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UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF MONTANA, GREAT FALLS DIVISION

Town of Browning, a Montana Municipal Corporation Plaintiff, v.s. Willis 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; Joe McKay; Earl Old Person; Tyson Running Wolf; and Nelse St. Goddard, Defendants.	)	CAUSE NO.: CV-14-24-6F-BMM-RKS DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT UNDER RULE 12(b)(1)

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INTRODUCTION

Plaintiff's Amended Complaint seeks to establish federal question jurisdiction under 28 U.S.C. 1331, but fails to identify the capacity in which the defendants are sued so as to establish such jurisdiction. What is clear, however, is that the amended complaint's request for relief, references to actions taken under authority of the Tribe, and, most transparently, addition of parties with whom plaintiff had no dispute until they assumed tribal offices, establish that the Blackfeet Tribe is the real party in interest in this suit. The amended complaint should be condemned as an attempt by plaintiff to use the federal courts to breach the sovereignty of the Tribe.

STATEMENT OF FACTS[1]

This case involves a 1995 Memorandum of Agreement ("1995 MOA" or "MOA") between the Blackfeet Tribe and the Town of Browning (Anderson Affidavit-Exhibit 1).[2] *ECF* 57-Amended Complaint, ¶20. Under the MOA, the Tribe and the Town created a new unified community utility system to provide

[1] In a Rule 12(b)(1) motion, the district court "is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction," and such does not convert the motion to a summary judgment motion. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). The court may also take judicial notice pursuant to Federal Rule of Evidence 201, of "matters of public record," but not of facts that may be subject to reasonable dispute. *United States v. Corinthian Colleges*, 655 F.3d 984, 998-999 (9th Cir. 2011).

[2] The Town of Browning is located entirely within the exterior boundaries of the Blackfeet Indian Reservation. The population within the Town's municipal limits is 92.7% Native American. U.S. Department of Commerce, U.S. Census Bureau, *American Fact Finder*.

utility services within the Reservation. MOA §2.03, §3.01. The Town was designated as the manager of the new utility entity, MOA §3.02,[3] and received compensation for its services. §3.02.b and d, §3.03.

The MOA was amended in 2009 (Anderson Affidavit-Exhibit 2), *ECF* 57-Amended Complaint, ¶21, when funds were received to construct a new water system, the Blackfeet Community Water Project. The new system served East Glacier, the Town of Browning and surrounding areas, and delivered water from a completely new water supply -- Tribal water from Two Medicine Reservoir -- which was treated at a new tribally owned water treatment plant near East Glacier and delivered to the Town through a tribally owned pipeline. Anderson Affidavit-Exhibit 2, ¶¶2-3.[4] The Amendment added a new section 5 to the 1995 MOA which again designated the Town as the operation-manager of all facilities and added requirements for the operation and management of the facilities. §5.01.

Among other things, the Town was to purchase treated water from the Tribe for re-sale to consumers within East Glacier and within the central service area.

[3] Under the original 1995 MOA, the Town was to "own, operate and maintain all facilities and equipment in the production, transmission and delivery of water from the Flatiron and Willow Creek water sources" to provide water service to the central service area. MOA §3.02.b. Beginning in 2009, however, the Flatiron and Willow Creek water sources located north of the Town were replaced by a water supply from Two Medicine Lake which impounds Blackfeet water. Water from Two Medicine is treated at a new treatment plant owned by the Tribe near Two Medicine Lake, and is then transported in a 12-mile pipeline owned by the Tribe to a point near the Town.

[4] The Town was not designated as owner of the facilities under the 2009 Amendment. Tribe is the owner of all new facilities.

§5.02.h and i. The Town was further required to insure that all operations were conducted in compliance with federal, state and tribal law and regulations. §5.02.k. The Town was to be compensated for its services as operator-manager in the amount of 10% of all revenues it collected, 90% to be paid over to the Tribe. §5.03.

The MOA was amended a third time in 2011 (Anderson Affidavit-Exhibit 3) at which time sections 5.02.h and 5.02.i were deleted and new language was inserted requiring that water and sewer rates would be set by the Tribe under its Ordinance 98.

The total cost of the new system was approximately $19 million. From 2002 – 2012, the Tribe was issued four 40-year water revenue bonds by USDA totaling $3,301,400 to construct the BCWP system. The Tribe is obligated to pay $170,196 annually towards the water revenue bond debt for approximately the next 35 years. It is also required to fund short-lived asset and debt reserve accounts in the amount of $53,802 annually as a condition to the water revenue bonds, including the firm recommendation of funding a long-lived asset reserve. The Tribe also obtained grant funds from IHS, EPA and Community Block grants to fund the system. The Town contributed 14%, which they obtained in the form of grant funds. No Town

funds were used. *Id.*[5]

Disputes arose between the Tribe and Town concerning operations under the MOA continuing for well over a year. On August 19, 2013, the BTBC terminated the 1995 MOA by Resolution 302-2013 (Anderson Affidavit-Exhibit 4). *ECF* 57-Amended Complaint, ¶22. See Anderson Affidavit-Exhibit 5. On August 27, 2013, as authorized by the resolution, notice was provided to the Town by the Chairman of the BTBC that the 1995 MOA would be terminated as of October 1, 2013, and that the Blackfeet Tribe would begin operating the water and sewer system as of that date (See Anderson Affidavit-Exhibit 6).

The Resolution and Notice detail the disputes between the Tribe and the Town concerning the water and sewer system, including among other things, the Town's refusal to meet with the Tribe for over two years, and to provide financial information concerning the system, the Town's mismanagement of revenues and other failures and improprieties.[6] The Tribe concluded that because it was no

[5] Anderson Affidavit-Exhibit 8 is a financial report showing the Tribe invested most of the money to construct the new water system. Anderson Affidavit-Exhibits 9 and 10 are letters from Montana State officials supporting the Tribe's effort to build a new water system to serve Browning. Exhibit 11 is the Environmental Assessment for the new water system which shows at Section 1.2 ¶ 2 that the Tribe will own and operate the new system. Anderson Affidavit-Exhibit 12 is an agreement between the Tribe and the State of Montana to relocate the Tribe's water main serving Browning and the Tribe's investment of $125,230.25 to relocate such water main.

[6] Related to the Tribe's concerns was an October 9, 2013 Public Notice pursuant to 5-7-503 MCA, the Montana Single Audit Act, that the Town's governmental operations were in violation of the Act for failing to file an annual financial report for 2011 and 2012. A similar notice was published on June 25, 2014 indicating the Town was still in violation of the state law audit requirement for failure to submit an annual financial report for 2011 and 2012 under the

longer able to ensure the safety and stability of the community water supply in the Browning area, it was necessary to terminate the MOA in the interests of the health, safety and welfare of the Tribal members. The Tribe thereafter assumed all operations of the water and sewer service.[7]

The Town's Amended Complaint is based on a flawed factual premise that it owns "utility systems". However, the Town never identifies what constitutes such "utility systems." As shown above, the vagueness of the Town's claim is explained by the fact that there is no longer, and has not been for some time, any Town utility systems. While such systems may have existed in the past, those systems have been substantially replaced, changed, and expanded far beyond the boundaries of the Town. What was once a single system serving the Town is now a single integrated utility system serving two municipalities, East Glacier and Browning, and large areas contiguous to, but outside, the Town.[8]

Montana Single Audit Act. The Act was established to help ensure that Montana local governments provide transparency and accountability to its constituents, and requires that all local governments complete annual financial reports and submit them to the Montana Department of Administration.

[7] On March 28, 2014, the Tribe sued the Town in Tribal Court to collect all amounts due and owing to the Tribe under the 1995 MOA up to the effective date of the termination. See Tribal Court Complaint (Anderson Affidavit-Exhibit 7). The Court can take judicial notice of the Complaint as a public document. *United States v. Corinthian Colleges*, 655 F.3d 984, 998-999 (9th Cir. 2011). See footnote 1.

[8] The surrounding areas include large housing areas constructed by the Tribe over the years that continue to be expanded, and new public and commercial developments, including a new public high school, a new Indian Health Service Hospital, the Tribe's new casino, hotel and grocery

The Tribe undertook an enormous effort and investment to construct the new Blackfeet Community Water Project (BCWP) as a replacement for the old East Glacier and Browning systems, and now owns the majority of the infrastructure associated with the system. See Anderson Affidavit-Exhibits 8-12.[9] More recently, the old water storage tanks within the Town have been replaced with IHS funding by a new million gallon water storage tank and 300,000 gallon water storage tank located on Tribal Trust property in the Browning area. See Anderson Affidavit-Exhibits 13 and 14. The Tribe further invested in a Supervisory Control and Data Acquisition (SCADA) system that electronically monitors and controls water treatment plant operations and the water levels in the new tanks. See Anderson Affidavit - Exhibit 15. And, the Tribe recently entered into an agreement with the Indian Health Service (IHS) to replace the existing chlorinator station in Browning to be owned and operated by the Tribe. See Anderson Affidavit-Exhibit 16, ¶9.

The sewer system serving Browning has also been replaced and the Tribe is

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store and a greatly expanded Tribal Community College, all of which are outside the Town boundaries.

[9] Anderson Affidavit - Exhibit 8 is a financial report showing the Tribe invested most of the money to construct the new water system. Anderson Affidavit - Exhibits 9 and 10 are letters from Montana State officials supporting the Tribe's effort to build a new water system to serve Browning. Anderson Affidavit - Exhibit 11 is the Environmental Assessment for the new water system which shows at Section 1.2 ¶ 2 that the Tribe will own and operate the new system. Anderson Affidavit - Exhibit 12 is an agreement between the Tribe and the State of Montana to relocate the Tribe's water main serving Browning and the Tribe's investment of $125,230.25 to relocate such water main.

designated as owner of the new system. See Anderson Affidavit-Exhibit 17. Of the two lagoons serving the system, the Last Star Lagoons are located entirely on Blackfeet Tribal Trust property and are owned by the Tribe. See Anderson Affidavit-Exhibit 18. The Hodson Lagoons are located on land substantially owned by the Tribe, and the Tribe owns the sewer treatment building that treats and discharges wastewater into the Tribe's surface waters. See Anderson Affidavit-Exhibits 19 and 20.

Since termination of the Town as the operator, the Tribe has assumed all operations of water and sewer services in order to protect the health, safety and welfare of the community and ensure the financial stability of the new water supply system. See Anderson Affidavit-Exhibit 6. The Town's claim that the defendants are now interfering with the "Town's utility systems" is nonsensical and inconsistent with the amended MOA given the new utility systems that are now in place, nearly all of which the Tribe owns, and the vastly expanded area served by the systems which extend far beyond the Town's boundaries.

I. All Defendants Are Immune From Suit

Tribal immunity precludes subject matter jurisdiction in an action against an Indian Tribe, its officials or agents. *Alvarado v. Table Mountain Rancheria,* 509 F.3d 1008, 1015-16 (9th Cir. 2007); *Miller v. Wright*, 705 F.3d 919 (9th Cir. 2013); *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006). Here, defendants

possess sovereign immunity from suit requiring dismissal of the Town's claims against the defendants.

As "distinct, independent political communities" with sovereign powers, Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978). A tribe is therefore subject to suit only where Congress has authorized the suit or the Tribe has waived its immunity. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.,* 523 U.S. 751, 754 (1998). Such a waiver "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58-59. This term, the Supreme Court reaffirmed these principles in *Michigan v. Bay Mills,* 134 S. Ct. 2024, 2030-31 (2014):

> Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58. That immunity, we have explained, is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribe of Fort Berthold Reservation v. Wold Engineering, P.C.* at 476 U.S. 855, 890 (1986); … Thus, we have time and again treated the "doctrine of tribal immunity [as] settled law" and dismissed any suit against a tribe absent congressional authorization (or a waiver). *Kiowa Tribe of Okla. V. Manufacturing Technologies, Inc*., 523 U.S. 751, 756 (1998).

Tribal sovereign immunity "extends to officials when acting in their official capacity and within the scope of their authority." *Miller v. Wright*, 705 F.3d 919 (9th Cir. 2013) *citing Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir.

2008). *See Marceau v. Blackfeet Housing Authority,* 455 F.3d 974, 978 (9th Cir. 2006) *citing United States v. Oregon*, 657 F.2d 1009, 1013 n. 8 (9th Cir. 1981) ("immunity extends to tribal officials when acting in their official capacity and within the scope of their authority").

There are no specific allegations in the Amended Complaint as to whether the individuals are named in their individual or official capacities, or that members of Council acted outside their official capacity or outside the scope of their authority in connection with the Reservation utilities. For three of the named members of Council, William Old Chief, Cheryl Little Dog and Paul McEvers, no action was in fact taken by them because they were not present and did not vote at the meeting at which the resolution terminating the MOA of passed,[10] and they have not taken any action in connection with this matter otherwise. Five of the additional members of Council added by to the Complaint by Amendment, Harry Barnes, Iliff Kipp, Tyson Running Wolf, Joe McKay, Nelse St. Goddard, are newly elected members of Council and have had no involvement in this matter in an individual or official capacity.

Since the filing of the Amended Complaint naming the additional Council members as parties, however, the Blackfeet Tribal Business Council adopted

[10] The resolution was passed by six members of Council, three of whom are not named in the Amended Complaint (*ECF* 57) – Shannon Augare, Roger Running Crane and Leonard Guardipee. See Anderson Affidavit-Exhibit 5.

Resolution 251-2014, expressing the position of members of Council that the Federal Court has no jurisdiction over them, and further that the members of Council have no authority to bind the Blackfeet Tribe in the absence of the Blackfeet Tribe as a party. See Anderson Affidavit-Exhibit 21, attached hereto.

Under these circumstances, there is no ground to find that the tribal officials acted outside their official capacity or outside the scope of their authority. *Imperial Granite Company v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271-72 (9th Cir. 1991). Accordingly, the members of Council retain their sovereign immunity and are not subject to suit.

The employees of the Tribe also are immune from suit. *Cook v. Avi Casino Enterprises. Inc.*, 548 F.3d 718, 727 (9th Cir. 2008). Cook held that similar to tribal officials, "tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority." *Id.* In so holding, the court explained:

> The principles that motivate the immunizing of tribal officials from suit—protecting an Indian tribe's treasury and preventing a plaintiff from bypassing tribal immunity merely by naming a tribal official—apply just as much to tribal employees when they are sued in their official capacity.

Id.

II. The Blackfeet Tribe is the Real Party in Interest

Even in the face of allegations that tribal official have acted beyond the

scope of their authority,[11] courts have refused to exercise jurisdiction if it is clear that the tribe is the real party in interest. In *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992), the court held that "where it is clear from 'the essential nature and effect' of the relief sought that the tribe 'is the real, substantial party in interest," the suit cannot be maintained against the officials. *Id.* at 1320 *citing Ford Motor Co. v. Department of Treasury of Indians*, 323 U.S. 459, 464 (1945). The court looked to the "general rule" that:

> a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," *Land v. Dollar*, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." *Larson v. Domestic & Foreign Corp*., 337 U.S. 682 (1949).

Id., citing Dugan v. Rank, 371 U.S. 609, 620 (1963). Under this general rule:

> A suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory power, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.

Larson v. Domestic & Foreign Corp., 337 U.S. 682, 691 (1949).

The relief sought here – an injunction and money damages -involves all three of the elements in *Dugan v. Rank*. The judgment would expend itself on the Blackfeet treasury to the extent any money damages are awarded against Tribal

[11] At most, any jurisdiction established on this basis allows only for prospective relief and not monetary relief. *Miller v. Wright*, 701 F.3d at 928.

officials acting in their official capacity, it would interfere with public administration by the Tribe of essential water and sewer services on the Reservation, and it would compel the Tribe to act in connection with Tribal property and resources thereby preventing the Tribe from exercising its sovereign powers to regulate and manage its property and resources. *See Miller v. Wright*, 705 F.3d at 928; *Cook v. Avi Casino Enterprises Inc.*, 548 F.3d at 727.

The relief sought here is "an intolerable burden on government functions" which "would impermissibly infringe[]" on the sovereignty of the Blackfeet Tribe. *Shermoen,* 982 F.2d at 1320. Since the relief will require not just a cessation of conduct, but affirmative action on the part of the Tribe to continue to provide treated water to the Town, this suit is a suit against the Tribe which must be dismissed in the absence of the Tribe.

In addition, the Defendants point to the specific allegations in the Amended Complaint that make clear this case is fundamentally against the Blackfeet Tribe. See *ECF* 57-Amended Complaint, ¶26 ("the Blackfeet Tribe attempted to take control of the water and sewer utility services in the Browning community"), paragraph 29 (the "tribal attorney" demanded payment "owed to the Blackfeet Solid Waste and Utility Management Program"), *ECF* 57-Amended Complaint, ¶32 (the Town will suffer irreparable harm unless the Court issues an order "restraining the Defendants from depriving the Town of property without due

process of law"), Exhibit B to *ECF* 57-Amended Complaint ("The Tribe took the step to provide water and sewer service"). Further, the Defendants point to the Town's filing pursuant to the Order of Mediation (*ECF* 56). The filing shows that the Tribe is the real party in interest.[12] The filing further confirms that the relief sought by the Town is fundamentally and solely against the Blackfeet Tribe. However, the Tribe is not a party and cannot be joined due to its sovereign immunity.

III. The Court Lacks Subject Matter Jurisdiction Under 28 U.S. C. § 1331

Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375 (1978). The district courts have jurisdiction in civil actions only when they "aris[e] under the Constitution, laws or treaties of the United States." 28 U.S.C. §1331. For §1331 jurisdiction to exist, "a right or immunity created by the Constitution or laws of the United States must be an essential element of plaintiff's claim." *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517, 519 (9th Cir. 1974, *cert denied*, 420 U.S. 974 (1975). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377

[12] The Town's letter, dated August 12, 2014, is identified as Anderson Affidavit - Exhibit 22 and admissible under FRE 408(b). The defendants in a separate motion will seek to file the document under seal pursuant to F.R. Civ. P. 5.2(d), L.R. 5.1.

(1994) *citing Turner v. Bank of North America*, 4 U.S. 8, 11 (1799) and *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936).

For a case to arise under federal law, "a plaintiff's well-pleaded complaint must establish either (1) that federal law creates the cause of action or (2) that the plaintiff's asserted right to relief depends on the resolution of a substantial question of federal law." *Peabody Coal Company v. Navajo Nation*, 373 F.3d 945, 949 (9th Cir. 2004), *citing Franchise Tax Bd. Of Cal. v. Constr. Laborers Vacation Trust of S. Cal.*, 463 U.S. 1, 27-28 (1983).

While the Town makes a general allegation that the Town's right to relief "depends on the resolution of substantial questions of federal law," and makes the general statement that this case "involves disputed federal power delegated to Indian tribes or individual Indian tribes or individuals to enact and enforce ordinances against non-Indian or non-member entities," *ECF* 57-Amended Complaint, ¶16, the Town simply makes conclusory statements about jurisdiction in this case that are simply not borne out.[13]

Rather than an assertion of disputed federal power, this case is simply and fundamentally a contract matter involving the 1995 MOA as amended under which

[13] The Town cites *Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir. 1989) and *Native Village of Tyonek v. Puckett*, 957 F.2d 631 (9th Cir. 1992). Both cases involved suits *by tribes* to apply tribal ordinances to non-members. In *Chilkat*, the issue was the Tribe's authority to apply ordinances "to those outside the community." 870 F.2d at 1469. In both cases, the issue was the Tribes' authority to apply their ordinances under federal law. As shown here, there is no issue of application of tribal law.

Town served as operator/manager of the single integrated water and sewer systems and received compensation for its services. The Blackfeet Tribe terminated the MOA effective October 1, 2013, due to the Town' non-compliance with the terms of the MOA. Anderson Affidavit-Exhibit 4. In the termination, no issue of non-compliance with any Tribal ordinance was raised or asserted. As the Tribe's termination of the MOA was based solely on the terms of the MOA, the issues raised by the termination relate only to the interpretation of the MOA.

This case, then, comes within the numerous Indian law cases in which the courts have refused to find federal question jurisdiction where the issue is a matter of contract interpretation. *Peabody Coal Company v. Navajo Nation*, 373 F.3d 945 (9th Cir. 2004) (no federal question in a suit to enforce an arbitration settlement agreement under a federal oil and gas lease); *Niagara Mohawk Power Corporation v. Tonawanda Band of Seneca Indians*, 94 F.3d 747 (2d Cir. 1996) (no federal question jurisdiction involving a franchise agreement where the cause of action sounds in contract arising under state law); *Tamiami Partners v. Miccosukee Tribe of Indian of Florida*, 999 F.2d 504 (11th Cir. 1993) (district court lacked federal question jurisdiction in suit to enjoin tribe from exercising self-help in contractual dispute); *Stock West, Inc. v. Confederated Tribe of the Colville Reservation*, 873 F2d 1221, 1225 (9th Cir. 1989) (no federal question in dispute over contracts relating to construction and management of a sawmill); *Gila River Indian*

Community v. Henningson, Durham & Richardson, 626 F.2d 798, 714-715 (9th Cir. 1980) (no federal question jurisdiction in involving a dispute concerning the design and construction of a youth center on the reservation); *Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965) (no federal question jurisdiction in claim of tortious interference with an attorney contract approved by the Secretary of the Interior).

The Town attempts to establish federal question jurisdiction by alleging an "attempted" takeover of water and sewer system by the "Blackfeet Tribe", a non-party in this case, under Blackfeet Ordinance 98. *ECF* 57-Amended Complaint, ¶23. However, a review of the Blackfeet Water and Sewer Ordinance 98, Exhibit A to *ECF* 57-Amended Complaint, shows that the Ordinance simply regulates the construction of water and sewer systems and regulates the rates related to such systems. See §01.01.3 of the Ordinance (Purpose). The Town vaguely alleges that the Tribe is invalidly enforcing Tribal Ordinance 98 against the Town. *ECF* 57-Amended Complaint, ¶¶23, 26. However, none of the Tribe's actions have been taken under Ordinance 98. The Town does not point to any specific provisions in the Ordinance that are being applied to it or which it challenges. The Town does not allege that it has been charged with violation of any of the provisions of Ordinance 98. Nor does it allege that any enforcement proceedings have been brought against it under the Ordinance. It further fails to allege any specific conduct on the part of any of the individual Defendants that constitutes

enforcement of Ordinance 98.

Ordinance 98 merely regulates the construction of water and sewer systems and regulates rates related to such systems. However, the dispute between the Town and the Tribe involves issues solely relating to operation and management under the MOA and has nothing to do with any enforcement of Ordinance 98. See Resolution, Minutes and Termination Letter (Anderson Affidavit-Exhibits 4, 5, and 6) The sole issue relating to Ordinance 98 is the rate structure, and the Town agreed to abide by the Tribe's rate structure in the MOA and even *after* the MOA was terminated.[14] See Anderson Affidavit-Exhibit 23.

Moreover, Ordinance 98 was enacted pursuant to agreements with IHS and other funding agencies to construct water and sewer facilities on the Blackfeet Indian Reservation. IHS requires that the Tribe "enact and enforce appropriate ordinances or regulations" governing connections, methods and materials used in making connection to the community water supply and sewage systems and the continued operation and maintenance of individual water supply and waste disposal facilities. See e.g. Memorandum of Agreement between the IHS and the Tribe regarding the Browning VC Sewermain Replacement (August 2, 2010), Anderson Affidavit-Exhibit 17, ¶11; see also Anderson Affidavit-Exhibit 16,

[14] On September 18, 2013, twenty (20) days after the termination of the 1995 MOA and its amendments, the Town issued a public notice stating that "The Town acknowledges the Tribe's exclusive right to set all rates for water and sewer services under Ordinance 98" and, therefore, "the Town is obligated to provide its customers with the same rates".

¶13.[15] Thus, rather than an assertion of sovereign authority over the Town, Ordinance 98 is a condition of funding for critical structures relating to the water and sewer systems serving residents of the Reservation.[16]

The Town's allegations that Ordinance 98 is being enforced against it in some unspecified manner by unspecified defendants, and that such "enforcement" raises a federal question, rings especially hollow. Not only does the Town fail to articulate a federal question, it fails to articulate any relief the Court can grant to remedy its unspecified allegations.

While the assertion of tribal authority over non-members may in some cases raise a federal question, see *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), this is not such a case. Here the Tribe terminated the 1995 MOA for the Town's failure to comply with the terms of the MOA. This case is a straight-forward contract action which raises no federal question establishing federal court jurisdiction.

IV. The Court Lacks Jurisdiction Under 28 U.S.C. §1343

The Town alleges jurisdiction under 28 U.S. C §1343 claiming that "this case implicates a statutory prohibition against Indian tribes or individual Indians

[15] The 2010 MOA provides for the replacement of the sewer main and makes clear that the Tribe is the owner of the facilities funded. See 2010 MOA ¶ 8.

[16] To the extent the Town challenges the ownership of the facilities funded by IHS, which includes most of the facilities, IHS requires in its agreements and MOAs that administrative remedies be first exhausted before IHS. See e.g. Anderson Affidavit-Exhibit 16, ¶27; Anderson Affidavit-Exhibit 17, ¶26.

exercising governmental power to take private property without just compensation or due process of law," *citing* 25 U.S.C. §§1302(a)(5) & (8) (Indian Civil Rights Act). *ECF* 57-Amended Complaint, ¶16. The Indian Civil Rights Act, however, is not enforceable in federal court under 28 U.S.C. §1343. Since the 1978 decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978), it has been recognized that the exclusive federal remedy under the Indian Civil Rights Act is habeas corpus pursuant to 25 U.S.C. §1303. See *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 981 (9th Cir. 1983), *cert. denied*, 472 U.S. 10116 (1985) and cases cited therein. The holding in *Santa Clara* has "foreclosed any reading of the [Act] as authority for bringing civil actions in federal court to request … forms of relief [other than *habeas corpus*]," *Snow Quinault Indian Nation*, 709 F.2d 1319, 1323 (9th Cir. 1983), *cert*. denied 467 U.S. 1214 (1984). Since no detention is involved and no habeas relief is requested, the court lacks jurisdiction under 28 U.S.C. 1343 to provide any relief under the Indian Civil Rights Act.[17]

Further the Indian Civil Rights Act is a limitation on the exercise of powers

[17] The Town does not allege and it is not clear from any of the allegations in the Amended Complaint that the property associated with the water and sewer system is "private property" within the meaning of 25 U.S.C. §1302(5) (no tribe in exercising powers of self-government shall "take any private property for a public use without just compensation") since the property has only been used for a public use. Nor is it clear that the Town, as a municipal corporation, is a "person" within the meaning of 25 U.S.C. §1302(8) (no tribe may deny "any *person* within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law").

of self-government by a tribe. 25 U.S.C. §1302 ("No Indian tribe in exercising powers of self-government shall—"). The Tribe is not a named party in this case, and for this as well, no claim can be maintained under 42 U.S.C. §1343.

V. The Court Lacks Jurisdiction Over the State Law Claims Alleged in Counts I-IV of the Amended Complaint

Since the court lacks jurisdiction under 28 U.S.C. §1331 and §1343, the court also lacks jurisdiction over the state law claims alleged in Counts I-IV of the Amended Complaint. Those claims are based on state law and do not raise a federal question. See *K-2 American Corporation v. Roland Oil & Gas, LLC*, 653 F.3d 1024 (9th Cir. 2011).

VI. The Town Must Exhaust Tribal Court Remedies

Even if jurisdiction should exist under 28 U.S.C. §1331 or 28 U.S.C. §1343, which we dispute, exhaustion of tribal court remedies is required before any claims may be entertained by the federal court. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856-67 (1985). Recently, the Ninth Circuit has affirmed the continuing application of this requirement.

> Federal law has long recognized a respect for comity and deference to the tribal court as the appropriate court of first impression to determine its jurisdiction. See *Nat'l Farmers Union Ins. Cos. V. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-16 (1987); *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.3d 1239, 1244-47 (9th Cir. 1991). As support for this premise, the Supreme Court cites: (1) Congress's commitment to "a policy of supporting tribal self-government and self-determination;" (2) a policy that allows "the

> forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge;" and (3) judicial economy, which will be served "by allowing a full record to be developed in the Tribal Court." *Nat'l Farmers*, 471 U.S. at 856.

Grand Canyon Skywalk Development LLC v. 'Sa' Nyu Wa Incorporated, et al., 715 F.3d 1196, 1200 (9th Cir. 2012).

Exhaustion is "not a jurisdictional bar, but a prerequisite to a federal court's exercise of its jurisdiction." *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 n.3 (9th Cir. 1991). A district court "has no discretion to relieve a litigant from the duty to exhaust tribal remedies prior to proceeding to federal court." *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 920 (9th Cir. 2008)

The Ninth Circuit requires exhaustion in all cases relating to tribal affairs if there is a colorable argument that the tribal courts has jurisdiction over the case. *Marceau v. Blackfeet Housing Authority*, 540 F.3d at 920-21; *Stock West Corp. v. Tayl*or, 964 F.2d 912, 919-20 (9th Cir. 1992); *Wellman v. Chevron, U.S.A., Inc*., 815 F.3d 577 (9th Cir. 1987). Further, exhaustion requires exhaustion of all available tribal procedures, including appellate review. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987).[18]

[18] The Court in *National Farmers Union* indicated in a footnote that exhaustion may not be required where an assertion of tribal jurisdiction is "motivated by a desire to harass or is conducted in bad faith," where the action is "patently violative of express jurisdictional prohibitions," or where exhaustion would be futile "because of the lack an adequate opportunity to challenge the court's jurisdiction." 471 U.S. 856 n. 21. Here, there are no allegations of bad

The Tribal Court's jurisdiction is more than colorable here. The claim arises on the Reservation and involves the provision of utility services to Reservation residents, the vast majority of whom are Tribal members residing on Tribal or individual Indian land through systems primarily owned by the Tribe. In suits by *non-member plaintiffs* against *Indian defendants* involving claims arising on the Reservation and relating to Tribal property and assets, the Tribal Court has exclusive jurisdiction as a matter of inherent sovereign authority. *Williams v. Lee*, 358 U.S. 217 (1959); see *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006).

In *Smith*, the Ninth Circuit held that where the plaintiff is a non-member, *Williams v. Lee* applies to establish tribal court jurisdiction. *Id*. at 1132 ("where the nonmembers are the *plaintiffs*, and the claims arise out of commercial activities within the reservation, the tribal courts may exercise civil jurisdiction") *citing Williams v. Lee, supra,* (emphasis in original). The Court also considered jurisdiction under the *Montana* test, noting that *Williams v. Lee* was cited as an example meeting both the exceptions under the *Montana* test. *Id.* at 1136. The Court further noted that the power to exercise civil authority is derived not only from the Tribe's inherent powers necessary to self-government and territorial

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faith, harassment, or express jurisdictional prohibitions. And, as we point out above, the Town has utilized the Tribal Court without complaint. Thus it is clear that exhaustion would not be futile.

management, "but also from the power to exclude nonmembers from tribal land." *Id*. at 1139, *citing Babbitt For, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 592 (9th Cir. 1983). See *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 811 (9th Cir. 2011) (upholding Tribal Court jurisdiction in an unlawful detainer action brought by the Tribe against a non-member lessee of tribal land based on the Tribe's sovereign power to exclude trespassers on tribal land and holding the *Montana* test inapplicable).

Since this case falls within the rule of *Williams v. Lee*, it necessarily meets the exceptions under the Montana test. *Smith v. Salish Kootenai College*, 434 F.3d at 1132.[19] The Tribe further has the power to exclude the Town's activities from Tribal and individual Indian lands. *Water Wheel*, *supra*.

In the circumstances of this case, the Town must exhaust remedies in the Blackfeet Tribal Court before the federal court exercises jurisdiction.[20]

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[19] The *Montana* exceptions are met here in any case. The 1995 MOA establishes a consensual relationship between the Tribe and Town for the provision of utility services to Blackfeet Tribal members and residents of the Reservation satisfying the first prong of the *Montana* test. However, even without the 1995 MOA, the first prong of the Montana test is satisfied. As set out in *Smith*, the consensual relationship prong of *Montana* is the equivalent of a "due process" "minimum contacts" analysis. *Smith*, 434 F.3d at 1137. Here, the Town has voluntarily taken steps to establish a substantial connection to the Blackfeet Indian Reservation, the Blackfeet Tribe and the Blackfeet Tribal members as a municipality on the Reservation. Under the second prong of the *Montana* test, the Town's actions in attempting to continue to provide utility services using Tribal water and utility structures has a direct demonstrable effect on the economic security, health and welfare of the Blackfeet Tribe and its members.

[20] The Town is no stranger to Blackfeet Tribal Court. It has been a successful litigant in the Tribal Court. *E.g., Town of Browning v. Peppers,* 2003 CA 222 (2003) (ordering the return of

CONCLUSION

The Court should dismiss this case for lack of subject matter jurisdiction and failure to exhaust Blackfeet Tribal Court remedies.

DATED this 20th day of August 2014.

/s/ Lawrence A. Anderson
Lawrence A. Anderson

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I certify that Defendants' Reply Brief in Support of Motion to Dismiss Amended Complaint Under Rule 12(b)(1) is double spaced, proportionately spaced, typed in Times New Roman, has a typeface of 14 points, and contains less than 6,500 words.

/s/ Lawrence A. Anderson
Lawrence A. Anderson

Town property by the defendant); *Town of Browning v. Augare et al*., Case No. 97 CA 336 (1998) (order and judgment in interpleader action).