plrlr/vol0/iss9/12>

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***Big Horn County Electric Cooperative, Inc. v. Big Man*, No. 1:17-CV-00065, 2018 WL 4603276, 2018 U.S. Dist. LEXIS 164387 (D. Mont. Sept. 24, 2018)**

**Brett Berntsen**

The tribal exhaustion doctrine requires that parties first exhaust available tribal court remedies before challenging tribal jurisdiction in federal court. Exactly what constitutes an exhaustion of tribal court remedies, however, remains riddled with nuance. In *Big Horn County Electric Cooperative, Inc. v. Big Man*, the U.S. District Court for the District of Montana rejected a U.S. magistrate judge’s recommendation to remand a case to tribal court to further develop the factual record. Instead, the district court relied on federal circuit court precedent in holding that exhaustion had occurred when the tribal appellate court expressly ruled on the case’s jurisdiction question, although its merits and factual determinations remained unresolved.

I. INTRODUCTION

Alden Big Man originally sued Big Horn County Electric Cooperative, Inc. (“BHCEC”) in Crow Tribal Court (the “tribal trial court” or “trial court”) after BHCEC allegedly shut off Big Man’s power in violation of tribal law.<sup>1</sup> The tribal trial court dismissed Big Man’s case, finding it lacked jurisdiction over the non-Indian BHCEC.<sup>2</sup> Big Man appealed, and the Apsaalooke Appeals Court (the “tribal appellate court” or “appellate court”) reversed the trial court’s jurisdictional findings and remanded the case for a decision on its merits.<sup>3</sup> BHCEC then filed suit in U.S. District Court for the District of Montana seeking declaratory and injunctive relief stating the tribal trial court lacked jurisdiction over Big Man’s case, and thereby preventing the Crow Tribe from regulating BHCEC’s actions.<sup>4</sup>

After reviewing motions from a host of named tribal defendants—including Big Man, several Crow tribal justices, and members of the Crow tribal health board—a U.S. magistrate court recommended BHCEC’s complaint be dismissed for failure to exhaust tribal court remedies.<sup>5</sup> The district court, reviewing the magistrate’s ruling, rejected the recommendation and held that BHCEC had indeed exhausted its tribal

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1. *Big Horn Cty. Elec. Coop., Inc. v. Big Man*, No. 1:17-CV-00065, 2018 U.S. Dist. LEXIS 164576, at \*3 (D. Mont. Aug. 15, 2018) [hereinafter *Magistrate Opinion*].

2. *Id.*

3. *Id.* at \*4.

4. *Id.*

5. *Id.* at \*22-23.

court remedies and that the district court had no choice but to consider BHCEC's complaint.<sup>6</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

Big Man, an enrolled member of the Crow Indian Tribe, received electricity at his house on the Crow Indian Reservation pursuant to a membership agreement with BHCEC, a non-Indian electrical cooperative headquartered in Hardin, Montana.<sup>7</sup> In January 2012, BHCEC disconnected Big Man's electric service after Big Man fell behind on payments.<sup>8</sup> Big Man then filed suit in the tribal trial court alleging BHCEC had violated a Crow tribal law prohibiting the cancellation of utility services during winter.<sup>9</sup> The trial court issued summary judgment in favor of BHCEC, finding that it lacked subject matter jurisdiction over Big Man's claim.<sup>10</sup> Big Man appealed this jurisdictional ruling to the tribal appellate court, which later issued a lengthy decision critiquing the trial court for failing to develop a detailed factual record concerning the jurisdiction claims.<sup>11</sup> The appellate court concluded that the trial court did, in fact, have subject matter jurisdiction over the claim and remanded Big Man's case for a decision on its merits.<sup>12</sup>

BHCEC then filed suit in federal district court, seeking a ruling on tribal jurisdiction.<sup>13</sup> In response, Big Man, members of the Crow tribal health board, Crow Chief Justice Joey Jayne, and Associate Justices Leroy Not Afraid and Kari Covers Up filed motions to dismiss, arguing in part that BHCEC had failed to exhaust its tribal court remedies before seeking federal relief.<sup>14</sup> The district court referred the case to the federal magistrate court to review the motions and submit a proposed findings of fact and recommendations.<sup>15</sup> The magistrate determined that BHCEC had failed to exhaust its tribal remedies and recommended the district court grant the tribal defendants' motions to dismiss.<sup>16</sup>

BHCEC timely objected to the magistrate's findings, arguing it had indeed exhausted its tribal remedies and that tribal court jurisdiction was plainly lacking.<sup>17</sup> Pursuant to the Federal Rules of Civil Procedure,

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6. Big Horn Cty. Elec. Coop., Inc. v. Big Man, No. 1:17-CV-00065, 2018 WL 4603276, 2018 U.S. Dist. LEXIS 164387, at \*7 (D. Mont. Sep. 24, 2018).

7. *Magistrate Opinion*, 2018 U.S. Dist. LEXIS at \*3.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at \*3-4.

12. *Id.* at \*4 (citing *Big Man v. Big Horn Cty. Elec. Coop., Inc.*, 2013 CROW AP 1, 16).

13. *Id.*

14. *Id.* at \*4, \*6.

15. Order, Document 38, at 1-2, *Big Horn Cty. Elec. Coop., Inc. v. Big Man*, 2018 WL 4603276, 2018 U.S. Dist. LEXIS 164387 (D. Mont. Sep. 24, 2018) (No. 1:17-CV-00065); 28 U.S.C. § 636(b)(1)(B) (2012).

16. *Magistrate Opinion*, 2018 U.S. Dist. LEXIS at \*22-23.

17. *Big Man*, 2018 U.S. Dist. LEXIS at \*2.

the district court reviewed the magistrate's findings de novo to determine whether to accept, reject, modify, or remand the opinion with further instructions.<sup>18</sup>

### III. ANALYSIS

The district court exclusively addressed BHCEC's threshold issue, identifying as dispositive the question of tribal court exhaustion where a tribal appellate court has positively ruled on the tribal trial court's jurisdiction, but questions on the merits of the claims remain.<sup>19</sup>

While non-Indians may challenge tribal jurisdiction in federal court under federal question jurisdiction, courts have long held that they must exhaust their tribal court remedies first.<sup>20</sup> The district court explained that the rule is based on notions of comity and supports tribal sovereignty in three ways.<sup>21</sup> First, it reflects congressional policies promoting tribal self-government.<sup>22</sup> Second, the rule facilitates the judicial process by allowing the tribal court to develop a full factual record.<sup>23</sup> Third, the rule provides the "benefit of tribal expertise if further review becomes necessary."<sup>24</sup>

In the preeminent case affirming the doctrine's validity, the U.S. Supreme Court held that exhaustion, at a minimum, "means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts."<sup>25</sup> Since then, other jurisdictions have built upon this baseline requirement.<sup>26</sup> For example, the U.S. Court of Appeals for the Ninth Circuit has held that exhaustion is satisfied when the tribal appellate court has the opportunity to review a case's jurisdictional questions and either issues or declines to issue a holding.<sup>27</sup> Meanwhile, the U.S. Court of Appeals for the Tenth Circuit has held that exhaustion is satisfied when the tribal appellate court expressly considers a case's jurisdiction question.<sup>28</sup>

Based on these holdings, the district court concluded that BHCEC had exhausted its tribal court remedies because the tribal appellate court's decision satisfied the minimum exhaustion requirements established by

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18. *Id.* at \*1-2; FED. R. CIV. P. 72(b).

19. *Big Man*, 2018 U.S. Dist. LEXIS at \*1-2.

20. *Id.* at \*2-3 (citing *Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 846 (9th Cir. 2009)).

21. *Id.* (citing *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856-857, (1985)).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at \*3 (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987)).

26. *Id.*

27. *Id.* (citing *Elliot*, 566 F.3d at 847 n. 4)).

28. *Id.* (citing *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1150 (10th Cir. 2011)).

the Ninth and Tenth Circuits.<sup>29</sup> By reviewing Big Man’s appeal and expressly stating the tribal trial court had subject matter jurisdiction over the action, the tribal appellate court clearly had an opportunity to consider and rule upon the jurisdictional question.<sup>30</sup> The district court noted that its ruling satisfied the exhaustion doctrine’s policy of allowing tribal courts to resolve jurisdiction issues in the first instance.<sup>31</sup> Considering the minimal requirements for exhaustion established by the Ninth Circuit, the district court determined that it had no alternative but to address the merits of BHCEC’s tribal jurisdiction challenge using the scarce facts available in the record.<sup>32</sup>

Despite its succinct holding, the district court claimed that it did not reach its conclusion “lightly,” and acknowledged the considerations highlighted in the magistrate court’s opinion.<sup>33</sup> The magistrate found BHCEC had not exhausted its tribal remedies because the appellate court had not truly had an opportunity to address the question of tribal jurisdiction,<sup>34</sup> and noted that the tribal appellate court repeatedly directed the trial court make further factual findings, particularly regarding land status.<sup>35</sup> Because land status often plays a key role in determining tribal civil jurisdiction, the magistrate found that the question could not be completely considered until the factual deficiencies were resolved in the record.<sup>36</sup> Additionally, the magistrate court stressed the importance of allowing the tribal court to adequately develop a factual record, because it is a fundamental policy underlying the exhaustion doctrine.<sup>37</sup> Therefore, despite the tribal appellate court’s “somewhat contradictory” holding, the magistrate concluded that the jurisdictional question did not have the requisite ripeness for tribal appellate court review until the tribal trial court supplemented the factual record.<sup>38</sup>

In light of the magistrate court’s concerns, the district court conceded that, under similar circumstances, it too had previously remanded a case to tribal court to conduct further fact-finding.<sup>39</sup> Nevertheless, the district court determined that the Ninth Circuit’s subsequent rulings had foreclosed upon that option.<sup>40</sup> Because the Ninth Circuit found in other causes of action that exhaustion occurred when a tribal appellate court discretionarily declined to address questions of tribal jurisdiction, the district court held exhaustion had surely occurred where a

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29. *Id.* at \*5.

30. *Id.* at \*5-6.

31. *Id.* at \*7 (citing *LaPlante*, 480 U.S. at 160).

32. *Id.*

33. *Id.* at \*6.

34. *Magistrate Opinion*, 2018 U.S. Dist. LEXIS at \*22.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Big Man*, 2018 U.S. Dist. LEXIS at \*6 (citing *Glacier Elec. Coop., Inc. v. Williams*, 96 F.Supp.2d 1089, 1092-1093 (D. Mont. 1999)).

40. *Id.* (citing *Elliot*, 566 F.3d at 846; *Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1217 (9th Cir. 2007)).

tribal appellate court expressly chose to provide an answer on those questions.<sup>41</sup> Moreover, the district court questioned whether it ever had the power to remand a case to tribal court based on an inadequate record, noting that “[n]either the Supreme Court nor the Ninth Circuit” had recognized such discretion.<sup>42</sup>

#### IV. CONCLUSION

While narrowly focused and highly procedural, *Big Man* provides a valuable example of what constitutes exhaustion of tribal court remedies throughout Montana and the Ninth Circuit. As the opinion shows, the nuances of the exhaustion doctrine can lead to differing interpretations concerning when exhaustion has occurred. The district court attempted to provide further clarity by confirming exhaustion’s occurrence where a tribal appellate court expressly rules on a case’s jurisdictional question. Additionally, this case indicates that insufficiencies in the factual record alone does not prevent a party from challenging tribal jurisdiction in federal court. This holding could serve as a cautionary reminder to tribal trial courts to develop a factual record when making jurisdictional rulings and could assist tribal appellate courts in knowing what to avoid when seeking to remand a case for further fact-finding.

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41. *Id.*

42. *Id.* at \*6-7.