UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Sprint Communications Company L.P. and Sprint Communications, Inc., formerly known as Sprint Nextel Corporation, Plaintiffs, vs. 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, Martina White Hawk and Arlene Catches the Enemy, in their official capacities as Commissioners of the Oglala Sioux Tribe Utilities Commission, Defendants.	Civil No. 4:15-CV-04051-KES **REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

In its opening brief, Sprint demonstrated that first, because Sprint is not offering telecommunications services on the Pine Ridge Reservation, the Oglala Sioux Tribe Utilities Commission (OSTUC) lacks regulatory jurisdiction over Sprint. Under *Montana v. United States*, 450 U.S. 544 (1981), before a tribe can regulate a nonmember, the conduct to be regulated must be on the reservation. Sprint also demonstrated that neither *Montana* exception conferred tribal jurisdiction over Sprint.

Defendants bear the substantial burden of rebutting *Montana's* presumption that tribes cannot regulate nonmembers. *Cf. Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001) ("we have never held that a tribal court had jurisdiction over a nonmember defendant.")[1] Because they offer no credible evidence that Sprint is offering telecommunication services on the reservation or has entered into a consensual relationship with the tribe or a party known to be a tribal member, the record before this Court is more than sufficient to grant Sprint's motion. Nor do Defendants even attempt to refute the fact that regulation of interstate telecommunications service is exclusively federal. Consequently, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), instructs that Sprint is not required to exhaust its tribal court remedies.

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[1] *See also* Tr. of Oral Argument in Plain's Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008):

> CHIEF JUSTICE ROBERTS: You said earlier – I am sorry. You said earlier that this was a straightforward application of Montana?
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> MR. FREDERICK: Given the facts that are present in this case.
>
> CHIEF JUSTICE ROBERTS: Yes, given the facts. But isn't it true that this would be the first case in which we have asserted or allowed Indian tribal jurisdiction to be asserted over a nonmember?
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> MR. FREDERICK: Yes, it would although the court in *National Farmers* and in *Iowa Mutual* could have disposed of the case simply on a bright-line-rule basis but rejected that very notion.

2008 WL 1710923 at *31 (Apr. 14, 2008).

BACKGROUND

Defendants rely on the affidavit of Gene DeJordy and three exhibits in an effort to establish tribal regulatory and adjudicatory jurisdiction over Sprint. While DeJordy is the OSTUC's General Counsel, he is not a tribal member and does not live on the Pine Ridge Reservation. DeJordy does not testify that he has firsthand knowledge of how Sprint handles interstate telecommunications traffic that originates from or terminates on the Pine Ridge Reservation. DeJordy also does not claim firsthand knowledge of Sprint's marketing of its interstate telecommunications services, whether wireless or traditional wireline, nor where Sprint actually offers wireless services.[2]

Based on the initial submission of Plaintiffs and Defendants, these key facts emerge undisputed:

- Sprint Communications, Inc., formerly called Sprint Nextel Corporation, is a holding company that itself does not provide telecommunications services.
- Sprint does not have any facilities or employees on the Pine Ridge Reservation.
- Sprint receives traffic originating out of or terminating on the Pine Ridge Reservation from third parties.

[2] In their response, Defendants offer as Exhibit B a listing of wireless licenses held by various entities identified as Sprint licensees. To clarify, Sprint Communications, Inc. (or Corp.) owns Sprint Communications Company, L.P., which is the long distance carrier and interexchange carrier (IXC) and will be referred to as Sprint Communications. The wireless licensees will be referred to simply as Sprint Wireless. *See* Second Affidavit of Mark Felton at ¶ 2. When the term "Sprint" is used, it should, as before, refer collectively to the holding company, Sprint Communications (the IXC) and Sprint Wireless (the wireless licensees).

- Sprint has no numbering resources on the Pine Ridge Reservation and therefore no wireless customers residing on the reservation.
- Sprint Communications has only three long distance wireline customers, none of which are known to be tribal members residing on the Pine Ridge Reservation.
- Sprint has not expressly consented to tribal jurisdiction.
- Wireline customers tell their local exchange carriers (LEC) which IXC to use.

The DeJordy affidavit purports to place Sprint as providing services on the Pine Ridge Reservation based on DeJordy's generic description of how interstate telecommunications service is routed. But this description does not reflect the reality of how Sprint offers telecommunications services in South Dakota. Wireline customers interact with their LECs and can unilaterally designate their preferred IXC. Second Affidavit of Mark Felton at ¶ 3, ¶ 14. Wireless customers must contract directly with Sprint Wireless for service. *Id.* To obtain wireless service from Sprint Wireless, a customer must obtain a wireless phone from Sprint Communications or have an existing wireless phone ported to Sprint Wireless service. *Id.* Sprint Wireless offers numbering resources in the Sioux Falls area and along the I-29 corridor, but not in western South Dakota. *Id.*

Sprint Wireless restricts its marketing efforts, and thus, who can be a customer, to those potential customers who reside in an area where Sprint Wireless provides direct (primary) service, as opposed to roaming service, where the calls are routed over a third party's equipment. *Id.* at ¶ 4. Sprint Wireless pays that third party for roaming service, but does not pass on those roaming

expenses to its customers. *Id.* Consequently, Sprint Wireless will not accept as a customer a user who does not reside or have a business where Sprint Wireless provides direct coverage. *Id.* If someone were to misrepresent his or her residence and obtain service, Sprint Wireless reserves the right to, and would, terminate wireless service to such customer. *Id.*

In the DeJordy affidavit, Defendants offer three exhibits that purport to show that Sprint is providing services on the Pine Ridge Reservation. DeJordy Affidavit Exhibit B is a list of several wireless spectrum licenses that are now held by or leased to Sprint Wireless. For two of the licenses, Sprint Wireless does not provide service that reaches the Pine Ridge Reservation. *Id.* at ¶¶ 5-6 and Ex. A and B. The third, call sign WQKT223, is for service Sprint Wireless is not yet providing. *Id.* ¶ 7 and Ex. C.

If a potential customer were to research over the Internet for the wireless service Sprint Wireless offers, that person easily would learn that Sprint Wireless does not offer wireless services on the Pine Ridge Reservation. Id. at ¶ 8 and Ex. D. Nevertheless, Defendants offer as DeJordy Exhibit C a document that purports to be a computer screen shot of a dialogue between "You" and "Megan," who says she is a Sprint chat specialist. The probative value of this exhibit is very suspect. "You" identifies his residence as 10 Whitetail Deer, Pine Ridge, South Dakota 57770. *Id.* at ¶ 11. That is the address of Jason Brings Him Back, who is affiliated with Native American Telecom-Pine Ridge. It appears that Brings Him Back, or someone claiming his address, engaged "Megan" on January 21, 2015,

the date after Sprint filed by way of special appearance a motion to dismiss in the Oglala Sioux Tribal Court. *Id.* "You" tried to induce "Megan" to say that Sprint Wireless would provide service to him. *Id.* "Megan" says the service would not be appropriate because it would be exclusively roaming.[3] But the Court should see what Exhibit C is – a ploy to manufacture tribal jurisdiction. Despite that ploy, Defendants offer no evidence of an actual tribal member living on the Pine Ridge Reservation taking wireless service from Sprint Communications.

In Exhibit D to the DeJordy Affidavit, Defendants offer a supposed vendor list showing "Sprint" as vendor. This exhibit is probative of nothing. Defendants offer no foundation to this exhibit – who created it and why. There is no explanation of which "Sprint" entity is on the list – the Irvine, Texas address is not where Sprint has its headquarters. *Id.* at ¶ 13. Instead, the address listed for Sprint on that exhibit is for an office where some of Sprint IT support personnel work. *Id.* Nor is there any explanation of why the vendor identification number for "Sprint" so differs from all other entries. Being on a vendor list is not the same as actually doing business today on the Pine Ridge Reservation.

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[3] Roaming is a common practice by national carriers in the wireless industry because those carriers do not have complete national coverage utilizing their own licensed spectrum and network facilities. Therefore, a wireless carrier enters into a roaming agreement with another carrier that does have coverage in a particular geographic area. Not all Sprint Wireless service plans include the ability to roam. When a customer does roam, he or she is actually utilizing the network coverage (spectrum and facilities) of another carrier. Second Felton Aff. ¶ 9. This is also the case for any Sprint Wireless customer who is roaming on the Pine Ridge Reservation. *Id.* ¶ 10.

ARGUMENT

I. *Montana's* Main Rule Dictates No Tribal Court Jurisdiction

Defendants' first argument is that the Supreme Court's decision in *Montana* does not apply to determining the OSTUC's regulatory authority over nonmembers who "consensually agree to operate and conduct business on the PRIR [Pine Ridge Indian Reservation]." Defendants' Brief at 10. This assertion is fatally flawed in a number of respects. First, *Montana* absolutely applies here because in *Montana*, the Supreme Court established a presumptive rule that tribes cannot regulate nonmembers, especially as to activities on fee land within a reservation, save for two exceptions addressed below. The decision in *Montana* is premised on what Congress had done to open the Crow Reservation in that case and consequently, to restrict the Crow Indian Tribe's gate-keeping authority. 450 U.S. at 547-48. The loss of that gate-keeping authority strictly limited a tribe's authority over nonmembers. As the Supreme Court noted in *Montana*, "it defies common sense" to assume tribal jurisdiction would remain over lands opened to settlement under various statutes specific to the Crow Reservation and more broadly under the General Allotment Act. 450 U.S. at 559 n.9.[4]

[4] In South Dakota, all the reservations created by Congress in the Act of March 2, 1889, 25 Stat. 888, have a history that parallels that of the Crow Reservation in *Montana* in every significant respect. Here, as in *Montana*, the General Allotment Act and other special allotment acts and related congressional acts regarding easements and rights of way have resulted in reservations, including the Pine Ridge Reservation, that have also been opened in part to settlement and allotted throughout. As a result, the Oglala Sioux Tribe no longer possesses the requisite gatekeeping authority necessary to support a tribal claim of civil jurisdiction over Sprint. *See South Dakota v. Bourland*, 508 U.S. 679, 692

Defendants' argument that *Montana* does not apply simply conflates *Montana's* main rule with one of the exceptions to the main rule enunciated in *Montana*: consent.

Defendants also argue that the scope of tribal civil authority is ill defined, citing *Attorneys' Process and Investigation Serv's, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927 (8th Cir. 2010), without explaining how that dubious observation trumps *Montana's* main rule.[5] One thing is certain: a tribe's adjudicatory authority does not exceed its regulatory authority. *Strate*, 520 U.S. at 453; *Plains Commerce Bank*, 554 U.S. at 330.

Defendants' citation to *Fort Yates Pub. School Dist. v. Murphy*, 997 F. Supp. 2d 1009 (D.N.D. 2014), reflects their confusion over *Montana*. In *Fort Yates*, the district court required the school district to exhaust its tribal court remedies under the first *Montana* exception, consent.[6] While the *Fort Yates* court did say *Montana* was inapplicable to a consensual relationship with a tribe when operating a school for the tribe on trust land, 997 F. Supp. 2d at 1011, the court also held that because there was consent, *Montana's* first exception was

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(1993); *United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975), *cert. denied*, 430 U.S. 982 (1977); *see also Plains Commerce Bank,* 554 U.S. at 337; *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 650 n.1 (2001).

[5] The reference in *Sac & Fox* that Defendants cite is to Justice Souter's concurrence in *Hicks*, where he wrote that the scope of tribal civil authority over nonmembers could be viewed as "ill defined," but he went on to characterize that issue as resolved: "The path marked best is the rule that, at least as a presumptive matter, tribal courts lack civil jurisdiction over nonmembers." 533 U.S. at 376-77.

[6] The Eighth Circuit has *Fort Yates* on appeal (Dkt. 14-1549) and heard oral argument in that and a related case on December 12, 2014.

met. *Id.* As there is no assertion that a joint enterprise with a tribe on trust land is involved in this case, *Fort Yates* does not establish that *Montana* is inapplicable.

Defendants also cite *F.T.C. v. Payday Fin., LLC*, 935 F. Supp. 2d 926 (D.S.D. 2013), for the proposition that *Montana* must yield to the way the Internet works. That assertion misses the point of *Montana*; in the absence of the power to exclude, a tribe presumptively cannot regulate a nonmember, especially on fee land and certainly not outside the reservation. Moreover, contrary to Defendants' assertions, Sprint is not marketing its wireless services on the Pine Ridge Reservation; indeed such service is simply unavailable. If someone on the Pine Ridge Reservation might access Sprint's network (wireless or traditional), such access could only be achieved through the facilities of third parties.

Payday involved the Federal Trade Commission's (FTC) efforts to shut down an online "pay day" lender, which was a South Dakota limited liability company owned by a member of the Cheyenne River Sioux Tribe. The lending company argued that its loan agreements required the borrower to consent to the jurisdiction of the Cheyenne River Sioux Tribal Court. *Id.* at 931. Other provisions required arbitration on the reservation. *Id.* at 931-31. Given the conflict over dispute resolution, the district court denied the lender's motion for

summary judgment as to the FTC's claim that the tribal court lacked jurisdiction over the borrowers. *Id.* at 943.[7]

The threshold inquiry to tribal jurisdiction under *Montana* is that the activity must first take place on the reservation. Defendants do not dispute that Sprint Communications has no facilities or employees on the Pine Ridge Reservation. Instead, Defendants argue that Sprint Communications is providing service on the Pine Ridge Reservation because calls that are routed on Sprint Communications' facilities outside the reservation originate from or terminate with callers on the reservation. That argument glosses over whether the caller or called party is a tribal member. This is a very telling oversight, for the Oglala Sioux Tribe has no inherent authority over transactions between nonmembers. *See Bourland,* 508 U.S. at 695 n.15 ("after *Montana,* tribal sovereignty over nonmembers 'cannot survive without express congressional delegation.'") (quoting *Montana*, 450 U.S. at 564); *Rice v. Rehner*, 463 U.S. 713, 720 (1983) (state regulation of liquor sales to nonmembers does not impair tribe's inherent sovereignty); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (tribe's retained

[7] In a subsequent order, Judge Lange granted the FTC partial summary judgment on its claims that the lending arrangements violated ¶ 5 of the FTC Act and the Electronic Funds Transfer Act. *See FTC v. Payday Fin., LLC,* 989 F. Supp. 2d 799 (D.S.D. 2013). In a separate case involving the same lender, the Seventh Circuit held that the arbitration provisions of the loan agreements were unenforceable, that the Cheyenne River Sioux Tribal Court lacked jurisdiction over the borrowers and tribal court exhaustion was not required. *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014). Significantly, the Seventh Circuit noted that the borrowers did not enter the reservation, merely applying for the loans over the Internet. 764. F.3d at 782.

inherent sovereignty extends to members). More fundamentally, however, Defendants' assertion of OSTUC jurisdiction over Sprint would encompass all interstate telecommunications traffic, regardless of how that interstate traffic is originated or terminated. That argument would also empower any Indian tribe to regulate all interstate telecommunications traffic that has a calling or called party within the boundaries of a reservation.

Defendants' argument must be rejected because it directly contradicts the regulatory regime Congress created in 1934 with the Federal Communications Act. Regulation of interstate telecommunications is exclusively federal, a preemption of other authority the federal courts have interpreted as sweeping. Congress preserved the broad scope of exclusive federal authority over interstate telecommunications in the 1996 Amendments to the 34 Act. In their brief, Defendants simply ignore the authority Congress has given the FCC or the federal courts in the 34 Act to regulate interstate telecommunications services. As with traditional long distance telecommunications service, Congress has long delegated regulation of the radio spectrum to the FCC. *See National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

Defendants are also mistaken in asserting that Sprint Wireless is using wireless spectrum to provide telecommunications service on the Pine Ridge Reservation. First, with respect to one spectrum license (call sign WQKT223), Sprint Wireless has not yet used that licensed spectrum. And with the other two

licenses, Sprint Wireless simply has no transmission towers that provide coverage within the boundaries of the Pine Ridge Reservation.

A simple check of Sprint Wireless' on-line coverage shows that it does not provide service on the Pine Ridge Reservation. Defendants offer an exhibit that purports to show that Sprint Wireless will provide wireless service on the Pine Ridge Reservation. That exhibit purports to show an on-line "chat" with a Sprint Wireless representative offering such service. Obtained under duplicitous circumstances, Defendants read too much into what is allegedly said. The representative said that such service would exclusively be roaming and would not be the best for the inquiring party. Further, Sprint Wireless would not, in fact, open an account with that address and if a party somehow obtained service outside of Sprint Wireless' service area, because the caller would be exclusively roaming, Sprint Wireless would have the right to and would terminate such service. In any case, Defendants offer no proof that any legitimate Sprint Wireless customer is a tribal member living on the Pine Ridge Reservation. And with respect to traditional wireline service, Defendants concede that such service is originated or terminated on the Pine Ridge Reservation through third-party LECs.

In short, the OSTUC simply cannot regulate Sprint because no Sprint entity is conducting activities on the Pine Ridge Reservation.

II. *Neither Montana* Exception Applies

A. Defendants Have Not Shown that Sprint Communications Has Activities That Fall Within *Montana's* First Exception

In *Montana*, the Supreme Court carved out an exception to *Montana's* main rule to allow a tribe to regulate a nonmember who enters into consensual relationships with the tribe or its members. 450 U.S. at 565. The burden to establish this exception rests with the tribe, or in this case, with the Defendants. *See Plains Commerce Bank*, 554 U.S. at 330. Further, this exception is a limited one "and cannot be construed in a manner that would 'swallow the rule.'" *Id.* (quoting *Atkinson*, 532 U.S. at 655).

Defendants fail their burden to show that Sprint Communications has consented to be regulated by the OSTUC. Sprint Communications has denied ever expressly consenting to the OSTUC's (or any other Oglala Sioux tribal entity's) regulatory authority, and Defendants offer no direct evidence contradicting that denial. Instead, Defendants baldly assert that Sprint Communications "promotes and sells its services to customers and prospective customers on the PRIR." Defendants' Brief at 14. No proof of that assertion is offered save for the naked assertion of Gene DeJordy, a nonmember who neither lives on the Pine Ridge Reservation nor claims any firsthand knowledge of Sprint Communications' marketing practices. Going further, Defendants argue that "[b]y the very nature of its business as an IXC, Sprint [Communications] has voluntarily entered the PRIR to provide utility services to tribal members and nonmembers who reside on the PRIR." *Id.* Defendants further assert that

carrying long distance telecommunications traffic that originates and terminates on the Pine Ridge Reservation "albeit through third party LECs" creates a "consensual relationship with the Oglala Sioux Tribe and its members." *Id.*

As noted above, this assertion – unsupported by any evidentiary citations – expands the regulatory authority of the OSTUC or any Indian tribe within the United States to regulate interstate telecommunications. Defendants' evidence to support this assertion is slim at most, or nonexistent.

Sprint has no facilities or employees on the Pine Ridge Reservation. Sprint Wireless does not provide wireless services on the Pine Ridge Reservation. It would not allow a potential customer who was honest about his or her address to open an account with a billing address located on the Pine Ridge Reservation. If Sprint Wireless learned that someone had obtained a wireless phone from it and was located on the reservation, that service would be terminated because all such traffic would be roaming (and for which Sprint Wireless would have to pay a third party for that traffic).

Defendants offer an exhibit that purports to show "Sprint" as a vendor. DeJordy Aff. Ex. D. What Sprint entity that name refers to is not disclosed. The address given is in Irving, Texas, not Overland Park, Kansas, where Sprint is located. No context for the list is provided, nor any copy of any contract between Sprint entity and the tribe (or any tribal entity or member). Hence, that list of vendors is not persuasive of a current business relationship. Moreover, the existence of one business dealing with a tribal member does not confer tribal

jurisdiction over Sprint Communications for all purposes. *See Plains Commerce Bank*, 554 U.S. at 338. As to the traditional wireline customers who have unilaterally chosen Sprint Communications as their preferred IXC, Defendants have not shown any of them to be a tribal member.

The traditional wireline long distance service is also unusual because an IXC like Sprint Communications has no choice on the traffic being carried. There are three calling parties on the Pine Ridge Reservation who have directed their LEC to route interstate outbound calls to Sprint Communications. That is their unilateral right, as part of the federal policy to open up interstate traffic to competition.[8] As a common carrier, Sprint Communications must take that traffic. As to calls inbound to the reservation, the calling party (outside the reservation) selects the IXC the calling party's LEC must use. The called party's LEC receives the call. None of the routing is controlled by Sprint Communications. Nor is Sprint Communications allowed to block any calls going into the Pine Ridge Reservation, such as to NAT-PR.[9]

At oral argument in *Plains Commerce Bank*, both counsel for the tribal members (David Fredrick) and for the United States (Curtis Gannon) conceded that for the first *Montana* exception to apply, the nonmember had to enter a

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[8] As noted in the Second Felton Affidavit, Sprint Communications is not accepting any new wireline long distance customers. Second Felton Aff. ¶ 15 and Ex. E.

[9] As noted in the Second Felton Affidavit, Sprint Wireless customers who roam on to the Pine Ridge Reservation would place or receive calls over third party facilities. Second Felton Aff. ¶¶ 9-10.

consensual relationship with a party known to be a tribal member, and even then, the tribal court might not have jurisdiction:

> JUSTICE ALITO: So an Indian goes to a bank off the reservation and asks for a loan and gets the loan. That contract is subject to the jurisdiction of the tribal courts?
>
> MR. FREDERICK: No. I don't think necessarily any loan. I think I answered Mr. Chief Justice's question to the effect that any kind of general loan of that nature would not necessary give rise to - -
>
> JUSTICE SCALIA: Well, it has to be known - - a known consensual relationship, for one thing. Wouldn't you add that requirement?
>
> MR. FREDERICK: Yes.
>
> JUSTICE ALITO: All right. So the Indian goes to the Bank and says: I'm an Indian. Give me a loan. The bank gives him a loan. That's subject to the jurisdiction of the tribal courts?
>
> MR. FREDERICK: No. I think, Justice Alito, that there are very fine gradations in the facts. And we are not asking for an articulation of a general rule of the kind of sweeping effect that the Petitioners are asking for.

Transcript of oral argument, 2008 WL 1710923 at *29-30.

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> CHIEF JUSTICE ROBERTS: What happens if the bank deals with a corporation that is not an Indian corporation, and then that - - the shareholders of that corporation sell their shares to Indians?
>
> MR. GANNON: Well - -
>
> CHIEF JUSTICE ROBERTS: Does the bank now have a consensual relationship with an Indian corporation?
>
> MR. GANNON: Well, I think, Mr. Chief Justice, to expand upon the discussion that you were having with Mr. Frederick, that the consensual relationship that's necessary to establish jurisdiction in the sense of Montana's first exception requires not only that there be a consensual relationship with a member, and which we do think that implicit in that is some knowledge at least objective knowledge

> that you knew you were dealing with a tribal member. And so if the conceptual relationship were established and with somebody who was not a nonmember who subsequently ended up through sales of shares to become a member, we don't think that that ex post facto development would effect [sic] the establishment of the original relationship.

Id. at 39.

This line of inquiry found its way into the Supreme Court opinion in *Plains Commerce Bank*. The Supreme Court reinforced the limited nature of *Montana's* first exception:

> Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. *See Montana,* 450 U.S., at 564.

554 U.S. at 337.

Defendants have offered no evidence – as they must – to support any finding that Sprint has knowingly consented to tribal regulatory jurisdiction. Certainly, nothing about being an IXC creates such a deliberate conscious relationship. Nor is the OSTUC's *sua sponte* regulatory initiative necessary to set conditions on entry, preserve tribal self-government, or control internal relations. The OSTUC could still argue that it can regulate those utilities present on the reservation who have actually consented to tribal jurisdiction.

B. Reserving Exclusive Federal Authority Over Interstate Telecommunications Will Not Implicate *Montana's* Second Exception

In *Montana*, the Supreme Court set out a second exception to its main rule – tribes may regulate the conduct of a nonmember within a reservation

> when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 566. Defendants argue that the tribe's utility code is meant to address these concerns, and that Sprint Communications' refusal to comply with the OSTUC's regulations meets the second *Montana* exception. Defendants' Brief at 15.

Defendants' *ipse dixit* assertion overlooks what the Supreme Court has said about *Montana's* second exception. That exception exists to allow the tribe to regulate conduct that "must do more than injure the tribe," it allows the tribe to act "'to avert catastrophic consequences.'" *Plains Commerce Bank*, 554 U.S. at 341 (quoting Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW); *Atkinson*, 532 U.S. at 657 n.12 ("The exception is only triggered by *nonmember conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority considered 'necessary' to self-government.") (emphasis in original). Defendants have shown no evidence that meets that high threshold. *Montana's* second exception simply does not apply.

III. *Strate* Determines That Sprint Communications Need Not Exhaust Tribal Court Remedies

In the opening brief, Sprint articulated how the Supreme Court in *Strate* stated an overriding exception to the *National Farmers/Iowa Mutual* tribal court exhaustion requirement. Plaintiffs' Brief at 18-21. Defendants do not address how *Strate* revised the tribal court exhaustion analysis, merely parroting what those two decisions said. Defendants' Brief at 16.

Defendants simply do not address what Sprint Communications said about exhaustion. Instead, Defendants cite Ninth Circuit authority for the proposition some deference should be given to a tribal court's determination of its own jurisdiction. Defendants' Brief at 17. But that debatable proposition is irrelevant. First, the question of tribal court jurisdiction is a question of federal law, and questions of law are subject to *de novo* review. Very simply, where federal preemption is beyond dispute, the tribal court lacks jurisdiction. Likewise, where the tribal entities cannot meet their burden to show that either *Montana* exception is satisfied, then *Strate* dictates that no exhaustion is required.

IV. Sprint Communications Meets The *Dataphase* Factors

Defendants half-heartedly argue that the *Dataphase* factors favor them. But the law on tribal court exhaustion favors Sprint Communications, as this Court has held in comparable circumstances. Consequently, on both the probability of success and irreparable harm factors, Sprint is entitled to injunctive relief.

Defendants assert that the tribal court should be able to hear the OSTUC's complaint for declaratory relief because "[t]here is no legitimate claim that such relief is preempted by state or federal law." Defendants' Brief at 18. But federal law most assuredly does preempt the OSTUC's efforts to regulate IXCs and others, and thus, the balance of harm tips in Sprint's favor. As to the public interest, the OSTUC is seeking more than *de minimus* authority and is endeavoring to impose substantial monetary sanctions. The public interest does not favor the exercise of such power without bona fide legal authority to do so.

CONCLUSION

Lacking any current regulatory jurisdiction over Sprint, the OSTUC is not entitled to proceed against Sprint in tribal court. The Court should issue the appropriate injunction, halting the tribal court action that the OSTUC has brought against Sprint.

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