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Attorney for Defendants

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

Glacier Electric Cooperative, Inc.,)
Brian Elliott, Willard Hjartarson,)
Jim Newman, Darrol Berkram,)
Zita Bremner, Miles Lewis,)
Dave Losing, and James Taylor,)
in their official capacities)
as directors of Glacier Electric)
Cooperative, Inc., and Dan Brewer,)
in his official capacity as Interim)
General Manager of Glacier Electric)
Cooperative, Inc.,)

Plaintiffs.)

v.)

Floyd "Bob" Gervias, James Kittson,)
Scott Smith, Emerald "Beep" Grant,)
Suzie Murray, Tashina McNabb,)
William Guardipee, Fred Guardipee,)
Heather Juneau, Joseph Arrowtop,)
William Wetzal, Troy Wilson, Melissa)
Gervais, Wilfred DeRoche, Georgia)
Matt, Rodney "Minnow" Gervais, Ralph)
Johnson, Mike Kittson, Kathy Broere,)
Lenore Matt, Evie Birdrattler,)
Rodney Gervais, Duane Ladd, Marcella)
Birdrattler, Tom Gervais, Jim Gervais,)
Marlene Matt, Wilfred DeRoche,)

**CAUSE NO. 4:14 CV-
00075 - BMM**

**PLAINTIFFS' REPLY
BRIEF IN SUPPORT
OF ITS MOTION TO
DISMISS**

Titus Upham, John DeRoche, Carl Evans)
Jeri J. Elliott, Dennis Juneau,)
Teri Ann DeRoche, Paul McEvers,)
Patricia Calflooking, Tony Carlson,)
Sarah Calf Boss Ribs, Kathy Gervais,)
Marcella Green, Ellen Burdeau,)
Randy Augare, Robert Wagner,)
Kenny Walter, Honey Davis, Anna ,)
Horn, Cherlyl Gervais, Anita Potts,)
Therese Salois, Faith Gervais,)
)
Defendants.)
)
)

PLAINTIFFS, through undersigned counsel hereby files the
Plaintiffs' Reply Brief In Support of Its Motion to Dismiss.

ARGUMENT

1. Compliance with Local Rule 7.1

The Defendants submit that they have substantially complied with this rule in that they have had discussions with the Plaintiffs on whether the Plaintiffs objected to the motion to dismiss but did not put this in the motion. Shortly after the Plaintiffs filed this complaint in federal court, the parties discussed the issue of whether Defendants would be willing to stay the proceedings in tribal court. The Defendants wrote a letter to the Plaintiffs and stated they would not be interested in a stay but would agree to the Plaintiffs staying

the federal court proceedings as they had failed to exhaust tribal court remedies. (Exhibit A) Plaintiffs did not respond to this letter. Defendants understand this rule exists and for further matters will specifically call to address whether opposing counsel objects to a motion to dismiss and will state so in the document. For purposes of this case, Defendants submit they have substantially complied with this rule by informing the Plaintiffs that the issue of exhaustion had to be addressed first but erred in not stating so in the motion.

Typically the Defendants before filing a procedural motion, calls the other side and then indicates in the motion whether opposing counsel objects. The Defendants rarely do this however, with a substantive motion. While the Defendants discuss a substantive motion with opposing counsel – opposing counsel’s objection is usually not put in the motion as the Defendants are certain opposing counsel is not going to agree and instead attaches a brief, as in this case the Plaintiffs would not agree to the dismissal of their case. For future motions, whether procedural or substantive, the Defendant will put in the motion that they have contacted opposing counsel and state whether they object or not.

2. Standard for Motion to Dismiss.

The issue of whether to dismiss for failure to exhaust tribal court jurisdiction does not appear to meet one of the Rule 12 motions as it is an issue of comity. Under the doctrine of exhaustion of tribal court remedies, relief may not be sought in federal court until appellate review of a pending matter in a tribal court is complete.

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987); see also Nat'l Farmers, 471 U.S. at 856-57 (applying the doctrine). As a matter of discretion, a district court may either dismiss a case or stay the action while a tribal court handles the matter. Nat'l Farmers, 471 U.S. at 857.

The motion that the law requires the Plaintiffs to first exhaust tribal court remedies is not the same issue as set out in rule 12 of the Fed. Rule of Civ. Pro. as the court can either dismiss the action outright without prejudice or stay the federal court proceedings pending the exhaustion of tribal court remedies. The United States Supreme Court has explained that the exhaustion of tribal remedies doctrine is " 'prudential,' [rather than] jurisdictional," Strate v. A-1 Contractors, 520 U.S. 438, 451, 117 S. Ct. 1404, 137 L. Ed. 2d 661(1997) (quoting Iowa Mut. Ins., 480 U.S. at 20 n.14). So federal courts are instructed to examine relevant federal policy and determine whether "[r]espect for tribal self-government ma[kes] it appropriate 'to give

the tribal court a "full opportunity to determine its own jurisdiction." *Id.* (quoting *Iowa Mut. Ins.*, 480 U.S. at 16). Thus, a motion to dismiss for failure to state a claim or a motion to dismiss for lack of subject matter jurisdiction may be brought only after the Plaintiffs have exhausted their tribal court remedies.

3. Defendant's Do Not Ignore Factual Allegations in Plaintiff's Complaint.

The first Montana test provides that the tribal court has jurisdiction over non-Indians who enter consensual transactions with tribal members. The Defendant's complaint filed in tribal court includes fifty plaintiffs. Glacier Electric argues 11 of whom it did not enter into a consensual relationship with, but the other 39 indeed it did. There is no showing that the tribal court cannot address the other 11 plaintiffs in the tribal court matter. This somehow does not do away with the requirement to exhaust tribal court remedies. The Plaintiffs can file a motion to dismiss in tribal court. While eleven of the plaintiffs in the tribal matter may not be members of the cooperative, this does not mean there is no tribal court jurisdiction. GEC should be required to raise this issue in the tribal court and if GEC does the tribal court may have to address the cause of action for the thirty-nine and dismiss as to the other eleven, but then Defendants

in tribal court would then likely request leave to amend its complaint. This issue does not go to the merits of the current motion to dismiss before this court.

4. Defendants' Motion Includes Supported Factual Allegations and Does Not Disregard the Scope of Relief.

The Defendants' factual allegations in their motion to dismiss are based on their complaint filed in the tribal court proceeding to address among others not having electricity in the winter months and GEC's unreasonable bylaws. This complaint is attached to the Plaintiff's Complaint and marked as Exhibit 1. The Plaintiffs argue to this court that the Defendants would like to have the Blackfeet Tribal Court review GEC bylaws and that this request extends far beyond not having electricity during the winter months. The reason for the request to change the bylaws is to place members from the west end of the cooperative on the board, where most of the tribal members reside, to address such matters as winter shutoffs. In addition, contrary to the Defendants' position, the Montana Supreme Court has said courts have the power to review propriety of an electrical cooperative's bylaws to determine whether the bylaws laws are reasonable. *Granbois v. Bighorn County*, 1999 MT 222; 296 Mont. 45; 986 P.2d 1097; 1999 Mont. LEXIS 227; 56 Mont. St. Rep. 874; *Howe v. Big Horn Electric*, 206 Mont. 297; 670 P.2d 936; 1983 Mont. LEXIS 805

(1983). The Defendants only need to follow the well-pled complaint rule, and if the Plaintiffs want to dispute the complaint, the place to dispute it is in the Blackfeet Tribal Court not Federal Court.

5. The Blackfeet Law and Order Code addressing Jurisdiction over Non-Indians Applies to Criminal matters not Civil.

The section cited by the Plaintiffs in its Response Brief regarding the Blackfeet Law and Order Code is taken out of context.

The section cited applies to offenses and offenders. It provides:

Section 1. Jurisdiction. (See Clarification of this Section in Preface).

The Blackfeet Tribal Court shall have jurisdiction over all offenses enumerated in Chapter 5, when committed by an Indian (person) as defined by this Section, within the Blackfeet Indian Reservation. With respect to any of the offenses enumerated in Chapter 5, over which federal or state courts may have lawful jurisdiction, the jurisdiction of the Court shall be concurrent and not exclusive. It shall be the duty of said Court to order delivery to the proper authorities of the State or Federal Government or of any other tribe or reservation for prosecution, any offender, there to be dealt with according to law or regulations authorized by law, where such authorities consent to exercise jurisdiction lawfully vested in them over the said offender. The Blackfeet Tribal Court is a court of "limited jurisdiction". This means that the Court can handle certain types of cases, but cannot handle other types. In order to know whether the Court can handle any particular criminal cases, it is necessary first to know where the offense took place, who is said to have committed the offense, and what offense is charged.

Where: The Blackfeet Tribal Court has jurisdiction over matters arising on land within the exterior boundaries of the Blackfeet Indian Reservation. In addition to trust lands belonging to the Tribe or to individual Indians, this includes fee-patented lands,

townsites, roads and other right-of-ways, and tracts reserved for school, agency or other governmental purposes.

Who: The Blackfeet Tribal Court has jurisdiction over all persons of Indian descent who are members of the Blackfeet Tribe of Montana and over all other American Indians unless its authority is restricted by an Order of the Secretary of the Interior. The Court does not have jurisdiction over non-Indians or over Indians from Canada. An Indian subject to the jurisdiction of the Blackfeet Tribal Court, including members of the Blackfeet Tribe, who also is employed in the Bureau of Indian Affairs, has a right to appeal from any sentence of the Court to the Secretary of the Interior, and the sentence if so appealed, does not become effective until approved by the Secretary.

Blackfeet Law and Order Code, Chapter 1, Section 1.

This section provides that the Blackfeet Tribal Court does not have criminal jurisdiction over non-Indians and or over Indians from Canada. GEC argues that through this section of the Blackfeet Law and Order Code the Tribe has disavowed jurisdiction over non-Indians. The interpretation of this section is a question of tribal law which is even more reason why this case should be in the tribal court as the tribal court is in the best position to interpret a question of local law. See also, *Fisher v. District Court of the Sixteenth Judicial District of Montana*, 424 U.S. 382; 96 S. Ct. 943; 47 L. Ed. 2d 106; 1976 U.S. LEXIS 24 (1976) where the U.S. Supreme Court deferred to tribal law in a case where the state district judge certified a question to the Northern Cheyenne Tribal Court. In fact the Montana Supreme Court has said

that: “We defer to that opinion on the basis of comity believing that the Tribal Court should interpret Tribal law as a matter of policy and that State courts should abstain from interpreting Tribal law to the contrary in cases where the Tribal Court has spoken on the subject.”

In re Marriage of Limpy, 195 Mont. 314, 318 (Mont. 1981). Accordingly, this court should dismiss this case and require the Plaintiffs to exhaust their tribal court remedies.

6. The Montana Exceptions

The Defendants have shown that the tribal court has jurisdiction by meeting the first Montana exception. The first Montana exception applies as the Defendants have entered into consensual commercial dealings with GEC.

The Defendants have also met the second Montana exception as the tribe has an intimate interest in ensuring people within the exterior boundaries of the reservation do not get frozen out of their homes in the winter months.

CONCLUSION

For the reasons stated herein the Defendants respectfully request that the court grant its motion to dismiss as the Plaintiffs have failed to exhaust their tribal court remedies.

Dated this 27th day of February 2015.

_____/s/____ Terry T. Matt
Terry T. Matt
Attorney for Defendants

CERTIFICATE OF COMPLIANCE

I hereby certify that the Reply Brief complies with Rule 7.1 in that the word count is 2,221 which is all-inclusive, and it meets the 14 point font requirement.

_____/s/____ Terry T. Matt
Terry T. Matt
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following persons, by the following means, this 27th day of February 2015.

_____ Hand Delivery	_____ Federal Express
_____ U.S. Mail	_____ Certified Mail
<u>1,2,3</u> E-mail	
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Certifier