UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

ALLTEL COMMUNICATIONS, LLC, Plaintiff,	)	
vs.	)	**CIV. No. 10-5011-JLV**
OGLALA SIOUX TRIBE Defendant.	)	

ALLTEL COMMUNICATIONS, LLC's MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Alltel Communications, LLC ("Alltel") is entitled to a preliminary injunction to prevent the Oglala Sioux Tribe (the "Tribe") from further pursuing a suit against Alltel in the Oglala Sioux Tribal Court ("Tribal Court"). The four factors this Court must consider in weighing injunctive relief overwhelmingly favor an injunction here.

First, Alltel is more than *likely* to succeed on the merits in showing that the Tribal Court lacks jurisdiction; it is virtually *certain* to do so. The Tribe has sought an injunction from the Tribal Court prohibiting Alltel from transferring the assets used to provide wireless telecommunications service on the Pine Ridge Indian Reservation (the "Reservation"). The proceeding in Tribal Court, however, is rife with dispositive jurisdictional defects. Although the Tribe has filed pleading after pleading randomly adding new respondents in various captions, the Tribe has never filed a complaint, nor has it served a summons and complaint on any defendant as required by both the Oglala Sioux Tribe Law and Order Code ("Tribal Code")[1] and elementary precepts of due process. Moreover, the sole basis the Tribe has given for the Tribal Court to exercise jurisdiction over a nonmember (Alltel) under *Montana v. United States*, 450 U.S. 544, 564 (1981), is a contract (the Tate Woglaka Service Agreement (the "Service Agreement") (Ex. 1)) *to which Alltel is not a party*. Thus, to exercise jurisdiction over any defendant on this record, the Tribal Court would have to ignore the Tribal Code, elementary principles of due process, and clear federal law limiting tribal jurisdiction over nonmembers.

But those are not the only defects depriving the Tribal Court of jurisdiction to grant the relief the Tribe seeks. The underlying contract on which the Tribe purports to base its claims requires all disputes to be submitted to arbitration and thus also forecloses Tribal Court

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[1] Relevant provisions of the Tribal Code are attached as Ex. 15.

jurisdiction. Even worse, on the basis of the questionable procedural foundation it has established, the Tribe is asking the Tribal Court to wade into substantive matters subject to exclusive federal control. The sale of assets the Tribe is asking the Tribal Court to enjoin is taking place pursuant to an antitrust consent decree entered by a federal court. Granting the Tribe's requested injunction would thus interfere with a transaction mandated under a federal court order. In addition, the subject matter of the injunction is outside the Tribal Court's jurisdiction and would bring it into conflict with the Federal Communications Commission ("FCC"). The Tribe has asked the Tribal Court to enjoin the transfer of federally issued licenses for electromagnetic spectrum used for providing wireless telephone service. Under federal law, the assignment and transfer of such licenses lies within the exclusive authority of the FCC. The particular licenses here, moreover, cover vast areas of South Dakota outside the boundaries of the Reservation. A Tribal Court injunction thus would interfere with an orderly transition in wireless services for thousands of nonmembers wholly beyond the Tribal Court's jurisdiction.

Second, if the action in Tribal Court is permitted to proceed, Alltel will suffer several forms of irreparable harm. Being deprived of the federal right to be free of unwarranted tribal court jurisdiction is itself a well-recognized form of irreparable harm justifying injunctive relief. *See, e.g.*, *MacArthur v. San Juan Cty.*, 309 F.3d 1216, 1224 & n.7 (10th Cir. 2002). Here, moreover, Alltel also has a bargained-for right to have all disputes related to the Service Agreement decided by arbitration. Deprivation of that right is also irreparable harm. Each time Alltel has to continue responding to the confusing array of contradictory pleadings that different tribal entities have filed in Tribal Court, its rights are impaired and it suffers further harm. Moreover, given the Tribe's failure to adhere to fundamental procedural requirements (such as service of process), permitting the Tribal Court to proceed would violate Alltel's rights under the

Due Process Clause, thereby magnifying the irreparable harm to Alltel. In addition, if the Tribal Court grants the relief the Tribe seeks and enjoins the transfer of assets, Alltel will suffer further irreparable harm. As explained in the Declaration of Stephen J. Linskey (attached as Ex. 2), Alltel would be forced to spend countless hours and millions of dollars in an effort to hold back assets from the sale that is now planned, pursuant to a federal consent decree, to AT&T. All of those costs will be unrecoverable if it later turns out the order was wrongly entered. Moreover, in the time available, it may not even be *possible* to plan and execute a workable separation of those assets from the rest of the network being transferred to AT&T. That means Alltel could be put in the position of being subject to contradictory court orders and being unable to comply with both.

Third, in contrast to the irreparable harm Alltel will suffer if the Tribal Court action proceeds, the Tribe will not suffer any cognizable harm if it is enjoined from pressing its case in Tribal Court. The Tribe suffers no harm if it is merely required to abide by the contract it signed and to submit all disputes arising out of the Service Agreement to arbitration. To the extent the Tribe raises speculation that if it cannot block the sale to AT&T, it will lose forever a supposed contractual right to the assets and that service on the Reservation will be cut off, such arguments are irrelevant here. A holding by this Court that the Tribal Court lacks jurisdiction in this case does not determine forever that the Tribe could not, in an appropriate forum after initiating an arbitration, seek relief. That question is for another day. In any event, the supposed harms the Tribe points to are illusory. Even if the Tribe did have a contract right to the assets — which it does not — allowing the sale to AT&T would not cause any irreparable harm. Where a contract right can be proved, specific performance can be an available remedy, even if that requires unwinding a previous sale. The Tribe gives no reason to think that any rights it actually has

under the Service Agreement will be extinguished beyond recovery if the sale to AT&T proceeds. Similarly, the Tribe's speculation about loss of service ignores the fact that the Service Agreement will be assigned to AT&T and the Service Agreement itself will require AT&T to continue providing service.

Fourth, and finally, the public interest weighs overwhelmingly in favor of an injunction enjoining the Tribe from proceeding in Tribal Court. Such an injunction would relieve the court system of unnecessary litigation and enforce the parties' bargain for an alternative mechanism for dispute resolution, thereby vindicating the federal policy in favor of arbitration. In addition, the relief the Tribe seeks in Tribal Court, if granted, would disrupt wireless service for tens of thousands of nonmembers living outside the bounds of the Reservation. It would mean that thousands of South Dakotans would be blocked from having AT&T become their wireless provider. And the scramble to accomplish the separation of assets will inevitably result in reduced service quality.

As of this filing, the Tribal Court has not yet issued its decision on jurisdiction. Nevertheless, given the tight timeframes under which the parties and the Court are operating, Alltel submits this Memorandum to explain in advance of the hearing set for May 7, 2010, why a an injunction prohibiting the Tribe from continuing to seek relief in Tribal Court is warranted. Alltel will file a short supplemental memorandum to address the specifics of any Tribal Court decision issued before May 7.

BACKGROUND

A. The Tate Woglaka Service Agreement, WWC License LLC, and Alltel

In 2000, the Oglala Sioux Tribe and WWC License LLC entered into the Tate Woglaka Service Agreement. (Ex. 1). The Service Agreement sets forth the terms under which WWC License LLC provides wireless telephone service on the Pine Ridge Indian Reservation. WWC

License LLC has provided service under the Service Agreement since 2000 and continues to provide service on the Reservation today. *See* Affidavits of Margaret Feldman, Karen Shipman, and Joseph Greco (Exs. 3-5) ("Feldman Aff.," "Shipman Aff.," and "Greco Aff.").

Several provisions of the Service Agreement are relevant here.

The Service Agreement contains a broad, mandatory arbitration clause requiring all disputes related to the contract to be submitted to binding arbitration:

> Arbitration. The Parties agree that all disputes, claims and controversies between them . . . arising from this Agreement . . . or otherwise in connection therewith, including, without limitation, contract disputes and tort claims, shall be resolved by binding arbitration pursuant to the Commercial Rules of the American Arbitration Association ("AAA").

Service Agreement § 17(B) (Ex. 1). The Service Agreement specifies a place for such an arbitration, prescribes rules for such an arbitration, and specifies that the Tribe "further waives and agrees not to assert any doctrine requiring exhaustion of tribal court remedies prior to proceeding with arbitration." *Id.* To facilitate arbitrations under the contract, the Service Agreement permits either party to seek "ancillary remedies" "during any dispute":

> This arbitration provision shall not limit the right of either Party during any dispute, claim or controversy to seek, use, and employ ancillary, or preliminary rights and/or remedies (collectively, the "Ancillary Remedies"), judicial or otherwise, for the purposes of realizing upon, preserving, protecting, foreclosing upon or proceeding under forcible entry and detainer for possession of, any real or personal property, and any such action shall not be deemed an election of remedies.

Id.

The Service Agreement makes it express that the Tribe has no rights in the assets that WWC License LLC uses to provide wireless service on the Reservation. That includes both the physical assets (such as antenna towers and radio equipment) and the licenses for spectrum issued by the FCC that are necessary for providing wireless service. Section 19 states:

> OGLALA SIOUX TRIBE acknowledges and agrees (i) that Western Wireless retains all ownership of the Cellular Telecommunications Infrastructure which provides the Telecommunications Services on the Reservation; (ii) Cellular Telecommunications Infrastructure is a part of a larger cellular network which is used by Western Wireless's mobile cellular customers and will continue to be used by all Western Wireless's mobile cellular customers; (iii) Western Wireless retains all rights to all revenues generated by the Sites and Western Wireless's mobile cellular customers on the Reservation; and (iv) retains all rights to all licenses granted by the FCC and other Government Agencies.

See also id. § 1 (defining "Cellular Telecommunications Infrastructure" to encompass a variety of transmission and switching equipment). The Service Agreement contains no option, right of first refusal, or any other provision entitling the Tribe to receive the assets as a gift, to purchase the assets, or to approve or disapprove any transfer of the cell towers, antennae, spectrum licenses, or other property used in providing service.

The Service Agreement does, however, make WWC License LLC's ability to assign the Service Agreement itself to another party — *i.e.*, to assign the *contract* — "subject to" the Tribe's "approval, which shall not be unreasonably withheld or delayed," *id.* § 20(J), providing:

> Subject to OGLALA SIOUX TRIBE'S approval, which shall not be unreasonably withheld or delayed, Western Wireless may assign this Agreement upon written notice to OGLALA SIOUX TRIBE, to any person controlling, controlled by, or under common control with Western Wireless, or any person or entity that, after first receiving all necessary regulatory agency approvals, acquires Western Wireless's radio communications business and assumes all obligations of Western Wireless under this Agreement.

Id. Section 20(J) thus, by its terms, contemplates that some other entity may "acquir[e] Western Wireless's radio communications business" — that is, all cell sites, radio transmitters, and other assets used to provide service on the Reservation — but it gives the Tribe no rights concerning that transfer of assets. Instead, the Tribe's only role is in approving the assignment of the Service Agreement itself.

In 2005, Alltel Corporation acquired the parent company of WWC License LLC. WWC License LLC's independent existence, however, was not altered, and WWC License LLC

continued providing service under the Service Agreement. Feldman Aff. at ¶ 4; Shipman Aff. at ¶ 6. Alltel Communications, LLC ("Alltel") simply became an intermediate parent of WWC License LLC. *See* Feldman Aff. at ¶¶ 3-4 & Ex. 1. WWC License LLC did not transfer the assets used to provide service (including towers, radio equipment, and federally issued spectrum licenses) to anyone, nor did it assign the Service Agreement itself. *Id.* at ¶¶ 4-6; Shipman Aff. at ¶¶ 6-7. WWC License LLC remains the service provider under the Service Agreement today. *Id.* at ¶ 6; *see also* Tribal PUC Mot. for Prelim. Inj. and for Hr'g ("Tribal PUC's PI Mot."), at 4 (Mar. 1, 2010) (Ex. 6(D)).

Thus, Alltel is not a party to the Service Agreement and it does not own the telecommunications infrastructure on the Reservation. Shipman Aff. at ¶¶ 4-6.

B. The Verizon Wireless-Alltel Merger and the AT&T Divestiture Sale

As explained in greater detail in Alltel's Memorandum in Support of a Temporary Restraining Order (Dkt. 8) ("Alltel's TRO Memorandum") at 5-7, Alltel Corporation (the parent of Alltel) and Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") agreed to a merger in June 2008. As a result of antitrust review, the U.S. Department of Justice ("DOJ") required the merged entity to divest operations in markets where Alltel Corporation and Verizon Wireless had significant overlap, including all of Alltel Corporation's markets in South Dakota. The divestiture requirements were embodied in a Consent Decree entered by a federal court. *See United States v. Verizon Communications, Inc.*, 607 F. Supp. 2d 1 (D.D.C. 2009). When it was known that assets in South Dakota would be divested, the Tribe began a campaign to obtain the assets on the Reservation for itself and repeatedly asked Verizon Wireless to sell these assets to the Tribe for $1.00. The Tribe never claimed a contractual right to purchase these assets — nor could it, since (as explained above) the Service Agreement expressly states that the Tribe has no right to the assets, equipment, or spectrum licenses.

Once the Verizon Wireless/Alltel Corporation merger closed in January 2009, Verizon Wireless proceeded with an auction for groups of assets defined in the Consent Decree. The Tribe did not submit any bids in that process. On May 8, 2009, AT&T Mobility LLC ("AT&T") and Verizon Wireless announced that Verizon Wireless would sell AT&T the assets to be divested in 18 States — including South Dakota — for $2.35 billion. (Verizon Communications Inc. SEC Form 10-Q at 6 *available at* www.sec.gov or www.sec.gov/Archives/edgar/data/732712/000119312509159648/d10q.htm.). AT&T is the second largest wireless carrier in the Nation and has greater resources and capabilities than did Alltel or WWC License LLC. *See* Linskey Decl. at ¶ 5. For customers in markets that AT&T is acquiring, AT&T will be bringing the benefits of a wireless carrier with greater resources, broader choices of services, rate plans, handsets and data devices (including those with advanced capabilities), and also expanded network coverage.

C. The Tribe's Petition for a Preliminary Injunction and the Parties' Negotiations

After sitting out the divestiture bidding process, the Tribe sought to obtain the assets for itself by seeking relief from Tribal Court. *See generally* Alltel's TRO Memorandum at 7-10. The Tribe filed a "Petition for Preliminary Injunction and Request for Hearing" against Alltel and Verizon Wireless LLC (a non-existent entity) in Tribal Court on October 21, 2009. *See* Ex. 6(A). In this "Petition," the Tribe sought to enjoin Alltel from transferring the assets located on the Reservation and the spectrum licenses used for providing service on the Reservation. Two licenses for spectrum issued by the FCC are used to serve the Reservation. These licenses cover the areas defined by the FCC as Cellular Market Areas ("CMAs") 638 and 639 — an area that encompasses not only the Reservation, but most of the Southwestern corner of the State as well.

See Linskey Decl. at Ex. 1C. The Tribe's objective in stopping the transfer was, yet again, to secure the assets, including the spectrum licenses, for itself.

It is undisputed that the Tribe never filed a complaint in Tribal Court and never accomplished service of process on any entity. Instead, the Tribe mailed a copy of the Petition alone, without a summons, by certified mail to Alltel's registered agent.

Alltel immediately approached the Tribe to attempt a negotiated resolution. The parties agreed to postpone a scheduled hearing and agreed that no hearing would be rescheduled without seven days' written notice. *See* Nov. 9, 2009 Stip. for Continuance of Hr'g and for Dismissal of Resp. Verizon Wireless LLC (Ex. 6(B)).[2] As described in Alltel's TRO Memorandum, Alltel and its parent, Verizon Wireless, spent months arranging meetings with tribal representatives, attempting to address their concerns, and then being met with stonewalling and refusals to meet. *See* Alltel's TRO Memorandum at 8-10.

On February 15, 2010, the Tribe suddenly refused to follow through with a meeting it had proposed and instead, at approximately 6:45 pm EST (on a federal holiday) counsel for the Tribe informed Alltel that the Tribe had scheduled a hearing in Tribal Court in less than 72 hours "to hear matters related to . . . compliance" with the Service Agreement." Feb. 15, 2010 Letter, J. Canis to P. Philbin (Ex. 7). Official notice of the hearing was sent on February 17, the day before the scheduled hearing. *See* Feb. 17, 2010 Notice of Hearing (Ex. 6(C)).

D. This Court's Intervention

As a last resort, Alltel filed a complaint in this Court seeking to compel the Tribe to arbitrate disputes relating to the Service Agreement and sought a temporary restraining order and injunctive relief to stop the hearing in Tribal Court. At the hearing on Alltel's motion, counsel

[2] The parties also agreed to dismiss Verizon Wireless LLC, a nonexistent entity, from the case.

for the Tribe and for the Tribal Office of Economic Development and Public Utilities Commission ("Tribal PUC") entered separate appearances and offered several conflicting explanations about the subject of the Tribal Court hearing. Finally, they announced that the hearing had been canceled due to inclement weather. Feb. 18, 2010 Tr. of Hr'g, Alltel Communications, LLC v. Oglala Sioux Tribe, No. 10-5011-JLV (D.S.D.) at 63:4-8.

This Court did not grant a temporary restraining order because, given the cancellation of the Tribal Court hearing, there was no longer urgency to Alltel's motion. *See* Mar. 1, 2010 Order Den. Mot. for TRO at 4 ("Order Denying TRO") (Dkt. 16). The Court ruled that the Tribal Court should be permitted to address its own jurisdiction — and *only* that question — in the first instance. *Id.* at 5.

E. The Tribal PUC Attempts To Notice a Hearing Violating This Court's Order

In the wake of the hearing before this Court, confusion reigned in the Tribal Court. Different lawyers representing the Tribe and the Tribal PUC filed a flurry of contradictory papers that left Alltel wondering which lawyer's filings it had to address. First, on March 1, 2010, Alltel received a Motion for Preliminary Injunction and Hearing and a notice setting a hearing for March 9 at 2:00 pm. *See* Tribal PUC's PI Mot. (Ex. 6(D)); Notice of Hearing (Mar. 1, 2010) (Ex. 6(E)). It later became clear that these papers had been filed by lawyers representing the Tribal PUC. The motion and the notice of hearing listed a new case number (Case No. Civ. 10-0104) and the captions — which differed on the two documents — purported to include new parties (Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") and Verizon Communications Inc.) in addition to Alltel. *Id.* Neither Verizon Wireless nor Verizon Communications Inc. ever received service of process purporting to make either entity a party to the case. Instead, counsel for the Tribal PUC merely added the names to the caption and emailed and faxed the documents to the lawyers representing Alltel.

Counsel for Alltel immediately pointed out that the Tribal PUC was violating the representations made to this Court, because the proposed hearing was not limited to jurisdiction. Mar. 1, 2010 Letter & Exhibit, P. Philbin to J. Canis, L. Adams, M. Gonzalez (Ex. 8); *see also* Mar. 2, 2010 Letter, P. Philbin to C. Gillis (Ex. 9).

The next day, on March 2, 2010, lawyers for the Tribe intervened and cancelled the March 9 hearing set by the Tribal PUC "because it is not in accordance or compliance with the federal court order." Mar. 2, 2010 Email from C. Gillis to J. Canis and P. Philbin (Ex. 10). The same day, Alltel received a "Motion for Hearing Establishing Jurisdiction" signed by counsel for the Tribal PUC and a new notice for a hearing set on March 17 at 9:00 am. Mot. for Hr'g Establishing Jurisdiction (Mar. 2, 2010) (Ex. 6(F)); Notice of Hearing (Mar. 2, 2010) (Ex. 6(G)). Again, these papers listed a new case number (No. Civ. 10-0104) and identified Verizon Wireless and Verizon Communications Inc. as parties in addition to Alltel. And again, neither Verizon Wireless nor Verizon Communications Inc. received any service of process purporting to make them parties to the Tribal Court case.

As Alltel attempted to sort through these conflicting filings, counsel for the Tribe explained in a telephone conversation that other lawyers represented the Tribal PUC, and that they had no authority to represent the Tribe itself. *See* Mar. 2, 2010 Letter, P. Philbin to C. Gillis (Ex. 9). Counsel for the Tribe also made clear that the Tribe would be filing a separate pleading to address the Tribal Court's jurisdiction. *See* Mar. 2, 2010 Email, C. Gillis to J. Canis and P. Philbin (Ex. 10). Counsel for the Tribal PUC acknowledged "that the Oglala Sioux Tribe, its Office of Economic Development and its Public Utility Commission require some time to resolve issues regarding local counsel representation and proceedings before the Tribal Court." *See* March 2, 2010 Letter, J. Canis to P. Philbin (Ex. 11).

In subsequent weeks, the confusion did not abate. On March 10, 2010, at the invitation of Theresa Two Bulls, the President of the Oglala Sioux Tribal Council, counsel representing Alltel and WWC License LLC met with members of the Tribal Council and the Tribe's lawyer, Mario Gonzalez, in an effort to resolve the Tribal Court case. Five days later, however, the Tribal Economic and Business Development Committee sent a letter to Alltel and other interested entities asserting that all communications must take place through the chairman of the Tribal PUC (Joe RedCloud) and directing the President of the Tribal Council not to interfere. *See* Mar. 15, 2010, Draft Minutes of Economic & Business Development Committee Special Session (Ex. 12); Mar. 15, 2010 Letter, P. Good Crow to T. Two Bulls (Ex. 13). Ten days after that, on March 25, 2010, Mr. RedCloud advised representatives of Alltel and AT&T "that Mr. Mario Gonzalez is not representing the Oglala Sioux Tribe in this matter." Mar. 25, 2010 Email, J. RedCloud to W. Browne (Ex. 14). Mr. Gonzalez, however, apparently did not agree with that assertion, because on the very same day an attorney at Mr. Gonzalez's law firm submitted a Brief in Support of Jurisdiction to the Tribal Court on behalf of the Tribe. *See* Oglala Sioux Tribe's Br. in Supp. of Jurisdiction of the Tribal Court (Mar. 25, 2010) ("Tribe's Br.") (Ex. 6(H)).

F. The Tribe's First Amended Petition for a Preliminary Injunction

On April 12, 2010, the Tribe filed a First Amended Petition for a Preliminary Injunction ("First Amended Petition"). *See* Ex. 6(I). The First Amended Petition is the first pleading filed on behalf of the Tribe (rather than the Tribal PUC) that lists Verizon Communications Inc. in the caption. It is also the first and only pleading that includes WWC License LLC in the caption. But the First Amended Petition was not served upon either Verizon Communications Inc. or WWC License LLC by any method specified in § 20.3(b) of the Tribal Code for bringing a party under the Tribal Court's jurisdiction. Rather, as indicated by the Certificate of Service, the document was simply faxed and sent via first-class mail.

After several agreed postponements to permit settlement discussions to continue, the parties set a hearing in Tribal Court for April 22, 2010. On April 19, Alltel filed its papers challenging the Tribal Court's jurisdiction.

G. Alltel Files First Amended Complaint in This Court

On April 23, 2010, with the Tribe's consent, Alltel filed a First Amended Complaint in this Court. In addition to an order compelling arbitration, the First Amended Complaint seeks a declaratory judgment that the Tribal Court lacks jurisdiction based upon all the same jurisdictional defects Alltel has presented in its papers before the Tribal Court.

H. The Tribal Court Hearing

The Tribe requested additional time to respond to Alltel's filing in Tribal Court, and Alltel therefore agreed to move the Tribal Court hearing to April 29, 2010, which was then held as scheduled. In its papers, Alltel pointed out numerous defects foreclosing Tribal Court jurisdiction. *See generally* Ex. 6(J). On most of these points, the Tribe offered no response at all. As of today's filing, the Tribal Court has not yet issued its decision.

ARGUMENT

The Tribal Court clearly lacks jurisdiction to enjoin Alltel (or any other respondent randomly added to the various pleadings in Tribal Court) from transferring assets used to provide service on the Reservation, and it is well settled that injunctive relief is appropriate both to enforce a party's right to be free of interference from a tribal court lacking jurisdiction and to enforce an arbitration clause. To determine whether to grant an injunction, courts consider four factors: (1) the likelihood of success on the merits; (2) the threat of irreparable harm to the moving party; (3) balancing this harm with any injury an injunction would inflict on other parties; and (4) the public interest. *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, 564 F.3d 900, 904 (8th Cir. 2009) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114

(8th Cir. 1981)). "[N]o single factor is determinative" and "[t]he equitable nature of the proceeding mandates that the court's approach be flexible enough to encompass the particular circumstances of each case." *Dataphase Sys.*, 640 F.2d at 113. Here, these factors overwhelmingly favor an injunction prohibiting the Tribe from proceeding in Tribal Court.

This Court may grant Alltel's request for an injunction immediately without requiring any further exhaustion of tribal remedies. It is settled law that tribal exhaustion is "unnecessary" where it is "clear . . . that tribal courts lack jurisdiction" such that exhaustion "would serve no purpose other than delay." *See Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (quoting *Strate v. A-1 Contrs.*, 520 U.S. 438, 459 (1997)); *see also Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009) (exhaustion unnecessary when tribal court did not have "colorable jurisdiction") (citing *Strate*, 520 U.S. at 460). As explained below, the Tribal Court clearly lacks jurisdiction. Alltel, moreover, has already exhausted tribal remedies by proceeding through a hearing in Tribal Court. Requiring further appeals in the tribal system would serve no purpose other than wasteful delay, and would result in precisely the irreparable harms described below. In addition, the Tribe has expressly agreed in the Service Agreement that it "waives and agrees not to assert any doctrine requiring exhaustion of tribal court remedies prior to proceeding with arbitration." Service Agreement § 17(B). There is no basis for refusing to enforce that express waiver by the Tribe.

I. Alltel Has a High Likelihood of Succeeding on the Merits in Showing that the Tribal Court Lacks Jurisdiction and that the Disputes Here Must Be Arbitrated.

A party seeking an injunction "is not required to prove a mathematical (greater than fifty percent) probability of success on the merits." *Heartland Academy Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003). Instead, a moving party must show that it has a "fair chance of prevailing" after "a trial on the merits." *Id.*

Here, Alltel has a high likelihood of success on the merits because the Tribe has failed entirely to meet its burden of demonstrating that the Tribal Court has jurisdiction. ***First***, the Tribe has failed to file a complaint, which is a fundamental prerequisite for initiating "[a]ll civil proceedings" in Tribal Court. Tribal Code § 20.2. ***Second***, the Tribe has failed to accomplish service of process on any of the entities over whom it has asked the Tribal Court to assert jurisdiction. ***Third***, under *Montana v. United States*, 450 U.S. 544, 564 (1981), the Tribal Court lacks jurisdiction over Alltel (the only entity actually served with *anything* in Tribal Court). The Tribe's only purported basis for asserting jurisdiction under the *Montana* rule is a contract (the Service Agreement) to which Alltel is not a party. ***Fourth***, by its terms, the Service Agreement forecloses jurisdiction, because it calls for arbitration of any dispute relating to the contract. ***Fifth***, the Tribal Court lacks jurisdiction over the transfer of wireless spectrum licenses, a matter over which Congress has given the FCC exclusive authority. Any one of these defects is sufficient to foreclose the Tribal Court's jurisdiction.

A. The Tribal Court Lacks Jurisdiction Because No Civil Action Has Been Properly Initiated by the Filing of a Complaint.

The Tribal Court lacks jurisdiction first and foremost because the Tribe has never properly invoked the Tribal Court's jurisdiction by filing a complaint. Instead, the Tribe has filed only a "Petition for Preliminary Injunction and Request for Hearing," (Ex. 6(A)), and a First Amended Petition for a preliminary injunction, (Ex. 6(I)). That is not sufficient.

The Tribal Code expressly requires that all civil proceedings in Tribal Court must be commenced by the filing of a complaint:

> ***All civil proceedings shall be commenced by filing a complaint with the clerk, accompanied by appropriate filing fee.*** The complaint shall be verified before a judge, clerk or assistant clerk, or a notary public.

Tribal Code § 20.2 (emphasis added). The Tribal Code makes it clear, moreover, that the filing of a complaint is a *sine qua non* for establishing jurisdiction. It specifies that "[n]o civil order or judgment of the Oglala Sioux Tribal Court shall be valid and effective or enforceable in any manner against any person unless the order or judgment shall have been issued in a civil case *arising out of the institution of a civil suit in accordance with this Code*." *Id.* § 22.4 (emphasis added). Where, as here, no complaint has been filed, no civil proceeding has been instituted in accordance with the Tribal Code, and the Tribal Court lacks jurisdiction to proceed.

Section 20.2 of the Tribal Code is a close analogue to Federal Rule of Civil Procedure 3, which provides that "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. It is long settled that this language means that a federal court "lacks jurisdiction to grant or even consider preliminary injunctive . . . relief prior to the filing of a complaint." *Gometz v. Knox*, No. 07-1734, 2007 WL 2986165, at *1 (D. Colo. Oct. 9, 2007).[3] Tribal Code Section 20.2, by its terms, necessarily has the same effect. In fact, not surprisingly, it is settled law across American jurisdictions that a bare request for injunctive relief, unaccompanied by any underlying legal action, fails to vest a court with jurisdiction. *See, e.g.*, *Koplow v. City of Biddeford*, 494 A.2d 175, 176 (Me. 1985); *Hall v. Hanford*, 64 So.2d 303, 304 (Fla. 1953); *Carolina Freight Carriers Corp. v. Local Union # 61*, 180 S.E.2d 461, 463 (N.C. App. Ct. 1971).[4]

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[3] *Accord Stratton v. Tony*, No. 05-1601, 2006 WL 3840802, at *2 (W.D. Pa. Dec. 22, 2006); *Adair v. England*, 193 F. Supp. 2d 196, 200 (D.D.C. 2002); *In re Boyle*, No. 96-6967, 1996 WL 806190, at *1 (C.D. Cal. Nov. 19, 1996); *P. K. Family Rest. v. IRS*, 535 F. Supp. 1223, 1224 (D. Ohio, 1982).

[4] The provision of the Tribal Code authorizing injunctive relief bolsters this conclusion. That provision refers to a pending "case" and "pending litigation" that will be "determined on the merits," Tribal Code § 20.24, and requires a showing of "a high likelihood of success *on the merits*." *Id.* (emphasis added). There can be no analysis of likely success "on the merits" unless there is a pending matter on which relief on the merits is sought. *Cf., e.g.*, *Long Prairie Packing Co. v. United National Bank,*

If the Tribal Court were to proceed without requiring the Tribe to comply with the clear commands of the Tribal Code, it would violate Alltel's due process rights. The procedural rules set out by the Tribal Code cannot be selectively ignored when Alltel happens to be the defendant.[5]

The Tribe, moreover, has offered no response to the fatal defect raised by its failure to file a complaint. The Tribe does not dispute that it has not filed a complaint, nor does it dispute that this violates the Tribal Code. Instead, when asked by the Tribal Court for some explanation, counsel for the Tribe responded that "if the Court rules that it does have jurisdiction over the dispute, then clearly the Tribe will file a complaint . . . [and] will abide by the Tribal Code." Tr. of Tribal Court Hr'g (Apr. 29, 2010) ("Tribal Court Tr.") at 44:16-19 (Ex. 6(M)). That gets things precisely backwards — consistent with due process, a plaintiff cannot get a jurisdictional ruling *first* and comply with jurisdictional prerequisites later.

Had the Tribe filed a complaint, it would have been immediately apparent that the only substantive relief the Tribe could seek from Tribal Court is an order to compel arbitration. As described below, the Service Agreement contains a broad arbitration clause requiring all disputes relating to the contract to be submitted to arbitration. *See* Service Agreement § 17(B); *see also infra* pp. 26-30. The Tribe's efforts to obtain an injunction untethered from a complaint for any other relief are telling. If the Tribe believed that it had a legitimate claim based on the Service

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Sioux Falls, 338 N.W.2d 838 (S.D. 1983) (holding under analogous South Dakota law that court lacks jurisdiction over a bare request for preliminary relief).

[5] The Tribe's failure to file a complaint also leads to concrete practical problems in the litigation. For example, the Tribal Code requires that all complaints "shall be verified before a judge, clerk or assistant clerk, or a notary public," Tribal Code § 20.2. If the Tribe had been required to verify its filing under oath, it likely would not have wasted this Court's, the Tribal Court's, and Alltel's time by suing the wrong party. *See infra* pp. 22-25. *Cf., e.g., Malone v. State*, 798 S.W.2d 149, 151 (Mo. 1990) ("The verification requirement is not a shallow gesture of form over substance, for '[t]he obvious purpose of the verification requirement . . . is to discourage frivolous and unfounded allegations.'") (quoting *West v. State*, 787 S.W.2d 856, 857 (Mo. App. 1990)).

Agreement, it could easily have started arbitration in the six months between filing its Petition and now, or even in the two months since the TRO hearing in this Court that focused on the arbitration clause. Instead, the Tribe has focused solely on arguing for its ability to secure an injunction from its preferred forum — the Tribal Court. That strategy speaks volumes about the Tribe's real objective. The Tribe has no interest in resolving a genuine dispute about the Service Agreement. All it really wants is a preliminary injunction blocking a transfer of assets, which can be used as leverage to extract extra-contractual concessions from Alltel.

B. The Tribal Court Lacks Jurisdiction Over Any Defendant Because None Has Ever Received Proper Service of Process.

The Tribal Court lacks personal jurisdiction over Alltel, and any of the other entities that have randomly been added to captions in various pleadings, because *none* of these entities — including Alltel — has ever received proper service of process. Indeed, the Tribe *does not even dispute* that there has been no service of process. Instead, before the Tribal Court, the Tribe simply promised that it "will" accomplish service *after* the court holds that is has jurisdiction. Tribal Court Tr. at 44:16-23.

But it is elementary that a court may not exercise jurisdiction over a party that has not received service of process. *See, e.g., Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) ("In the absence of service of process . . . , a court ordinarily may not exercise power over a party the complaint names as defendant."); *Dodco, Inc. v. American Bonding Co.*, 7 F.3d 1387, 1388 (8th Cir. 1993) (Per Curiam) ("If a defendant is improperly served, the court lacks jurisdiction over the defendant."). Civil "process" has two components: the summons and the complaint. *See, e.g.*, Fed. R. Civ. P. 4(c)(1) ("A summons must be served with a copy of the complaint."). Indeed, the Tribal Code expressly requires a plaintiff to serve *both* a summons and the complaint on every defendant. *See* Tribal Code § 20.3 (a) ("Each defendant *shall be served*

with a copy of the complaint *and a summon[s]*.") (emphasis added). Here, in violation of both fundamental principles of due process and the express statutory command of § 20.3 of the Tribal Code, the Tribe never served a summons or complaint on *anyone*.

Failure to accomplish service of process is not a mere technicality. To the contrary, proper service of process is "fundamental to any procedural imposition on a named defendant." *Murphy Bros.*, 526 U.S. at 350. As the Supreme Court has made clear, "[b]efore a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of *service of summons* must be satisfied." *Omni Capital v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (emphasis added). Failure to serve process requires dismissal of the case, even if the defendant may otherwise have notice of the plaintiff's claims. *See, e.g.*, Fed. R. Civ. P. 12(b)(4)-(5); S.D. Cod. Laws §§ 15-6-12(b)(3)-(4); *see also Norsyn, Inc. v. Desai*, 351 F.3d 825, 829 (8th Cir. 2003); *Adams v. AlliedSignal Gen. Aviation Avionics*, 74 F.3d 882, 885-86 (8th Cir. 1996) (citing *Printed Media Servs., Inc. v. Solna Web, Inc.*, 11 F.3d 838, 843 (8th Cir. 1993)).

Here, the Tribe does not dispute that it did not accomplish service of process on *any entity*. Verizon Wireless, Verizon Communications Inc., and WWC License LLC were never served with *anything*. Instead, on March 1, 2010, counsel for the Tribal PUC simply began filing pleadings captioned with a new case number (Case No. Civ. 10-0104), and variously including Verizon Wireless or Verizon Communications Inc. in the caption. *See* Exs. 6(D) & 6(E). These pleadings were faxed or e-mailed to the lawyers that represent Alltel.[6] Later still, on April 12, the Tribe filed a First Amended Petition that added into the caption Verizon Communications

[6] The Tribal PUC's Motion for a Preliminary Injunction and For Hearing, which lists Alltel Communications, LLC and Cellco Partnership d/b/a/ Verizon Wireless in its caption, contains no Certificate of Service at all. (Ex. 6(D)). The Notice of Hearing, which lists Alltel Communications, LLC and Verizon Communications Inc. in its caption, states only that it has been "mailed or served . . . on the above-named party." *See* Mar. 1, 2010 Notice of Hearing at 1. (Ex. 6(E)).

Inc. and (for the first time in any pleading) WWC License LLC. (Ex. 6(I)). That document was also never transmitted to any entity by a method of service specified in Tribal Code § 20.3.[7] Needless to say, an entity cannot be made a party to a case by simply adding its name to a caption without service of process.

Alltel is the only entity that has been served with any document in Tribal Court proceedings in accordance with one of the methods prescribed in Tribal Code §§ 20.3(b)-(e). Even Alltel, however, has never been served with a *summons* or *complaint.* Instead, on October 21, 2009, the Tribe served Alltel with a petition for preliminary injunction in attempted compliance with Tribal Code § 20 (b)(4) by sending it by certified mail to Alltel's registered agent, CT Corp. Thus, the *only* entity to have received service of *anything* is Alltel, and even that was not service of a complaint and summons. Failure to serve a summons is fatal to jurisdiction. *See, e.g.*, *Omni Capital*, 484 U.S. at 104; *Bowen v. Cheuvront*, 521 F.3d 860, 861 (8th Cir. 2008) (Per Curiam) ("The record clearly establishes that the [defendant] was never served summons in this matter. As a result, neither the district court nor this court has personal jurisdiction over the defendant/appellee."). The Tribal Court therefore lacks jurisdiction over *any* entity listed in the various captions the Tribe has used. *See Omni Capital*, 484 U.S. at 104; *Norsyn*, 351 F.3d at 829.

The Tribe offers no explanation for failing to serve process. It does not dispute that it has not served any defendant. Rather, it argues that the question of the Tribe's personal jurisdiction over any defendant is an issue "for another day on down the line." *See* Tribal Court Tr. at 43:18-

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[7] The certificate of service indicates that this document was sent by first class mail addressed to WWC License LLC at an address in Bellingham, Washington, and sent by first class mail to an individual at Verizon Communications Inc.'s office in Arlington, Virginia. Even putting aside the fact that the First Amended Petition is not a complaint and that it included no summons, transmittal by first class mail is not a permitted method of service of process. *See* Tribal Code §§ 20.3(b)-(e).

19; 45:14-46:2. But it is black-letter law that personal jurisdiction is a threshold question that cannot be deferred until some indefinite time. *See Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94 (1998) ("The requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception.") (internal quotations omitted).

Indeed, because no one has been served properly, it would violate the Due Process Clause for the Tribal Court to exercise jurisdiction over any entity named as a respondent in the various pleadings filed in Tribal Court. A court cannot enter a judgment against entities over which it lacks jurisdiction consistent with due process of law. *See Hansberry v. Lee*, 311 U.S. 32, 40 (1940). Here, moreover, the requirements of due process have been expressly incorporated into the Tribal Code, which provides that "[n]o civil order or judgment of the Oglala Sioux Tribal Court shall be valid and effective or enforceable in any manner against any person unless the order or judgment shall have been issued in a civil case arising out of the institution of a civil suit in accordance with this Code." Tribal Code § 22.4. The Tribe has indisputably violated at least two provisions of the Tribal Code — the requirement that "[a]ll civil proceedings shall be commenced by filing a complaint," Tribal Code § 20.2, and the requirement that "[e]ach defendant shall be served with a copy of the complaint and a summon[s]," *id.* § 20.3(a). The Tribal Court cannot be permitted to allow the Tribe to comply selectively with only those procedural requirements in the Tribal Code that the Tribe wishes to follow in any given case. Such a "pick and choose" approach would violate due process. *See Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997) (due process requires "an impartial tribunal that conducts the trial upon regular proceedings after proper service").

C. The Tribe Has Failed To Establish Jurisdiction over Alltel Under Both *Montana v. United States* and Due Process Minimum Contacts Analysis.

The Tribal Court also lacks jurisdiction over Alltel for the straightforward reason that Alltel is a nonmember of the Tribe and the Tribe has not carried its burden of showing that any of the exceptions specified in *Montana*, 450 U.S. at 564, applies. A tribal court may not exercise jurisdiction over a nonmember defendant unless one of the *Montana* exceptions to the general rule prohibiting jurisdiction over nonmembers is applicable. *See Strate*, 520 U.S. at 445-46. The Tribe invokes the Service Agreement as the source of the Tribal Court's jurisdiction, but the Tribe has failed to sue the *only* entity that is a party to that Service Agreement and that could be subjected to jurisdiction through it — namely, WWC License LLC. Indeed, it would violate not only the *Montana* rule, but also fundamental principles of due process for the Tribal Court to be permitted to exercise jurisdiction over Alltel or other more remote parents of WWC License LLC on the mere basis that a subsidiary signed the Service Agreement.[8]

It is settled law that a tribal court may not exercise jurisdiction over a nonmember unless one of the exceptions to *Montana* applies, *see Strate*, 520 U.S. at 445-46, and that the Tribe, as plaintiff, bears the burden of establishing jurisdiction, *see Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2720 (2008). The Tribe claims that the Tribal Court "may exercise jurisdiction [over Alltel] under the first exception to the *Montana* rule," Tribe's Br. at 2, which provides that a tribal court may have civil jurisdiction over "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. According to the Tribe, the Service Agreement provides such a "consensual relationship," and the Tribe has brought this

[8] The arguments here address Alltel specifically because Alltel was the original named defendant in the Tribe's Petition. The same analysis under *Montana* and the Due Process Clause applies *a fortiori* to Verizon Wireless and Verizon Communications Inc.

action "to adjudicate certain matters regarding the Defendant Alltel's compliance with the Tate Woglaka Service Agreement." *See* Tribe's Br. at 1. (Ex. 6(H)).

The problem with that approach is that the Tribe has failed to sue the one and only entity that is a party to the Service Agreement — namely, WWC License LLC. By the plain terms of the Service Agreement, WWC License LLC is the Tribe's only counterparty in that contract. *See* Service Agreement Preamble; Feldman Aff. at ¶ 4; Shipman Aff. at ¶ 5. WWC License LLC is the telecommunications service provider under the Service Agreement. *See* Shipman Aff. at ¶ 6. WWC License LLC also owns the telecommunications infrastructure on the Reservation as well as the federal licenses for spectrum used to provide service on the Reservation. *Id.* Shipman Aff. at ¶ 6; Greco Aff. at ¶ 3; *see also* Service Agreement § 19 (providing that WWC License LLC owns the infrastructure on the Reservation). As explained in the attached affidavit of Margaret Feldman, when Alltel Corporation acquired Western Wireless Corporation in 2005, WWC License LLC (which was then a subsidiary of Western Wireless Corporation), remained the Tribe's counterparty to the Service Agreement. *See* Feldman Aff. at ¶¶ 3-4. WWC License LLC's distinct existence was not altered when it became an indirectly owned subsidiary of Alltel. WWC License LLC also maintained ownership of the underlying telecommunications infrastructure. *Id.*; Shipman Aff. at ¶¶ 6-7; Greco Aff. at ¶ 3. Thus, contrary to the suggestions in the Tribe's brief and the assertions in its eleventh-hour First Amended Petition — which are unsupported by any affidavit or other evidence — *the Service Agreement has never been assigned to Alltel.*[9] *See* Shipman Aff. at ¶¶ 5, 7; Feldman Aff. at ¶ 4.[10] WWC License LLC is still the Tribe's counterparty under the Service Agreement.

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[9] Even if the Tribe's assertions were allegations in a complaint (which they are not), the Court need not, and cannot, accept them when Alltel has submitted contrary evidence in the form of affidavits. *See, e.g.*, *Stevens v. Redwing*, 146 F.3d 538, 546 (8th Cir. 1998); *Jet Charter Serv., Inc. v. Koeck*, 907 F.2d 1110, 1112 (11th Cir. 1990) ("When a defendant raises through affidavits, documents or

The Tribe, however, has not taken the steps necessary to make WWC License LLC a party to the case. As explained above, *see supra* pp. 19-20, simply adding WWC License LLC to the caption on the Tribe's last-minute First Amended Petition and mailing that petition by first class mail to WWC License LLC's offices is not sufficient to bring WWC License LLC before the Tribal Court. Moreover, throughout its filings in Tribal Court, the Tribe has framed its claims to seek redress from *Alltel*, an indirect parent of WWC License LLC, and has done so without ever explaining how Alltel could be regarded as an alter ego of its subsidiary.

The *Montana* rule, however, does not permit the Tribal Court simply to ignore the distinctions between different corporate entities. To the contrary, application of *Montana* must comport with the constitutional requirements of due process. *Romak USA, Inc. v. Rich*, 384 F.3d 979, 984 (8th Cir. 2004); *see also* 25 U.S.C. § 1302(8). Due process requires "minimum contacts" between the defendant and the forum "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980) (quotations omitted). In other words, a defendant must "purposefully avail[ ] itself of the privilege of conducting activities within the forum" such that it should "reasonably anticipate being haled into court there." *Id.* (quotations omitted)

Parent entities such as Alltel (and Verizon Communications Inc. and Verizon Wireless, for that matter) are not doing business on the Reservation or entering a consensual relationship

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testimony a meritorious challenge to personal jurisdiction, the burden shifts to the plaintiff to prove jurisdiction by affidavits, testimony or documents.").

[10] Indeed, even the Tribal PUC recognized that fact as it has explained: "When Western Wireless was acquired by Alltel [Corporation], Alltel maintained Western Wireless as a subsidiary, and retained the independent corporate identity of Western Wireless, so the assignment provision of the [Service Agreement] was not invoked. As a result, the change in control of Western Wireless did not result in the property on the Pine Ridge Indian Reservation being assigned to a third party." Tribal PUC's PI Br. at 4 (Ex. 6(D)).

with the Tribe "merely by the presence of [a] wholly owned subsidiary." *See Epps v. Stewart Information Servs Corp.*, 327 F.3d 642, 649 (8th Cir. 2003). Rather, as the Supreme Court has made clear in addressing state court jurisdiction, personal jurisdiction can be based on the activities of a subsidiary "only if the parent so controlled and dominated the affairs of the subsidiary that the latter's corporate existence was disregarded so as to cause the residential corporation to act as the nonresidential corporate defendant's alter ego." *Id.*; *see also Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 n.* (1988) ("[T]he activities of a subsidiary are not necessarily enough to render a parent subject to a court's jurisdiction, for service of process or otherwise."). Thus, the "general rule is that a parent corporation that owns a subsidiary — even wholly owns a subsidiary — is not present in a state merely because the subsidiary is there." *Epps*, 327 F.3d at 650. As this Court has explained, "[m]ere identification of a subsidiary without more information is insufficient to reach the conclusion that the subsidiary is the alter ego of the parent." *Bollwerk v. Susquehanna Corp.*, 811 F. Supp. 472, 477 (D.S.D. 1993). Thus, the ability to reach a parent based on the activities of a subsidiary "is contingent on the ability of the plaintiffs to pierce the corporate veil," *Epps*, 327 F.3d at 648-49. And "it is only when the privilege of transacting business in corporate form has been illegally abused to the injury of a third person that the corporate entities should be disregarded." *Id.*

To establish the Tribal Court's jurisdiction over Alltel (or any more remote parent such as Verizon Wireless or Verizon Communications Inc.) the Tribe bears the burden of demonstrating that the distinct corporate identity of WWC License LLC may be disregarded. *See id.* at 648. The Tribe, however, has not even attempted to meet that burden. It has presented no argument and no evidence to justify treating any parent as an alter ego of WWC License LLC.

D. The Tribal Court Lacks Jurisdiction Under the Terms of the Service Agreement.

The Tribal Court also lacks jurisdiction to resolve any disputes about the Service Agreement or to issue the preliminary injunction the Tribe has requested because the Service Agreement has a mandatory arbitration clause that forecloses Tribal Court jurisdiction. Under Section 17(B), "all disputes, claims and controversies" relating to the Service Agreement must be decided by binding arbitration. Service Agreement § 17(B). (Ex. 1). Although the Service Agreement does allow parties to seek "ancillary relief" in court (including injunctive relief), such relief can be pursued only "during any dispute" — that is, during a pending arbitration. The Tribe cannot benefit from that provision because, even though it started litigating more than six months ago, the Tribe has never sought to submit any dispute to arbitration.

The terms of the Service Agreement are critical for assessing jurisdiction because, as explained above, under *Montana*, the Tribal Court lacks jurisdiction over any nonmember absent a finding that the Service Agreement constituted consent to jurisdiction. *See Montana*, 450 U.S. at 565. The Tribe has made clear, moreover, that the Service Agreement and activities under it provide the sole basis on which it purports to invoke the Tribal Court's jurisdiction over a nonmember defendant. *See* Petition at 1-2 (Ex. 6(A)); First Amended Petition at 1 (Ex. 6(I)).

The Service Agreement, however, makes it express that WWC License LLC (the only party to the agreement with the Tribe) did *not* consent to tribal court jurisdiction. To the contrary, the Service Agreement is carefully drafted to ensure a private dispute resolution mechanism for all disputes. The parties expressly agreed to submit any disputes "arising from" or "in connection with" the Service Agreement to binding arbitration:

> Arbitration. The Parties agree that ***all disputes, claims and controversies*** between them . . . arising from this Agreement . . . or otherwise in connection therewith, including, without limitation, contract disputes and tort claims, ***shall be***

> ***resolved*** by binding arbitration pursuant to the Commercial Rules of the American Arbitration Association ("AAA").

Service Agreement § 17(B) (emphasis added). By agreeing to have an arbitrator resolve "all disputes, claims and controversies" on the merits, the parties divested the Tribal Court of jurisdiction to resolve such disputes in the first instance.

It is settled law that, in the face of an arbitration clause, the only issues a judicial body is empowered to answer are "(1) whether there is a valid arbitration agreement and (2) whether the particular dispute falls within the terms of that agreement.'" *EEOC v. Woodmen of World Life Insurance Society*, 479 F.3d 561, 565 (8th Cir. 2007). Here, the answer to both inquiries is clear. To the extent the Tribe intends to raise disputes concerning "compliance" with the Service Agreement, Tribe's Br. at 1, the arbitration clause demands arbitration of such disputes and deprives the Tribal Court of jurisdiction. This is the sort of broadly phrased clause that leaves no doubt that disputes between the parties must be resolved elsewhere, not in Tribal Court. *See Fleet Tire Serv. of N. Little Rock v. Oliver Rubber Co.*, 118 F.3d 619 (8th Cir. 1997). In fact, there is no dispute that all controversies related to compliance with the Service Agreement fall within the scope of the arbitration clause. The Tribe concedes that "the arbitration clause by its express terms requires . . . disputes, claims and controversies between Western Wireless and Tribe to be resolved by binding arbitration." Tribe's Br. at 4.

Instead, the Tribe and the Tribal PUC attempt to avoid the arbitration clause with contradictory arguments According to the Tribe, the arbitration clause does not apply because Alltel (the defendant named by the Tribe) is a successor to WWC License LLC (the original signatory), and only the original signatory to the contract (not successors) can invoke the arbitration clause. *See* Tribe Br. at 8-9. This argument suffers from at least two fatal flaws.

First, the entire argument is based on a factual error. As explained above, contrary to the suggestions in the Tribe's brief, WWC License LLC has never assigned the Service Agreement to Alltel and Alltel is not a successor to WWC License LLC under the Service Agreement. *See supra* p. 23; *see also* Feldman Aff. at ¶ 4; Shipman Aff. at ¶ 7. It is true, as the Tribe points out, that *Alltel* "does not have a contract or any other agreement with the Oglala Sioux Tribe to provide telecommunications services." Tribe's Br. at 6. The logical conclusion to be drawn from that fact, however, is that *the Tribe has sued the wrong party*. WWC License LLC is the party to the Service Agreement and the only entity that can be sued under that agreement. Suing the wrong party does not permit the Tribe to throw the arbitration clause out the window.

Second, even if the Tribe could somehow justify suing Alltel rather than WWC License LLC (which it cannot, and which it has not attempted to do), Alltel could still enforce the arbitration clause signed by its subsidiary. Courts have routinely found that non-signatory parent corporations can enforce a subsidiary's arbitration clause because "it would be manifestly unfair to allow plaintiffs to . . . avoid the arbitration for which they had contracted simply by adding a nonsignatory defendant" to their claims. *Rossi Fine Jewelers, Inc. v. Gunderson*, 648 N.W.2d 812, 815 (S.D. 2002) (quotations, internal citations omitted). Permitting such a maneuver to evade an arbitration clause would defeat the "efficacy of contracts and the federal policy favoring arbitration." *Id*. (quotations omitted). Thus, a litigant cannot succeed with precisely the tactic the Tribe is attempting here — namely, arguing that an entity may be sued for breach of a contract, but asserting at the same time that the entity is not a party to the contract and cannot benefit from the contract's arbitration clause. As the Eighth Circuit has explained, "[i]t would be inequitable to allow [a litigant] to claim that these parties are liable for failure to perform under a contract and at the same time to deny that they are contractual parties in order to avoid

enforcement of the arbitration clause." *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728 (8th Cir. 2001).[11] Here, the Tribe asserts that it seeks to enforce "compliance" with the Service Agreement, Tribe's Br. at 1, and alleges a breach of a contract by a signatory, WWC License LLC, First Amended Petition at 1-2. Such claims must be arbitrated.

The Tribal PUC has taken a different approach. It did not even acknowledge the arbitration clause, much less explain a way around it, before the Tribal Court. *See* Tribal PUC's PI Mot. (Ex. 6(D)). At the TRO hearing before this Court, the Tribal PUC pointed to language in the arbitration clause providing that the "arbitration provision shall not limit the right of either Party during any dispute, claim or controversy to seek, use and employ" certain "Ancillary Remedies," including injunctive relief issued by a court. Service Agreement § 17(B).

That provision cannot support the Tribal Court's jurisdiction, however, because by its terms it permits parties to seek "Ancillary Remedies" (including injunctive relief) only "*during any dispute, claim or controversy*" — that is, *after* a party has properly submitted a dispute to arbitration. The terms of the Service Agreement make plain that "Ancillary Remedies" are preserved solely as an aid to facilitating arbitration. Indeed, the very fact that the contract defines such remedies as "ancillary" confirms that these remedies are available only to support *another* pending proceeding. "Ancillary" means "subordinate to" or "auxiliary to," Webster's II New College Dictionary 42 (3d ed. 2005), and thus the term "ancillary remedy" necessarily

[11] *See also PRM Energy Sys., Inc. v. Primenergy, LLC*, 592 F.3d 830, 835 (8th Cir. 2010) ("[I]t would be unfair to allow the signatory to rely on the agreement in formulating its claims but to disavow availability of the arbitration clause of that same agreement."); *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798 (8th Cir. 2005) ("[W]hen the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory . . . arbitration is appropriate.") (quotations, internal citation omitted).

presupposes the existence of another proceeding.[12] Providing for "ancillary remedies" in the arbitration clause certainly does not suggest that a party can circumvent arbitration altogether by asking the Tribal Court for a free-floating injunction unrelated to any arbitration. To the contrary, where contracting parties wish to have recourse to courts to provide preliminary relief *before* any arbitration has been initiated, they expressly so provide by contract.[13]

Given the evident purpose of the arbitration clause to preserve "Ancillary Remedies" solely to support arbitration, the Tribe's effort to obtain an injunction untethered from any arbitration is particularly telling. If the Tribe believed that it had a legitimate claim based on the Service Agreement, it could easily have started an arbitration by now. Instead, the Tribe has persisted in seeking an injunction from its preferred forum — the Tribal Court — wholly divorced from any underlying arbitration. As discussed above, that strategy in itself reveals that the Tribe's real objective is to have the Tribal Court issue a preliminary injunction blocking a transfer of assets, which the Tribe can then use as leverage to extract extra-contractual concessions from Alltel. This forum shopping should not be permitted, especially where the parties to a contract expressly protected themselves against precisely such an outcome.

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[12] *Cf. Greenwich Insurance Co. v. Goff Group, Inc.*, 159 Fed. Appx. 409, 410 (3d Cir. 2005) (providing for ancillary relief after arbitration had been properly initiated pursuant to contract); *Arnold Chase Family, LLC v. UBS AG*, No. 08-0581, 2008 WL 3089484 (D. Conn. Aug. 4, 2008) (same); *Robert Lewis Rosen Assocs. v. Webb*, 2009 WL 1650212 (N.J. App. Div. June 15, 2009) (same).

[13] *See, e.g.*, *BAYPO Ltd. P'ship v. Technology JV, LP*, 940 A.2d 20, 23 (Del. Ch. 2007) (arbitration clause provided that it "shall not limit either party's recourse to courts of competent jurisdiction for injunctive or equitable relief . . . *before*, during or after the pendency of the process set forth in the [dispute resolution procedures]") (emphasis added); *Walther v. Sovereign Bank*, 872 A.2d 735, 747 (Md. 2005) ("Nothing in this agreement shall be construed to limit the right of any party to … obtain provisional or ancillary remedies . . . from a Court having competent jurisdiction *before*, during or after the pendency of any arbitration.") (emphasis added).

E. The Tribal Court Lacks Jurisdiction To Enjoin the Transfer of the Spectrum Licenses, which Are Under the Exclusive Jurisdiction of the FCC and Cover Vast Territory Outside the Reservation.

The Tribe's request for a preliminary injunction also exceeds the Tribal Court's jurisdiction because the Tribal Court simply has no authority to enjoin the transfer of spectrum licenses to AT&T. Under federal law, the FCC has exclusive authority over both issuing such licenses and approving or restricting their transfer. In addition, the order the Tribe seeks would exceed the Tribal Court's jurisdiction by sweeping far beyond the bounds of the Reservation, and affect wireless telephone service in roughly one quarter of the State of South Dakota.

Congress has established a nationwide system of regulation under which the FCC is assigned exclusive authority over all licensing of the electromagnetic spectrum for radio transmissions. The Communications Act makes clear that Congress's purpose was "to maintain control of the United States over *all* the channels of radio transmission; and to provide for the use of such channels . . . by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. § 301 (emphasis added). Congress assigned exclusive authority for issuing such licenses to the FCC and provided that licenses "shall not be transferred, assigned, or disposed of in any manner voluntarily or involuntarily, directly or indirectly, or by transfer of control of any . . . corporation holding such permit or license, to any person, *except upon application to the [FCC]*." 47 U.S.C. §310(d) (emphasis added). Decades of Supreme Court precedent make clear that "Congress assigned to the Federal Communications Commission . . . exclusive authority to grant licenses under the Act." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 553 (1995), *overruled on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375-76 (1969).

The FCC's exclusive control over spectrum licensing is essential for the system of regulation created by Congress to function. As the Supreme Court has explained, radio

"frequencies constitute[e] a scarce resource whose use [can] be regulated and rationalized only by the Government." *Red Lion Broad. Co.*, 395 U.S. at 376. If there were not a single, national authority assigning the rights to use particular frequencies across the country, conflicting transmissions would make television and radio broadcasts, wireless telephony, radio communications and a host of other applications impossible. "Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." *Id*. at 377.

When federal statutes, such as 47 U.S.C. §§ 301 and 310(d), place exclusive authority over a matter in a federal forum, they "leav[e] no room for adjudication in any other forum — be it state, tribal, or otherwise." *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 905 (9th Cir. 2002); *cf. also* Oglala Sioux Tribe Utilities Code § 1-101(1) (stating that the power to regulate is "an aspect of the retained sovereignty of the Oglala Sioux Tribe *except where it has been limited or withdrawn by Federal law*") (emphasis added).

Indeed, it is settled law that the FCC's exclusive control over licensing spectrum means that the Tribal Court's authority cannot extend to remedies that direct or restrain the transfer of spectrum licenses. For more than half a century, the Supreme Court has made clear that state courts have no jurisdiction whatsoever to enter orders on such matters. *See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127-28 (1945). In *Radio Station WOW*, a state court concluded that a transaction involving the lease of a radio station (including both its physical assets and spectrum license) was void for fraud. The state court recognized, however, that it "had no jurisdiction over the transfer of the license under which WOW was operating." *Id.* at 127-28; *see also id.* at 123 ("[T]he question of the federal license [is] a question solely for the Federal Communications Commission."). The court recognized that it could not issue an order

reconveying the license to undo the transaction, because such an order would impinge on the exclusive authority of the FCC. Instead, the court directed the parties to take all steps necessary to *seek* a retransfer of the license before the FCC. *Id.* at 130. The Supreme Court held that even that order was beyond the state court's jurisdiction, because it went too far in attempting to control the assignment of a spectrum license. It has been established ever since that state courts have no authority to direct the transfer of a license as a remedy for any state law dispute before them, or to restrain the transfer of a license pending decision of such a claim on the merits. Instead, it is settled that "only the FCC [can] determine the validity of a license transfer and that state courts are without jurisdiction in that respect." *Big League Broadcasting Co. v. Shedd-Agard Broadcasting, Inc.*, 313 So.2d 247, 251 (La. Ct. of App. 1975). The same reasoning applies *a fortiori* to the Tribal Court, which has no greater authority than a state court to intrude on a sphere assigned by Congress exclusively to the FCC. Indeed, even federal courts are without jurisdiction to interfere in the FCC's licensing decisions. *See In re Nextwave Personal Communications, Inc.*, 200 F.3d 43, 55-56 (2d Cir. 1999).

Enjoining the transfer of the spectrum licenses would also exceed the Tribal Court's jurisdiction for a further reason. The licenses at stake cover vast areas of South Dakota outside the boundaries of the Reservation. Two licenses are used for providing service on the Reservation and would be covered by the Tribe's requested injunction. These are the licenses for the areas the FCC has designated Cellular Market Areas ("CMAs") 638 and 639.[14] *See* Linskey Decl. at ¶ 6. As shown in Exhibit A to Mr. Linskey's Declaration, these CMAs cover not only the area of the Reservation, but also the bulk of southwestern South Dakota, including Bennett, Custer, Fall River, Gregory, Haakon, Jackson, Jones, Lyman, Mellette, Shannon, Stanley, Todd,

[14] The Tribe has identified the licenses for CMA 638 and CMA 639 as the licenses whose transfer it seeks to block in its filing before the FCC.

and Tripp counties.[15] Indeed, approximately *three quarters* of the population and land area encompassed by these CMAs is *outside* the Reservation boundaries.[16] The injunction the Tribe seeks would thus put the Tribal Court in the position of interfering with the transition to AT&T wireless service for thousands of South Dakotans through an order that has an impact on vastly more people *outside* the Reservation than it does on people *inside* the Reservation. *See* Linskey Decl. ¶ 6. The Tribal Court has no power to issue such an order. It is simply beyond the territorial jurisdiction of the Tribal Court. *See, e.g.*, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 658 (2001) (tribe lacks jurisdiction even over non-Indian operated trading post on non-Indian land within the reservation); *see also Plains Commerce Bank*, 128 S. Ct. at 2718-19 (tribal jurisdiction "centers on the land held by the tribe and on tribal members within the reservation").

The Tribe has offered no theory for explaining how the Tribal Court could have jurisdiction to grant the relief the Tribe seeks. When asked by the Tribal Court to explain how that court could enjoin "transfer of licenses that are exclusively under the jurisdiction of the FCC [and] encompassing off-reservation communities," Tribal Court Tr. at 49:18-20, counsel for the Tribe conceded that "[t]he short answer is, I don't have an answer to that," *id.* at 50:11-12. Instead, the Tribe argued that the question of the Court's *jurisdiction* to grant the relief requested

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[15] A map of the CMAs is available at the FCC's website: http://wireless.fcc.gov/auctions/data/maps/CMA.pdf.

[16] *See* 2000 Census of South Dakota, *available at* http://factfinder.census.gov/servlet/GCTTable?_bm=y&geo_id=04000US46&ds_name=DEC_2000_PL_U&-_lang=en&-_caller=geoselect&-redoLog=false&mt_name=DEC_2000_PL_U_GCTPL_ST7&-format=ST-5 *and at* http://factfinder.census.gov/servlet/GCTTable?_bm=y&-context=gct&-lang=en&-caller=geoselect&-ds_name=DEC_2000_PL_U&-CONTEXT=gct&-mt_name=DEC_2000_PL_U_GCTPL_ST7&-tree_id=400&-redoLog=false&-_caller=geoselect&-geo_id=04000US46&-format=ST-2&-_lang=en (50,602 [77%] of the 66,109 residents of CMAs 638 and 639 live outside the boundaries of the Reservation); South Dakota Association of County Officials website, *available at* http://www.sdcounties.org/index.php?option=com_content&task=view&id=14&Itemid=28 (14,490 [74%] of the 19,638 square miles of land within these two CMAs lies in the 10 counties wholly outside the Reservation).

"goes to the merits" and should be "left for another day." *Id.* at 50:14-15. Whether the Tribal Court has authority to enjoin the transfer of spectrum licenses, however, is unquestionably an issue of subject matter jurisdiction that should be decided now, before Alltel is forced to expend any further resources in litigation before a court that lacks jurisdiction to proceed.

II. Alltel Will Be Irreparably Harmed If the Tribal Court Is Permitted To Resolve Disputes Arising out of the Service Agreement.

Alltel will suffer irreparable harm in several forms if the Tribe is permitted to continue seeking relief in Tribal Court.

First, Alltel will be deprived of its federal right to be free of unwarranted tribal court jurisdiction. It is well settled that a party suffers irreparable harm if it is deprived of its "federal right to be free from tribal court interference." *MacArthur v. San Juan Cty.*, 309 F.3d 1216, 1224 & n.7 (10th Cir. 2002). If the Tribe is permitted to continue to press its case in Tribal Court, Alltel will be forced to expend further time and resources to defend the merits of issues in a court that has no jurisdiction. It would do so, moreover, at the risk of receiving inconsistent judgments. Eventually, disputes about the Service Agreement will be brought before an arbitrator, as the parties agreed, and Alltel may face inconsistent decisions from the Tribal Court and an arbitrator. Other federal district courts have frequently recognized that such burdens of unnecessary tribal litigation constitute irreparable harm warranting an injunction. *See, e.g., Ford Motor Co. v. Todecheene*, 221 F. Supp. 2d 1070, 1087-88 (D. Ariz. 2002), (enjoining tribal court where its jurisdiction was "clearly lacking" and would result in unnecessary delay) *aff'd*, 394 F.3d 1170 (9th Cir. 2005), *w'drawn on other grounds*, 488 F.3d 1215.[17]

[17] *See also Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (expenditure of resources and risk of inconsistent judgments constitute irreparable harm supporting injunction against a state court proceeding); *UNC Res., Inc. v. Benally*, 514 F. Supp. 358, 363 (D.N.M. 1981) (enjoining tribal court "to protect" plaintiff from unnecessary litigation in court that

Second, without an injunction Alltel will be irreparably harmed by being denied its bargained-for right to have disputes about the Service Agreement resolved by arbitration. It is axiomatic that the "very nature of arbitration demonstrates the irreparable harm" Alltel faces because "its right to arbitration is a contractual right, sanctioned by statute, to have claims addressed in a particular forum." *Olde Discount Corp. v. Tupman*, 1 F.3d 202, 213 (3d Cir. 1993). If Alltel "were forced to address" issues subject to arbitration in a different forum, "even if it simultaneously could pursue an arbitration, it would suffer an immediate, irreparable harm to the federal right established by the FAA." *See id.*; *accord Global Tel*Link Corp. v. Scott*, 652 F. Supp. 2d 1240, 1246-47 (M.D. Fla. 2009); *Reliance Nat'l Ins. Co. v. Seismic Risk Ins. Servs., Inc.*, 962 F. Supp. 385, 390-91 (S.D.N.Y. 1997). The Tribe's attempt to circumvent the arbitration clause constitutes irreparable harm to Alltel's contractual and federal statutory right to have any disputes about the Service Agreement decided by binding arbitration. *Cf. Nordin v. Nutri/System, Inc.*, 897 F.2d 339, 342 (8th Cir. 1990) (order denying motion to compel arbitration has "serious, perhaps irreparable, consequences").

Third, if the Tribal Court grants the injunction the Tribe has requested, Alltel and Verizon Wireless will be forced to incur millions of dollars in unrecoverable costs in an effort to comply with that order and may very well be placed in the impossible situation of being subject to two contradictory court orders, both of which cannot be satisfied. As explained in the Declaration of Stephen J. Linskey, if the Tribal Court prohibits the transfer of the spectrum licenses covering CMAs 638 and 639, Alltel and its parent, Verizon Wireless, will be forced to attempt to separate the network assets in those CMAs from Alltel Corporation's legacy network in an impossibly

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had no jurisdiction); *BNSF Ry. Co. v. Ray*, 138 F. App'x. 970, 971 (9th Cir. 2005) (unpublished) (affirming preliminary injunction halting tribal proceedings); *Weter v. Archambault*, 232 F.3d 899 (table), No. 99-35638, 2000 WL 1028973, at *1 (9th Cir. July 26, 2000) (unpublished) (affirming injunction against further tribal court proceedings where there was no tribal jurisdiction).

short timeframe before the anticipated closing of the AT&T transaction. Linskey Decl. ¶¶ 8-9. The wireless assets in CMAs 638 and 639 do not function independently. *Id.* ¶ 10. To the contrary, they must be part of a network to provide service. *Id.* In particular, as part of the legacy Alltel Corporation network, they currently rely on a switch in Sioux Falls for routing their calls. *Id.* Without switching from that switch (or some other switch), the cell sites and radio transmitters in CMAs 638 and 639 are useless. *Id.* The assets in CMAs 638 and 639 also need billing support, customer service support, and other back office functions. All of these are currently provided through the legacy Alltel Corporation systems. *Id.* ¶¶ 10-11. The Sioux Falls switch, for example, collects critical billing data for customers in these CMAs and interfaces with the billing platform for generating their bills. That switch, however, will be part of the assets transferred to AT&T because it is necessary for AT&T to operate the Alltel Corporation assets it is acquiring and also serves as the switch for Alltel Corporation's GSM roaming network in parts of North Dakota, Montana, Wyoming, Utah, Nevada, Colorado and Minnesota. *Id.* Once that Sioux Falls switch is transferred to AT&T, Alltel and Verizon Wireless will not have the capability to connect CMAs 638 and 639 to Alltel Corporation's legacy network. *Id.* ¶ 12. Moreover, Verizon Wireless is prohibited from incorporating these CMAs into Verizon Wireless's network. *Id.* The Consent Decree requires these assets to be divested and to remain separate from Verizon Wireless's network. *Id.*

As a result, to keep service in these CMAs functioning, Alltel and Verizon Wireless would be required to spend hundreds of hours and millions of dollars to develop some work around. *Id.* ¶ 9. All of those costs would be unrecoverable. It is settled that such unrecoverable costs constitute irreparable harm warranting injunctive relief. *See, e.g.*, *Iowa Utils. Bd. v. F.C.C.*, 109 F.3d 418, 426 (8th Cir. 1996) ("The threat of unrecoverable economic loss . . . does qualify

as irreparable harm."); *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1472-73 (8th Cir. 1994); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1226-27 (8th Cir. 1987).

It might not even be feasible to implement a functioning separation of the network in the time available. As Mr. Linskey explains, planning a project of that nature would take months. Linskey Decl. ¶ 13. As a result, Alltel and Verizon Wireless may be forced into an impossible situation in which they are required under the federal Consent Decree to divest the assets in CMAs 638 and 639, but they are blocked by the Tribal Court from transferring the assets to AT&T, and thus there will be no practically feasible means of complying with both orders.

Lastly, Alltel and Verizon Wireless will suffer an unrecoverable diminution in the sale price for the assets in CMAs 638 and 639. As Mr. Linskey explains, it is extremely unlikely that any purchaser could be found in the future to purchase CMAs 638 and 639 as stand alone properties at a price that matches their value as part of a large regional cluster of integrated markets. Linskey Decl. ¶ 15. Keeping markets together in a cluster tends to produce a more robust competitor and, for the same reason, makes the properties more desirable for a potential purchaser. *Id.* The assets have particular strategic value to AT&T because they fill a gap in AT&T's coverage. *Id.* The value of the assets is necessarily diminished if they are orphaned and must be sold on a stand-alone basis.

III. The Tribe Will Not Be Injured By an Order Enjoining Proceedings in Tribal Court.

While it is certain that Alltel will suffer irreparable harm without an injunction, on the other side of the balance, the Tribe will not suffer *any* cognizable harm if an injunction is issued.

An order enjoining the Tribe from proceeding in Tribal Court and requiring the Tribe to arbitrate disputes arising out of the Service Agreement simply requires the Tribe to abide by its contract.[18]

To the extent the Tribe argues that it will suffer harm if it cannot block the sale to AT&T, that speculation is irrelevant here. An order simply prohibiting the Tribe from proceeding with its case in Tribal Court does not determine for all time that the Tribe may not, after invoking the arbitration procedures agreed upon by the parties, seek some relief. That request can be addressed when and if the Tribe ever brings it. In any event, the Tribe presents no threat of irreparable harm. The Tribe asserts, without any explanation — much less any evidence in support — that if the assets are transferred to AT&T, somehow residents will lose services. That ignores the terms of the AT&T transaction. The Service Agreement will be *assigned* to AT&T. As a result, AT&T will assume all obligations under the Service Agreement, *see* Service Agreement § 20(J), which include obligations to provide service, *id.* § 2 (A). The Tribe provides no basis whatsoever for its speculation that AT&T will not continue to provide service as the assignee of the Service Agreement.

The Tribe also claims that it would forever lose its purported contractual right to the assets. But that is plainly not correct. If the Tribe actually had a contractual right to the assets (such as a right of first refusal) and could prove its claim, it could prove its claim in arbitration and secure the assets, even if it meant unwinding the sale to AT&T. Nothing about the transfer to AT&T would leave the Tribe without a fully sufficient remedy.

IV. The Public Interest Favors an Injunction.

Finally, the public interest favors enjoining the Tribe from proceeding in Tribal Court.

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[18] For the same reason, there is no need for Alltel to post a bond under Fed. R. Civ. P. 56(c). The Tribe will incur no costs or damages as a result of an order stopping the action in Tribal Court.

First, such an injunction would support the general public policy in favor of arbitration. It is well settled that "federal policy favors arbitration." *Fleet Tire Serv. of N. Little Rock v. Oliver Rubber Co.*, 118 F.3d 619, 621 (8th Cir. 1997); *see also Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983) (questions relating to the scope of arbitrable issues "should be resolved in favor of arbitration"); *Affiliated Foods Midwest Coop., Inc. v. Integrated Distribution Solutions, LLC*, 460 F. Supp. 2d 1068, 1071-72 (D. Neb. 2006) ("Federal policy favors arbitration, and there is a strong presumption of arbitrability."). Orders compelling parties to arbitrate issues subject to valid and applicable arbitration clauses serve the public interest by relieving the public court system of unnecessary litigation and enforcing the parties' bargained-for effort to provide an alternative mechanism for dispute resolution.

Second, the particular order that the Tribe seeks — an order enjoining the transfer of the federal spectrum licenses for CMAs 638 and 639 — would affect tens of thousands of nonmembers living outside the Reservation. Such an order would interfere with the transition to AT&T wireless service for tens of thousands of South Dakotans who have not in any way consented to Tribal Court jurisdiction. As explained above, the licenses at issue (for CMAs 638 and 639) cover thirteen counties constituting the bulk of southwestern South Dakota. *See supra* pp. 33-34 & nn. 15-16; *see also* Linskey Decl. at Ex. 1B. Indeed, more than three-quarters of the people served in CMAs 638 and 639 do not live on the Pine Ridge Reservation. *See supra* p. 34. It is clearly in the public interest to enjoin the Tribe from continuing to press for an injunction from the Tribal Court that would disrupt wireless service through a sweeping order so flagrantly beyond the bounds of the Tribal Court's jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should grant Alltel's motion for a preliminary injunction.

Dated: May 5, 2010

BY ***/s/ Talbot J. Wieczorek***

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

ALLTEL COMMUNICATIONS, LLC, Plaintiff, vs. OGLALA SIOUX TRIBE Defendant.	)	**CIV. No. 10 - 5011** **CERTIFICATE OF SERVICE**

The undersigned certifies that on the 5th day of May, 2010, I served by electronic filing and electronic mail, a true and correct copy of Alltel's Memorandum in Support of the Motion for a Preliminary Injunction to:

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