UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN 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.

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

INTRODUCTION

Under well-established principles of federal Indian law, the facts of this case mandate that before further proceedings can occur in this Court, Sprint Communications Company, L.P. (Sprint) must exhaust its remedies in the parallel action previously filed by Native American Telecom, LLC (NAT) in Crow Creek Tribal Court (Tribal Court).[1]

The exhaustion doctrine precludes a party from attacking or evading the jurisdiction of a tribal court in a collateral or parallel federal action until it first exhausts all remedies available in the tribal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15-17 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). At its core, the exhaustion doctrine recognizes that "[t]ribal courts play a vital role in tribal self-government, . . . [that] the Federal Government has consistently encouraged their development[,]" and that "[a] federal court's exercise of jurisdiction over matters relating to reservation affairs can . . . impair the authority of tribal courts[.]" *Iowa Mut.*, 480 U.S. at 14-15 (citations and footnote omitted). Therefore, a federal court must "stay[] its hand" and may not "consider any relief" until exhaustion is complete. *Nat'l Farmers,* 471 U.S. at 857. While exhaustion 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 (2d Cir. 2000) (quoting *Granberry v. Greer*, 481 U.S. 129, 131

[1] Sprint largely devotes its "Memorandum in Opposition to Defendant NAT's Motion to Stay" (Opposition Memorandum) to arguing the merits of its claim for injunctive relief and the inapplicability of the *Montana* exceptions. (*See generally* Doc. 34). However, as explained in NAT's "Brief in Support of Motion to Stay," (Support Memorandum) Sprint's attempt to embroil NAT and this Court in the merits of the parties' dispute *prior to resolution of the threshold exhaustion issue* (which resolution will determine the appropriate forum) clearly contravenes the tribal exhaustion doctrine. (*See generally* Doc. 15). As such, NAT will not directly respond to Sprint's arguments on the merits, except as necessary to address the proper application of the exhaustion doctrine to this case.

(1987)). *See also, Burlington Northern R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 & n.3 (9th Cir. 1991) (exhaustion is "not discretionary; it is mandatory" and is "a prerequisite to a federal court's exercise of its jurisdiction").[2] Sprint cannot dispute these fundamental principles.

Sprint cannot disguise its deliberate efforts to circumvent the jurisdiction of the Tribal Court via this later-filed and duplicative action. On July 7, 2010, NAT filed a complaint with the Tribal Court. In its Tribal Court complaint, NAT alleges that (1) Sprint is unlawfully refusing to compensate NAT for Access Tariffs, and (2) the Crow Creek Sioux Tribal Utility Authority (Tribal Utility Authority)[3] and Tribal Court have proper jurisdiction over Sprint in this matter.[4] (Doc. 14-8). Approximately one month later, on August 16, 2010, Sprint filed its complaint with this Court. (Doc. 1). The scope of the parties' respective factual allegations, and the practical effect of any ruling on the merits, is indistinguishable. Thus, exhaustion is plainly warranted.

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[2] In *Iowa Mut.*, the Supreme Court firmly rejected the argument that a federal court's undisputed subject matter jurisdiction, whether based upon diversity of citizenship or the presence of a federal question, "overrides the federal policy of deference to tribal courts" and excuses the exhaustion of tribal court remedies. 480 U.S. at 17-18. *See also, Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1229-30 (9th Cir. 1989) (exhaustion required despite federal court's subject matter jurisdiction).

[3] Under the Constitution and By Laws of the Crow Creek Sioux Tribe, the Tribal Council is empowered and authorized to enact resolutions and ordinances governing the management of all economic and educational affairs and enterprises of the Tribe. The Crow Creek Utility Authority Ordinance was amended in September 1997 to establish the Crow Creek Utility Authority. Under the Crow Creek Utility Authority Plan of Operation, the stated purpose of the Crow Creek Utility Authority is to "plan for, provide, and furnish utility services in all areas of the Crow Creek Sioux Reservation." Crow Creek Sioux Tribe – "*Order Granting Approval to Provide Telecommunications Service*," October 28, 2008. This "Order" is filed with this Court as Document 14-4.

[4] NAT's complaint in Tribal Court includes the following federal, tribal, and common law claims: *Count I* – Breach of Contract/Collection Action Pursuant to Federal Tariffs; *Count II* – Breach of Implied Contract Resulting from Violation of Federal and Tribal Tariffs; *Count III* – Violation of Section 201 of the Communications Act, 47 U.S.C. § 201; *Count IV* – Violation of Section 203 of the Communications Act, 47 U.S.C. § 203; *Count V* – Breach of Contract/Collection Action Pursuant to Tribal Tariff; *Count VI* – Quantum Meruit (Unjust Enrichment); and *Count VII* – Declaratory Judgment. (Doc. 14-8, pages 9-14 of 16).

Next, Sprint cannot reasonably dispute that the respective legal actions arise from activities occurring within the exterior boundaries of the Crow Creek Sioux Tribe Reservation (Reservation). Specifically, Sprint challenges the legitimacy and viability of:

- the Tribal Court;
- NAT - a tribally-owned limited liability company;
- high-speed Internet access, basic telephone, and long-distance services on and within the Reservation;
- the Tribal Utility Authority's ability to plan and oversee utility services on the Reservation;
- the Tribal Utility Authority's ability to promote the use of these utility services to improve the health and welfare of the residents;
- the Tribe's Telecommunications Plan;
- the Tribal Utility Authority's Approval Order;
- the Tribal Utility Authority's access tariffs;
- the Tribal Utility Authority's Enforcement Order;
- one of the first new tribally-owned telephone systems in the United States;
- over one hundred (100) high-speed broadband and telephone installations at residential and business locations on the Reservation;
- a new high-speed broadband and telephone installations on the Reservation;
- an Internet Library with six (6) work stations that provide computer/Internet opportunities for Tribal members who do not otherwise have access to computers;
- the construction and opening of a state-of-the-art facility that will serve as a full-service communications center offering free Internet, online education classes, computer classes and instruction, and free telephone access to individuals who would otherwise not have access to even these basic services on the Reservation;
- subsidies that provide telecommunications services, free-of-charge, to Tribal members;

- the Reservation's ability to escape the unfortunate and long-standing circumstances that have prevented economic development and growth;
- past, present, and future employment and economic development opportunities in one of the nation's poorest areas; and
- a unique business structure composed of both Tribal and private entity ownership that has attracted unprecedented financial and capital investment to the Reservation.

Sprint's attempt to characterize this dispute as a "non-tribal affair" finds no support in the law and is inconsistent with the factual record. It is also well-settled that the existence of off-reservation contacts does not excuse application of the exhaustion doctrine where the genesis of a dispute lays on-reservation. *See, e.g.*, *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 32 (1st Cir. 2000) (dispute arising from tribal housing authority's development of off-reservation low-income housing project for tribal members); *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1168-70 (10th Cir. 1992) (exhaustion required in interpleader action filed by off-reservation bank holding funds subject to contract dispute between tribe and non-Indian company stemming from on-reservation gaming activity); *Stock West Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992) (although disputed document "was delivered . . . off the reservation[,]" exhaustion required because totality of facts show that activities giving rise to the allegations were "commenced on tribal lands"). Here, it is clear that the "genesis" of the parties' dispute arises from activities taking place within the Reservation's boundaries.

Finally, Sprint cannot dispute that it has flouted the processes of the Tribal Utility Authority and Tribal Court. Sprint justifies its actions through letters and filings challenging the Tribal Utility Authority's and Tribal Court's jurisdiction over it and the subject matter of NAT's

action.[5] By taking this posture, Sprint ignores a fundamental tenet of the exhaustion doctrine – that tribal courts should enjoy the opportunity in the first instance to adjudicate challenges to their own jurisdiction. *See Nat'l Farmers,* 471 U.S. at 856-57 (tribal court must have a "full opportunity to determine its own jurisdiction[,] . . . to rectify any errors it may have made[,] . . . [and] to explain to the parties the precise basis for accepting jurisdiction").

In sum, through its actions before this Court and the Tribal Court, Sprint has defied the requirements of the exhaustion doctrine and the orders of the Tribal Utility Authority. Sprint has caused the very "jurisdictional confrontation" it now purports to avoid, and, in doing so, has both presented a textbook case for application of the exhaustion doctrine and vividly underscored the doctrine's importance in safeguarding the integrity of the Tribal Court.

A. Sprint's Reliance on *Strate, Hornell, Christian Children's Fund,* and *Hicks* is Misplaced

Sprint disregards the uniform body of federal court precedent that controls this case and instead relies upon multiple cases that are readily distinguishable. NAT has established that the federal courts have uniformly held that the exhaustion doctrine precludes a party from litigating in federal court, as Sprint seeks to do here, those very same issues that are pending in a parallel, previously-filed tribal court action. Sprint has no answer for this wealth of authority running directly counter to the relief it seeks from this Court. Instead, Sprint either improperly argues the *merits* of this case or relies on authorities that are inapplicable.

Indeed, Sprint principally relies on *Strate v. A-1 Contractors,* 520 U.S. 438 (1997). In *Strate,* however, the Supreme Court was confronted with this limited issue – could a tribal court entertain a civil action between *two non-tribal members* which occurred on a portion of a *public*

[5] This Court should note that on October 13, 2010, Sprint made a "special appearance" before Tribal Court Judge B.J. Jones (Judge Jones). During this "special appearance," Judge Jones issued a briefing schedule regarding initial jurisdictional issues.

highway maintained by the State under a federally granted right-of-way over Indian reservation land? *Id.* at 442. In answering this question in the negative, the Supreme Court held that "tribal courts *may not* entertain claims against *nonmembers* arising out of accidents *on state highways*, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question."[6] *Id.* (emphasis added). In this case, NAT has clearly demonstrated that it is a *tribally-owned* telecommunications company, conducting business on the *Reservation*, and providing employment and economic development opportunities on the *Reservation*. As such, Sprint's reliance on *Strate* is misplaced.

Sprint next cites *Hornell Brewing Co. v. Rosebud Sioux Tribal Court,* 133 F.3d 1087 (8th Cir. 1998), in support of its position. However, in *Hornell,* it was "undisputed that the Breweries *d[id] not conduct [its] activities on the Rosebud Sioux Reservation*. . . ." *Id.* at 1091 (emphasis added). Once again, in this case, NAT has clearly demonstrated that it is a *tribally-owned* telecommunications company, conducting business on the *Reservation*, and providing employment and economic development opportunities on the *Reservation*. As such, Sprint's reliance on *Hornell* is also misplaced.

Sprint also relies upon *Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Court,* 103 F.Supp.2d 1161 (D.S.D. 2000). However, the *Christian Children's Fund* Court found that "[t]he alleged conduct which forms the basis for the complaints in tribal court against CCF *did not occur within the Reservation*. All decisions and related actions regarding the termination of CCF's involvement . . . were *made and implemented off the [R]eservation*."[7] *Id.*

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[6] To demonstrate *Strate*'s limited precedential value, the Supreme Court opined, "T[he] Court expresses no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation." *Id.*

[7] It should also be noted that in *Christian Children's Fund,* the parties actually exhausted tribal court remedies before proceeding to federal district court. *Id.* at 1163-64.

at 1166 (emphasis added). Of course, in this case, NAT has clearly demonstrated that it is a *tribally-owned* telecommunications company, conducting business on the *Reservation*, and providing employment and economic development opportunities on the *Reservation*. Sprint's reliance on *Christian Children's Fund* is also misplaced.

Sprint finally submits that *Nevada v. Hicks*, 533 U.S. 353 (2001) also precludes application of the exhaustion doctrine. In *Hicks,* however, the Supreme Court was presented with the issue of whether a tribal court may assert jurisdiction over civil claims against *state officials* who entered tribal land to execute a search warrant against a tribal member suspected of having violated state law *outside the reservation*.[8] *Id.* at 355. Once again, in this case, NAT has clearly demonstrated that it is a *tribally-owned* telecommunications company, conducting business on the *Reservation*, and providing employment and economic development opportunities on the *Reservation*. Sprint's reliance on *Hicks,* therefore, is also misplaced.

B. Sprint's Unsupported Claims of "Tribal Exhaustion Exceptions" Do Not Apply

In *Nat'l Farmers*, 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 [1] "is motivated by a desire to harass or is conducted in bad faith," or [2] where the action is patently violative of express jurisdictional prohibitions, or [3] 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). It is clear, however, that none of these exceptions apply here.

[8] It should also be noted that the *Hicks* Court specifically stated, "*Our holding in this case is limited* to the question of tribal-court jurisdiction *over state officers enforcing state law*. We leave open the question of tribal-court jurisdiction over nonmember defendants in general." *Id.* at 358 n.2 (emphasis added).

i.) "Futility" and "Bad Faith or Harassment" Exceptions

NAT previously outlined the exceptions to the exhaustion doctrine and demonstrated why none of those exceptions applies to this case. Sprint nevertheless seeks to manipulate the "futility" and "bad faith or harassment" exceptions to substantiate Sprint's disregard for the Tribal Court. It is readily apparent, however, that neither exception applies here.

As Sprint must concede, the "futility" exception is directed at circumstances where "exhaustion would be futile *because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction*[.]" *Nat'l Farmers*, 471 U.S. at 857 n.21 (emphasis added). Sprint cannot claim that it lacks an adequate opportunity to challenge the jurisdiction of the Tribal Court, which is a long-standing institution governed by a comprehensive set of civil procedure rules. In fact, the Tribal Court has already ordered the parties to brief the question of possible federal preemption in this case.

Sprint's speculation that NAT's pursuit of Tribal Court remedies would be futile is not enough to keep Sprint from exhausting its Tribal Court remedies. "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 is a fully functioning and vital court system. Judge B.J. Jones has been appointed to preside over NAT's case in Tribal Court. 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).

A party must presume that it will receive a fair trial in tribal court. "Absent any indication of bias," a tribal court should not be presumed to be "anything other than competent and impartial." *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation,* 27 F.3d 1294, 1301 (8th Cir. 1994). Sprint's facts in this regard are nebulous, its logic is confused, and its understanding and appreciation of the implications of its argument on tribal sovereignty is non-existent.

Sprint next proceeds, under the guise of arguing the "bad faith" exception, to attack the powerful congressional policies underpinning the exhaustion doctrine. Sprint's failure to appreciate the vital role that tribal courts play in tribal sovereignty and self-government is readily apparent. However, "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians[,]" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978), and civil jurisdiction over "the activities of non-Indians on reservation lands" "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute[,]" *Iowa Mut.*, 480 U.S. at 18.

It is not "bad faith" for NAT to take the position that the Tribe's own judiciary should resolve questions so central to its self-governance and economic security. Rather, it is a vindication of the important value that both the Tribe and the federal government have placed on

maintaining the vitality and integrity of the Tribal Court. In sum, 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."

In the end, Sprint trivializes the legitimacy of the Tribal Court. The federal courts, however, have not been receptive to unfounded attacks on the integrity and impartiality of tribal courts. *See, e.g.*, *Iowa Mut.*, 480 U.S. at 19 ("The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in [*Nat'l Farmers*], and would be contrary to the congressional policy promoting the development of tribal courts"). As the First Circuit explained in *Ninigret Dev. Corp.*:

> The unsupported averment that non-Indians cannot receive a fair hearing in a tribal court flies in the teeth of both congressional policy and the Supreme Court precedents establishing the tribal exhaustion doctrine. . . . [A] party cannot skirt the tribal exhaustion doctrine simply by invoking unfounded stereotypes.

207 F.3d at 34 (citations omitted). Sprint's invitation to second-guess the wisdom of the federal policies underpinning the exhaustion doctrine should fare no better here.

ii.) "Federal Prohibition" Exception

Under the third 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. Sprint alleges that 47 U.S.C. § 207 precludes Tribal Court jurisdiction in this case. However, Sprint's assertion is not consistent with either the purpose of this statutory provision or recent precedent analyzing "federal prohibition" exception.[9]

[9] NAT believes that a comprehensive jurisdictional analysis at this juncture is premature and contravenes 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

47 U.S.C. § 207 provides:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter *may* either make complaint to the Commission as hereinafter provided for, or *may* bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

(emphasis added).

First, by using the permissive term "may," Section 207 does not foreclose an Indian tribe's sovereign authority to initiate and regulate its own telecommunications system.[10] And in fact, the Federal Communications Commission (FCC or Commission) has never foreclosed an Indian tribe's sovereign authority to initiate and regulate its own telecommunications system.

Second, powerful FCC policies support application of the exhaustion doctrine in this case. The Commission recognizes that access to modern telecommunications services is critical

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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).

[10] *See e.g., Blue Legs v. U.S. Bureau of Indian Affairs,* 867 F.2d 1094 (8th Cir. 1989). In *Blue Legs*, a tribal exhaustion case, the Eighth Circuit analyzed whether the federal Resource Conservation and Recovery Act of 1976 (RCRA) placed exclusive jurisdiction for suits brought under it in the federal courts. In finding that the RCRA did place exclusive jurisdiction in the federal courts, the Eighth Circuit noted, "Any action under section 6972(a)(1) of the RCRA, . . . "*shall* be brought in the district court for the district in which the alleged violation occurred." *Id.* at 1097 (emphasis added). *See also Louis v. U.S.,* 967 F.Supp. 456 (D.N.M. 1997). In *Louis,* the district court found that there was no reason to exhaust tribal court remedies because Section 1346(b) of the Federal Tort Claims Act clearly defined the jurisdictional grant to federal courts to entertain suits brought against the United States sounding in tort: "[T]he *district courts ... shall have exclusive jurisdiction* of civil actions on claims against the United States. . . ." 28 U.S.C. § 1346(b) (emphasis in original).

to the successful development of all Indian communities.[11] Federal Communications Commission, *Indian Telecom Initiatives,* pages 1-4. Among other benefits, telecommunications access enhances an Indian community's:

- Educational and learning opportunities through access to the Internet;
- Employment and business opportunities;
- Public safety services, including access to emergency services and long distance medical services; and
- Access to government services.

Id. at 4. Without question, the FCC is "*committed to facilitating increased access to telecommunications in Indian Country*." *Id.* (emphasis added).

The FCC also recognizes that Tribal governments have the right to set their own telecommunications priorities and goals for the welfare of their membership.[12] Federal Communications Commission, *Expanding Telecommunications Access in Indian Country*, pages 9, 18 (July 2006). The Commission acknowledges the unique legal relationships that exist between the federal government and Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive Orders, and numerous court decisions. *Id.* at 18. "As domestic dependent nations, Indian Tribes *exercise sovereign powers over their members and territory*. . . . In this regard, the Commission recognizes that the federal government has a *longstanding policy of promoting tribal self-sufficiency and economic development*." *Id.* (emphasis added).

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[11] The FCC's *Indian Telecom Initiatives* booklet is filed with this Court as Document 46-4. For more information on the FCC's efforts to recognize tribal governments' sovereignty and its Indian Telecom Initiatives, *see* www.fcc.gov/indians/.

[12] The FCC's *Expanding Telecommunications Access in Indian Country* document is filed with this Court as Document 46-5.

The Commission has been steadfast in "[affirming] its commitment to promote a *government-to-government relationship* between the FCC and federally-recognized Indian Tribes."[13] Federal Communications Commission, *In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes,* Policy Statement (June 8, 2000) (emphasis added). In fact, the FCC recently established an Office of Native Affairs and Policy, which recognizes the importance of "Tribal Nations and Native communities exercis[ing] their sovereignty and self-determination to ensure a bright future for their generations. . . ."[14] Federal Communications Commission, *FCC Establishes Office of Native Affairs and Policy,* August 12, 2010.

Third, Sprint contends that the United States Supreme Court's decision in *El Paso Natural Gas Co. v. Neztsosie,* 526 U.S. 473 (1999) requires this Court to conclude that the tribal exhaustion doctrine should not apply to suits brought under 47 U.S.C. § 207. This is clearly not the case. Because of its complexity, however, a thorough analysis of *Neztsosie* is necessary to properly differentiate its mandates from the present case.

In *Neztsosie,* two members of the Navajo Nation sued El Paso Natural Gas Co. (El Paso) in tribal court for compensatory and punitive damages under Navajo tort law for injuries arising

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[13] The FCC's *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes* is filed with this Court as Document 47. "Notwithstanding . . . efforts to promote ubiquitous service, the Commission has recognized that certain communities, *particularly Indian reservations and Tribal lands, remain underserved, with some areas having no service at all*." *Id.* (emphasis added).

[14] The FCC's Press Release announcing the establishment of the Native Affairs and Policy Office is filed with this Court as Document 47-1. *See generally* "Statement of Commissioner Michael J. Copps" (dated August 12, 2010) (recognizing the establishment of the FCC's Native Affairs and Policy Office). Commissioner Copps' statement is filed with this Court as Document 47-2. *See also* FCC Press Release (dated June 22, 2010). *See also* "Commissioner Michael J. Copps Applauds the Appointment of Geoffrey Blackwell to Lead New Initiatives for Indian Country" (ensuring "robust government-to-government consultation with Tribal governments"). This FCC Press Release is filed with this Court as Document 47-3.

from exposure to radioactive and other hazardous materials. *Id.* at 477. El Paso sued in the federal district court to enjoin the Neztsosies from pursuing their claims in tribal court. The district court denied the injunctions under the tribal exhaustion doctrine except to the extent that the claims fell under the Price-Anderson Act, but allowed the tribal court to determine in the first instance whether the claims fell under Price-Anderson. The Ninth Circuit modified the order to permit the tribal court to resolve all issues. *Id.* at 478.

The Supreme Court reversed as to the claims under the Price-Anderson Act and concluded that the Neztsosies were not entitled to pursue their Price-Anderson Act claims in tribal court. The Court found that the case differed from *National Farmers* and *Iowa Mutual* because

> [b]y its *unusual preemption provision*, the Price-Anderson Act transforms into a federal action "any public liability action arising out of or resulting from a nuclear incident[.]" The Act not only gives a district court original jurisdiction over such a claim *but provides for removal to a federal court as of right* if a putative Price-Anderson action is brought in a state court. Congress thus expressed an *unmistakable preference for a federal forum*, at the behest of the defending party, both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested.

Id. at 484-85 (internal citations and footnote omitted) (emphasis added).

Given the preemptive scope of the Price-Anderson Act, the Court held that "[a]ny generalized sense of comity toward nonfederal courts is obviously displaced by the provisions for preemption and removal from state courts, which are thus accorded neither jot nor tittle of deference." *Id.* at 485. Accordingly, the Court found that "the comity rationale for tribal exhaustion normally appropriate to a tribal court's determination of its jurisdiction stops short of the Price-Anderson Act." *Id.* at 487.

Sprint contends that this decision significantly altered the legal landscape by severely

restricting the tribal exhaustion doctrine.[15] However, the Supreme Court noted in *Neztsosie*:

> that the existence of a federal preemption defense in the *more usual sense* would affect the logic of tribal exhaustion. *Under normal circumstances*, tribal courts, like state courts, can and do decide questions of federal law, and there is no reason to think that questions of federal preemption are any different. The situation here is the *rare one* in which statutory provisions for conversion of state claims to federal ones and removal to federal courts express congressional preference for a federal forum.

Id. at 485 n. 7 (emphasis added).

Neztsosie teaches that a federal court *does not* need to "stay its hand" pending tribal court adjudication under the Price-Anderson Act. This then brings the parties to the question this Court must decide: Does the Federal Communications Act (FCA) (and specifically 47 U.S.C. § 207) have the pre-emptive force of the Price-Anderson Act, thereby displacing comity considerations underlying the tribal exhaustion doctrine? NAT believes it does not.

Unlike the present case, an exhaustive analysis of Price-Anderson's unique legislative intent and comprehensive procedural framework reveals:

> The [Price-Anderson] Act provides clear indications of the congressional aims of speed and efficiency. Section 2210(n)(3)(A) empowers the chief judge of a district court to appoint a special caseload management panel to oversee cases arising from a nuclear incident. The functions of such panels include case consolidation, § 2210(n)(3)(C)(i); setting of priorities, § 2210(n)(3)(C)(ii); "promulgat[ion] [of] special rules of court . . . to expedite cases or allow more equitable consideration of claims," § 2201(n)(3)(C)(v); and implementation of such measures "as will encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident," § 2210(n)(3)(C)(vi).

[15] To date, the Supreme Court has applied the doctrine of complete preemption (in the tribal exhaustion context) to only a few federal statutes, most notably the Labor Management Relations Act (LMRA), the Employee Retirement Income and Security Act (ERISA), the Hazardous Materials Transportation Act (HMTA), and the Resource Conservation and Recovery Act of 1976 (RCRA).

> The terms of the Act are underscored by its legislative history, which expressly refers to the multitude of separate cases brought "in various state and Federal courts" in the aftermath of the Three Mile Island accident. . . . This history adverts to the expectation that "the provisions for consolidation of claims in the event of any nuclear incident . . . would avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation."

Id. at 486.

In this case, the FCA (and Section 207) does not have the pre-emptive force of the Price-Anderson Act, thereby displacing comity considerations underlying the tribal exhaustion doctrine. For instance, unlike the Price-Anderson Act:

- the FCA does not provide any clear indications of the congressional aims of speed and efficiency;
- the FCA does not empower the chief judge of a district court to appoint a special caseload management panel to oversee cases arising from a Section 207 claim;
- the FCA does not appoint special panels to consolidate cases, set priorities, or promulgate special rules to expedite cases;
- the FCA does not give a district court exclusive original jurisdiction over the type of claims made by NAT;
- the FCA does not provide for removal to a federal court as a matter of right if a Section 207 claim is brought in a tribal court;
- the FCA's legislative history does not refer to any plethora of separate cases brought "in various state and [f]ederal courts"; and
- the FCA's legislative history does not identify the need to avoid "inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions."

As such, unlike the Price-Anderson Act, Congress simply did not express an unmistakable preference for a federal forum when litigating a Section 207 claim on the merits.[16]

[16] It is also important to note that Sprint's Complaint seeks 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

C. Tribal Regulatory Jurisdiction and Adjudicatory Jurisdiction

As previously indicated, NAT believes that an exhaustive jurisdiction analysis at this juncture is premature and contravenes the fundamental purpose of the tribal exhaustion doctrine. Nonetheless, Sprint provides an exhaustive jurisdictional analysis and predictably concludes that this case does not fall within either of the exceptions in *Montana v. U.S.,* 450 U.S. 544 (1981). (Doc. 34, pages 19-29 of 31). However, Sprint's *Montana* analysis disregards the fundamental principle of the tribal exhaustion doctrine – the issue currently before this Court is *not* whether the Tribal Court *has jurisdiction* over this case, but *whether* the Tribal Court *should be permitted* to address that question *before* the case is brought in federal court. And although NAT believes it inappropriate at this time, NAT will provide this Court with an abbreviated *Montana* analysis.

Among the most vexing issues in Indian law is the scope of federal, tribal, and state civil *regulatory jurisdiction* and *adjudicatory jurisdiction* in Indian country. Since *Worcester v. Georgia,* 31 U.S. 515 (1832), the United States Supreme Court has struggled to articulate general principles to resolve these issues. Analysis of civil regulatory authority in Indian country invariably begins with identifying relevant codified statutes, and in some instances, pertinent treaty provisions. When Congress has directly spoken, its wishes must be honored. In most cases, however, no federal statute or treaty authorizes or prohibits explicit assertion of state or

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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 Int'l Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 847-48 (8th Cir. 2003).

tribal regulatory power in a particular situation, and the issue will become whether, under general judge-made principles, states or tribes (or both), have that power.

The basic standards are easily summarized: (1) Congress possesses broad authority to establish the range of state, federal, and tribal authority in Indian country, including the power to delegate federal authority to tribes and the power to restore inherent tribal authority lost through application of federal policies; (2) tribes possess a substantial measure of inherent, or non-congressionally conferred, authority over their members but somewhat limited power over nonmembers; (3) states may regulate nonmembers engaged in Indian country transactions with the resident tribe or its members unless the balance of federal, state, and tribal interests emanating from applicable federal statutes, regulations, treaties, or tribal self-government rights counsels preemption; (4) states may regulate purely nonmember activities within Indian country absent express congressional direction to the contrary; and (5) states generally may not regulate the Indian country activities of the resident tribe or its members absent exceptional circumstances or congressional authorization. *See generally*, *American Indian Law Deskbook (Fourth Edition),* Conference of Western Attorneys General, Chapter 5 (2008).

In other words, it is a fundamental principle of Indian law and United States federal policy that, absent Congressional authorization, jurisdiction over the actions of American Indians and of Tribal Governments, *especially for actions arising on and within the exterior boundaries and on lands reserved in trust for American Indians*, is prohibited. In *Worcester,* the Supreme Court found that Indian tribes have the inherent right to regulate their internal affairs and state officials may only intervene through congressional consent. Indeed, the exercise of state jurisdiction over Indians (in Indian country), "would interfere with tribal sovereignty and self-

government," and is preempted "as a matter of federal law." *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 15 (1987).

D. The Tribal Utility Authority Has *Regulatory Jurisdiction* In This Case

The Tribe is undoubtedly endowed with the inherent *regulatory jurisdiction* to establish the Tribal Utility Authority. The Tribal Utility Authority's purpose is to plan and oversee utility services on the Reservation and to promote the use of these services "to improve the health and welfare of the residents."

In furtherance of this purpose, the Tribe issued its Telecommunications Plan. The Tribal Utility Authority then issued its Order granting NAT the ability to provide telecommunications service on the Reservation subject to the jurisdiction of the laws of the Tribe. 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.

After over one year of planning and infrastructure development, NAT launched one of the first new tribally-owned telephone systems in the United States. NAT provides telephone and advanced broadband service to residential and business customers on the Reservation. 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. NAT will soon be opening a new stand-alone Internet Library and Training Facility, which will include Internet stations and educational facilities for classes.

The telephone and advanced broadband network system on the Reservation enables the Tribe to pursue new economic development opportunities. The broadband network supports

high-speed broadband services, voice service, data and Internet access, and multimedia. This telecommunications system is the Tribe's new vehicle for "paving the way for much-needed business, economic, social and educational development on the . . . Reservation." Crow Creek Sioux Tribe Press Release, "*Crow Creek Sioux Tribe Launches New Tribally Owned Telephone and Advanced Broadband Telecommunications System*," February 8, 2010.[17]

The Tribal Utility Authority also created a legal and administrative process to administer complaints. Sprint refused to pay the lawfully-imposed access tariffs for services rendered by NAT on the Reservation. As such, NAT invoked the Tribal Utility Authority's legal and administrative processes. The Tribal Utility Authority then entered an Order finding that 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." For these reasons, the Tribal Utility Authority has properly assumed regulatory jurisdiction over this matter.

E. The Tribal Court Has *Adjudicatory Jurisdiction* In This Case

The Supreme Court's decision in *Montana,* 450 U.S. at 544, also weighs in favor of tribal *adjudicatory* jurisdiction. In *Montana,* the Supreme Court found two exceptions that allow for tribal adjudicatory jurisdiction – (1) the consensual relationship exception, and (2) the substantial tribal interest exception when the activities of the non-Indian "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribes." *Id.* at 565-66.

First, Sprint has entered into a "consensual relationship" with the Tribe by providing telecommunications services on the Reservation. Without the advanced telecommunications

[17] The Tribe's Press Release is filed with this Court as Document 14-5.

system located on the Reservation, Sprint's customers simply could not complete their calls to Reservation residents.

Sprint further engaged in a "consensual relationship" with the Tribe by actually (although temporarily) paying the access fees at issue in this case.[18] On December 10, 2009, NAT forwarded its initial "Cover Letter" and Invoices for payment to Sprint. This "Cover Letter" to Sprint clearly designated CABS Agent as NAT's billing and collection agency. This "Cover Letter" also provided Sprint with precise details of NAT's services, ownership structure, and purpose. In January 2010, Sprint voluntarily paid NAT's Invoices in the amount of $18, 544.26. In February 2010, Sprint once again voluntarily paid NAT's Invoices in the amount of $10,911.96. As a result of these multiple payments, Sprint voluntarily paid NAT's Invoices in the total amount of $29,456.22. It was only in March 2010 that Sprint ceased paying NAT's Invoices. Second Affidavit of Thomas J. Reiman, ¶¶ 4-10.

Clearly, Sprint has been in a consensual relationship with NAT, the Tribe, and the Tribe's members within the exterior boundaries of the Reservation. The application of tribal adjudicatory jurisdiction in this case is applicable under the first *Montana* exception.

Second, Sprint's actions directly threaten and effect the "political integrity, the economic security, or the health or welfare of the tribe." Sprint's actions attack the Tribe's ability to regulate and administer telecommunications services on the Reservation. Once again, it is important to recognize that Sprint's claims threaten the legitimacy and viability of:

- the Tribal Court;
- a tribally-owned limited liability company;

[18] As per this Court's request, the "Cover Letter" that accompanied NAT's initial Invoices to Sprint is attached to the Second Affidavit of Thomas J. Reiman and marked as "Exhibit 7." NAT's initial Invoices to Sprint are attached to the Second Affidavit of Thomas J. Reiman and marked as "Exhibit 8."

- high-speed Internet access, basic telephone, and long-distance services on and within the Reservation;
- the Tribal Utility Authority's ability to plan and oversee utility services on the Reservation;
- the Tribal Utility Authority's ability to promote the use of these utility services to improve the health and welfare of the residents;
- the Tribe's Telecommunications Plan;
- the Tribal Utility Authority's Approval Order;
- the Tribal Utility Authority's access tariffs;
- the Tribal Utility Authority's Enforcement Order;
- one of the first new tribally-owned telephone systems in the United States;
- over one hundred (100) high-speed broadband and telephone installations at residential and business locations on the Reservation;
- a new high-speed broadband and telephone installations on the Reservation;
- an Internet Library with six (6) work stations that provide computer/Internet opportunities for Tribal members who do not otherwise have access to computers;
- the construction and opening of a state-of-the-art facility that will serve as a full-service communications center offering free Internet, online education classes, computer classes and instruction, and free telephone access to individuals who would otherwise not have access to even these basic services on the Reservation;
- subsidies that provide telecommunications services, free-of-charge, to Tribal members;
- the Reservation's ability to escape the unfortunate and long-standing circumstances that have prevented economic development and growth;
- past, present, and future employment and economic development opportunities in one of the nation's poorest areas; and
- a unique business structure composed of both Tribal and private entity ownership that has attracted unprecedented financial and capital investment to the Reservation.

Sprint's actions beg the question – why does Sprint want to prevent the Tribe from enhancing its members' access to telecommunications services? Is it simply because Sprint does not want advanced telecommunications services to prosper on the Reservation? Or is it because Sprint finds it economically advantageous to erect barriers to increased educational, commercial, health care, and public safety opportunities for the Tribe?

Whatever the answer, Sprint has never attempted to provide these opportunities despite the FCC's determination that the Tribe's unfortunate circumstances are "largely due to the lack of access to and/or affordability of telecommunications services in these areas." Conversely, NAT's efforts unquestionably enhance the Tribe's access to high-quality telecommunications services. NAT provides these critically-needed educational, commercial, health care, and public safety opportunities for the Tribe on the Reservation. Where Sprint has strenuously labored to prevent progress, NAT has succeeded in leading the way to growth and technological advancement on the Reservation.

Therefore, the application of tribal regulatory and adjudicatory jurisdiction in this case is also proper under the second *Montana* exception. Sprint's actions undoubtedly threaten and have a direct impact on the political integrity, economic security, health, and welfare of the Tribe.

CONCLUSION

Because this case goes to the core of the exhaustion doctrine, NAT respectfully requests that this Court stay all proceedings in this duplicative action until the Crow Creek Tribal Court has a full and fair opportunity to determine its jurisdiction over Sprint and the subject matter of

NAT's action, and if it finds such jurisdiction to exist, to adjudicate the parties' dispute on the merits.[19]

Dated this 22nd day of October, 2010.

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[19] Of course, the duration of the stay turns upon the Tribal Court's jurisdictional determination. If the Tribal Court concludes that it lacks jurisdiction over Sprint or the subject matter of the parties' 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 Sprint's exhaustion of any available appellate remedies, this Court would then proceed to review the jurisdictional determination of the Tribal Court. If this Court upheld the jurisdictional determination under federal law, then it would not readjudicate the merits. If, however, this Court found that the Tribal Court acted without jurisdiction, it would then adjudicate the merits of the dispute.

LOCAL RULE 7.1 - WORD COUNT CERTIFICATE OF COMPLIANCE

I, Scott R. Swier, certify that the *Reply Brief in Support of Defendant Native American Telecom, LLC's Motion to Stay,* contains *8,869 words*. This word count certification includes all text, including headings, footnotes, and quotations.

Dated this 22nd day of October, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on *October 22nd, 2010,* the foregoing *Reply 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