No. 12-2871

In the
UNIED STATE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DISH NETWORK SERVICE L.L.C.
Plaintiff-Appellant,
V.
BRIAN LADUCER; HON. MANDONNA MARCELLAIS, IN HER OFFICIAL CAPACITY AS CHIEF JUDGE OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS TRIBAL COURT, AND PRESIDING JUDGE IN BRIAN LADUCER V. DISH NETWORK L.L.C., CIVIL ACTION NO. 09-10122,
Defendants-Appellees.

On Appeal from the United States District Court
For the District of North Dakota (Northwestern Division)
(The Honorable Daniel L. Hovland)

APPELLEE, HON. MARCELLASIS, OPENING BRIEF

Larry M. Baer
1550 South Deer Road
West Des Moines, Iowa 50266
(515) 988-4204
LMBAER@BAERLODGE.COM
ND 03284: IA AT0010021

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SUMMARY OF CASE

This is an appeal from the denial of motion for preliminary injunctive relief filed by Appellant (DISH) which sought to enjoin proceedings before the Tribal Court of the Turtle Mountain Band of Chippewa Indians in the case of Brian Laducer v. DISH Network Services, L.L.C., No. 09-10122. What is not accurately set forth is the DISH summary of the case are two significant facts.

First, the District Court Order denying DISH preliminary injunctive held DISH had failed to "meet its burden of establishing the necessity of a preliminary injunction" by the standards enumerated by this Court's opinion in Dataphas Sys., Inc. V. CL Ss.Inc., 640 F.2d 109, 114 (8th Cir. 1981). (See, Appellant's Appendix, Page 4)

Second, DISH has "Cherry Picked" only select portions of the Tribal Court record it now challenges on appeal. Missing are the Tribal Court Docket, the Tribal Court exhibits, and the motions and brief filed on the issue of Trial Court jurisdiction. DISH filed its action before the District Court without presenting to the District Court a complete record of the Tribal Court proceedings, and DISH has done so again before this Court.

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JURISDICTION STATEMENT

The Tribal Court accepts the jurisdictional statement of DISH. Whether a tribal court has authority to adjudicate claims against a nonmember is always a federal question within the jurisdiction of the federal courts. In Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 324 128 S.Ct. 2709, 2716, 171 L.Ed.2d 457 (2008), the Court ruled:

> "We begin by noting that whether a tribal court has adjudicative authority over nonmembers is a federal question. See Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987); National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 852–853, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985)."

However, the timing of the exercise of such jurisdictional authority is contested herein as is argued below.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. DISH has failed to present an adequate record on appeal of the Tribal Court proceedings as would allow this Court to meaningfully evaluate the likelihood of DISH success on the merits.

    * United States v. Borden Co., 347 U.S. 514, 516, 74 S. Ct. 703, 705, 98 L. Ed. 903 (1954)

2 DISH has failed to meet its burden of establishing the necessity of a preliminary injunctive relief.

* Dataphase Sys., Inc. V. CL Ss.Inc., 640 F.2d 109, 114 (8th Cir. 1981)

3. The present civil action filed by DISH is collateral attack upon an un-appealed Order of Dismissal in State District Court for want of jurisdiction.

* Liberty Mut. Ins. Co. v. Fag Bearings Corp., 335 F.3d 752, 758 (8th Cir., 2003); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)

STATEMENT OF THE CASE

The Tribal Court would adopt the Statement of the Case presented by DISH until it asserts the District Court Order found three of the four Dataphas factors to have been met by DISH. To the contrary, the District Court Order denying DISH preliminary injunctive relief was not limited to a failure to demonstrate a likelihood of success on the merits, but also included a finding by the District Court that DISH had failed to "meet its burden of establishing the necessity of a preliminary injunction" as enumerated by this Court's opinion in Dataphase Sys., Inc. V. CL Ss.Inc., 640 F.2d 109, 114 (8th Cir. 1981). (See, Appellant's Appendix, Page 4)

STATEMENT OF THE FACTS

It is impossible to provide to this Court a complete statement of the facts because significant and material portions of the Tribal Court record were not a part of the record before the District Court below, and are not a part of the record now submitted by DISH in the instant appeal. DISH chose to proceed before the District Court without presenting the entirety of the Tribal Court record to the Court. No effort was made by DISH to secure a certified copy of either the Tribal Court docket or of the filings and exhibits considered by the Tribal Court. Very fundamental exhibits are not now before the Court: 1) the contract between Mr. Laducer and DISH are omitted, and 2) all the exhibits filed before the Tribal Court which related to the due performance such contract which give rise to claims by DISH against Mr. Laducer for conversion, breach of contract, fraud, and implied indemnification.

The recitation of tribunal forum shopping as set forth in the DISH Statement of the Facts is accurate. It is obvious DISH has spent a great deal of time and resources to avoid enforcing its contractual relationship with Mr. Laducer in Tribal Court. DISH accurately reciteds that DISH sued Mr. Laducer in Federal Court, "alleging (1) conversion; (2) breach of contract; (3) fraud; and (4) implied indemnification." (Appellant's Brief, Page 4). However, missing from the

Statement of Facts is the formation of the contract relationship between DISH and Mr. Laducer that gave rise to such allegations.

There is also the matter of the inserted "presumption" set forth in Footnote 2, Page 2 of the DISH Statement of the Facts, in which DISH "assumes" the entirety of Mr. Laducer's Tribal Court claims flow from being named a Third Party Defendant to a civil action not yet served. In reality, no one yet knows the nature and extend of Mr. Laducer's claims against DISH, at least not from the record now before the Court. In the Tribal Court's Order denying the DISH Motion to Dismiss, the Tribal Court saw exhibits which demonstrated DISH had accused Mr. Laducer of "(1) conversion; (2) breach of contract; (3) fraud; and (4) implied indemnification." (Appellant's Appendix, Page 170. The Tribal Court also had before it exhibits which allowed it to conclude that such allegations of misconduct alleged against Mr. Laducer related to the performance of a contract entered into by an enrolled Tribal member, Mr. Laducer, for services to be delivered by DISH within the exterior boundaries of the Turtle Mountain Indian Reservation. (Appellant's Appendix, Pages 170-1).

Appellant's recitation of what happened in separate and distinct civil causes of action in State Court, then in Federal Court, and then again in State Court before finally to be dismissed by the State District Court for want of jurisdiction, is largely irrelevant to the substance of the present appeal.

STANDARD OF REVIEW

Standard of review of an Order of denial of a preliminary injunction is abuse of discretion. Roudachevski v. All-Am. Care Cntrs., Inc., 648 F.3d 701, 705-06 (8th Cir. 2011). "An abuse of discretion occurs where the district court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions." Lankford v. Sherman, 451 F.3d 496, 503-04 (8th Cir. 2006). The questions before this Court is whether the district court abused its discretion in the application of the four-part Dataphase test, which weighs "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." Dataphase, 640 F.2d at 113.

SUMMARY OF ARGUMENT

DISH has failed to present to this Court an adequate record from which this Court may analyze both the facts and legal issues inherent in the judicial review of a Tribal Court's assertion of jurisdiction over the conduct of a non-member.

Applying the Dataphase factors, the District Court properly denied preliminary injunctive relief.

The present civil action filed by DISH is collateral attack upon an un-appealed Order of Dismissal in State District Court.

ARGUMENT

I. DISH has failed to present an adequate record on appeal of the Tribal Court proceedings as would allow this Court to meaningfully evaluate the likelihood of DISH success on the merits.

Fed.R.App.P. 10(a) provides that trial exhibits are an integral part of the record on appeal. While 8th Cir.R. 10A allows an Appellee to supplement the production of exhibits introduced at the District Court, it does not provide for an Appellee to seek out and submit additional documentation and exhibits not presented to the District Court. In a recent case before the 11th Circuit in which the appellant had failed to file a complete record before the Appellate Court, the

Court observed:

> "Because the appellant must affirmatively show prejudice, it is incumbent on the appellant to present this court with a record on appeal adequate to determine whether the District Court erred and, if so, whether the error was prejudicial. See, e.g., id. ("The appellants have brought up only a partial record and there is no way to determine that the argument of counsel was not supported by or responsive to the entire record."). This court cannot analyze error for prejudice in a vacuum because what constitutes error in the abstract may be inconsequential in light of the totality of evidence before the finder of fact. See, e.g., United States v. Borden Co., 347 U.S. 514, 516, 74 S. Ct. 703, 705, 98 L. Ed. 903 (1954)." Rosenfeld v. Oceania Cruises, Inc. __ F3d __ (11th Cir., 2012)

In the instant case, while Appellant has supplied this Court with copies of the Orders of the Tribal Court and Tribal Court of appeals, it has not provided copies of the motions, briefs and exhibits considered by the Tribal Court before entering its Order, nor has DISH provided the Court with a certified copy of the docket entries of the Tribal Court. .

> "[I]t is counsel's responsibility to see that the record on appeal is sufficient for consideration and determination of the issues on appeal. The court is

under no obligation to remedy any failure of counsel to fulfill that responsibility." 10th Cir. R. 10.3; see also Fed. R.App. P. 10(b).” Roberts v. Roadway Exp., Inc., 149 F.3d 1098, footnote 3 (C.A.10, 1998)

Without a complete Tribal Court record on appeal, it is impossible for an Appellate Court to effectively review the Tribal Court proceedings, for among other purposes, the exhaustion of Tribal Court remedies. It is a well settled point of law, that the Tribal Court should be given an opportunity to make a record of both the facts and the Tribal Court's interpretation of applicable law before Federal Courts review jurisdictional issues:

" The Supreme Court has mandated the exhaustion of tribal remedies as a prerequisite to a federal court's exercise of its jurisdiction: "[E]xhaustion is required before such a claim may be entertained by a federal court." National Farmers Union, 471 U.S. at 857, 105 S.Ct. at 2454 (emphasis added). In Iowa Mutual Ins. v. LaPlante, the Supreme Court said that "federal policy ... directs a federal court to stay its hand," and "proper respect ... requires" tribal remedy exhaustion. 480 U.S. at 16, 107 S.Ct. at 976 (emphasis added). Therefore, non-Indian petitioners "must exhaust available tribal remedies." Id. The LaPlante Court emphasized that "National Farmers Union requires that the issue of jurisdiction be resolved

by the Tribal courts in the first instance. Id." Burlington Northern R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1245 (C.A.9, 1991)

How can one determine if the remedies available in Tribal Court have been exhausted absent a complete Tribal Court record on appeal? The Tribal Court record serves multiple purposes, as this Court Observed:

> "In addition to encouraging tribal self-government, exhaustion of tribal remedies permits: a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed [in the federal district court].... [It will also] encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will provide other courts with the benefit of their expertise in such matters in the event of further judicial review." Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir.1994).

While DISH has gone through great lengths to document the trips DISH has taken through various jurisdictional forums outside the Tribal Courts, such information contributes little to an analysis of the basis for Tribal Court jurisdiction. It make no difference if separate proceedings were started first in Tribal Court or some other forum. Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668 (8th Cir.1986) (Weeks was also a contract dispute entered on the reservation which

raised questions of tribal law interpretation which was held to be within the province of the tribal court.)

II. DISH has failed to meet its burden of establishing the necessity of a preliminary injunctive relief under the criteria enunciated by this Court in Dataphase Sys., Inc. V. CL Ss.Inc., 640 F.2d 109, 114 (8th Cir. 1981)

Whether a preliminary injunction should issue "involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir.1981) (en banc). A preliminary injunction is an extraordinary remedy and the burden of establishing the propriety of an injunction is on the movant. See Roudachevski v. All–am. Care Centers Inc. D/B/A All–am. Care of Little Rock, 648 F.3d 701, 705 (8th Cir., 2011); and Watkins, Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir.2003).

It is well-established that the movant has the burden of establishing the necessity of a temporary restraining order. Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994). "No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they

weigh towards granting the injunction." Calvin Klein Cosmetics Corp. v. Lenox Lab., 815 F.2d 500, 503 (8th Cir.1987);

A party moving for a preliminary injunction is required to show the threat of irreparable harm. Modern Computer Sys. v. Modern Banking Sys., 871 F.2d 734, 737 (8th Cir.1989). Even when a plaintiff has a strong claim on the merits, preliminary injunctive relief is improper absent a showing of a threat of irreparable harm. “The likelihood that plaintiff ultimately will prevail is meaningless in isolation ... [and] must be examined in the context of the relative injuries to the parties and the public.” Gen. Motors Corp. v. Harry Brown's LLC, 563 F.3d 312, 319 (8th Cir.2009). To succeed in demonstrating a threat of irreparable harm, “a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.” Iowa Utils. Bd. v. Fed. Commc'ns Comm'n, 109 F.3d 418, 425 (8th Cir.1996).

In the instant case, the factual context in which the legal questions of subject matter jurisdiction and personal jurisdiction can be analyzed are yet to be fully developed. DISH has only presented selective pleadings, a few select exhibits, an affidavit concerning the costs of litigation, and legal briefs of counsel. But from even with these select submission, this Court, like both the District Court and the Tribal Court of Appeals, should continue to direct the making of a complete record

before the Tribal Court. Only upon exhaustion of all Tribal Court remedies (including renewal of motion to dismiss for want of jurisdiction, and, if denied, appeal thereof to the Tribal Court of Appeals with a complete factual record) should this matter be heard again before the District Court, and possibly, on appeal again, by this Court. DISH is continuing to jump the gun by seeking review of the jurisdictional rulings of the Tribal Court in Federal Court before the full record is made. Even the Appellant Brief filed by DISH repeatedly employs the words "assumes" and "assumption" without a factual record upon which to base its assumptions.

Contrary to the factual assertions made by DISH within its Federal Complaint and Legal Briefs – the scope of legal and factual issues now before the Tribal Court are much broader than alleged by DISH, encompassing much more than an abuse of process claim premised solely upon legal filings within a State Court civil action. To the contrary, two Courts, one a District Court of the State North Dakota, and the other the Turtle Mountain Tribal Court, have each independently found that the factual and legal nexus of the present Tribal Court case herein at issue is within the jurisdiction of the Tribal Courts of the Turtle Mountain Indian Reservation. (See, Appellant's Appendix, Pages 169 and 172) There is nothing within the Laducer Tribal Complaint now before the Tribal Court

which limits the scope of such Complaint to events within the scope of the State Court filings initiated by DISH. – to the contrary, the State Court proceedings (or Federal removal proceedings) are not identified or referenced within the Complaint filed by Mr. Laducer. (See, Appellant's Appendix, Page 152)

Contrary to the claim by DISH that the present civil action before the Tribal Court relates solely to off-Reservation activities of DISH, both the North Dakota District Court and the Tribal Court have found the fundamental facts and law of this case to involve the interpretation and enforcement of a contract for services between DISH and Mr. Laducer. Both Courts have further ruled that such contract for services was executed on the Turtle Mountain Indian Reservation; that Mr. Laducer is a Member of the Turtle Mountain Band of Chippewa Indians; that the services were to be delivered within the exterior boundaries of the Turtle Mountain Indian Reservation; and that DISH willingly entered into this contractual relationship with a known Tribal Member for the delivery of services within the exterior boundaries of the Turtle Mountain Indian Reservation.

Such "factual and legal context" was found so compelling by the District Court of the State of North Dakota, that it unilaterally dismissed the parallel civil proceedings then before it on its own motion. (See, Appellant's Appendix, Page 172). The same "factual and legal context" supports the Tribal Court finding that

the necessary factual and legal basis for a preliminary finding that the civil action now before it is within the jurisdiction of the Tribal Court. The Tribal Court found the nexus of the dispute between the parties, involved issues flowing from a contract entered between a non-member which had entered into a consensual contractual relationship with a Tribal Member within the Reservation and for the delivery of services within the Reservation. (See, Appellant's Appendix, Page 169).

1. Threat of Irreparable Harm – There Isn't Any.

To succeed in demonstrating a threat of irreparable harm, "a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." Iowa Utils. Bd. v. Fed. Commc'ns Comm'n, 109 F.3d 418, 425 (8th Cir.1996). DISH asserts the potential cost of trial litigation constitutes an irreparable harm from which is should be protected. Such costs are routinely borne by every party to every lawsuit. Nothing "irreparable" is going to happen to DISH in the event the scheduled Tribal Court legal proceedings go forward to allow the creation of a full factual record No DISH assets will be destroyed or taken pending final review of the full facts of the case, first, by the Tribal Trial Court, and, second, by the Tribal Court of Appeals. The on-going business activities of DISH within the Reservation are not in peril of being closed

down or in anyway interfered with prior to exhaustion of all Tribal Court remedies and appeals. I can be argued DISH has already incurred more legal costs fighting Tribal Court jurisdiction than it would to create a record from which, if appropriate, jurisdiction could again be challenged – in State Court; in Federal Court; in State Court again; in Tribal Court; before the Tribal Court of Appeals; again in Federal Court, and now on appeal to the Circuit Court.

DISH has been directed by the Tribal Court of Appeal to make a trial record to allow its challenge to Tribal Court jurisdiction be place in context for appellate review. Nothing more. Instead, DISH has chosen to raise another layer of costs with each maneuver it takes trying to avoid a trial on the merits of Mr. Laducer's claims.[1] The costs of litigation are universal to our system of justice. The Tribal Court of Appeals has ruled it cannot make a jurisdictional ruling without a complete factual record–nor can a Federal Court analyze the question without a factual context.. (See Appellant's Appendix, Page 176) Both parties must incur the costs of trial without legal certainty of the jurisdictional power of the Tribal Court. As with any Court, at the conclusion of trial, the Tribal Trial Court may very well enter a directed verdict based upon post-trial analysis of the jurisdiction

[1]If the issue of jurisdiction is as black and white as painted by DISH, the record it needs to create in the Tribal Court would be of minimal costs

of the Court. In the same manner, the Tribal Court of Appeals, the District Court, or this Court may do the same, but a record must first be created.

DISH has been hopping from jurisdiction to jurisdiction trying to "avoid" the alleged legal costs of a trial on the merits while at the same time, incurring substantial additional legal costs over and above anything a trial in Tribal Court might cost. As noted, DISH has already been before the State District Court of the State of North Dakota in which the State District Court ruled this case was not within its subject matter jurisdiction. DISH also took an earlier run at U.S. District Court, and now an appeal to the U.S. Court of Appeals! DISH can hardly claim "litigation expense" as an irreparable harm when it so willingly has sent Mr. Laducer to so many different courts, both State and Federal Courts, in multiple civil maneuvers within a relatively simple civil actions involving relatively small sums of money. The State Court dismissed the DISH action, ruling the subject matter to be outside the scope of its jurisdiction, deferring to the jurisdiction of the Tribal Court. The State Court dismissal was not appealed by DISH. DISH may not now take a second bite of the apple in Federal Court seeking to re-litigate that which it failed to appeal in state court.

2. Balance Between Risk of Harm and Damage to Party Litigants.

To determine the true parameters of the factual and legal issues now before

the Tribal Court, a factual record needs to be completed in some court at some point in time. When and where this factual record will be created if not before the Tribal Trial Court? Does DISH expect the United States District Court to hold an evidentiary hearing every time a party to a Tribal Court proceedings challenges the jurisdiction of the Court? The Courts have already said "No" to such an intrusive, supervisory role over the Tribal Courts prior to the creation of a full factual record and exhaustion of Tribal Court remedies in the interests of **comity** and the preservation of judicial resources.

Under the Tribal Exhaustion Doctrine, the record must first be made in Tribal Court in all cases in which a colorable claim of Tribal jurisdiction has been asserted.

> "[W]hen a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims." Ninigret Dev. Corp. V. Narrangansett Indian Weuomuck Hous. Auth., 207 F.3d 21, 31 (1st Cir. 2000).

The doctrine "is based on a policy of supporting tribal self-government and self-

determination." Ib. (*Citing* Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).) While the doctrine is prudential, it is appropriately followed in the instant proceeding.

The tribal exhaustion doctrine is based on "a policy of supporting tribal self-government and self-determination," Nat'l Farmers Union Ins. Co., 471 U.S. at 856, 105 S.Ct. 2447, and it is prudential, rather than jurisdictional. See Iowa Mut. Ins. Co., 480 U.S. at 20 n. 14, 107 S.Ct. 971. Exhaustion is mandatory, however, when a case fits within the policy, Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir.1994); Burlington N. R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1245 (9th Cir.1991).

There will be costs incurred to complete a record from which the question of the jurisdictional authority of the Court can be more accurately ascertained, but such "costs" are inherent to every case in which the jurisdiction of a trial Court is challenged. It is not irreparable harm to do what every party litigant must do when advancing or defending litigation

3. Probability of Success on the Merits

The Tribal Court found – by examining the pleadings, the DISH response and the exhibits and briefs submitted on behalf of DISH – that Mr. Laducer's claims, and the DISH defenses advanced all held a factual and legal nexus

originating in a consensual on-Reservation relationship between Mr. Laducer and DISH. The Tribal Court specifically cited: (1) Breach of Contract; (2) Conversion; (3) Fraud; and (4) Implied Indemnification. (See Appellant Appendix, Page 170)

4. The Public Interest.

Other than protecting the integrity of the Turtle Mountain Tribal Court, there are no public interest issues at play in the instant proceedings. One company has attempted to enforce a contract made for the delivery of services within the exterior boundaries of a Reservation to a Tribal member who resides within the Reservation. The American Indian party to the contract now claims the company has abused legal process in its attempt to enforce such contract. Claims and counter-claims have been made, but to-date, no evidentiary hearings have been held. Nothing about this dispute is of general interest to the public at large.

III. The present civil action filed by DISH is collateral attack upon an un-appealed Order of Dismissal in State District Court.

DISH chose not to appeal the ruling of the District Court of the State of North Dakota which held the case then before the State District Court did not belong in State Court, but rather, was within the sole jurisdiction of the Tribal

Courts of the Turtle Mountain Indian Reservation. (Appellant's Appendix, Page 172) **Now Dish seeks to collaterally attack the State Court jurisdictional ruling in Federal Court**. This is may not do. Application of the legal principal of Issue Preclusion bars re-visiting jurisdictional holding of the State District Court pending development of the record.

DISH will not prevail on the merits of its present appeal to the Circuit Court due to the application of the doctrine of Issue Preclusion. In the instant case, the District Court of the State of North Dakota has ruled the Tribal Court, and not the State Court, has jurisdiction over the parties and the subject matter of the suit now before the Tribal Court. (See Appellant's Appendix, Page 172) Before the State District Court were the same parties, involved in litigation of nearly identical facts and law. On Issue Preclusion, This Court recently observed:

> "The underlying goal of issue preclusion, also known as collateral estoppel, is to promote judicial economy and finality in litigation. Thus, "when an issue of ultimate fact has been determined by a valid judgment, it may not again be litigated between the same parties." King Gen. Contractors v. Reorganized Church of Jesus Christ of Latter Day Saints, 821 S.W.2d 495, 500 (Mo.1991) (en banc); see also Restatement (Second) of Judgments § 27 (1982) ("When an issue of fact or law is actually litigated and determined by

> a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."). Liberty Mut. Ins. Co. v. Fag Bearings Corp., 335 F.3d 752, 758 (8th Cir., 2003)

In North Dakota, the preclusion doctrines operate "to promote the finality of judgments," resulting in increased certainty for litigants and conservation of judicial resources. Ungar v. N.D. State Univ., 721 N.W.2d 16, 20 (N.D. 2006). Under North Dakota law, issue preclusion will apply in a case like this one if (1) the issue decided in the state-court adjudication is identical to the one presented in federal court, (2) the state-court judgment on the merits is final, (3) the party against which the doctrine is invoked in the federal action was a party in the state case, and (4) that party was given a fair opportunity in state court to be heard on the issue. See Baker Elec. Coop., Inc.v. Chaske, 28 F.3d 1466, 1475 (8th Cir. 1994). The rule "forecloses re-litigation of issues of either fact or law in a second action based on a different claim, which were necessarily litigated, or by logical and necessary implication must have been litigated, and decided in the prior action." Ungar, 721 N.W.2d at 21. Knutson v. City of Fargo, 600 F.3d 992, 996-7 (8th Cir., 2010) Absent the development of a greater record before the Tribal Court, there is nothing to rule upon that has not already been ruled upon by the state district

court.

In the instant case, a final judgment of the State Court dismissed the civil case then before which raised identical questions of law and fact. for want of jurisdiction. (See Appellant's Appendix, Page 172) DISH did not appeal that decision even though the present Tribal Court civil action was then pending. By the Tribal Court's decision dated October 28, 2011, the Tribal Court agreed with the State District Court, and found, after examining the pleadings, the exhibits, and the briefs submitted on behalf of DISH – that Mr. Laducer's claims, and the DISH defenses all held a factual and legal nexus originating in a consensual on-Reservation relationship between Mr. Laducer and DISH which involved: (1) Breach of Contract; (2) Conversion; (3) Fraud; and (4) Implied Indemnification. (See Appellant's Appendix, page 169)

The Rooker-Feldman Doctrine

In Rooker, a plaintiff filed a bill of equity in federal district court seeking a declaration that an Indiana circuit court judgment, "which was affirmed by the Supreme Court of the state, [be] declared null and void." Rooker v. Fidelity Trust Co., 263 U.S. 413, 414 (1923). The plaintiff in Rooker argued that the circuit court judgment contravened certain provisions of the United States Constitution. The Supreme Court determined that the federal district courts lacked jurisdiction to

"entertain a proceeding to reverse or modify" a state court judgment, even if said judgment was wrong. Id. at 416. The jurisdiction of federal district courts, the Supreme Court explained, is "strictly original" and such courts may not exercise "appellate jurisdiction" over purported erroneous state court judgments. Id. Rather, Congress empowered only the Supreme Court to do so. The Supreme Court affirmed the dismissal for lack of jurisdiction.

Approximately 60 years after Rooker, the Supreme Court decided Feldman. (District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983)) In Feldman, two disappointed applicants to the District of Columbia bar filed separate lawsuits in the United States District Court for the District of Columbia after the District of Columbia Court of Appeals refused to waive a court rule that required District of Columbia bar applicants to have graduated from an accredited law school approved by the American Bar Association. Neither plaintiff graduated from an accredited law school. The district court determined that it lacked jurisdiction to hear their claims, but the United States Court of Appeals for the District of Columbia reversed in part, concluding that the waiver proceedings in the District of Columbia Court of Appeals were not judicial proceedings. The Supreme Court granted certiorari.

Having determined that the proceedings surrounding the plaintiffs' waiver

petitions in the District of Columbia Court of Appeals were judicial in nature, the Supreme Court concluded that a federal district court has "no authority to review final judgments of a state court in judicial proceedings." Feldman, 460 U.S. at 482, 103 S.Ct. 1303. "Review of such judgments may be had only in [the United States Supreme Court]." Id. The Supreme Court drew a distinction between general challenges to the constitutionality of state bar rules and challenges to state court decisions in particular cases that raise federal constitutional questions, finding that a federal district court has jurisdiction to consider the former but not the latter. Id. at 485-86, 103 S.Ct. 1303.

Underlying the analysis in Rooker and Feldman is the interpretation of two federal statutes: 28 U.S.C. § 1331 and 28 U.S.C. § 1257. First, section 1331 provides that federal district courts "shall have original jurisdiction of all civil actions arising" under federal law, not appellate jurisdiction. 28 U.S.C. § 1331. Second, section 1257 provides for Supreme Court review of state court judgments: "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari" when certain federal questions arise. 28 U.S.C. § 1257(a). Taken together, the Rooker-Feldman doctrine draws a "negative inference" from section 1257: "because Congress only provided for review of state court judgments by the

Supreme Court, Congress therefore intended to preclude lower federal courts from exercising such review." Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico, 410 F.3d 17, 21 (1st Cir.2005). See also Dornheim v. Sholes, 430 F.3d 919, 923 (8th Cir.2005) ("The basis for the Rooker/Feldman doctrine is that, other than in the context of habeas claims, federal district courts are courts of original jurisdiction, and by statute they are precluded from serving as appellate courts to review state court judgments, as that appellate function is reserved to the Supreme Court under 28 U.S.C. § 1257."). In the present case, the only new factor is the role of the Tribal Court between the presently sought review and the State Court decision.

CONCLUSION

DISH has failed to present to this Court an adequate record from which this Court may analyze both the facts and legal issues inherent in the judicial review of a Tribal Court's assertion of jurisdiction over the conduct of a non-member. Applying the Dataphase factors, the District Court properly denied preliminary injunctive relief. The present civil action filed by DISH is collateral attack upon an un-appealed Order of Dismissal in State District Court

The District Court opinion denying application for a Temporary Restraining Order was correct. DISH should not now be able to accomplish indirectly through

the device of an appeal, that which it could not do directly before the District Court.

Respectfully submitted to the Court this 18th day of October, 2012.

/s/ Larry M. Baer
Larry M. Baer (N.D. #03284)
1550 South Deer Road
West Des Moines, Iowa 50266
Phone (515) 988-4204
LMBAER@BAERLODDGE.COM

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 28(a)(11) and 32(a)(7)©, FRCivP, I certify this brief (exclusive of tables of contents and authorities, certificates of service and this certificate) contains 5,622 words per the word count analysis provided by Word Perfect X5, and does conform to the type and volume limitations set forth in said Rules of Appellate Procedure. Pursuant to 8th Circuit Rule 28A(h), I also certify the electronic version hereof has been scanned for viruses and is virus free.

/s/ Larry M. Baer
Larry M. Baer (N.D. #03284)
1550 South Deer Road
West Des Moines, Iowa 50266
Phone (515) 988-4204
LMBAER@BAERLODDGE.COM

No. 12-2871

In the
UNIED STATE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DISH NETWORK SERVICE L.L.C.
Plaintiff-Appellant,
V.
BRIAN LADUCER; HON. MANDONNA MARCELLAIS, IN HER OFFICIAL CAPACITY AS CHIEF JUDGE OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS TRIBAL COURT, AND PRESIDING JUDGE IN BRIAN LADUCER V. DISH NETWORK L.L.C., CIVIL ACTION NO. 09-10122,
Defendants-Appellees.

APPELLEE, HON. MARCELLAIS, OPENING BRIEF

CERTIFICATES OF SERVICE
FOR DOCUMENTS FILED USING CM/ECF

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on October 18, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I further certify that I have filed with the Clerk of The Court ten(10) paper copies of Appellee's Brief by sending them to the Court via United States Mail on October 18, 2012, and did on the same date serve by US Mail a paper copy of said brief to the counsel fo record for the co-Appellee and Appellant.

s/_____

Larry M. Baer
1550 South Deer Road
West Des Moines, Iowa 50266
(515) 988-4204
LMBAER@BAERLODGE.COM
ND 03284: IA AT0010021