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

ALLTEL COMMUNICATIONS, L.L.C.,	)	
	)	CIV. No. 10-5011
Plaintiff,	)	
	)	
v.	)	BRIEF IN SUPPORT OF
	)	RENEWED MOTION TO
OGLALA SIOUX TRIBE,	)	DISMISS
	)	
Defendant.	)	

Introduction

Defendant Oglala Sioux Tribe, by and through its undersigned counsel, files this Brief in support of the Tribe's renewed 12(b)(1) and 12(b)(6) motion to dismiss the above-captioned civil action.

I. The Tribe Gave Only A Limited Consent To Suit In Federal Court, Applicable Solely To Suits Brought By The Original Contracting Parties Against Each Other.

It is well established that a Tribe's waiver of sovereign immunity from suit "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Rosebud Sioux Tribe v. Val-U Const. Co. of South Dakota, Inc.*, 50 F.3d 560, 562 (8th Cir.), *cert. denied*, 516 U.S. 819 (1995). This principle applies with equal force to contract actions. *See American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1965) (rejecting, on the basis of overwhelming precedent alone, district court's conclusion that tribal sovereign immunity "need not be expressly waived, but can be waived by implication, in contract actions"). As the Eighth Circuit recognized in *American Indian Agricultural Credit*, "Indian tribes have long structured their commercial dealings upon the justified expectation that absent an express waiver their sovereign immunity

stood fast":

> Relaxation of the settled standard invites challenge to virtually every activity undertaken by a tribe on the basis that the tribal immunity has been implicitly waived. Moreover, a waiver of immunity by tribal action represents a substantial surrender of sovereign power and therefore merits no less scrutiny than a waiver based on congressional action. As the Fifth Circuit stated, "To construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity, namely, the protection of the interests and the property of tribes * * *." *Maryland Casualty Co. v. Citizens National Bank*, 361 F.2d 517, 521-22 (5th Cir.), *cert. denied*, 385 U.S. 918, 17 L. Ed. 2d 143, 87 S. Ct. 227 (1966).

780 F.2d at 1378. Thus, despite the observation that "the express waiver standard can unfairly deprive contracting parties of the benefit of their bargains," the Eighth Circuit in *American Indian Agricultural Credit* held that, even in contract actions, "*Santa Clara Pueblo* and its lineage compel us to conclude that nothing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation." *Id.* at 1379.

Furthermore, waivers of tribal sovereign immunity "are to be strictly construed in favor of the Tribe." *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995); *accord*, *Ransom v. St. Regis Mohawk Education and Community Fund, Inc*., 86 N.Y.2d 553, 561, 658 N.E.2d 989, 635 N.Y.S.2d 116 (1995); *see also Seneca-Cayuga Tribe. v. Oklahoma*, 874 F.2d 709, 715 (10th Cir. 1989) ("While tribal sovereign immunity is not absolute, waivers of sovereign immunity are strictly construed."). Because a waiver of immunity "'is altogether voluntary on the part of [a tribe], it follows that [a tribe] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.'" *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d at 1378 (quoting *Beers v. Arkansas*, 61 U.S. 527, 529 (1857)); *see also Oglala Sioux Tribe v. C&W Enterprises, Inc.*, 542 F.3d 224, 231 (8th Cir. 2008) ("A sovereign tribe has full authority to limit any waiver of immunity to which it consents."). "In addition, if a tribe 'does consent to suit, any conditional limitation it imposes on

that consent must be strictly construed and applied.'" *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8th Cir. 2001), *cert. denied*, 535 U.S. 1053 (2002) (quoting *Namekagon Dev. Co. v. Bois Forte Reservation Housing Auth.*, 517 F.2d 508, 509 (8th Cir. 1975)).

In this case, the contract in question here, the Service Agreement, contains a limited waiver of the sovereign immunity of the Tribe to allow certain court actions. Thus, Paragraph 17(A) provides as follows:

> Nothing in this Agreement shall be deemed to be a waiver of the OGLALA SIOUX TRIBE's sovereign immunity from suit, except that the OGLALA SIOUX TRIBE hereby provides a limited waiver of sovereign immunity and consents to be sued should an action be commenced to determine and enforce the obligations of the Parties under this Agreement or the Other Agreements, and provided further that the OGLALA SIOUX TRIBE's consent to suit is only as to arbitration and court action initiated consistent with this Agreement and the Other Agreements. OGLALA SIOUX TRIBE agrees not to take any action that would result in the revocation or modification of the limited waiver granted by this Paragraph 17.

Service Agreement, ¶ 17(A).

Thus, Paragraph 17(A) states that the Tribe has made "a *limited* waiver of sovereign immunity," that it "consents to be sued should an action be commenced to determine and enforce *the obligations of the Parties* under this Agreement or the Other Agreements," and that the Tribe's consent to suit "is *only as to* arbitration and *court action initiated consistent with this Agreement* and the Other Agreements." (Emphasis added.) Otherwise, "[n]othing in this Agreement shall be deemed to be a waiver of [the Tribe's] sovereign immunity from suit[.]"

A "limited" waiver is one that is "[r]estricted; bounded; prescribed," "[c]onfined within positive bounds," or "restricted in duration, extent or scope." *See* Black's Law Dictionary 1077 (4th ed. 1968) (definition of "limited"). One such "restriction" or "positive bound" is that the Tribe's waiver of sovereign immunity and consent to suit is "only as to . . . court action initiated

consistent with" the Service Agreement. "Consistent with" means in harmony with. Black's Law Dictionary 381 (4th ed. 1968). Thus, the terms of the Service Agreement, including its arbitration clause, must be examined to determine whether Alltel's federal court action is consistent with or in harmony with the Service Agreement, given that Alltel is admittedly not a party to the Service Agreement but rather a nonsignatory parent corporation. *See* First Amended Complaint, ¶¶ 6, 18.

Paragraph 17(A) of the Service Agreement provides that the Tribe "consents to be sued should an action be commenced to determine and enforce *the obligations of the Parties* under this Agreement[.]" Service Agreement, ¶ 17(A) (emphasis added). The term "Parties" is defined by the Service Agreement as follows: "Western Wireless and OGLALA SIOUX TRIBE are sometimes referred to individually as a '**Party'** and collectively as the '**Parties**.'" Service Agreement, p. 1, Introductory Paragraph (emphasis in original). Thus, the term "Parties" is not defined as including successors or assigns, or the corporate parent, of a Party, but rather refers solely to the original contracting parties themselves. Furthermore, Paragraph 17(B) specifically provides for "the right of either Party" to bring suits for "Ancillary Remedies." Service Agreement, ¶ 17(B). Finally, Paragraph 17(C) provides for enforcement of judgments "through other courts as necessary to enforce the Party's rights against the judgment Party's properties and assets." Service Agreement, ¶ 17(C).

Thus, when the "limited" waiver of sovereign immunity set forth in Paragraph 17(A) of the Service Agreement, as well as the conditional limitations imposed on that consent to suit, are strictly construed in favor of the Tribe, it can readily be seen that the waiver only allows suits brought by one original contracting party against the other original contracting party. Nothing in Paragraph 17 clearly, unequivocally, or explicitly allows a corporate parent or an assignee to

bring an action against the Tribe. In particular, Paragraph 17 cannot be read to allow a corporate parent or an assignee to bring an action against the Tribe to compel compliance with the arbitration clause, since that clause only applies to disputes, claims or controversies "between them [, i.e., the original contracting Parties]." Service Agreement, ¶ 17(B).

Nor can a waiver of sovereign immunity be implied from the clause of the contract governing assignments. Paragraph 20 (J) of the Service Agreement provides as follows:

> Assignment by Western Wireless. Subject to OGLALA SIOUX TRIBE's approval, which shal1 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 Wire1ess under this Agreement. Upon such assignment, Western Wireless shall be relieved of all liabilities and obligations hereunder and assignee shall assume all liabilities and obligations hereunder. OGLALA SIOUX TRIBE shall look solely to the assignee for performance under this Agreement and all obligations hereunder unless OGLALA SIOUX TRIBE reasonably determines that the assignee is not of equal or substantially similar credit worthiness. Western Wireless may otherwise assign this Agreement upon written approval of OGLALA SIOUX TRIBE, which approval shall not be unreasonably withheld or delayed.

Service Agreement, ¶ 20 (J).

Nothing in Paragraph 20 (J) either expressly or clearly and unequivocally provides that an assignee of Western Wireless will have the benefit of the waiver of sovereign immunity and consent to suit contained in Paragraph 17(A). Paragraph 20(J) merely provides that an "assignee shall assume all liabilities and obligations hereunder." It could be implied from this language that, since the assignee is bound by the obligations of the Service Agreement, it also obtains the benefits thereof, including the benefit of the Tribe's waiver of sovereign immunity and consent to suit set forth in Paragraph 17(A). Such a construction, however, would necessarily imply a waiver of the sovereign immunity of the Tribe that exceeds the "limited" express waiver of tribal

sovereign immunity set forth in Paragraph 17 of the Service Agreement, which express waiver only applies to the original contracting parties. Such a waiver, or extension of a waiver, by implication is not permitted, even in contract cases.

Furthermore, Paragraph 17(A) expressly provides that "[n]othing in this Agreement shall be deemed to be a waiver of the OGLALA SIOUX TRIBE's sovereign immunity from suit [except the limited waiver set forth in Paragraph 17]." Service Agreement, ¶ 17(A). The word "deemed" is used in the sense of "construed." *See* Black's Law Dictionary 504 (4th ed. 1968) (defining "deem" as meaning "[t]o hold; consider; adjudge; condemn; determine; treat as if; *construe*") (emphasis added). Consequently, nothing in Paragraph 20 (J), allowing assignments of the contract by Western Wireless, can be "deemed" or construed to constitute a waiver of the Tribe's sovereign immunity so as to allow an assignee to sue the Tribe to enforce its obligations under the Service Agreement. Similarly, nothing in the agreement can be "deemed" or construed to constitute a waiver of the Tribe's sovereign immunity so as to allow a corporate parent of one of the original contracting parties to sue the Tribe to enforce its obligations under the Service Agreement.

With regard to construction of the contract in question here, the Service Agreement provides that "[t]his Agreement will be construed according to OGLALA SIOUX TRIBE and federal laws, or in the absence of such laws, the laws of the State shall be used as guidance, without giving effect to conflict of law principles." Service Agreement, ¶ 20(D). In interpreting a contract, a court seeks to ascertain and give effect to the intention of the parties; at the same time, to find the intention of the parties, the court relies on the contract language they actually used. *Carstensen Contracting, Inc. v. Mid-Dakota Rural Water Sys., Inc.*, 653 N.W.2d 875, 877 (S.D. 2002). To ascertain the intent of the parties to a contract, a court relies on the contract's

language and must attempt to give meaning to all of the provisions of the contract. *Prunty Construction, Inc. v. City of Canistota*, 682 N.W.2d 749, 755 (S.D. 2004).

The intent of the parties to the Service Agreement as expressed in Paragraph 17 was to provide only a limited waiver of tribal sovereign immunity to provide for court actions between the original contracting parties. To extend that waiver by implication to allow a nonsignatory corporate parent or an assignee to bring an action against the Tribe would be contrary to that expressed intent.

In sum, as an alleged nonsignatory corporate parent of Western Wireless, Alltel cannot bring an action in federal district court to compel the Tribe to arbitrate disputes arising between Alltel and the Tribe, as any action to compel such arbitration (1) does not fall within the bounds or restrictions of the Tribe's limited waiver of immunity set forth in Paragraph 17 of the Service Agreement and is therefore barred by tribal sovereign immunity and (2) is contrary to and not "consistent with" the terms of the Service Agreement, as properly construed.

II. By Bringing Suit In Tribal Court Against Alltel, The Tribe Did Not Waive Its Immunity From Responsive Suits For Affirmative Relief Brought By Alltel In Federal Court.

When a tribe brings a lawsuit, it does not waive immunity for counterclaims or other cross-suits. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("[A] tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe."); *United States v. United States Fidelity & Guaranty Corp.*, 309 U.S. 506, 513 (1940) ("Possessing . . . immunity from direct suit, we are of the opinion [the Indian nations] possess a similar immunity from cross-suits."); *Rosebud Sioux Tribe v. Val-U Const. Co.*, 50 F.3d at 562. The only exception is "for

matters asserted in recoupment." *Rosebud Sioux Tribe v. Val-U Const. Co.*, 50 F.3d at 562. "Recoupment is a defensive action that operates to diminish the plaintiff's recovery rather than to assert affirmative relief." *Id.* (citation omitted).

By direct analogy to these authorities, the Tribe did not waive its immunity from a responsive suit brought by Alltel in federal court by its unilateral action in instituting litigation against Alltel in the tribal court. Moreover, Alltel's federal court action is clearly not one sounding in recoupment, as it seeks affirmative declaratory and injunctive relief against the Tribe.

III. The Alternative Estoppel Doctrine Cannot Be Invoked To Pierce The Tribe's Sovereign Immunity.

Although admitting that it is not a party to the service agreement, Alltel attempts to invoke the doctrine that "a nonsignatory [to a contract containing an arbitration clause] may compel a signatory to arbitrate claims *in limited circumstances*." *PRM Energy Systems, Inc. v. Primenergy L.L.C.*, 592 F.3d 830, 834 (8th Cir. 2010) (emphasis added). The Eighth Circuit has recognized "two such circumstances." *Id.* "The first relies on agency and related principles to allow a nonsignatory to compel arbitration when, as a result of the nonsignatory's close relationship with a signatory, a failure to do so would eviscerate the arbitration agreement." *Id.* "The second relies loosely on principles of equitable estoppel, broadly encompasses more than one test for its application, and has been termed 'alternative estoppel.'" *Id.*

Alltel is relying on the alternative estoppel theory "which takes into consideration the relationships of persons, wrongs, and issues." *C.D. Partners LLC v. Grizzle*, 424 F.3d 795, 799 (8th Cir. 2005). More specifically, "[a]lternative estoppel typically relies, at least in part, on the claims [that the signatory is asserting against the nonsignatory] being so intertwined with the agreement containing the arbitration clause that it would be unfair to allow the signatory to rely

on the agreement in formulating its claims [against the nonsignatory] but to disavow availability of the arbitration clause of that same agreement [to the nonsignatory]." *PRM Energy Systems, Inc. v. Primenergy L.L.C.*, 592 F.3d at 835.

But Alltel cannot rely on the alternative estoppel doctrine to pierce the Tribe's sovereign immunity. Tribal sovereign immunity is a right that can only be waived by either Congress or the Tribe itself, and, in the absence of such a waiver, must be recognized. It cannot be pierced based on equitable considerations. "Sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of the situation." *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1052 n. 6 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9 (1985), citing *People ex rel. California Dep't of Fish & Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) ("Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize."). "[T]he requirement that a waiver of tribal immunity be 'clear' and 'unequivocally expressed' is not a requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved." *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998). "In the absence of a clearly expressed waiver by either the tribe or Congress, the Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *Id.*, citing *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758 (1998) (declining suggestion to limit tribal sovereign immunity "to reservations or to noncommercial activities," despite "considerations [that] might suggest a need to abrogate tribal immunity, at least as an overarching rule," including that "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as

in the case of tort victims"), and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. at 510 (refusing to "modify the long-established principle of tribal sovereign immunity" despite arguments that the immunity impermissibly burdens the administration of state tax laws and that tribal businesses have become so far removed from traditional tribal interests that immunity "no longer makes sense in this context").

In short, because neither Congress nor the Tribe itself has waived the immunity of the Tribe from suit in federal court in clear and unequivocally expressed terms, the alternative estoppel rule cannot be employed to pierce or evade that immunity, and the Court should therefore dismiss the First Amended Complaint under Rule 12(b)(1) as barred by tribal sovereign immunity.

IV. Alltel Lacks Standing To Sue.

Under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), a party must establish three elements for Article III standing: (1) the party must have suffered an "injury in fact," consisting of an "invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent[,]" *id.* at 560 (internal quotation marks and citations omitted), (2) there must be a causal connection between the injury and the conduct complained of, where the injury is fairly traceable to the challenged action, and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citation omitted). *See Planned Parenthood of Mid-Missouri and Eastern Kansas v. Ehlmann*, 137 F.3d 573, 577 (8th Cir. 1998).

In this case, Alltel cannot satisfy the first and third requirements for Article III standing. First, Alltel has not suffered an injury in fact, as there has been no invasion of a legally protected interest of Alltel's. As pointed out above, Alltel is neither a party to the Service Agreement, nor

a transferee of rights arising under that agreement. Rather, Alltel is merely a nonsignatory parent corporation. As such, Alltel is generally not entitled to invoke the arbitration clause and compel the Tribe to arbitrate disputes arising under a contract signed only by its subsidiary. Furthermore, as will be explained in detail below, the limited circumstances allowing a nonsignatory to compel a signatory to submit to arbitration are not present in this case. Consequently, because Alltel has not suffered the invasion of a legally protected interest, it has not suffered the requisite injury in fact.

In addition, Alltel cannot satisfy the redressability requirement, in view of the Tribe's sovereign immunity from suit. Because neither Congress nor the Tribe has waived the Tribe's sovereign immunity, it is unlikely that any injury suffered by Alltel can be redressed by a favorable decision.

In short, because Alltel cannot meet the injury in fact and redressability requirements for Article III standing, the First Amended Complaint should be dismissed under Rule 12(b)(1) for lack of standing.

V. Alltel, As A Nonsignatory, Cannot Compel Arbitration Of Disputes Arising Under The Service Agreement, As The Agreement's Arbitration Clause Is Specifically Limited To The Arbitration Of "Disputes, Claims And Controversies Between [The Parties]."

Alltel's claim to compel arbitration rests on the principle that "[a] nonsignatory can enforce an arbitration clause against a signatory to the agreement in several circumstances." *C.D. Partners LLC v. Grizzle*, 424 F.3d at 799. In particular, it appears that Alltel is relying on the rule that "equitable estoppel allows a nonsignatory to compel arbitration 'when 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.'" *Donaldson Co., Inc. v. Burroughs*

Diesel, Inc., 581 F.3d 726, 733 (8th Cir. 2009), quoting *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999).

However, this rule of alternative estoppel does not apply where the arbitration clause is not drafted broadly enough to encompass disputes between the signatory and the nonsignatory. Thus, in *C.D. Partners LLC v. Grizzle*, the Eighth Circuit held that the defendants, nonsignatory corporate officers, could compel the plaintiff signatory to arbitrate, rejecting the suggestion that the franchise agreements at issue in that case "were not drafted skillfully enough to include [the corporate] officers within the ambit of the arbitration clause":

> Each agreement's arbitration clause was *drafted broadly* to cover every "claim, controversy or dispute arising out of" the operation of the franchise. Each agreement further provided nothing in the agreement would be deemed to confer rights or remedies upon anyone "other than Franchisee, Franchisor, Franchisor's officers, directors, and employees, ..." By necessary implication, then, each agreement intended to confer its rights or remedies - including the right to arbitrate- upon "Franchisor's officers, directors, and employees." Under the circumstances involved in this case, it is clearly appropriate to allow the nonsignatories to enforce the arbitration agreement against signatory C.D. Partners.

424 F.3d at 800 (emphasis added).

In this case, by contrast, the arbitration clause in the Service Agreement was *drafted narrowly* to cover only those "disputes, claims and controversies between them [, i.e., between the Parties]." Thus, the Service Agreement only intended to confer the right to arbitrate on the original contracting parties, namely Western Wireless and the Tribe. Under the circumstances of this case, it is therefore inappropriate to allow a nonsignatory, such as Alltel, to enforce the arbitration clause against signatory Oglala Sioux Tribe, and Count II of the First Amended Complaint should be dismissed under Rule 12(b)(6) as failing to state a claim upon which relief can be granted.

VI. Alltel Must Exhaust Its Tribal Judicial Remedies Before Challenging The Tribal Court's Jurisdiction In Federal Court, Including Seeking Appellate Review By The Supreme Court Of The Oglala Sioux Nation.

With regard to Count I of Alltel's First Amended Complaint, which seeks a declaratory judgment that the Oglala Sioux Tribal Court lacks jurisdiction to enjoin Alltel from selling or transferring assets used to provide telecommunications services on the Reservation, Alltel must first exhaust its tribal judicial remedies. The United States Supreme Court has held that the federal policy supporting tribal self-government "directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'" *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987), quoting *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985). The Court clarified in *LaPlante* that this "full opportunity" includes tribal appellate review:

> As *National Famers Union* indicates, proper respect for tribal legal institutions requires that they be given a "full opportunity" to consider the issues before them and "to rectify any errors." 471 U.S., at 857 . . .. The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. In this case, the Tribal Court has made an initial determination that it has jurisdiction over the insurance dispute, but Iowa Mutual has not yet obtained appellate review, as provided by the Tribal Code, ch. 1, § 5. Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. at 16-17.

Thus, until the decision of the Tribal Court that it has jurisdiction is fully reviewed by the Supreme Court of the Oglala Sioux Nation, Alltel has not fully exhausted its tribal court remedies. Thus, even assuming Count I of Alltel's First Amended Complaint is not barred by tribal sovereign immunity, the Court should nevertheless either dismiss that count without prejudice or stay this action pending exhaustion of tribal court remedies.

CONCLUSION

In view of the arguments made and authorities cited above, the Defendant Oglala Sioux Tribe respectfully requests that the Court grant its renewed motion to dismiss and dismiss the action with prejudice, or, in the alternative, dismiss without prejudice or stay the action pending Alltel's exhaustion of its tribal court remedies.

Dated this 6th day of May, 2010

Respectfully submitted,

/S/ Mario Gonzalez
Mario Gonzalez, Esq. (SDSB # 612)
GONZALEZ LAW FIRM
522 Seventh Street, Suite 202
Rapid City, South Dakota 57701-2756
Tel: 1-605-716-6355
Fax: 1-605-716-6357
Email: mario@mariogonzalezlaw.com

Attorney for Defendant Oglala Sioux Tribe