UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

SPRINT COMMUNICATIONS COMPANY L.P.,

CIV. NO. 10-4110

Plaintiff,

vs.

THERESA MAULE, in her official capacity as Judge of Tribal Court, CROW CREEK SIOUX TRIBAL COURT, and NATIVE AMERICAN TELECOM, LLC,

Defendants.

BRIEF IN SUPPORT OF
DEFENDANT NATIVE AMERICAN TELECOM, LLC's
MOTION TO STAY

STATEMENT OF THE ISSUE

The sole issue before the Court at this time is whether Defendant Native American Telecom, LLC's (NAT) Motion to Stay, based on the "Tribal Exhaustion Doctrine," should be granted.

STATEMENT OF THE CASE

NAT respectfully requests that the Court stay all proceedings in this duplicative action until Plaintiff Sprint Communications Company L.P. (Sprint) exhausts all tribal court remedies in an action previously filed by NAT in the Crow Creek Tribal Court (Tribal Court), and involving the same questions of law and fact that Sprint seeks to litigate in this Court. It is an elementary tenet of federal Indian law that a party may not circumvent or collaterally attack the

jurisdiction of a tribal court by filing a parallel action in federal court. This rule, which promotes tribal self-government and the authority and development of tribal courts, mandates that this Court "stay its hand" until the Tribal Court has had a full and fair opportunity to determine its jurisdiction, and, if the Tribal Court finds such jurisdiction to exist, to adjudicate the merits of the dispute between NAT and Sprint.

STATEMENT OF FACTS

A. The Structure and Purpose of NAT

NAT is a full-service, tribally-owned limited liability company organized under the laws of the State of South Dakota. NAT's ownership structure consists of the Crow Creek Sioux Tribe (51%) (Tribe), Native American Telecom Enterprise, LLC (25%) (NAT ENTERPRISE), and WideVoice Communications, Inc. (24%) (WideVoice).[1] Affidavit of Gene DeJordy ¶ 2 (hereinafter DeJordy Affidavit ¶ -).

NAT provides high-speed Internet access, basic telephone, and long-distance services on and within the Crow Creek Sioux Tribe Reservation (Reservation). NAT's services take place exclusively within the exterior boundaries of the Reservation. NAT *does not* provide services within the State of South Dakota outside the exterior boundaries of the Reservation. As a result of its efforts, NAT has created jobs and provided much-needed economic opportunities on the Reservation.[2] DeJordy Affidavit ¶ 4.

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[1] For sake of clarity, it should be noted that NAT ENTERPRISE is a telecommunications development company and is a ***separate and distinct entity*** from NAT. The Tribe is a federally recognized Indian tribe with its tribal headquarters located on the Crow Creek Sioux Tribe Reservation in Fort Thompson, South Dakota. WideVoice is a Competitive Local Exchange Carrier (CLEC). DeJordy Affidavit ¶ 3.

[2] The lack of sufficient telephone and other telecommunications services upon Native American reservations has been a long-standing problem. While 94% of all Americans have at least one telephone in their home, the Federal Communications Commission (FCC) has found that only 47% of Native Americans living on reservations or other tribal lands have telephone service.

B. NAT's Efforts on the Crow Creek Sioux Tribe Reservation and Sprint's Refusal to Pay the Crow Creek Sioux Tribal Utility Authority's Lawfully-Imposed Access Tariffs

In 1997, the Crow Creek Sioux Tribal Council established the Crow Creek Sioux Tribe Utility Authority (Tribal Utility Authority) for the purpose of planning and overseeing utility services on the Reservation and to promote the use of these services "to improve the health and welfare of the residents." DeJordy Affidavit ¶ 5.

On August 19, 2008, the Tribe issued its "Crow Creek Indian Reservation - Telecommunications Plan to Further Business, Economic, Social, and Educational Development" (Telecommunications Plan).[3] DeJordy Affidavit ¶ 6.

On October 28, 2008, the Tribal Utility Authority entered its "Order Granting Approval to Provide Telecommunications Service" (Approval Order).[4] Under this Approval Order, NAT was "granted authority to provide telecommunications service on the Crow Creek Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe."[5] DeJordy Affidavit ¶ 7.

The FCC has determined that this lower telephone subscribership is "largely due to the lack of access to and/or affordability of telecommunications services in these areas" *Federal-State Joint Board on Universal Services: Promoting Development and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order,* 15 FCC Red. 12208 (2000), at ¶¶ 20, 26 (2000 FCC Report). The FCC has also found that "by enhancing tribal communities' access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, we increase tribal communities' access to education, commerce, government and public services." *Id.* at ¶ 23. *See* Tracey A. LeBeau, *Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development,* 12 Stan. L & Pol'y Rev. 237, 238 (2001) ("Reservation infrastructures, including basic services such as water, electricity, gas and telecommunications, are currently incapable of supporting tribal populations").

[3] The Telecommunications Plan is attached as "Exhibit 1" to NAT's Motion to Stay.

[4] The Approval Order is attached as "Exhibit 2" to NAT's Motion to Stay. The Approval Order was signed by then-Crow Creek Tribal Chairman Brandon Sazue.

[5] The Approval Order "is akin to competitive local exchange (CLEC) approval provided to carriers outside of reservations."

As a result of the Approval Order, NAT properly filed two Access Service Tariffs (Access Tariff) governing termination of telephone traffic on the Reservation. One Access Tariff was filed with the Federal Communications Commission (FCC) for interstate traffic. A second Access Tariff was filed with the Tribal Utility Authority.[6] DeJordy Affidavit ¶ 8.

In September 2009, pursuant to the Approval Order, and after over one year of planning and infrastructure development, NAT launched one of the first new tribally-owned telephone systems in the United States.[7] NAT provides telephone and advanced broadband service to residential and business customers on the Reservation. DeJordy Affidavit ¶ 9.

The telephone and advanced broadband network system on the Reservation enables the Tribe to pursue new economic development opportunities. The Tribe describes its advanced telecommunications system as a vehicle for "paving the way for much-needed business, economic, social and educational development on the Crow Creek Reservation." Specifically, the broadband network supports high-speed broadband services, voice service, data and Internet access, and multimedia.[8] DeJordy Affidavit ¶ 12.

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[6] The Approval Order requires that the basic telephone service offered by NAT must be "consistent with the federal universal service requirements of 47 U.S.C. § 214(e) and the rules of the Federal Communications Commission." NAT has always complied with this portion of the Approval Order. DeJordy Affidavit ¶ 8.

[7] NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. NAT also provides a computer training facility with free Internet and telephone service to tribal members. In September 2010, NAT will be opening a new stand-alone Internet Library and Training Facility, which will include Internet stations and educational facilities for classes. DeJordy Affidavit ¶ 10. The Tribe's press release announcing the launch of its tribally-owned telephone and advanced broadband telecommunications system is attached as "Exhibit 3" to NAT's Motion to Stay.

[8] The broadband network uses WiMax (Worldwide Interoperability for Microwave Access) technology operating in the 3.65 GHZ licensed spectrum, providing service to residential, small business, hospitality, and public safety customers. WiMax is a Broadband Wireless Access technology based on the IEEE 802.16 standard that enables the delivery of high-speed personal, business, and enterprise class broadband services to subscribers anytime, anywhere. Through the

Shortly after NAT launched its tribally-owned telephone system, Sprint improperly refused to pay NAT's lawfully-imposed Access Tariff.[9] In March 2010, NAT filed a complaint with the Tribal Utility Authority seeking enforcement of its Access Tariff. Specifically, NAT alleged that Sprint was not paying the required Access Tariff for services NAT rendered on the Reservation.[10] DeJordy Affidavit ¶¶ 14, 16.

On March 29, 2010, the Tribal Utility Authority entered an Order agreeing with NAT and finding that Sprint's "self-help" in refusing to pay NAT's Access Tariff violated the "filed rate doctrine."[11] DeJordy Affidavit ¶ 17. Specifically, the Tribal Utility Authority found that

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use of advanced antenna and radio technology with OFDM/OFDMA (Orthogonal Frequency Division Multiplexing), NAT delivers wireless IP (Internet Protocol) voice and data communications. WiMax was selected because this technology offers flexible, scalable, and economically viable solutions that are key components to deploying in vast rural environments, such as the Reservation. DeJordy Affidavit ¶ 13.

[9] Sprint is a limited partnership that provides interexchange services on the Reservation. It should be noted that Sprint initially paid NAT its lawfully-imposed Access Tariffs. However, shortly after making these initial payments, Sprint engaged in the improper "self-help" actions that have resulted in this (and other) lawsuits. DeJordy Affidavit ¶ 15.

[10] Sprint has taken the position, despite its earlier Access Tariff payments and the applicability of lawful tariffs in effect, that the termination of traffic by NAT on the Reservation is not subject to compensation, even though NAT incurs costs to terminate Sprint's traffic. DeJordy Affidavit ¶ 16.

[11] The Tribal Utility Authority's Order is attached as "Exhibit 4" to NAT's Motion to Stay. The Order was signed by then-Crow Creek Tribal Chairman Brandon Sazue. The "filed rate doctrine" requires all customers, such as Sprint, who avail themselves of tariffed services, to pay lawfully-imposed tariff rates. The "filed rate doctrine" is a common law construct that originated in judicial and regulatory interpretations of the Interstate Commerce Act and was later applied to the Communications Act of 1934 (as amended). The doctrine has been consistently applied to a variety of regulated industries and stands for the principle that a validly filed tariff has the force of law and may not be challenged in the courts for unreasonableness, except upon direct review of an agency's endorsement of the rate. *See, e.g. Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116, 117 (1990). The doctrine is premised on two tenets – (1) it prevents carriers from engaging in price discrimination between ratepayers; and (2) it preserves the exclusive role of authorities in approving "reasonable" rates for telecommunications services. *Marcus v. AT&T Corp.,* 138 F.3d 46, 58 (2nd Cir. 1998).

"[Sprint's] self-help actions could jeopardize the ability of a carrier, like [NAT], to serve the essential telecommunications needs of the residents of the Crow Creek reservation." The Tribal Utility Authority also held "[NAT] commenced providing essential telecommunications services . . . to the residents of the Crow Creek reservation pursuant to [the Tribal Utility Authority's Approval Order]. . . . It is also a matter of public record that [NAT] has commenced offering new and critically needed services on the reservation." DeJordy Affidavit ¶ 17.

The Tribal Utility Authority's Order concluded by stating:

> The Crow Creek reservation is a rural, high-cost service area. Access service revenue has historically been a critically important source of revenue for rural carriers, like [NAT], to support operations. . . . If carriers, like Sprint, are able to take self-help actions and not pay for services rendered subject to a lawful tariff, it would not only put at risk the continued operation of carries like [NAT], but would also put at risk the services relied upon by, and in some cases essential to[,] the health and safety of, consumers."

As such, the Tribal Utility Authority found "Sprint's non-payment of [NAT's] access tariff charges to be a violation of the laws of the Crow Creek Sioux Tribe."[12] DeJordy Affidavit ¶ 18.

As of today's date, Sprint continues to entirely ignore this Order and refuses to pay the Tribal Utility Authority's lawfully-imposed Access Tariff. DeJordy Affidavit ¶ 20.

C. Sprint's Actions Have Resulted in Duplicative Federal Court and State Regulatory Agency Legal Proceedings

i.) Sprint's South Dakota Public Utilities Commission Complaint

Less than two months after the Tribal Utility Authority issued its Order, Sprint filed a complaint with the South Dakota Public Utilities Commission ("SDPUC" or "Commission").[13]

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[12] The Tribal Utility Authority's Order also provided Sprint with an invitation to address Sprint's concerns. However, Sprint has also entirely ignored this part of the Order. DeJordy Affidavit ¶ 19.

[13] Sprint's Amended Complaint to the SDPUC is attached as "Exhibit 5" to NAT's Motion to Stay.

Sprint's complaint concerns issues identical to those decided by the Tribal Utility Authority. In its SDPUC complaint, Sprint alleges that (1) the SDPUC has the sole authority to regulate Sprint's interexchange services within the State of South Dakota; (2) the Tribal Utility Authority lacks jurisdiction over Sprint; and (3) NAT must seek a Certificate of Authority from the SDPUC and file a tariff with the Commission before NAT can access charges for switched access service.

At this time, Sprint's complaint is pending before the SDPUC. NAT (along with the Tribal Utility Authority) has requested that Sprint's SDPUC complaint be dismissed (or stayed) based on the doctrine of "tribal exhaustion" and for lack of jurisdiction. The parties are currently in the process of briefing these issues for the Commission.

ii.) NAT's Complaint in Crow Creek Tribal Court

On July 7, 2010, NAT filed a complaint with the Crow Creek Tribal Court.[14] NAT's complaint concerns issues identical to those decided by the Tribal Utility Authority. In its Tribal Court complaint, NAT alleges that (1) Sprint is unlawfully refusing to compensate NAT for Access Tariffs; and (2) the Tribal Utility Authority and Tribal Court have proper jurisdiction over Sprint in this matter.

At this time, NAT's complaint is pending before the Tribal Court. Sprint has requested that NAT's Tribal Court complaint be dismissed for lack of jurisdiction. NAT has requested that a scheduling order be entered by the Tribal Court.

[14] NAT's Tribal Court Complaint is attached as "Exhibit 6" to NAT's Motion to Stay.

iii.) Sprint's Complaint in Federal District Court

On August 16, 2001, Sprint filed a complaint with this Court. Sprint's complaint concerns issues identical to those decided by the Tribal Utility Authority and contained in NAT's Tribal Court complaint. In sum, Sprint alleges that the Tribal Utility Authority and Tribal Court have no jurisdiction over its activities on the Reservation and requests damages, declaratory relief, and injunctive relief.

At the present time, Sprint's complaint is pending before this Court. NAT has filed its Motion to Stay based upon lack of subject matter jurisdiction and the "Tribal Exhaustion Doctrine."

DISCUSSION OF LAW

I. THE "TRIBAL COURT EXHAUSTION DOCTRINE" AND ITS UNDERLYING POLICIES REQUIRE THAT SPRINT EXHAUST ITS REMEDIES IN THE CROW CREEK TRIBAL COURT BEFORE THIS COURT PROCEEDS

In *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) and *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845 (1985), the Supreme Court announced the doctrine of "tribal court exhaustion." This doctrine is designed to protect the integrity of tribal courts, vital as those courts are to the exercise of tribal self-government. Under this doctrine, Sprint may not, in this Court, challenge the jurisdiction of the Crow Creek Tribal Court or litigate the merits of the dispute already pending before the Tribal Court until Sprint first exhausts all remedies available in the Tribal Court regarding similar issues.

The federal courts have uniformly held that, under the tribal court exhaustion doctrine, a party may not circumvent or attack a tribal court's jurisdiction by filing a duplicative federal court action. Because this dispute strikes at the very heart of the Tribe's self-determination – including Sprint's efforts to pierce the Tribe's sovereign immunity and the Tribe's exercise of

regulatory and adjudicatory oversight over economic development activities on the reservation – it presents a classic case for application of the tribal court exhaustion doctrine. Accordingly, this Court should "stay its hand" until Sprint exhausts its remedies in Crow Creek Tribal Court.[15]

A. The Tribal Court Exhaustion Doctrine Applies Here Where Sprint Has Filed a Duplicative Federal Court Action Regarding the Same Questions of Law and Fact as the Tribal Court Action

"Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 14-15 (1987) (internal citation and footnote omitted). "A federal court's exercise of jurisdiction over matters relating to reservation affairs can . . . impair the authority of tribal courts[.]" *Id.* at 15 (citations omitted). Accordingly, a party may not attack or circumvent the jurisdiction of the tribal court in a collateral or parallel federal action unless and until it first exhausts all remedies available in tribal court. *Id.* at 16-17; *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 856-57 (1985).[16] In fact, the Eighth Circuit Court of Appeals has even gone as far as to hold that the exhaustion of tribal court remedies is required even when *no tribal court action is pending* at the time a federal court action is filed. *See e.g., Duncan Energy Co. v. Three*

[15] The duration of such a stay would turn on the Crow Creek Tribal Court's jurisdictional determination. Under the tribal court exhaustion doctrine, if the Tribal Court concludes that it lacks jurisdiction over Sprint or the subject matter of the dispute, this Court would then proceed to adjudicate the merits of the dispute. If, however, the Tribal Court concludes that it possesses jurisdiction, then this Court should "stay its hand" until the Tribal Court adjudicates the merits of the dispute. After the Tribal Court's adjudication on the merits, and the parties' exhaustion of any available appellate remedies, this Court could then proceed to review the Tribal Court's jurisdictional determination. If this Court upholds the jurisdictional determination under federal law, then it would not re-adjudicate the merits. If, however, this Court finds that the Tribal Court acted without jurisdiction, it would then adjudicate the merits of the dispute.

[16] The tribal court exhaustion doctrine applies regardless of whether a party collaterally attacks the jurisdiction of a tribal court directly, see *Nat'l Farmers,* 471 U.S. at 856-57, or indirectly by seeking to litigate the merits of a dispute already before a tribal court, see *Iowa Mut.,* 480 U.S. at 11-13, 16-17.

Affiliated Tribes of Fort Berthold Reservation, 27 F.3d 1294, 1295-96, 1299-1301 (8th Cir. 1994).

While the exhaustion of tribal court remedies is "required as a matter of comity, not as a jurisdictional prerequisite[,]" *Iowa Mut.,* 480 U.S. at 16 n. 8, the doctrine is a mandatory "inflexible bar" to a federal court's exercise of jurisdiction. *Bowen v. Doyle,* 230 F.3d 525, 529-30 (2nd Cir. 2000). Further, because the "federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, . . ." "[a]t a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determination of the lower tribal courts[,]" *Iowa Mut.,* 480 U.S. at 16-17, and a federal court must "stay[] its hand" until tribal appellate review is complete, *Nat'l Farmers,* 471 U.S. at 857. Following the exhaustion of tribal court remedies, the tribal courts' determination of tribal jurisdiction is subject to challenge in federal court – until then, "it would be premature for a federal court to consider any relief." *Id.; see also Iowa Mut.,* 480 U.S. at 19.

To NAT's knowledge, the federal courts have arrived at complete unanimity on the precise question presented here. With the exception of occasional district court opinions that have been overturned on appeal, the federal courts have uniformly held that the tribal court exhaustion doctrine precludes a party such as Sprint from litigating in federal court those very same issues that are pending in a parallel tribal court action.

For example, in *Gaming World Int'l Ltd. v. White Earth Band of Chippewa Indians,* 317 F.3d 840 (8th Cir. 2003), the Eighth Circuit considered a dispute stemming from a casino management agreement between Gaming World and the Band. The dispute arose when the tribal council terminated the agreement and Gaming World initiated arbitration proceedings. *Id.* at 846-47. The Band subsequently sued Gaming World in tribal court, seeking a declaration that

the management agreement was invalid. *Id.* at 846. Gaming World objected to tribal court jurisdiction and, one month later, sued the Band in federal court, seeking a declaratory judgment as to the validity of the agreement and an order compelling arbitration. *Id.* Recognizing that "[t]he first filed declaratory action [in tribal court] encompasses all of the issues between the parties . . . [and that] Gaming World's subsequent petition for declaratory relief and arbitration was a clear attempt to evade tribal court jurisdiction," the Eighth Circuit held:

> [T]he district court erred by not deferring for exhaustion of tribal court remedies and by proceeding to rule on the motion to compel arbitration. *Our decision in* [Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996)] and those in similar cases decided by the Fifth, Ninth, and Second Circuits teach that exhaustion should be required when a party tries to avoid tribal court jurisdiction by seeking an order to compel arbitration in federal court.* This is especially true if the underlying dispute involves *activities undertaken by tribal government within reservation lands.* Failure to require exhaustion in these circumstances would undermine the important federal policy to foster tribal self government through the development of tribal courts as enunciated in *Nat'l Farmers Union Ins. Co.* and *Iowa Mut. Ins. Co.*

Id. at 851-52 (emphasis added) (footnote omitted).

The Eighth Circuit was also confronted with the exhaustion doctrine in *Bruce H. Lien Co. v. Three Affiliated Tribes,* 93 F.3d 1412 (8th Cir. 1996). There, the Chairman and Secretary of the Three Affiliated Tribes Tribal Business Council, purportedly acting on behalf of the Tribes, executed a gaming management agreement with the Bruce H. Lien Company that included an arbitration clause and corresponding waiver of sovereign immunity. *Id.* at 1414-15 n.2. When the company demanded arbitration, the Tribes sued in tribal court seeking a ruling that the management agreement was "null and void under Tribal law due to lack of proper authority and failure to garner approval by the [Tribal Business Council]." *Id.* at 1415-16. After the Tribes obtained a preliminary injunction from the tribal court enjoining the company and the American

Arbitration Association from proceeding with the arbitration, the company filed suit in federal court seeking to enforce the arbitration clause. *Id.* at 1416. The Eighth Circuit concluded:

> [T]he Tribes are challenging the legal validity of the contract itself, specifically the actions of its former Chairman leading to the execution of the contract. This challenge to the document itself therefore calls into question all provisions contained therein (including provisions relating to arbitration, sovereign immunity, and federal district court jurisdiction). . . .
>
> [T]he issue becomes where the decision regarding the contract's validity is to be made. In the end we are convinced that the question must first be promptly addressed in the Tribal Court, subject to appropriate review by the District Court.

Id. at 1417.

In *Reservation Telephone Cooperative v. Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F.3d 181 (8th Cir. 1996), three telephone cooperatives challenged the authority of multiple tribes to impose possessory interest tax on telephone lines and rights-of-way within their reservation. *Id.* at 182. Each cooperative provided telephone service to the reservation through telephone cables crossing reservation lands by virtue of rights-of-way granted by the Secretary of the Interior.[17] *Id.* at 182-83.

In 1990, the tribes enacted a tax on interests in real and personal property located within the exterior boundaries of the reservation and used for business or profit. This possessory interest tax was assessed on 100 percent of the actual value of the possessory interest as determined by the Tribal Tax Commission. *Id.* at 183. Under tribal law, the cooperatives' property interests situated within the reservation were subject to the possessory interest tax and

[17] Congress authorized the Secretary of the Interior to grant these rights-of-way in Section 3 of its Act of March 3, 1901, 31 Stat. 1083 (codified at 25 U.S.C. § 319) (1901 Act). The 1901 Act further authorizes the Secretary of the Interior to tax telephone lines for the benefit of Indian tribes, but leaves intact the authority of state, territorial, or municipal authorities to assess a tax on telephone lines laid pursuant to federal rights-of-way. *Id.* at 183.

to tribal remedies and appeal provisions. As such, the Tribal Tax Commission sent the possessory interest tax forms to the cooperatives with a letter indicating the tribes' intent to collect the taxes. Subsequently, the tribes sent a notice to the cooperatives setting a deadline for filing possessory interest tax returns. *Id.*

In an attempt to avoid paying the taxes, the cooperatives filed an action for declaratory judgment in the United States District Court for the District of North Dakota. The cooperatives asserted various grounds for invalidation of the tribal tax and sought to enjoin the tribes from enforcing the tax. *Id.* The district court held that the cooperatives were required to present their arguments to the tribal court before the federal court action would be allowed to proceed.[18] *Id.* at 184. In affirming the district court's decision, the Eighth Circuit found the cooperatives' opposition to the tribal exhaustion doctrine to be "both incongruous and inconsistent with the policy of tribal self-governance. . . ." *Id.* at 185. The Eighth Circuit concluded by opining that "if a federal court 'accepts the reasoning that a party does not have to exhaust tribal remedies in a case where the party says the underlying tribal action is preempted, there will never be an exhaustion rule.'" *Id.* (internal citations omitted).

In this case, Sprint seeks to litigate a dispute in this Court involving (1) NAT (a tribally-owned company), (2) NAT's actions on and within the exterior boundaries of the Reservation, (3) the Tribe's and Tribal Utility Authority's regulatory authority, (4) the Tribal Court's adjudicatory authority, (5) the Tribe's financial stability, (6) the Tribe's economic development

[18] Shortly thereafter, upon a motion by the cooperatives, the district court amended its stay order to provide instead that the case be dismissed without prejudice pending exhaustion by the cooperatives of their tribal remedies. *Id.* at 184.

efforts, (7) employment opportunities for the Tribe's members, and (8) the Tribe's sovereign immunity.

NAT filed an appropriate action in Tribal Court. Approximately one month later, Sprint filed a plainly duplicative action in this Court and informed the Tribal Court that it contests the jurisdiction of the Tribal Court over it and the subject matter of the dispute. The tribal court exhaustion doctrine unquestionably bars Sprint's transparent attempt to circumvent (and disregard) the jurisdiction of the Tribal Court. Accordingly, this Court should not proceed further in this action until Sprint fully exhausts its remedies in the Tribal Court.

B. Exhaustion in this Dispute – a Quintessential Tribal Affair Stemming from the Crow Creek Sioux Tribe's Exercise of Self-Government and Turning on the Interpretation of Tribal Law – Fulfills the Policies Underlying the Tribal Court Exhaustion Doctrine

The policies underlying the tribal court exhaustion doctrine underscore the importance of its application to this dispute. In addition to promoting the substantive federal policies of tribal self-government, self-determination, and the authority and development of tribal courts, the tribal court exhaustion doctrine advances several prudential policies. *See Iowa Mut.,* 480 U.S. at 14-17; *Nat'l Farmers,* 471 U.S. at 856-57. Judicial efficiency, the "orderly administration of justice," and the avoidance of "procedural nightmare[s]" demand that a tribal court be afforded full opportunity to determine its jurisdiction, evaluate any challenges thereto, rectify any errors, and develop a full record before a federal court intervenes.[19] *Nat'l Farmers,* 471 U.S. at 856-57. Moreover, exhaustion encourages tribal courts "to explain to the parties the precise basis for

[19] As a procedural matter, when a court finds that tribal exhaustion is required, the court can either stay or dismiss the action. If dismissal may result in the running of the applicable statute of limitations, the court should stay the action instead of dismissing it. *Farmers Union Oil Co. v. Guggolz, et al.,* 2008 WL 216321 (U.S.D.C. – South Dakota – Northern Division, January 24, 2008 – Honorable Charles B. Kornmann) (citing *Sharber v. Spirit Mountain Gaming Inc.,* 343 F.3d 974, 976 (9th Cir. 2003)).

accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 857 (footnote omitted).

By contrast, allowing litigants like Sprint to evade proper exercises of tribal court authority through the filing of duplicative actions in other courts would sap tribal courts of their authority and undermine tribal self-government:

> [U]nconditional access to the federal forum *would place it in direct competition with the tribal courts,* thereby impairing the latter's authority over reservation affairs. Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.

Iowa Mut., 480 U.S. at 16 (emphasis added) (citations omitted). The importance of the tribal court exhaustion doctrine has accordingly been affirmed in numerous cases. *See, e.g., Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.,* 207 F.3d 21, 32-33 (1st Cir. 2000) ("[H]aving a tribal court address, in the first instance, the scope of its jurisdiction over a dispute that stems from actions taken in the course of tribal governance promotes efficiency and sensibly allocates scarce judicial resources"); *Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe of Kansas,* 987 F.Supp. 1321, 1329 (D. Kan. 1997) ("If exhaustion is not required, the legitimacy and independence of the tribal court system come into serious question. Allowing litigants to bypass tribal institutions by filing an action in federal court would undercut the tribal court system").

The federal courts have therefore not hesitated to require exhaustion in cases implicating these policies. *See, e.g., Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation,* 27 F.3d 1294, 1300 (8th Cir. 1994) (dispute over tribal taxation and employment rights); *Navajo Nation v. Intermountain Steel Bldgs., Inc.,* 42 F.Supp.2d 1222, 1229 (D.N.M. 1999) (case turning on tribal law and custom of insurance, contract, and tort). "Federal court

restraint is 'especially appropriate' where the issues between the parties grow out of '[t]ribal governmental activity involving a project located within the borders of the reservation.'" *Gaming World,* 317 F.3d at 850 (quoting *Bruce H. Lien,* 93 F.3d at 1420).

Disputes such as the present one between the parties go to the heart of tribal self-government, self-determination, and the disposition of tribal resources. By filing a federal action duplicative of the Tribal Court action, Sprint seeks to place this Court and the Tribal Court on the very "collision course" that the exhaustion doctrine forbids. Sprint's strategy offends the policies of judicial efficiency, the orderly administration of justice, tribal-court development, and tribal law-making authority set forth by the Supreme Court in *Iowa Mut.* and *Nat'l Farmers.* Therefore, in keeping with the numerous decisions set forth above, the exhaustion doctrine and the important policies underpinning it dictate that the Crow Creek Tribal Court must have the first opportunity to address this quintessential tribal affair.

II. THE EXCEPTIONS TO THE EXHAUSTION DOCTRINE DO NOT EXCUSE ITS MANDATORY APPLICATION HERE

In *Nat'l Farmers Union*, the Supreme Court articulated three exceptions to the requirements of the exhaustion doctrine:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

471 U.S. at 856 n.21 (internal citation omitted). In *Strate v. A-1 Construction,* 520 U.S. 438 (1997), the Supreme Court added that the exhaustion doctrine also "must give way" and "would serve no purpose other than delay" when "it is plain" that the tribal court lacks jurisdiction as a

matter of federal law. 520 U.S. at 459 n.14. It is patently clear, however, that none of these exceptions apply here.

With respect to the first exception (bad faith or harassment), NAT's decision to seek judicial relief from the Tribal Court to enforce the Tribal Utility Authority's Order arising out of NAT's activities on and within the Reservation cannot reasonably be viewed as an exercise in bad faith or harassment.

Under the second exception, exhaustion is not required when a federal law expressly vests jurisdiction over a dispute in the federal courts to the exclusion of other forums. *See, e.g., El Paso Natural Gas v. Neztsosie,* 526 U.S. 473, 483-87 (1999) (Price-Anderson Act); *Blue Legs v. United States Bureau of Indian Affairs,* 867 F.2d 1094, 1096-98 (8th Cir. 1989) (Resource Conservation and Recovery Act). Here, Sprint has sought relief from this Court under the Declaratory Judgment Act, (*see* Doc. 1 at ¶¶ 50-56), which provides that a district court "*may* declare the rights and other legal relations of any interested party seeking such declaration[.]" 28 U.S.C. § 2201 (emphasis added). However, because this Act confers "unique and substantial discretion in deciding whether to declare the rights of litigants" rather than an "absolute right upon the litigant[,]" a court's willingness to award such relief must "yield to the applicability of the tribal exhaustion doctrine." *Malaterre v. Amerind Risk Mgmt.*, 373 F. Supp. 2d 980, 981-82 (D.N.D. 2005) (quoting in part *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286-87 (1995)). Indeed, as discussed above, courts have routinely enforced the exhaustion doctrine in declaratory judgment actions against tribes. *See, e.g.*, *Gaming World*, 317 F.3d at 847-48.

Nor may Sprint claim under the third exception that exhaustion would be futile due to any inability to challenge the Crow Creek Tribal Court's jurisdiction. "As long as a tribal forum is arguably in existence, as a general matter, [the federal court] [is] bound by *National Farmers*

to defer to it." *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe,* 117 F.3d 61, 66 (2nd Cir. 1997). Thus, if "the availability of a remedy at tribal law is facially apparent[,]" federal plaintiffs "must direct their arguments to the [t]ribal [c]ourt in the first instance." *Id.*

Here, the Crow Creek Tribal Court has a fully functioning and vital court system. Proceedings before the Tribal Court are governed by a comprehensive set of rules which are designed to ensure the orderly and impartial administration of justice, and litigants enjoy a right of appeal from the determinations of the Tribal Court. If Sprint chooses not to avail itself of the procedures and protections being afforded it by the Tribal Court, that decision cannot operate to undermine the application of the exhaustion doctrine. *See Bank of Oklahoma v. Muscogee (Creek) Nation,* 972 F.2d 1166, 1170 (10th Cir. 1992); *see also Williams-Willis v. Carmel Fin. Corp.,* 139 F.Supp.2d 773, 780-81 (S.D. Miss. 2001) (holding that alleged potential for bias in tribal forum does not excuse failure to exhaust).

Finally, while the Supreme Court noted in *Strate* that application of the exhaustion doctrine is not required where "it is plain" that tribal court jurisdiction is lacking as a matter of federal law, 520 U.S. at 459 n.14, such is clearly not the case here. While an exhaustive jurisdiction analysis at this juncture would be premature and would contravene the fundamental purpose of the exhaustion doctrine – *see Petrogulf Corp. v. Arco Oil & Gas Co.,* 92 F.Supp.2d 1111, 1117 (D. Colo. 2000) ("By arguing that this case falls under neither of the *Montana* exceptions, Plaintiff addresses whether the tribal court has jurisdiction over this case, not whether the tribal court should be permitted to address that question *before* the case is brought in state or federal court. As the Supreme Court has stated, the questions are distinct") (emphasis in original) – it is clear in this case that the Crow Creek Tribal Court has jurisdiction over the dispute between NAT and Sprint. The Supreme Court has referred to its decision in *Montana v.*

United States, 450 U.S. 544, 565-66 (1981) as "the pathmarking case concerning tribal civil authority over nonmembers." *Strate,* 520 U.S. at 445. In *Montana,* the Court held that, at a minimum, tribes may regulate the activity of nonmembers when they "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or when their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-66 (citations omitted).

III. THE COURT SHOULD STAY THIS ACTION UNTIL THE CROW CREEK TRIBAL COURT EITHER DETERMINES IT LACKS JURISDICTION OVER THIS DISPUTE OR ADJUDICATES THE DISPUTE ON THE MERITS

Under the tribal exhaustion doctrine, this Court should "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction[.]" *Nat'l Farmers,* 471 U.S. at 857. The Crow Creek Tribal Court will be called upon to address its jurisdiction over Sprint and the subject matter of NAT's action. In the event the Crow Creek Tribal Court concludes it possesses jurisdiction, the Supreme Court has outlined the downstream sequence and parameters of judicial review:

> If the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, petitioner may challenge that ruling in the District Court. Unless a federal court determines that the Tribal Court lacked jurisdiction, however, *proper deference to the tribal court system precludes relitigation of issues raised by the [underlying] claim and resolved* in the Tribal Courts.

Iowa Mut., 480 U.S. at 19 (emphasis added) (citations omitted). If the Crow Creek Tribal Court upholds its jurisdiction, then, it should proceed to adjudicate the merits of the underlying claim,

and the appellate process should be exhausted, before Sprint may challenge the jurisdictional determination in this Court.[20]

Further, if this Court subsequently upholds an affirmative jurisdictional determination by the Tribal Court, it should not then readjudicate the merits of the underlying dispute. *See, e.g., AT&T Corp. v. Coeur d'Alene Tribe,* 295 F.3d 899, 903-04 (9th Cir. 2002); *Davis v. Mille Lacs Band of Chippewa Indians,* 193 F.3d 990, 991-92 (8th Cir. 1999). As the First Circuit succinctly summarized the exhaustion procedure in *Ninigret Dev. Corp.:*

> [A]s a matter of comity, it is for the tribal court, in the first instance, (a) to determine the contours of its own jurisdiction . . . and if it determines that it has the authority to proceed, (b) to effectuate its jurisdictional determination by adjudicating the merits of the appellant's claims. . . .
>
> Should the case return to the federal court, all preserved jurisdictional issues . . . are subject to plenary district court review. Nevertheless, as long as the tribal court has property defined its own jurisdiction, respect for the tribal court system will bar the relitigation of merits-related issues that were presented to and decided by that court.

207 F.3d at 35 (citations omitted). Accordingly, a party must exhaust its tribal court remedies with respect to the underlying claims as well as the threshold question of jurisdiction. *See Calumet Gaming Group-Kansas, Inc.,* 987 F.Supp. at 1328-29. The failure to do so precludes the federal plaintiff from challenging in federal court even the jurisdictional determination of the tribal court, let alone its decision on the merits of the underlying claim. *See Davis,* 193 F.3d at 991-92.

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[20] Following exhaustion, in making its jurisdictional determination, a district court should review the tribal court's finding of facts under a deferential, clearly erroneous standard, while reviewing legal determinations under a *de novo* standard. *See Mustang Prod. Co. v. Harrison,* 94 F.3d 1382, 1384 (10th Cir. 1996); *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation,* 27 F.3d 1294, 1300 (8th Cir. 1994).

CONCLUSION

This dispute involves (1) NAT (a tribally-owned company), (2) NAT's actions on and within the exterior boundaries of the Reservation, (3) the Tribe's and Tribal Utility Authority's regulatory authority, (4) the Tribal Court's adjudicatory authority, (5) the Tribe's financial stability, (6) the Tribe's economic development efforts, (7) employment opportunities for the Tribe's members, and (8) the Tribe's sovereign immunity.

It is essential that the Crow Creek Tribal Court make the initial jurisdictional and adjudicative determinations in this case. Under the well-established doctrine of tribal court exhaustion, NAT respectfully requests that the Court stay this action until the Tribal Court has had a full and fair opportunity to determine its jurisdiction over the dispute, and if the Tribal Court upholds that jurisdiction, to adjudicate the merits of this matter.

Dated this 6th day of September, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on *September 6th, 2010,* the foregoing *Brief in Support of Defendant Native American Telecom, LLC's Motion to Stay,* was filed and served on all counsel of record via the Court's CM/ECF system.

/s/ Scott R. Swier