Maxon R. Davis
Paul R. Haffeman
Derek J. Oestreicher
DAVIS, HATLEY, HAFFEMAN & TIGHE, P.C.
The Milwaukee Station, Third Floor
101 River Drive North
P.O. Box 2103
Great Falls, Montana 59403-2103
Telephone: (406) 761-5243
max.davis@dhhtlaw.com
paul.haffeman@dhhtlaw.com
derek.oestreicher@dhhtlaw.com
Attorneys for the Town of Browning

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

TOWN OF BROWNING, a Montana municipal corporation,

Plaintiff,

-vs-

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.

CAUSE NO.
CV-14-24-GF-BMM-RKS

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT UNDER RULE 12(b)(1) (Dkt. 70)

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INTRODUCTION

In yet another transparent attempt to delay this action from adjudication, defendants' Motion to Dismiss misconstrues this case as "simply and fundamentally a contract matter." Dkt. 71, p. 14. In doing so, defendants present a series of "straw men" legal arguments which are easily knocked down upon examination of the facts in the proper light. There is no contract in dispute; rather, this case involves whether the defendants – who at all relevant times were officials and employees of the Blackfeet Tribe (hereinafter the "Tribe") – have authority to exercise control over the utility systems, equipment, and infrastructure owned, operated, maintained, and improved by the Town of Browning (hereinafter the "Town"). Put simply, the central issue is whether the defendants can take the Town's utility systems and steal the Town's utility revenue.

The means by which the defendants have exercised unauthorized control over the Town's utility systems violate express provisions of federal law and raise substantial questions of federal law. First, the defendants claim the purported authority for their conduct is Blackfeet Ordinance 98 ("Ordinance 98"). Thus, the question necessarily becomes whether federal law authorizes tribal ordinance enforcement against a non-member such as the Town. Second, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the defendants have utilized the U.S. Postal Service to disseminate notices and threats to the

Town and its utility customers directing that customers no longer pay the Town for utility services. In both instances, this Court has jurisdiction.

FACTUAL BACKGROUND

Previously, defendants had erroneously asserted that the Town somehow failed to establish its ownership of certain utility systems within the Browning community. Dkt. 27, p. 31. Now, the defendants assert that the Town's ownership of its utility systems and infrastructure has simply ceased to exist on account of the construction of the Blackfeet Community Water Project ("BCWP"). Dkt. 71, p. 3. As shown below, defendants' current assertion lacks merit.

As stated in the Amended Complaint, the Town has owned, operated, maintained, and improved utility systems in the Browning community since at least 1934. Dkt. 57, ¶ 18; *see for example* Meeting Minutes, (August 16, 1934), (Exhibit A) (showing the Town has owned utility systems and infrastructure in the Browning community since at least 1934); Meeting Minutes, (October 4, 1934), (Exhibit B) (showing the Town installed an additional well and water pump to provide water utility services in 1934); Meeting Minutes, (January 5, 1956), (Exhibit C) (showing the Town began to repair and expand its water distribution pipes in 1956); Great Northern Railway Co. Grant Deed, (Exhibit D) (showing the Great Northern Railway conveyed water facilities to the Town in September 1956); Hodson Lagoon Deed, (Exhibit E) (showing the Hodson Lagoon is deeded

to the Town to be used for sewer purposes in 1970)[1]; Montana Dept. Health & Human Services Letter, (April 5, 1995), (Exhibit F) (showing the Town continued to expand its water and sewer distribution system in 1995). The Town's ownership over these utility systems and infrastructure has never been extinguished. Affidavit of Willie Morris, ¶ 8.

Until 1995, the Town provided utility services to its customers located inside and outside of the Town's geographical boundaries by utilizing its own utility systems and infrastructure, including the systems described above, without any formal agreement with the Tribe. Dkt. 57, ¶¶ 18-19; Morris Affidavit, ¶ 5. The Town provided water utility services to the Town's customers by pumping water from Town-owned wells (which are still operational), through Town-owned water distribution pipes and infrastructure, and to the Town's customers. Morris Affidavit, ¶ 5. Likewise, the Town provides sewer utility services by pumping solid waste from the homes of the Town's customers, through Town-owned sewage pipes, and to the Town-owned Hodson Sewage Lagoon – which was deeded to the Town in 1970. *Id.*, ¶ 6; *see also* Exhibit E. The Town has never disclaimed, transferred, or conveyed these water and sewer distribution pipes,

[1]The defendants erroneously suggests that the Tribe owns the Hodson Lagoon simply because the Lagoon is located on land partially classified as tribal trust property. Dkt. 71, p. 7. This meritless suggestion is defeated by the Town's clear ownership of the Hodson Lagoon established by the Hodson Lagoon Deed. Exhibit E. Simply put, the Tribe does not own everything located on tribal trust property, especially with regard to the Town's utility systems and infrastructure, including the Hodson Lagoon.

infrastructure, and systems. Morris Affidavit, ¶ 8. The Town still owns these water and sewer distribution pipes, infrastructure and systems. *Id*.

On August 31, 1995, the Town and the Tribe formalized their longstanding relationship with regard to utility services by executing a Memorandum of Agreement ("MOA"). Dkt. 57, ¶ 20; Dkt. 71-1, Exhibit 1. Under the terms of the MOA, the Town was designated the manager and operator of a unified utility service provider, the Blackfeet Consolidated Utility Service ("BCUS"). Dkt. 71-1, Exhibit 1, p. 2, § 3.02. Just as it had for decades prior, the Town utilized its own utility distribution system to provide utility services to customers in the Browning community. Dkt. 57, ¶ 20.

The MOA was amended in 2009 and 2011, by agreement between the Town and Tribe, whereby the Town, the Blackfeet Tribal Business Council ("BTBC"), and the East Glacier Water and Sewer District ("EGWSD") agreed to fund the Blackfeet Community Water Project ("BCWP"). Dkt. 57, ¶ 21; Dkt. 71-1, Exhibits 2 & 3; *see also* Map of BCWP pipeline, (Exhibit G); Right-of-Way Easements extending to Parsons Connection, (Exhibit H). Under the MOA as amended, the Town was designated the operator and manager of all utility systems, which included the new BCWP treatment and delivery system. Dkt. 71-1, Exhibit 2, p. 1, ¶ 5. The rates for the Town's utility services were to be set by the Tribe pursuant to Ordinance 98. Dkt. 71-1, Exhibit 3.

The BCWP is a water treatment and delivery system which draws water from Lower Two Medicine Lake and delivers it to the Parsons Connection – which is a connection point running east from the BCWP into the Town's water distribution pipes. Dkt. 71-1, Exhibit 2, p. 1; Morris Affidavit, ¶ 3; Exhibits G & H.[2] With the construction of the BCWP, the Town's water utility customers no longer received water drawn from Town-owned wells. Morris Affidavit, ¶ 7. Instead, the Town's water utility customers receive water drawn out of Lower Two Medicine Lake. *Id*. Water from Lower Two Medicine Lake is delivered to a water treatment facility near East Glacier, Montana. *Id*. This treated water flows east through a recently constructed pipeline where it is delivered to the Town's water pipeline located at the Parsons Connection. *Id*.; Exhibit G. From the Parsons Connection, water originally drawn from Lower Two Medicine Lake is delivered to the Town's customers through the Town-owned water distribution pipes. Morris Affidavit, ¶ 7. In other words, all water pumped east of the Parsons Connection flows through the Town's water distribution pipes and infrastructure. *Id*.

The Town has never disclaimed, transferred, or conveyed the Town's water

[2]The MOA as amended recognizes that the construction of the BCWP only extends "to a point where it will *connect to the Town's water distribution system*." Dkt. 71-1, Exhibit 2, p. 1, ¶ 3. Thus, the defendants are sorely mistaken to assert that "there is no longer, and has not been for some time, any Town utility systems." Dkt. 71, p. 5. The fact is, the Town has owned the utility systems and infrastructure east of the Parsons Connection for approximately 80 years. The Town's ownership of these pipes, systems, and infrastructure has not simply ceased to exist.

and sewer distribution pipes, infrastructure, and systems located east of the Parsons Connection. *Id*., ¶ 8. The Town still owns the water and sewer distribution pipes, infrastructure and systems located east of the Parsons Connection. *Id*.; *see also* Dkt. 71-1, Exhibit 2, p. 1, ¶ 3.

After the 2011 amendment to the MOA, the Town and Tribe began to negotiate terms for a new proposed MOA. Declaration of Ross Cannon, ¶ 3. This agreement was never executed. *Id*., ¶ 4. The terms of the proposed MOA provided that the Town was to deliver water utility services to customers east of the Parsons Connection, and the Tribe would deliver water utility services to customers west of the Parsons Connection. *Id*., ¶ 3. Likewise, the Town was to provide sewer utility services to customers connected to the Hodson Sewage Lagoon (owned by the Town), and the Tribe would provide sewer utility services to customers connected to the Last Star Lagoon (owned by the Tribe). *Id*. In essence, the proposed MOA reaffirmed what had been long-recognized: the Town owns the utility systems and infrastructure east of the Parsons Connection. *Id*.

After negotiations for the proposed MOA proved unsuccessful, the BTBC unilaterally withdrew from the existing MOA. Dkt. 57, ¶ 22; Dkt. 71-1, Exhibit 4. On August 27, 2013, Defendant Willie Sharp notified the Town that the MOA would be terminated effective October 1, 2013, and further that the Tribe's newly created Two Medicine Water Company ("TMWC") would assume control over all

water and sewer utility services pursuant to the Tribe's purported "sovereign powers, including Ordinance 98." Dkt. 57, ¶ 23; Dkt. 71-1, Exhibit 6. However, for TMWC to provide utility services to customers east of the Parsons Connection required the unauthorized use of the Town's utility systems and infrastructure. *See* Morris Affidavit, ¶¶ 3-8; Cannon Declaration, ¶ 3; Exhibit G; Dkt. 71-1, Exhibit 2, p. 1, ¶ 3.

Around the same time, the defendants stole the Town's utility customer list. Dkt. 57, ¶ 24. Using the names and addresses from the stolen utility customer list, the defendants began to disseminate notices and threats to the Town's utility customers directing that all payment for water and sewer utility services be made to TMWC. *Id*., ¶ 25; Dkt. 57, Exhibits B & C; *see also* TMWC Notice, (Exhibit I). The defendants threatened the Town's utility customers with utility "shutoffs" and even eviction for failure to remit payment to TMWC. *Id*.

Beginning October 1, 2013, under the direction and control of the defendants, TMWC began to exercise unauthorized control over the Town's water and sewer utility distribution systems. Dkt. 57, ¶ 26. Additionally, on November 1, 2013, under the direction and control of the defendants, the newly created Blackfeet Solid Waste and Utility Management Program attempted to take control over the garbage utility services previously provided by the Town. *Id*., ¶¶ 27-28. TMWC and BSWUMP began to collect a large portion of the utility revenues

previously remitted to the Town. Meanwhile, despite suffering substantial losses in utility revenue, the Town has continued to provide utility services in the Browning community.

ARGUMENT

When considering a motion to dismiss, the Court must take the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *K2 America Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1026 (9th Cir. 2011); *citing Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). The Court may consider materials attached to the complaint, or "unattached evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *U.S. v. Corinthian Colleges*, 655 F.3d 984, 998-99 (9th Cir. 2011).

If the moving party converts a motion to dismiss into a "factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Wolfe, supra* at 362 (citations omitted)(emphasis supplied). Accordingly, the Town has furnished supplemental evidence where the Defendants have attacked the factual allegations of the Complaint.

The Defendants have requested the Court take judicial notice of a Blackfeet tribal court complaint. Dkt. 71, p. 5, fn. 6. In this regard, "a court may take judicial notice of a 'document filed in another court to establish the fact of such litigation and related filings,' but [generally] 'cannot take notice of the factual findings of another court.'" *Eastbourne Arlington One, LP v. JPMorgan Chase Bank*, 2011 WL 3165683, * 2 (N.D. Tex. 2011); *see also U.S. v. Bailey*, 111 Fed.Appx. 894, 895 (9th Cir. 2004); *Guam Inv. Co. v. Central Bldg., Inc.*, 288 F.2d 19, 23 (9th Cir. 1961). As the *Guam* court recognized:

> The reason for the rule above referred to is that the decision of a cause must depend upon the evidence introduced. If the courts should recognize judicially facts adjudicated in another case, it makes those facts, though unsupported by evidence in the case in hand, conclusive against the opposing party; while if they had been properly introduced they might have been met and overcome by him.

Guam, supra at 23.

With this rationale in mind, the Court may take judicial notice that a complaint has been filed against the Town. However, the allegations contained in the complaint are by their very nature "subject to reasonable dispute." In fact, the Town has disputed its allegations and the purported jurisdiction of the tribal court over a distinct sovereign. As a municipal corporation of the State of Montana, the Town and its officials are immune from suit in tribal court. *Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1997). Accordingly, the Court should disregard the factual allegations contained in the tribal court complaint. Dkt. 71-1, Exhibit 7.

I. The defendants enjoy no immunity from suit.

The defendants mistakenly conflate the Tribe's immunity as their own. Dkt. 71, pp. 7-8. In doing so, the defendants ignore the fact that the United States Supreme Court has consistently recognized "suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct" as an appropriate alternative to suit against a tribe itself. *Michigan v. Bay Mills Indian Cmty.*, — U.S. —, 134 S.Ct. 2024, 2035 (2014); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (tribal officer not protected by tribe's immunity from suit); *Puyallup Tribe, Inc. v. Department of Game of State of Washington*, 433 U.S. 165, 171 (1977) ("a suit to enjoin violations of state law by individual tribal members is permissible . . . sovereign immunity . . . does not immunize the individual members of the Tribe"). The defendants – as officials and employees of the Tribe – enjoy no immunity from suit.

Defendants recognize that tribal sovereign immunity *only* "extends to officials when acting in their official capacity and within the scope of their authority." *Miller v. Wright*, 705 F.3d 919, 928 (9th Cir. 2012) *citing Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008); *see also 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"). In other words, if tribal officials or employees act *outside* the scope of their authority, then tribal sovereign immunity is inapplicable.

In this case, the defendants have acted, and continue to act, outside the scope of their authority by taking the Town's "private property . . . without just compensation." 25 U.S.C. § 1302(a)(5).[3] Since the Tribe itself would be prohibited from taking the Town's property, the defendants have acted outside the scope of their authority by exercising control over and effectively taking the Town's utility systems and infrastructure. Furthermore, the newly added defendants in the Amended Complaint have, by their own acts and omissions, perpetuated the unauthorized control of the Town's utility systems and infrastructure. None of the defendants enjoy sovereign immunity from suit for their wrongful acts. *See Michigan*, *supra* at 2035.

Furthermore, federal law defines the limitations of tribal ordinance enforcement against non-Indian, non-members such as the Town. *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1473 (9th Cir. 1989); *Native Village of Tyonek v. Puckett*, 957 F.2d 631 (9th Cir. 1992). The enforcement of a tribal ordinance against a non-Indian arises under federal law such that a federal district court has

[3]The Town concedes that only habeas corpus relief may be granted under the Indian Civil Rights Act. Thus, citation to 25 U.S.C. § 1302(a)(5) is meant purely to demonstrate that the defendants' conduct falls squarely outside the scope of their authority as tribal officers and employees. Since the Tribe could not take the Town's property, the defendants are prohibited from doing the same.

jurisdiction. *Id*.

In *Chilkat*, the Chilkat Indian Village brought suit to enforce an ordinance prohibiting removal of artifacts against a non-Indian. *Chilkat* at 1471-72. The Court recognized that the enforcement of a tribal ordinance "depends upon the status of the [party] against whom the ordinance is sought to be imposed." *Id*. at 1473. As the Village sought to enforce an ordinance against a non-Indian, the Court held that the enforcement of an ordinance against a non-Indian "arise[s] under federal law," because "federal law defines . . . the outer boundaries of an Indian tribe's power over non-Indians." *Id.* at 1473-74.

Similarly, in *Tyonek*, an Indian tribe sought to enforce a tribal ordinance in an effort to evict non-Indians who leased a tribal member's home. *Tyonek* at 633. The Ninth Circuit reversed the district court's dismissal of the action and held that an Indian tribe's authority to enact or enforce an ordinance against non-Indians was defined by federal law. *Id*. at 643. Again, the Ninth Circuit recognized the importance of the status of the party against whom a tribal ordinance is sought to be enforced. *Id*. The Court quoted *Chilkat* and held the "enforcement of [an] ordinance against [a] non-Indian . . . arise[s] under federal law within the meaning of 28 U.S.C. §§ 1331 and 1362." *Id*.

The *Chilkat* and *Tyonek* decisions apply with equal force to this case, and support the Town's position that this Court has subject matter jurisdiction over

this action based on a substantial question of federal law. Here, defendants have facilitated and directed control over the Town's utility systems and infrastructure based on the Tribe's purported "sovereign powers, including Ordinance 98," Dkt. 71-1, Exhibit 6, p. 3. Likewise, defendants argue that they are authorized to prevent the Town from using its own utility systems and infrastructure based on Ordinance 98. Since the defendants have argued that their conduct is authorized by tribal ordinance, the Court must also examine whether the defendants have acted outside the scope of their authority by enforcing a tribal ordinance against the Town. This is a substantial question of federal law which grants this Court jurisdiction.

Laughably, the defendants make much of the fact that the BTBC has adopted Resolution 251-2014, which purports to remove any potential jurisdiction with which this Court could entertain this action. Dkt. 71, p. 10; Dkt. 71-1, Exhibit 21. Operating under the erroneous assumption that the Tribe is a real party in interest, the named defendants who are also members of the BTBC have apparently stripped themselves of any power to act on behalf of the Tribe – which ironically is the primary function of the BTBC. *Id*. Regardless, Resolution 251-2014 has no bearing on whether the defendants have sovereign immunity or whether this Court has jurisdiction. A tribal resolution – passed by the very defendants being sued – is anything but binding.

II. The Tribe is not the real party in interest

Citing *Dugan v. Rank*, 372 U.S. 609 (1963), defendants mistakenly assert that the Tribe is the real party in interest in this action. Dkt. 71, p. 10-11. However, *Dugan* is inapposite and inapplicable. *Dugan* involved an action brought by riparian owners seeking to enjoin officials of the Bureau of Reclamation from impounding water at a federal dam. *Id*. at 610-11. The Court first determined that the government's officials conduct was (1) not "beyond their statutory powers" and (2) was "within the scope of their authority." *Id*. at 621-22. It was only after making this determination that the Court evaluated whether the United States was the real party in interest. *Id*. Unlike *Dugan*, the defendants in this case have clearly exceeded the scope of their limited power by facilitating and directing unauthorized control over the Town's utility systems and infrastructure. Thus, the Court need not address the *Dugan* factors to evaluate whether the Tribe is a real party in interest.

Even if the *Dugan* factors are applied to this action, the Tribe is still not the real party in interest. There is not a scintilla of evidence to suggest that a judgment would "expend itself on the Blackfeet treasury," Dkt. 71, pp. 11-12, unless the Tribe regularly indemnifies its own officers and employees for unlawful conduct. Further, whether or not the Court determines that Ordinance 98 is enforceable against the Town, the Tribe's administration or regulation of utility

services on the Reservation – within the confines of federal law – will remain unhindered. In other words, the Tribe may still have some authority to regulate utility services on the Reservation; however, the resolution of this case will determine whether the defendants, or the Tribe, have the authority to use and control the utility systems and infrastructure legally owned by the Town.

Ironically, defendants maintain that any relief against them will bind the Tribe. *Id*., p. 12. Of course, the defendants who are tribal employees have no inherent authority to bind the Tribe itself. Likewise, the defendants who are members of the BTBC have recently stripped themselves of any authority to bind the Tribe. Dkt. 71-1, Exhibit 21. It logically follows that any relief afforded to the Town against the defendants will not bind the Tribe.[4]

Defendants also quote isolated portions of the Amended Complaint in an attempt to persuade the Court that the Tribe is actually the party in interest. Dkt. 71, p. 12. Defendants' argument is unpersuasive, as these quotations are out-of-context and hardly suggest that the Tribe is somehow the party in interest. *See* Dkt. 57, ¶ 26 ("*[U]nder the direction of the Defendants* Sharp, Calf Boss Ribs, McEvers, Old Chief, Little Dog, Lahr, Yellow Owl, and Kline, and purportedly pursuant to Blackfeet Tribal Ordinance 98, the Blackfeet Tribe attempted to take

[4]Just as the defendants have purportedly stripped themselves of any power to bind the Tribe, they may also just as easily "restore" their power. In this regard, the Town primarily wishes to point out the irony and incongruity of the defendants' position.

control of the water and sewer utility services in the Browning community"), ¶ 29 ("*Under the direction of the above-named Defendants*, tribal attorney Derek Kline demanded payment..."). As the Amended Complaint makes clear, the defendants have directed and facilitated the unlawful and unauthorized conduct upon which the Town bases its allegations. The Amended Complaint's passing references to the Tribe do not necessitate the Tribe's involvement in this case.[5]

III. The Court has jurisdiction under 28 U.S.C. § 1331

Federal district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 849 (1985). District courts also have jurisdiction when a complaint reveals a "dispute or controversy respecting the validity, construction, or effect of such a [federal] law, upon the determination of which the result depends." *Oneida Indian Nation of N.Y. State v. Oneida County, New York*, 414 U.S. 661, 677 (1974).

As stated above, the Ninth Circuit has consistently held that the enforcement of a tribal ordinance against a non-Indian arises under federal law such that a federal district court has jurisdiction. *See Chilkat*, *supra* at 1473;

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[5]Also without merit is the defendants' reference to the Town's Settlement Offer. Dkt. 71, p. 13. Under L.R. 16.5(b)(2), all settlement proceedings are confidential, without exception. The defendants display their indifference for the confidentiality of settlement negotiations, and apparent ignorance for the Local Rules, by even mentioning this unfiled and confidential document in their brief. The Town has more fully addressed this issue in its Brief in Opposition to Motion to File Under Seal. Dkt. 94.

Tyonek, *supra*.

The defendants summarily reject the *Chilkat* and *Tyonek* decisions as inapplicable to the alleged "contract matter" at issue in this case. Dkt. 71, p. 14. The defendants have entirely missed the point. This is not a contract matter, because there is no contract. The MOA and amendments have been terminated. Dkt. 57, ¶ 22; *see also* Dkt. 71-1, Exhibit 4. This case is about the defendants' unlawful exercise of control over the Town's utility systems, and further, this case involves the defendants' wrongful conduct in stealing the Town's utility revenue. In both instances, the defendants acted under the purported authority of Ordinance 98.

The *Chilkat* and *Tyonek* decisions are entirely applicable to this case and support the proposition that this Court has subject matter jurisdiction over the action based on a substantial question of federal law. The ordinance at issue in this case is Ordinance 98. Dkt. 57, Exhibit A. While the MOA was in effect, the Town *had* consented to the application of the ordinance to the extent the Tribe would set rates for utility services. Dkt. 71, Exhibit 3. When the MOA was unilaterally terminated, so too was the Town's consent to the application or enforcement of the ordinance for any purpose.

Despite lacking the Town's consent for the enforcement of Ordinance 98, the defendants claim the ordinance is the purported authority for "taking over all

operations of the . . . water and sewer" utility services and systems in the Browning community. Dkt. 57, ¶ 23; Dkt. 71-1, Exhibit 6, p. 3. However, without the Town's consent, the sole authority for the enforcement of Ordinance 98 against the Town "arise[s] under federal law within the meaning of 28 U.S.C. §§ 1331 and 1362." *Chilkat* at 1473; *Tyonek* at 634. On this basis alone, defendants' argument is defeated.

Defendants also attempt to distinguish the *Chilkat* and *Tyonek* decisions as inapposite because both cases involved suits by *tribes* to enforce tribal ordinances. Dkt. 71, p. 14, fn. 13. This distinction is irrelevant. As the *Chilkat* decision recognized, "the status of the [party] against whom the ordinance is sought to be imposed" is the relevant inquiry. *Chilkat* at 1473. The question of tribal ordinance applicability to a non-member entity is unaltered whether the claim is brought by a *tribe* or a *non-member*. Whether the defendants can enforce Ordinance 98 against the Town, in the absence of consent or agreement, is a substantial federal question, the determination of which grants this Court subject matter jurisdiction.

The Amended Complaint makes clear that the defendants' purported authority for their unauthorized control over the Town's utility systems and infrastructure was based on Ordinance 98. Dkt. 57, ¶ 23. Even the defendants' August 27, 2013, notice to the Town claims the defendants' conduct is authorized

by "sovereign powers, including Ordinance 98." Dkt. 71-1, Exhibit 6, p. 3. Yet, the defendants now claim that Ordinance 98 "merely regulates the construction of water and sewer systems and regulates rates related to such systems." Dkt. 71, p. 17. The Town agrees – Ordinance 98 is a regulatory ordinance and connotes no authority to the defendants to exercise control over the Town's utility systems and infrastructure, much less, insert themselves between the Town and its customers to wrongfully appropriate the Town's revenue stream.

In this regard, Ordinance 98 is insufficient on its face to authorize the defendants to exercise control over the Town's utility systems and infrastructure – it merely regulates the operation of such systems. Not only does the enforcement of Ordinance 98 against the Town raise a substantial question of federal law, but it also raises the question of whether the defendants acted beyond the scope of their power by exercising control over the Town's property, and grounding their authority to do so on a tribal ordinance which grants no such power. This, of course, precludes the defendants' mistaken claims of immunity.

IV. Jurisdiction under 28 U.S.C. § 1343

The Town must concede that available remedies under the Indian Civil Rights Act allow for only habeas corpus relief. *Santa Clara, supra* at 56-57. Regardless, as shown above, this fact does not prevent this Court from exercising federal question jurisdiction over this action.

V. Jurisdiction over state law claims

As stated above, this Court has jurisdiction under 28 U.S.C. §§ 1331 and 1362 to address whether Ordinance 98 can be enforced against the Town, a non-Indian and non-member entity. *See Chilkat* and *Tyonek, supra*. Accordingly, this Court may exercise jurisdiction over the Town's state law claims in Counts I-IV because "there is a federal claim of sufficient substance to confer subject matter jurisdiction on the court[]." *Spotted Eagle v. Blackfeet Tribe*, 301 F.Supp. 85, 91 (D. Mont. 1969).

VI. The Town is not required to exhaust tribal court remedies

The defendants erroneously contend that the Town should be required to exhaust tribal court remedies before seeking relief in this Court. Dkt. 71, p. 20. This contention ignores the well-established rule that exhaustion of tribal court remedies is not required if "the action is patently violative of express jurisdictional prohibitions." *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013), *citing Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999). Here, the Blackfeet tribal court could exercise no jurisdiction over this action because the Town has asserted federal claims, i.e., civil RICO claims, for which no tribal court has jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 368-69 (2001) (tribal courts have no jurisdiction over claims arising under federal law). On this basis alone, the Town should not be

required to exhaust tribal court remedies.

Furthermore, the tribal court has no jurisdiction over the Town based on the doctrine of sovereign immunity. *Gilham, supra* at 1138 (holding "[t]he power to subject other sovereigns to suit in tribal court was simply not part of the tribes' inherent sovereignty"). Under Article II, Section 18 of the Montana Constitution, states, counties, *cities*, *towns*, and all other local governmental entities have only waived sovereign immunity with respect to suits brought in *state courts*. *Gilham* at 1139, *citing Holladay v. Montana*, 506 F.Supp. 1317, 1321 (D. Mont. 1981) (holding "[t]he Montana waiver of sovereign immunity [in Article II, Section 18 of the Constitution] seems to be limited to consent to be sued in state courts. . ."). The Town's officials are afforded the same immunity as the Town because the Tribe's claims against the officials "arose out of the same subject matter." *Kiely Const., LLC v. City of Red Lodge*, 2002 MT 241, ¶ 88, 312 Mont. 52, 57 P.2d 836 (holding claims against city officials arose from the same subject matter as claims against city, thus city officials were immune). In other words, the Town and its officials are immune from suit in tribal court, thus exhaustion of tribal court remedies is inapplicable.

Defendants' reliance on the Town's prior litigation in tribal court – against different parties and involving different claims – is also unavailing. Dkt. 71, pp. 21-24, fn. 18 & 20. "A nonmember's consensual relationship in one area . . . does

not trigger tribal civil authority in another – it is not 'in for a penny, in for a pound.'" *Town Pump, Inc. v. LaPlante*, 394 Fed.Appx. 425, 427 (9th Cir. 2010) (citations omitted). Put simply, the Town's prior consent to tribal jurisdiction does not grant tribal jurisdiction in this action.

Ignoring the clear jurisdictional prohibitions, defendants maintain that the Town must exhaust tribal court remedies because the ***Tribe*** sued the Town – as opposed to the Town bringing suit in tribal court, then seeking subsequent relief in federal court. Dkt. 71, pp. 21-23; Dkt. 71-1, Exhibit 7.[6] In support of this contention, defendants rely on cases requiring exhaustion of tribal court remedies where the *action was initiated in tribal court*, and the pending federal action *involved the same parties to the tribal court action*. Dkt. 71, pp. 21-23. This action is distinguishable as it was initiated in federal court, involves entirely different claims, and *involves completely different parties* from the tribal court action. Dkt. 71-1, Exhibit 7. The ***Tribe*** is the plaintiff in the tribal court action and is not a named, nor required, party to this action.

Even if the Court considered the doctrine of exhaustion of tribal court remedies, this case falls squarely within an exception to the requirement. The

[6]As before, defendants' Exhibit 7 is improperly before this Court to the extent the defendants wish the Court to take judicial notice of allegations which are subject to reasonable dispute. Eastbourne Arlington One, LP v. JPMorgan Chase Bank, 2011 WL 3165683, * 2 (N.D. Tex. 2011); see also U.S. v. Bailey, 111 Fed.Appx. 894, 895 (9th Cir. 2004); Guam Inv. Co. v. Central Bldg., Inc., 288 F.2d 19, 23 (9th Cir. 1961).

Ninth Circuit has recognized four exceptions to the requirement for exhaustion of tribal court remedies where:

> (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule.

Grand Canyon, *supra* at 1200, *citing Burlington*, *supra* at 1065.

1. The tribal court has no jurisdiction over the Town's conduct based on Montana's main rule.

The Blackfeet tribal court clearly has no jurisdiction over the Town based on *Montana's* main rule. *Montana v. United States*, 450 U.S. 544 (1981), is a "pathmarking case concerning tribal civil authority over nonmembers." *See Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). The *Montana* decision confirmed the general rule that "Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation." *Id*. at 446. In other words, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Burlington*, *supra* at 1062.

As with most general rules, the *Montana* rule regarding tribal civil jurisdiction over non-members is subject to two limited exceptions, such that tribal jurisdiction exists over: (1) non-members who enter "consensual relationships with the tribe;" or (2) "activity that directly affects the tribe's political integrity,

economic security, health, or welfare." *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1131 (9th Cir. 2006). With regard to exhaustion of tribal court remedies, if neither *Montana* exception applies, the general rule applies to bar tribal jurisdiction.

The first exception is inapplicable as the "consensual relationship" that existed between the Town and Tribe regarding the operation of utility systems in the Browning community was severed by the BTBC's unilateral termination of the MOA. Dkt. 71-1, Exhibit 4. As stated above, this action stems from the defendants' wrongful and unauthorized exercise of control over the Town's utility systems. This is anything but a "consensual relationship." In the absence of a "consensual relationship," the tribal court clearly lacks jurisdiction.

The second exception is also inapplicable as the Town is not engaged in any activity that threatens the political integrity, economic security, or health and welfare of the Tribe. The second exception "does not entitle [a] tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe." *Burlington, supra* at 1064-65. As the *Strate* decision recognized, "if *Montana's* second exception require[d] no more, the exception would severely shrink the rule." *Strate, supra* at 458. Ninth Circuit precedent is consistent with this rationale. *See Burlington, supra* (rejecting argument that deaths of tribal members warranted application of the second *Montana* exception); *County of*

Lewis v. Allen, 163 F.3d 509, 515 (9th Cir. 1998) (holding that a tribe's bare interest in the safety of its members cannot satisfy the second exception). Here, the Town's activity at issue – *mere ownership of utility systems* – does not warrant application of the second exception. This is especially true where, as here, the defendants are transparently attempting to squeeze out the only competition for the provision of utility services, i.e., the Town, to monopolize utility services on the Reservation.

As was the case in *Burlington*, "*Montana's* main rule, rather than its exceptions, applies to this case." *Burlington*, *supra* at 1065. Exhaustion of tribal court remedies should not be required since the Blackfeet tribal court "plainly lack[s] the authority to regulate" the *ownership* of Town property. *Evans v. Shoshone-Bannock Land Use Policy Com'n*, 736 F.3d 1298, 1307 (9th Cir. 2013).

2. Exhaustion of tribal court remedies would be futile

The futility exception to the requirement for exhaustion of tribal court remedies applies in rare circumstances. *Grand Canyon*, *supra* at 1203; *citing Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032 (9th Cir. 1999) (two year delay called into question the possibility of tribal court remedies); *Krempel v. Prairie Island Indian Cmty.*, 125 F.3d 621 (8th Cir. 1997) (exhaustion not required where there was no functioning tribal court). Here, the state of affairs in Blackfeet tribal court at the time the Town initiated this action warrants the application of the

futility exception.

The United States Department of the Interior, Bureau of Indian Affairs ("BIA") recently completed a review of the Blackfeet tribal court which found, *inter alia*, that the court's judges and administrator were hired with invalid tribal resolutions. BIA Report, (Exhibit J), p. 7. In other words, at the time this action was filed and to date, the court has had no validly appointed judicial officer. It is a court without a judge.

Additionally, the BIA expressed great concern that a "political faction" of the BTBC "has significant influence over court activities." *Id*. In other words, the court is controlled by the BTBC. The report states:

> It appears the Tribe's current form of government make it difficult for the court to operate in an independent manner free from external political controversies . . . it is imperative that the Tribe's Constitution be revised to assure judicial independence . . . [u]ntil constitutional reform can be made, actions must be taken to assure the Court is free from any interference or influence from the Tribal Council.

Id., p. 28.

"[R]emedies that are inadequate need not be exhausted." *Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp*., 489 U.S. 561, 587 (1989). Based on the compelling findings of the BIA, the Town should not be required to exhaust inadequate tribal court remedies. Without a validly appointed judicial officer, the Blackfeet tribal court is equivalent to a non-functioning court. *Krempel, supra* at

622. Further, any remedy available in tribal court would be inadequate because of the control the BTBC exerts over the court. The fact that the tribal court is influenced or controlled by an outside party frustrates the purpose of the court and creates the potential for due process and civil rights violations. Exhaustion of tribal court remedies would be futile.

CONCLUSION

For the foregoing reasons, the defendants' Motion to Dismiss (Dkt. 70) should be denied.

DATED this 15th day of September, 2014.

/s/ Derek J. Oestreicher
DEREK J. OESTREICHER
P.O. Box 2103
Great Falls, MT 59403-2103
Attorneys for the Town of Browning

CERTIFICATE OF COMPLIANCE

I certify that this brief, excluding the caption, table of contents, table of authorities, and certificate of service, contains less than 6,500 words in compliance with Local Rule 7.1(d)(2)(A).

/s/ Derek J. Oestreicher
Derek J. Oestreicher
Attorneys for the Town of Browning