

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION**

<p>Sprint Communications Company L.P. and Sprint Communications, Inc., formerly known as Sprint Nextel Corporation,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>Mary Wynne, in her official capacity as Chief Judge of the Oglala Sioux Tribal Court, the Oglala Sioux Tribe Utilities Commission; and Joe Red Cloud, Ivan Bettelyoun, David "Terry" Mills, and Arlene Catches the Enemy, in their official capacities as Commissioners of the Oglala Sioux Tribe Utilities Commission,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;">Civil Action No. 4:15-cv-04051-KES</p> <p style="text-align: center;">DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION</p>
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Defendants above-named submit this brief in opposition to the motion for preliminary injunction filed by plaintiffs Sprint Communications Company L.P. and Sprint Communications, Inc., formerly known as Sprint Nextel Corporation (collectively "Sprint"). For the reasons set forth herein, plaintiffs' motion should be denied.

INTRODUCTION

Sprint, a public utility, makes the bold assertion that because it does not have a physical presence on the Pine Ridge Indian Reservation (PRIR), and does not own property or equipment situated on the reservation, and has no work force on the

reservation, that it is not subject to regulation by the Oglala Sioux Tribe Utilities Commission (OSTUC) or to jurisdiction of the Oglala Sioux Tribal Court. However, the plain truth is that Sprint provides telecommunications services on the PRIR that is essential to the political and economic security and welfare of the Oglala Sioux Tribe (Tribe) and residents of the PRIR. Sprint, an interexchange carrier (IXC), has entered into a consensual relationship with the Tribe and its members, through commercial dealing, contracts or other arrangements. This is largely as described in Sprint's memorandum of law in support of its motion, as further clarified and expounded upon by sworn statements set forth in the Affidavit of Gene DeJordy, filed herewith.

At this point, the facts establishing Sprint's consensual relationship with the Tribe and its members, through commercial dealing and other arrangements, have not been fully developed. The scope and extent of OSTUC's regulatory authority over Sprint and other IXCs is the subject of the pending action in the Oglala Sioux Tribal Court, OSTUC v AT&T Corp et al, Civil No. 15-0004. That court should be afforded the opportunity, in the first instance, to determine the regulatory authority of the OSTUC. Sprint must exhaust its tribal court remedies before seeking declaratory or injunctive relief from this Court.

FACTUAL BACKGROUND

The OSTUC was established through the adoption of the Oglala Sioux Tribe Utilities Code by Ordinance of the Oglala Sioux Tribal Council, Ordinance No. 09-11, February 24, 2009.

In November 2013, the OSTUC was formally established as a chartered governmental subdivision of the Oglala Sioux Tribe. This was pursuant to the Oglala Sioux Tribe Utilities Code, which was approved by the Tribal Council in Ordinance No. 09-11. DeJordy Aff. ¶ 5.

The Utility Commission's authority and jurisdiction over Utility providers on the PRIR is based upon applicable laws, including the Utilities Code and the Utility Commission Ordinance.

The OSTUC “serves an essential governmental function of the Oglala Sioux Tribe by providing for the exercise of Tribal regulatory authority over policies and operations of all utility systems on the Pine Ridge Indian Reservation” [Section 3-102(1) of the OST Utilities Code] and “serves an essential governmental function of the Oglala Sioux Indian Tribe by helping to address the serious economic, social and health problems associated with utility services within the jurisdiction of the Tribe” [Section 3-102(2) of the OST Utilities Code]. DeJordy Aff. ¶ 6.

With this mandate from the Oglala Sioux Tribal Council, the OSTUC has implemented a system of regulation to govern the provision of utility services on the PRIR. DeJordy Aff. ¶ 6.

The OSTUC has authority over utility providers on the PRIR. Oglala Sioux Tribe “formally delegates exclusive and essential government functions and authority for the appropriate and independent regulation of utilities on the Pine Ridge Indian reservation” to the OSTUC [Section 3-102 of the OST Utilities Code]. The Tribal Council has made clear that “the operations of the Commission be conducted independently and on behalf

of the Tribe for the sole benefit and interests of the Tribe, its members, and the residents of the Reservation” [Section 3-102(3) of the OST Utilities Code]. DeJordy Aff. ¶ 7.

The OSTUC has established a solid foundation for utility regulation on the PRIR that will benefit the Oglala Sioux Tribe and its people for years to come by promoting tribal sovereignty, independence, and the political integrity, the economic security, and health and welfare of the OST. The regulatory system established by the OSTUC protects the due process rights of all Utility providers through (i) notice of all proposed rules, (ii) fact finding through discovery and comments, (iii) legal considerations through independent analysis and comments from interested parties, (iv) open public meetings, and (v) options for reconsideration of issues. All actions taken by the OSTUC are documented and posted on the OSTUC web site: www.ostuc.net. DeJordy Aff. ¶ 8.

In 2014, the OSTUC initiated seven rulemaking proceedings involving utility providers operating on the PRIR. The OSTUC also adopted twelve (12) orders in 2014, including the establishment of consumer protection rules, which Sprint is challenging in its Motion to Dismiss the Verified Complaint filed by OSTUC with the Oglala Sioux Tribal Court. The consumer protection rules adopted by the Commission in Case No. U-1-2014 were the culmination of an extensive regulatory process that involved discovery, a Staff Report, two preliminary orders, a Final Order, and a Notice of Liability. DeJordy Aff. ¶ 10.

The OSTUC Complaint filed in Oglala Sioux Tribal Court seeks enforcement of the Final Order adopted on September 9, 2014, which established the following basic

consumer protection rules aimed at protecting the political and economic security and welfare of the Oglala Sioux Tribe and residents of the PRIR:

- a. Registration requirement – all utility providers are required to furnish information about the company and the services provided by the company on the PRIR (this is not an application and no approval by the OSTUC is necessary);
- b. Annual Report – all utility providers are required to submit an Annual Report to the OSTUC providing information about their operations;
- c. Annual Fee – all utility providers are required to submit a minimal annual regulatory fee;
- d. Consumer Complaints – consumers can file complaints about utility services with the OSTUC;
- e. Taxes and Fees -- the OSTUC provides guidance on the imposition of taxes and fees on residents of the PRIR; and
- f. Disconnection of Service – the OSTUC established notice requirements for the disconnection of service for residents of the PRIR.

DeJordy Aff. ¶ 11.

The OSTUC has exercised its jurisdiction over Utility providers on the Pine Ridge Indian Reservation to establish a minimum regulatory framework necessary to protect tribal welfare and security and consumer interests, including: (i) a registration requirement with no approval necessary to provide the OSTUC with information on utility providers making essential services available to residents of the PRIR, and (ii) basic consumer protection requirements to ensure residents on the PRIR are not harmed by Utility providers that have a monopoly or dominant position in the market on the reservation. DeJordy Aff. ¶ 12.

On page 4 of its Memorandum of Law in Support of Motion for Preliminary Injunction (“Brief”), Sprint states that it “has no property of any kind within the Pine Ridge Reservation for providing telecommunications services.” Attached as Exhibit B to the Affidavit of Gene DeJordy is a list from the Federal Communications Commission (FCC) of entities holding radio spectrum to provide telecommunications services in Shannon County (name changed to “Oglala Lakota County” effective March 5, 2015) on the PRIR. Sprint is listed as the licensee of broadband PCS and EBS spectrum in Shannon County on the PRIR. Sprint uses its property interest in radio spectrum, along with other access to local facilities, to provide telecommunications services on the PRIR. DeJordy Aff. ¶ 13, Ex. B.

On page 4 of its Brief, Sprint states it “has no numbering resources on the Pine Ridge Reservation and thus, Sprint Communications does not offer local telecommunications services to persons residing within the Pine Ridge Reservation.” Telecommunications providers, like Sprint, typically provide service within a geographic area, like the PRIR, without local numbering resources. Sprint provides service throughout the United States, but obtains numbering resources in select geographic areas, such as Rapid City and Sioux Falls, to provide service throughout the entire state of South Dakota. This is typical of how mobile wireless carriers provide service in the United States. DeJordy Aff. ¶ 14.

On page 34 of its Brief, Sprint declares: “Sprint Communications has no presence of any sort on the Pine Ridge Reservation” Attached as Exhibit C to the Affidavit of Gene DeJordy is a transcript of a conversation with a Sprint representative in which

Sprint proposes to offer local telecommunications service to an individual residing on the PRIR. DeJordy Aff. ¶ 15, Ex. C.

On page 17 of its Brief, Sprint acknowledges that its traffic originates and terminates on the PRIR, but that such traffic is routed through a third party. The telecommunications industry is comprised of local service providers, long distance service providers, and resellers of telecommunications services. In some situations, telecommunications providers have their own facilities, but in many situations, telecommunications providers use the facilities of other carriers to provide service to consumers. For example, long distance service providers or IXCs, such as Sprint, use the facilities of local providers, like NAT-PR and ILECs (Golden West, Great Plains, and Fort Randall/Mt. Rushmore) on the PRIR, to originate and terminate their customer traffic. Regardless of whether Sprint has facilities on the PRIR for the origination and termination of telecommunications traffic, it is providing a telecommunications service as a Utility provider on the PRIR. Sprint is billing its customers on the PRIR and/or Sprint is paying local providers on the PRIR to originate or terminate its traffic. DeJordy Aff. ¶ 16.

Telecommunications traffic on the Pine Ridge reservation falls into one of three categories: interstate, intrastate (off reservation), and intrareservation (on reservation). The regulatory authority for this traffic lies with the Federal Communications Commission (FCC), the South Dakota Public Utilities Commission (SDPUC), and/or the Oglala Sioux Tribe Utility Commission (OSTUC). Telecommunications service providers on the PRIR carry traffic that may be interstate, intrastate, and/or

intrareservation. For example, Golden West and Great Plains carry local telecommunications traffic which originates from residents of the reservation and terminate to residents on the reservation (*e.g.*, intrareservation), as well as traffic that may originate from residents of the reservation and terminate to residents off reservation (*e.g.*, intrastate or interstate). Clearly, these utility providers are subject to the jurisdiction of the OSTUC. DeJordy Aff. ¶ 17.

IXCs, such as AT&T Corp. and Sprint, have customers that reside on the PRIR, but they use the facilities of local providers, such as Golden West and Great Plains, who typically control essential, so-called “bottleneck,” facilities necessary for the origination and termination of telecommunications traffic. Regardless of whether Sprint has facilities on the PRIR, it makes service available to residents using its own facilities or the facilities of local service providers. DeJordy Aff. ¶ 17.

Many telecommunications providers make service available to consumers using the facilities of other carriers. These so-called “non-facilities” based carriers are indistinguishable from facilities-based carriers by consumers. For example, in the wireless industry, there are companies like TracFone/Safelink, Boomerang, and Virgin Mobile (a subsidiary of Sprint) that provide mobile wireless service to consumers using the facilities of other carriers, like AT&T, Verizon, Sprint, and T-Mobile. These “non-facilities” based carriers are subject to federal, state, and tribal regulation much the same as facilities-based carriers. In fact, Boomerang recently registered with the OSTUC, consistent with the requirements of Final Order in Case No. U-1-2014. DeJordy Aff. ¶ 18.

In the long distance market, there are also service providers without their own facilities in certain geographic area. For instance, an IXC, like Sprint, may have facilities that run from New York City to Minneapolis, but no facilities between Minneapolis and Pine Ridge. This IXC could still provide long distance service on the PRIR, but would use the facilities of an ILEC, like Golden West, to originate and terminate calls, and use the facilities of an intermediary carrier, like SDN, to transport the traffic to a point of presence in Minneapolis. DeJordy Aff. ¶ 18.

The point is that a carrier, like Sprint, does not need to own their own facilities in order to provide service on the PRIR, as demonstrated by the fact that Sprint has long distance customers and offers mobile wireless service on the PRIR without apparently owning any facilities on the reservation. Sprint is also listed as a vendor by the Oglala Sioux Tribe Revenue Office in its most recent report, indicating that Sprint has a contract with, or provides service to, the Oglala Sioux Tribe or residents of the PRIR. Exhibit D attached to the Affidavit of Gene DeJordy is a print out of the page from the Oglala Sioux Tribe Revenue Office listing Sprint as a vendor with ID #1138. DeJordy Aff. ¶ 18, Ex. D.

Mobile wireless carriers, which Sprint is as well, also use another carrier's facilities to provide service to consumers. This is typically referred to as one carrier's customers "roaming" on another carrier's network facilities. Even though Sprint may not have its own wireless equipment on the PRIR, it provides or makes available wireless service to consumers on the PRIR, as demonstrated by Exhibit C. DeJordy Aff. ¶ 19, Ex. C.

On page 13 of its Brief, Sprint states that “it is plain the OSTUC is merely a stalking horse for NAT-PR.” The OSTUC is an independent Chartered Governmental Subdivision of the Oglala Sioux Tribe. NAT-PR is a Utility provider on the PRIR, which is subject to the rules and requirements of the OSTUC, like all other Utility providers on the PRIR. Much like the FCC and state commissions, the OSTUC has established an entire framework and applicable rules and requirements governing the provision of critical Utility service on the PRIR that is essential to the political and economic security and welfare of the Oglala Sioux Tribe and residents of the PRIR. DeJordy Aff. ¶ 20.

ARGUMENT

I. The OSTUC has regulatory authority over Sprint with respect to long distance telecommunications traffic that originates or terminates on the PRIR.

A. *Montana* does not apply when determining regulatory authority over nonmembers who consensually agree to operate and conduct business on the PRIR.

A tribal court's exercise of jurisdiction over non-Indians is a federal question answered by federal law. *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985). As a general rule, “absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.” *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). The Supreme Court has carved out two categories where tribal civil jurisdiction may be exercised over non-Indians/nonmembers even though Congress has not expressly authorized it: (1) when

a nonmember has entered into a consensual relationship with a tribe or its members, through commercial dealing, contracts, leases, or other arrangements; or (2) when the nonmember's conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana v. United States*, 450 U.S. 544, 565–66 (1981).

Despite the general rule and enumerated exceptions, the scope of tribal civil authority over nonmembers remains “ill-defined.” *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 934 (8th Cir. 2010) (citing *Nevada v. Hicks*, 533 U.S. 353, 376 (2001) (Souter, J., concurring)).

As noted by the Eighth Circuit:

The controlling principles are broad and abstract and must be carefully applied to the myriad of factual scenarios they govern. Determining the contours of tribal civil jurisdiction and the boundaries of tribal sovereignty requires consideration of the historical scope of tribal sovereignty and the evolving place of the tribes within the American constitutional order, careful study of precedent, and ultimately a ‘proper balancing’ of the conflicting interests of the tribes and nonmembers.

Attorney's Process, 609 F.3d at 934.

It remains an open question whether a tribe's adjudicative authority is equal to its regulatory authority. *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 850 n. 5 (9th Cir. 2009). Moreover, the Court in *Hicks* limited its holding to the issue of tribal court jurisdiction over state officers enforcing state law. *Hicks* did not apply the *Montana* exceptions. Instead, the Court determined that tribal ownership, alone, was not enough “to support tribal regulatory jurisdiction over nonmembers and analyzed the

jurisdictional issue within the context of whether tribal regulatory authority over the state wardens was ‘necessary to protect tribal self-government or to control internal relations.’” *North Cent. Elec. Co-op., Inc. v. North Dakota Pub. Serv. Comm'n*, 837 N.W.2d 138, 144 (N.D.2013) (quoting *Hicks*, 533 U.S. at 360). With the exception of *Hicks*, the Supreme Court has applied *Montana* “almost exclusively to questions of jurisdiction arising on non-Indian land or its equivalent.” *Grand Canyon Skywalk Dev., LLC v. ‘Sa’ Nyu Wa Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013).

In *Fort Yates Public School District v. Murphy*, 997 F.Supp.2d 1009 (D.N.D. 2014), the court held that *Montana*, restricting tribal court jurisdiction over nonmembers’ conduct on tribal lands, is inapplicable when determining the adjudicatory authority over nonmembers who consensually agree to operate and conduct business in conjunction with the tribe on tribal trust land. The same result should obtain here.

There is no question Sprint offers its services as an IXC to customers and potential customers on the PRIR. It bills for these services. Sprint acknowledges it has customers on the PRIR who currently contract for long distance telecommunications service with Sprint, and who thereby have a consensual relationship with Sprint – through commercial dealing, contracts, leases, or other arrangements. Regardless of the relatively small number of customers, this level of commercial activity is sufficient to trigger the regulatory authority of the OSTUC. This is particularly so in light of the minimal regulatory requirements sought to be imposed on Sprint – a registration requirement, filing of an annual report, and various consumer protection measures such as disconnecting or terminating service.

A comparison can be drawn to a retailer who seeks to sell cigarettes or other tobacco products, or alcohol, or firearms in a particular location. The retailer cannot circumvent or evade the applicable licensing requirements and reporting regulations by responding: “I don’t need to register or submit to governmental regulation because I haven’t sold any product yet.” That is absurd. Sprint’s argument that it currently has few if any customers who are members of the Oglala Sioux Tribe or who reside on the PRIR, and therefore should not be subjected to regulation by the OSTUC, is without merit.

B. Even if *Montana* applies, the result would be the same: Sprint has entered into a consensual relationship with the Oglala Sioux Tribe or its members or residents on the PRIR, by offering its services.

In a recent decision of this Court, the realities of modern day commerce as it affects the determination of the nonmember’s physical presence on the reservation, were brought forth:

[I]n cases involving a contract formed on the reservation in which the parties agree to tribal jurisdiction, treating the nonmember's physical presence as determinative ignores the realities of our modern world that a defendant, through the internet or phone, can conduct business on the reservation and can affect the Tribe and tribal members without physically entering the reservation. The proper focus is on the nonmember Borrower's “activities” or “conduct,” *940 *Attorney's Process One*, 609 F.3d at 937 (quoting *Plains Commerce Bank*, 554 U.S. at 329–330, 128 S.Ct. 2709), not solely the nonmember Borrower's physical location. Under the FTC's presence-based analysis, a tribal court would have jurisdiction if a Borrower traveled to the Reservation to do any of the steps to obtain a loan from a Lending Company. But, if the Borrower stays home and undertakes the same steps by phone or internet to obtain the same loan, according to the FTC, the tribal court can never have jurisdiction. Those contracts, however, have the same

effect on the nonmember, the tribe, the lender, and the reservation. Reducing the Montana jurisdictional analysis from a thorough investigation of the nonmember's course of conduct and contact with the reservation, to a mere determination of the nonmember's physical location is improper and would render Montana's jurisdictional inquiry inapplicable to many modern-day contracts involving a reservation-based business. *See Attorney's Process One*, 609 F.3d at 934 (citing *Hicks*, 533 U.S. at 376, 121 S.Ct. 2304 (2001) (Souter, J., concurring)) (“The controlling principle[s] [of tribal civil authority over nonmembers] are broad and abstract and must be carefully applied to the myriad disparate factual scenarios they govern. Determining the contours of tribal civil jurisdiction and the boundaries of tribal sovereignty requires consideration of the historical scope of tribal sovereignty and the evolving place of the tribes within the American constitutional order, careful study of precedent, and ultimately a ‘proper balancing’ of the conflicting interests of the tribes and nonmembers.”).

F.T.C. v. Payday Financial, LLC, 935 F.Supp.2d 926, 939-40 (D.S.D. 2013).

As borne out in the lengthy description of Sprint’s commercial dealings on the PRIR, in Sprint’s own Brief, Sprint has entered into a consensual relationship with the Oglala Sioux Tribe or its members with respect to long distance telecommunications services. It promotes and sells its services to customers and prospective customers on the PRIR. This case fits squarely within the plain language of the first *Montana* exception.

By the very nature of its business as an IXC, Sprint has voluntarily entered the PRIR to provide utility services to tribal members and non-members who reside on the PRIR. The fact that it carries long distance telecommunications traffic that originates and terminates on the PRIR – albeit through third party LECs – Sprint has entered into a consensual relationship with the Oglala Sioux Tribe and its members, “through commercial dealing, contracts, leases or other arrangements.”

C. The OSTUC's regulation of interexchange carriers (IXCs) like Sprint, concerning the provision of telecommunications services on the PRIR directly affects the tribe's political integrity, economic security, health, or welfare.

The Oglala Sioux Tribe has recognized that utility services, in general, impact the economic security, health, welfare, and general well-being of the Tribe:

Every utility which enters and operates within the exterior boundaries of the Reservation, enters into consensual relations, commercial dealings and contracts with residents of the Reservation, Indian and non-Indian, and with the Tribe, to provide services, operate facilities, construct and erect pipelines, transmission lines, poles, towers and other improvements upon and across Reservation lands owned by Indians, non-Indians and the Tribe. The services, rates, policies, procedures and practices of every utility located and operating upon the Reservation have a demonstrably serious impact which imperils the economic security, health, welfare and general well-being of the Tribe, its members, and all residents of the Reservation and that regulation of every such utility by the Tribe is a necessary and proper exercise of the sovereign authority of the Tribe. The regulation of such utilities located, operating or providing services upon the Reservation is an essential governmental function of the Tribe.

Section 1.101(8) of the Utilities Code.

With respect to long distance telecommunication services, Sprint's refusal to abide by minimal regulation sought to be imposed by the OSTUC threatens the political integrity of the Oglala Sioux Tribe, as well as the economic security, health or welfare of its members. Consumer protection rules have been adopted by the Commission to ensure fair play and proper respect for the Tribe and its members, by all utility providers on the PRIR.

II. The Oglala Sioux Tribal Court should have the opportunity to consider the scope and breadth of the OSTUC's regulatory authority over Sprint, operating as an IXC.

The rule requiring exhaustion of tribal remedies in matters related to reservation affairs is an important aspect of the federal government's longstanding policy of supporting tribal self-government. *See, e.g., National Farmers Union*, 471 U.S. at 856; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). Tribal courts play a vital role in tribal self-government, and respect for that role requires, as a matter of comity, that examination of issues of tribal sovereignty and jurisdiction be conducted in the first instance by the tribal court itself. *See National Farmers Union*, 471 U.S. at 856; *Duncan Energy*, 27 F.3d at 1299.

In accordance with these principles, the U.S. Supreme Court has recognized few exceptions to the general requirement of exhaustion of tribal remedies. In *National Farmers Union*, the Court enumerated these exceptions, stating that exhaustion would not be required “where an assertion of tribal jurisdiction ‘is motivated by a desire to harass or is conducted in bad faith,’ or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.” *National Farmers Union*, 471 U.S. at 856 n. 21 (internal citations omitted). Barring the presence of one of these exceptions, a federal court should stay its hand in order to give tribal forums the initial opportunity to determine cases involving questions of tribal authority. *Iowa Mutual*, 480 U.S. at 15-16.

There are two other significant principles that have not been abrogated by the Supreme Court: (1) the federal policy of promoting tribal self-government, which necessarily encompasses the development of a functioning tribal court system, *Iowa Mut. Ins. Co.*, 480 U.S. at 16–17, 107 S.Ct. 971; and (2) because “tribal courts are competent law-applying bodies, the tribal court's determination of its own jurisdiction is entitled to ‘some deference.’ ” *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011), *quoting FMC v. Shoshone–Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990).

Tribal courts are important to the protection of significant tribal interests. The Oglala Sioux Tribal Court should be given the opportunity, in the first instance, to determine the regulatory authority of the OSTUC.

III. Sprint has failed to carry its burden of establishing the propriety of enjoining the Oglala Sioux Tribal Court from hearing the case now before it, filed by OSTUC.

A. Probability of Success on the Merits.

Sprint seeks a preliminary injunction to enjoin the Oglala Sioux Tribal Court from hearing the case before it, filed by the OSTUC. The action seeks declaratory relief, setting forth the scope and breadth of OSTUC’s regulatory authority with respect to the provision of telecommunications services on the PRIR. Clearly, the tribal court in Pine Ridge may properly exercise subject matter jurisdiction over that case. Accordingly, this factor weighs heavily in favor of denying the preliminary injunction.

B. The Threat of Irreparable Harm.

The movant for a preliminary injunction must show a threat of irreparable harm, and the failure to do so is sufficient grounds for a court not to grant a preliminary injunction. *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991).

Sprint argues that it has met its burden because it has shown the likelihood of success on the merits of this action. The Eighth Circuit has held that irreparable harm can be found if the probability of success on the merits is met. *Lenox Labs.*, 815 F.2d at 505 (“The court correctly noted that it could presume irreparable injury from finding of probable success” on the merits.). This factor weighs in favor of defendants.

C. Balance between This Harm and Injury that Granting the Injunction Will Inflict on defendants.

Sprint argues that defendants will not suffer any harm if this Court issues a preliminary injunction because the tribal court has no jurisdiction over Sprint. However, certainly with respect to long distance services being actively promoted and sold to customers and potential customers on the PRIR, by Sprint, the Oglala Sioux Tribal Court had jurisdiction to hear and determine the merits of the OSTUC’s complaint for declaratory relief. There is no legitimate claim that such relief is preempted by state or federal law. Accordingly, this factor weighs in favor of defendants.

D. The Public Interest.

Here, the public interest favors the defendants, in realizing the integrity of the tribal court system. The OSTUC seeks minimal and ordinary regulatory powers over utilities conducting business on the PRIR. That is the subject of the OSTUC's complaint filed in the Oglala Sioux Tribal Court. That Court should be afforded the first opportunity to declare the regulatory authority of the OSTUC, a chartered governmental subdivision of the Oglala Sioux Tribe.

CONCLUSION

For the reasons stated above, plaintiffs' motion for preliminary injunction should be denied.

Dated: April 14, 2015.

THE SHULTZ LAW FIRM, PROF LLC

By: /s/ _____
Jay C. Shultz
Attorney for Defendants
402 St Joseph Street, Suite 13
Rapid City, SD 57701
605-791-1115
jay@shultzlawsd.com