

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

TOWN OF BROWNING, a
Montana Municipal Corporation,

Plaintiff,

v.

WILLIE A. SHARP, JR.;
FORRESTINA CALF BOSS RIBS;
PAUL McEVERS; WILLIAM OLD
CHIEF; CHERYL LITTLE DOG;
SHAWN LAHR; ALVIN YELLOW
OWL; DEREK KLINE; HARRY
BARNES; ILIFF KIPP; TYSON
RUNNING WOLF; JOE McKAY;
EARL OLD PERSON; and NELSE
ST. GODDARD,

Defendants.

CV-14-24-GF-BMM

ORDER

BACKGROUND

Plaintiff Town of Browning has sued current and former members of the Blackfeet Tribal Business Council, as well as the interim director and the administrator of the Blackfeet Tribe's Two Medicine Water Company, and the administrator of the Blackfeet Environmental Office (collectively "Defendants"). Plaintiff states in its amended complaint that it has owned, operated, maintained, and improved water facilities, equipment, and infrastructure located within and near the Town of Browning. Plaintiff states that it has provided water utility services to the Browning community since at least 1934. Plaintiff also states that it has provided sewer utility services and garbage collection and disposal services to the Browning community. (Doc. 57 at 5).

Plaintiff and the Blackfeet Indian Tribe entered into a Memorandum of Agreement in 1995. The Memorandum of Agreement designated Plaintiff as the manager, operator, and owner of water, sewer, and garbage collection and disposal services within the Browning community. (Doc. 57 at 6). The Blackfeet Tribe built a new water treatment and delivery system. The parties amended the Memorandum of Agreement to designate Plaintiff as the operator and manager of this new water treatment and delivery system. (Doc. 95 at 6-7). The Blackfeet Tribal Business Council terminated the 1995 Memorandum of Understanding in August, 2013. (Doc. 57 at 7).

Plaintiff alleges that Defendants have begun collecting revenue for the water and sewer utility services that Plaintiff continues to provide to the Browning community. Plaintiff alleges that Defendants stole Plaintiff's list of utility customers. Plaintiff alleges that Defendants mailed notices to Plaintiff's water and sewer customers throughout the Browning community stating that all payment for water and sewer services should no longer be directed to Plaintiff. The notices informed the recipients that payment instead should be directed to the Two Medicine Water Company, a water company set up by the Blackfeet Indian Tribe. Similarly, Plaintiff alleges that Defendants mailed notices to Plaintiff's utility customers stating that payment for garbage collection and disposal services should be directed to the Blackfeet Solid Waste and Utility Management Program.

Plaintiff alleges that Defendants relied on Blackfeet Ordinance 98 as justification for their actions. Plaintiff alleges that the notices claim that the Blackfeet Indian Tribe owns the water and sewer infrastructure. Plaintiff argues that it maintains ownership of its water and sewer infrastructure, although it admits that the Tribe owns different water and sewer infrastructure.

Defendants have filed a motion to dismiss Plaintiff's amended complaint for lack of subject matter jurisdiction under Rule 12(b)(1). (Doc. 70). Defendants first argue that Plaintiff has failed to state any claim over which a federal court would have jurisdiction. Defendants next argue that tribal sovereign immunity precludes

jurisdiction here. Defendants finally argue that even if jurisdiction exists, the Court should dismiss the case because Plaintiff has failed to exhaust tribal court remedies.

STANDARD

A Rule 12(b)(1) motion to dismiss for lack of jurisdiction may be either facial or factual. A challenger in a facial attack asserts that the allegations contained in the complaint are insufficient to invoke federal jurisdiction. In a factual attack, the challenger disputes the truth of allegations that, by themselves, otherwise would invoke federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

Defendants have presented only facial attacks in their motion to dismiss. A facial attack does not depend on the resolution of a factual dispute. The Court assumes the plaintiff's allegations in the complaint to be true and draws all reasonable inferences in the plaintiff's favor. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

ANALYSIS

1. Federal Court Jurisdiction

Plaintiff argues that this Court possesses subject matter jurisdiction pursuant to 28 U.S.C. § 1331. A case may arise under federal law if the plaintiff's asserted

right to relief “depends on the resolution of a substantial question of federal law.”

Peabody Coal Co. v. Navajo Nation, 373 F.3d 945, 949 (9th Cir. 2004).

Plaintiff alleges that Defendants unlawfully collect revenue for the utility services that Plaintiff provides to the Browning community. Plaintiff alleges that Defendants have acted pursuant to Blackfeet Ordinance 98. (Doc. 57 at 7-8). Plaintiff argues that Defendants’ apparent reliance on Blackfeet Ordinance 98 presents at least two substantial federal questions. The first question addresses whether Blackfeet Ordinance 98 should apply to Plaintiff. The second question addresses whether Blackfeet Ordinance 98 provides authority for Defendants to claim ownership of Plaintiff’s utility services and collect revenue for the utility services that Plaintiff actually provides.

Plaintiff points to two cases where the Ninth Circuit determined that a tribe’s authority to apply a tribal ordinance to a party outside the tribal community presented a substantial question of federal law. In *Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir. 1989), an Indian tribe attempted to enforce an ordinance that prohibited the taking of Indian artifacts against non-tribal members. The court determined that a claim for enforcement of the ordinance against the non-Indians “does arise under federal law within the meaning of 28 U.S.C. §§ 1331 and 1362.” *Chilkat Indian Vill.*, 870 F.2d at 1473.

The Ninth Circuit reiterated its determination that subject matter jurisdiction exists when a tribe attempts to apply an ordinance against non-tribal members in *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 634 (9th Cir. 1992). The Village of Tyonek attempted to apply an ordinance to prevent non-members from staying in the Village for longer than twenty-four hours. The court determined that similar to *Chilkat Indian Village*, the Village's power to apply the ordinance against non-members required a showing of authority under federal law. *Puckett*, 957 F.2d at 634.

Plaintiff alleges here that Defendants have applied Blackfeet Ordinance 98 against non-tribal members and, pursuant to this ordinance, have claimed ownership of Plaintiff's utility infrastructure and have collected revenue for the utility services that Plaintiff provides. This allegation differs from the allegations at issue in *Chilkat* and *Puckett*. In both cases, a tribe attempted to control a non-tribal member's action, either to prevent a non-tribal member from taking tribal artifacts or to prevent a non-tribal member from spending more than twenty-four hours in the village. Plaintiff alleges here that Defendants have exercised an eminent domain-like authority to claim ownership of Plaintiff's utility infrastructure. Plaintiff further alleges that Defendants have used this apparent authority to begin collecting revenue for utility services that Plaintiff provides through that infrastructure. Whether Defendants possess the authority to exercise an eminent

domain-like authority against non-tribal members, as Plaintiff alleges Defendants have done by enforcing Blackfeet Ordinance 98, represents a substantial federal question. *Peabody Coal Co.*, 373 F.3d at 949.

Defendants question whether Plaintiff properly have asserted a federal question. Defendants have submitted no argument, however, to challenge Plaintiff's allegation that Defendants unlawfully have claimed ownership of Plaintiff's utility infrastructure, that Defendants collect revenue for utility services that Plaintiff actually provides, or that Defendants have acted pursuant to Blackfeet Ordinance 98. The Court must assume for purposes of the motion to dismiss that Plaintiff's allegations are true. *Wolfe*, 392 F.3d at 362. The Court also must draw all reasonable inferences in favor of Plaintiff at this stage of the proceedings. *Wolfe*, 392 F.3d at 362. Plaintiff has asserted a right to relief that "depends on the resolution of a substantial question of federal law." *Peabody Coal Co.*, 373 F.3d at 949.

2. Tribal Sovereign Immunity

Defendants argue in their motion to dismiss that tribal sovereign immunity prevents this Court from exercising jurisdiction over Defendants. Plaintiff counters that its complaint takes the form of an *Ex Parte Young* action against members of the Blackfeet Tribal Business Council. *Ex Parte Young*, 209 U.S. 123 (1908).

Plaintiff has alleged that Defendants have acted, and continue to act, beyond the scope of their authority.

The Ninth Circuit recognized that a party may bring an *Ex Parte Young* action against tribal members in *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007). The remedy for such an action is limited to prospective injunctive relief. *Vaughn*, 509 F.3d at 1092. To determine whether the doctrine of *Ex Parte Young* applies to overcome a tribal official's claim of immunity, this Court looks to whether Plaintiff has alleged an ongoing violation of federal law and seeks prospective relief. *Vaughn*, 509 F.3d at 1092.

Plaintiff first has alleged that Defendants improperly have applied Blackfeet Ordinance 98 to non-tribal members, and in doing so, unlawfully claim ownership of Plaintiff's utility infrastructure. Plaintiff further alleges that Defendants continue to collect accompanying revenue for utility services that Plaintiff provides. Whether Blackfeet Ordinance 98 can be applied to non-tribal members represents a substantial question of federal law. *Peabody Coal Co.*, 373 F.3d at 949. Plaintiff also has requested prospective injunctive relief related to Defendants' collection of the revenue. (Doc. 57 at 11-12). To the extent that Plaintiff seeks damages, those are not recoverable in an *Ex Parte Young* action.

Defendants nevertheless contend that the Blackfeet Tribe represents the real party in interest in this lawsuit. Defendants claim that the relief that Plaintiff seeks,

an injunction, would require action by the Blackfeet Tribe. Defendants argue that Plaintiff would not be able to provide these utility services if the Court enjoins Defendants from providing these utility services. Defendants contend that Plaintiff would need to use the Blackfeet Tribe's sewer infrastructure and lagoon systems. Defendants further contend that Plaintiff would lack sufficient water from an old well, and so would need to use the Blackfeet Tribe's new water treatment plant. Defendants argue that an injunction essentially would compel the Blackfeet Tribe to allow Plaintiff to use the Blackfeet Tribe's infrastructure.

Defendants correctly note that an injunction could prevent Defendants from using Plaintiff's infrastructure to provide water and sewer services. An injunction also could prevent Defendants from collecting revenue for utility services actually provided by Plaintiff. An injunction would not require, however, the Blackfeet Tribe to allow Plaintiff to use the Blackfeet Tribe's infrastructure. Further, Plaintiff claims that it can provide utility services without the Blackfeet Tribe's infrastructure. An injunctive remedy would not address Plaintiff's ability to provide utility services. The Court's grant of an injunction, therefore, would not transform the Blackfeet Tribe itself into the real party in interest in this case.

3. Exhaustion of Tribal Court Remedies

Defendants separately argue that this Court lacks jurisdiction based on Plaintiff's failure to exhaust tribal court remedies. A federal district court generally

should abstain from asserting federal question jurisdiction over claims “that are identical to claims pending in tribal court” until the tribal court has considered the basis for its own jurisdiction. *Burlington N. R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999), as amended on denial of reh’g (Jan. 6, 2000).

A case that arises from the same facts as this case currently remains pending in the Blackfeet Tribal Court. The Blackfeet Tribe of the Blackfeet Indian Reservation sued the Town of Browning, the Mayor of Browning, and four Aldermen on March 28, 2014. (Doc 71-1, Exhibit 7). The Blackfeet Tribe alleges that the Town of Browning has failed to pay more than \$767,000 to the Blackfeet Tribe as required under the 1995 Memorandum of Understanding between the Town and the Tribe.

Plaintiff brought this present action in this Court against members of the Blackfeet Tribal Business Council and employees of the Blackfeet Tribe on April 4, 2014. (Doc. 1). The claims before this Court do not appear to be “identical to claims pending in tribal court.” *Red Wolf*, 196 F.3d at 1065. The same factual basis admittedly underpins both lawsuits. The claims alleged by Plaintiff differ, however, from the breach of contract claims alleged by the Blackfeet Tribe.

Plaintiff seeks injunctive relief against members of the Blackfeet Tribal Business Council and employees of the Blackfeet Tribe. Plaintiff alleges that Defendants tortuously interfered with Plaintiff’s business relations, acted with

malice, committed conversion of Plaintiff's water and sewer infrastructure, and committed mail fraud in violation of 18 U.S.C. § 1341, as part of a racketeering scheme in violation of 18 U.S.C. § 1962. (Doc. 57). No identical claims currently pend before a tribal court. This Court need not grant the tribal court the opportunity to review whether it has jurisdiction pursuant to *Red Wolf*, 196 F.3d at 1065.

Defendants nevertheless argue that Plaintiff should be forced to bring its claims first in the Blackfeet Tribal Court. The absence of ongoing litigation in tribal court over the same matter "does not defeat the tribal exhaustion requirement." *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 921 (9th Cir. 2008).

Plaintiff contends that it should not be forced to bring its case before the Blackfeet Tribal Court. No exhaustion of tribal court remedies is required if "express jurisdictional prohibitions" prevent the tribal court from exercising jurisdiction over the matter. *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013) (cert. denied).

Plaintiff argues that it possesses sovereign immunity from suit in tribal court. Plaintiff, the Town of Browning, points to *State of Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1998). A tribal court entered a judgment against the State of Montana arising out of a tort action. The Ninth Circuit determined that Montana enjoys immunity from suit in tribal court. *Gilham*, 133 F.3d at 1139.

Defendants contend that the reasoning of *Gilham* does not extend to towns, such as the Town of Browning. Defendants give no reason why *Gilham* should not apply to the Town of Browning. *Gilham* considered Montana's Constitution and its waiver of sovereign immunity in Montana courts for both the State of Montana and towns. *Gilham*, 133 F.3d at 1139. The Montana Constitutional provision that waives sovereign immunity for the State of Montana limits any action to Montana courts. *Gilham*, 133 F.3d at 1138. The Montana Constitution likewise limits the waiver of sovereign immunity for towns to lawsuits filed in Montana courts. Mont. Const. art. 2, § 18.

Defendants further argue that *Gilham* does not extend to the circumstances present here. The court specifically limited the holding in *Gilham* to the facts presented in that case. The court did not consider whether a state may be subject to a contract suit in tribal court. *Gilham*, 133 F.3d at 1140 n. 8. Defendants argue, as a result, that *Gilham* does not control the type of breach of contract action brought here.

Defendants confuse the case that exists in tribal court and the case that Plaintiff has filed in this Court. The tribal court action appears to involve a contract dispute. The question before this Court does not address whether the Blackfeet Tribe can sue Plaintiff in tribal court over a contract dispute. The question before this Court addresses whether Plaintiff must exhaust tribal court remedies for the

allegations that it has made against members of the Blackfeet Tribal Business Council and employees of the Blackfeet Tribe. Plaintiff alleges no breaches of any contract in its action before this Court.

Gilham addressed directly whether Montana could be forced to defend itself in tribal court. Defendants suggest here that Plaintiff should be forced to become a plaintiff in tribal court. Although the facts may differ, the reasoning of *Gilham* applies here. The Town of Browning, similar to the State of Montana, maintains sovereign immunity from suit in tribal court.

Defendants have cited no authority that would require a party to exhaust tribal court remedies even when that party enjoys sovereign immunity from suit in a tribal court. In the absence of any such authority, this Court will not force Plaintiff to exhaust tribal court remedies when it maintains immunity from suit in tribal court.

CONCLUSION

This Court possesses subject matter jurisdiction over this case. Plaintiff has asserted a right to relief that “depends on the resolution of a substantial question of federal law.” *Peabody Coal Co.*, 373 F.3d at 949. Plaintiff has alleged an *Ex Parte Young* action against Defendants. Tribal sovereign immunity poses no bar to this type of action that seeks prospective relief. *Vaughn*, 509 F.3d at 1092. Plaintiff itself possesses sovereign immunity. This Court will not require Plaintiff to file this

case in tribal court to exhaust tribal court remedies before this Court will consider the case.

IT IS ORDERED, Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Doc. 70, is **denied**.

DATED this 18th day of November, 2014.

A handwritten signature in blue ink, reading "Brian Morris". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Brian Morris
United States District Court Judge