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

Glacier Electric Cooperative, Inc.., Brian Elliott, Willard Hjartarson, Jim Newman, Darrol Berkram, Zita Bremner, Miles Lewis, Dave Losing, and James Taylor, in their official capacities as directors of Glacier Electric Cooperative, Inc., and Dan Brewer, in his official capacity as Interim General Manager of Glacier Electric Cooperative, Inc.,	)	**CAUSE NO. 4:14 CV-00075 - BMM**
Plaintiffs.	)	**DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' RULE 60(b) MOTION**
v.	)	
Floyd "Bob" Gervias, James Kittson, Scott Smith, Emerald "Beep" Grant, Suzie Murray, Tashina McNabb, William Guardipee, Fred Guardipee, Heather Juneau, Joseph Arrowtop, William Wetzel, Troy Wilson, Melissa Gervais, Wilfred DeRoche, Georgia Matt, Rodney "Minnow" Gervais, Ralph Johnson, Mike Kittson, Kathy Broere, Lenore Matt, Evie Birdrattler, Rodney Gervais, Duane Ladd, Marcella	)	

Birdrattler, Tom Gervais, Jim Gervais,)
Marlene Matt,Wilfred DeRoche,)
Titus Upham, John DeRoche, Carl Evans)
Jeri J. Elliott, Dennis Juneau,)
Teri Ann DeRoche, Paul McEvers,)
Patricia Calflooking, Tony Carlson,)
Sarah Calf Boss Ribs, Kathy Gervais,)
Marcella Green, Ellen Burdeau,)
Randy Augare, Robert Wagner,)
Kenny Walter, Honey Davis, Anna ,)
Horn, Cherlyl Gervais, Anita Potts,)
Therese Salois, Faith Gervais, and the)
Honorable Chief Judge Dave Gordon,)
)
Defendants.)
)
_____)

Come now the Defendants, by and through their undersigned counsel, and file this Brief In Opposition To Plaintiffs' Rule 60(b) Motion. As discussed below, Plaintiffs' motion (Doc. #13) is frivilous, should be denied, and Defendants awarded the amount of costs and fees incurred in responding to it.

PROCEDURAL HISTORY

1. On or about August 6, 2014, Defendants filed a Complaint in Blackfeet Tribal Court.

2. On or about October 17, 2014, Plaintiffs filed a Complaint for Declaratory Relief and Injunctive Relief with this Court (Doc. # 1).
3. On or about December 22, 2014, Defendants filed a Motion to Dismiss and Brief in Support (Doc. #3), asking the Court to dismiss the complaint (Doc. #1) for Plaintiffs' failure to exhaust all available tribal court remedies before filing in federal court.
4. On or about January 22, 2015, Plaintiffs filed a Brief in Opposition to Defendants' Motion to Dismiss (Doc. #6). In their brief, Plaintiffs argued the Blackfeet Tribal Court lacked jurisdiction because the Blackfeet Tribal Code does not allow it, the two *Montana* exceptions are not satisfied, and that Defendants' motion (Doc. #3) did not identify a specific Rule 12(b), Fed. R. Civ. P. standard of review.
5. On or about April 24, 2015, the Court issued an Order granting Defendants' Motion to Dismiss (Doc. #10) and dismissed the complaint (Doc. #1) without prejudice for failure to exhaust tribal court remedies.
6. On or about May 26, 2015, the Honorable Chief Judge of the Blackfeet Tribal Court, Dave Gordon, issued an Order

finding that the Blackfeet Tribal Court did have jurisdiction over the matter.

7. On or about July 30, 2015, Plaintiffs filed a Rule 60(b) Motion (Doc. #13) that argued, again, that the Blackfeet Tribal Code does not allow for jurisdiction, the two *Montana* exceptions are not satisfied, and that the Court's order (Doc. #10) did not identify a specific Rule 12(b), Fed. R. Civ. P. standard of review. (Doc. #13 at 2). In addition, Plaintiffs also alleged the Court cited to legal precedent that did not apply. *Id*.

LEGAL STANDARD

Relief under Rule 60(b), Fed. R. Civ. P. is at the expense of the finality of judgments; hence relief is considered "extraordinary." *See Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005) (noting that Rule 60(b)'s "whole purpose is to make an exception to finality"). Rule 60(b) is not a substitute for appeal. *Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341, (9th Cir. 1981).

Rule 60(b) contains six enumerated grounds for relief. Plaintiff's motion is titled "Rule 60(b) Motion" but it does not specify which of the six grounds for relief they are making their motion under. However, the "LEGAL STANDARD" portion of the motion explicitly refers to Rule 60(b)(1) as the basis for the motion. (Doc. #13

at p. 4). It is the only one of the specific grounds for relief Plaintiffs cite to. Presumably, Plaintiffs specifically cite only to Rule 60(b)(1) because they believe the other five bases under Rule 60(b) do not apply.

Rule 60(b)(1) provides in relevant part, "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect." Rule 60(b)(1), Fed. R. Civ. P. Legal error does not by itself warrant the application of Rule 60(b). *Plotkin v. Pacific Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982). The correction of legal errors committed by the district courts is the function of the Court of Appeals, and can usually be remedied on appeal. *Id*. In order to bring themselves within the limited area of Rule 60(b), the Plaintiffs are required to establish the existence of extraordinary circumstances which prevented or rendered them unable to prosecute an appeal. *Plotkin v. Pacific Tel. & Tel. Co.*, 688 F.2d at 1293.

A Rule 60(b) motion should not merely present arguments previously raised. *Maraziti v. Thorpe*, 52 F.3d 252, 255 (9th Cir. 1995). "A party cannot have relief under this rule merely because he or she

is unhappy with the judgment." *Khan v. Fasano*, 194 F. Supp. 2d 1134, 1136 (S.D. Cal. 2001).

DISCUSSION

At the outset, it should be noted that Plaintiffs did not appeal the Court's order (Doc. #10). "Allowing motions to vacate pursuant to Rule 60(b) after a deliberate choice has been made not to appeal, would allow litigants to circumvent the appeals process and would undermine greatly the policies supporting finality of judgments." *Plotkin v. Pacific Tel. & Tel. Co.*, 688 F.2d at 1293.

Instead, Plaintiffs filed a Rule 60(b) Motion alleging four reasons the Court's Order contains both mistakes of law and facts. (Doc. #13 at p. 2 and p.4) Three of these reasons: Blackfeet Tribal Code, *Montana* exceptions, and Rule 12, are the same arguments the Plaintiffs unsuccessfully made to the Court in their brief (Doc. #6). The fourth, the inapplicability of *Grand Canyon Skywalk Development v. Sa Nyu Wa, Inc.*, 715 F. 3d 1196 (9th Cir. 2013), although discussed in detail by the Court in the order (Doc. #10), was not raised by Plaintiffs in their original briefing of the issue.

I. Rule 60(b)(1) Does Not Apply.

Considering that Plaintiffs' Motion almost exclusively relies on previously existing law and facts, it appears that Plaintiffs believe

that their own failure to argue the alleged irrelevancy of *Grand Canyon Skywalk Development v. Sa Nyu Wa, Inc.*, 715 F.3d 1196 (9th Cir. 2013), constitutes the "mistake, inadvertence, surprise or excusable neglect" required by Rule 60(b)(1), Fed. R. Civ. P. The Ninth Circuit is clear that "neither ignorance nor carelessness on the part of the litigant or his attorney provide grounds for relief under Rule 60(b)(1)." *See Allmerica Financial Life Ins. and Annuity Co. v. Llewellyn*, 139 F.3d 664, 666 (9th Cir. 1997) (citing *Engleson v. Burlington Northern R. Co.*, 972 F.2d 1038, 1043 (9th Cir.1992)).

Further, an allegation that the Court made a wrong legal ruling does not constitute a "mistake" under Rule 60(b)(1). "A petitioner warrants relief under Rule 60(b)(1) when he demonstrates that a mistake is attributable to special circumstances and not simply an erroneous legal ruling." *See McMillan v. MBank Fort Worth, N.A.*, 4 F.3d 362, 367 (5th Cir. 1993). A motion for relief under Rule 60(b)(1) is not a substitute for the ordinary method of redressing judicial error-appeal. *See Plotkin v. Pacific Tel. & Tel. Co.*, 688 F.2d at 1293.

In short, whether Plaintiffs' alleged "mistake" is its own as a result of failing to make certain legal arguments, or the Court's for allegedly applying inapplicable legal precedent, Rule 60(b)(1), Fed. R.

Civ. P. does not apply. Therefore, Petitioners' motion (Doc. #13) must be denied.

II. A Rule 60(b) Motion Should Not Merely Present Previously Raised Arguments.

Plaintiffs continue to rehash their same three (3) arguments. As discussed *supra*, a motion for reconsideration under Rule 60(b) should not merely present arguments previously raised. *See Maraziti v. Thorp*, 52 F.3d at 255. A Rule 60(b) motion is not a vehicle permitting the unsuccessful party to reiterate arguments previously presented. *Id*.

A. Blackfeet Tribal Court

Plaintiffs argued in both (Doc. #1 and Doc. #6) and continue to argue that the Blackfeet Tribal Code does not allow for jurisdiction over the proceedings. (Doc. # 13 at p. 5-6). They seem to ignore the fact that the Chief Judge of the Blackfeet Tribal Court has found to the contrary.

Ignoring the fact that Rule 60(b) is not an instrument to revive failed arguments, had Plaintiffs read the Order before filing this frivolous motion (Doc. #13) they would see that the Court agrees with them. "It does not appear that the Cooperative Members possess a colorable claim of tribal court jurisdiction based on the

membership status of the parties." (Doc. #10 at p. 6). Nevertheless, Plaintiffs frivolously use this issue as a basis for a Rule 60(b) Motion.

B. The *Montana* Exceptions

Again, Rule 60(b) is not an appeal and should not be used to revive failed arguments. Plaintiffs argued the *Montana* issue before the Court in both their complaint (Doc. #1) and brief (Doc. #6), and the Court decided that the exceptions were met. (Doc. #10 at pp. 9 – 11). The Plaintiffs forget that because they filed their complaint without first exhausting tribal court remedies, the standard the Court must apply is a "colorable claim of jurisdiction". The Court correctly found that this standard is easily met due to the "consensual nature of the relationship between the parties and the potential impact of the relationship on the health and welfare of the Blackfeet tribal members." (Doc. #10 at p. 11). The fact that Plaintiffs continue to press an issue already argued and decided is frivolous, not grounds for a Rule 60(b) motion, and a waste of Defendants and the Court's time.

C. The Exhaustion Of Tribal Court Remedies Standard Was Applied.

Finally, Plaintiffs attempt to argue semantics regarding Fed. R. Civ. P. 12(b)(1). (Doc. #13 at p. 12-15). Again, this is the same argument they unsuccessfully made in their brief (Doc. #6 at p.6) and is not a proper basis for a Rule 60(b) motion.

That being said, the "factual" or "facial" Rule 12(b)(1) standard does not even apply in this case. Plaintiffs correctly note that the Court's order was made pursuant to Rule 12(b)(1), Fed. R. Civ. P. (Doc. #10, p. 1). However, they fail to note that their complaint was dismissed for failure to exhaust tribal court remedies. (Doc. #10 at p. 12).

Although often treated as a Rule 12(b)(1) motion, the requirement of tribal court remedy exhaustion is different than a standard 12(b)(1) motion. The tribal court exhaustion rule is prudential, not jurisdictional. *Atwood v. Fort Peck Tribal Court Assiniboine & Sioux Tribes*, 513 F.3d 943, 948 (9th Cir. 2008)) (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997)). Under the exhaustion rule, relief may not be sought in federal court until appellate review of a pending matter in a tribal court is complete. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987). As a matter of

discretion, a district court may either dismiss a case or stay the action while a tribal court handles the matter. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985).

In this case, it was well within the Court's discretion to dismiss the action. Plaintiffs cite no statute or case law that states that it is necessary to identify and apply either the "factual" or "facial" standard to the exhaustion of tribal court remedies doctrine. As with their other arguments, Plaintiffs Rule 12(b)(1) argument is a repeat and is most certainly not a proper basis for a Rule 60(b) motion.

CONCLUSION

Plaintiffs' motion (Doc. #13) is nothing more than an effort by Plaintiffs to re-litigate those issues already argued and decided by this Court. Plaintiffs' conclusory allegations that the Court made both mistakes of fact and law are not supported by the facts, the law, and are wholly insufficient to warrant relief under Rule 60(b), Fed. R. Civ. P.

Plaintiffs can point to nothing that this Court overlooked. Rather, Plaintiffs merely repeat their previous arguments and boldly claim that this Court applied the wrong legal precedent. Plaintiffs' motion is baseless and does not satisfy the stringent standard for the relief requested under Fed. R. Civ. P. 60(b). In situations such as this,

the Court is empowered by Rule 11, on its own initiative, to impose sanctions after issuance of an order directing Plaintiffs to show cause why they have not violated Rule 11(b) by filing their current motion (Doc. #13). Rule 11(b), Fed. R. Civ. P.; *Jones v. United Parcel Service, Inc*., 460 F.3d 1004, 1008 (8th Cir. 2006).

Respectfully, Defendants request that this Court deny Plaintiffs' Rule 60(b) Motion (Doc. # 13). Further, Defendants request an award of costs and fees incurred in responding to the frivolous motion.

DATED this 20th day of August 2015.

/s/Terryl T. Matt
Terryl T. Matt
Attorney for Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2) of the United States Local Rules, I certify that this Brief is limited to 2,234 words (as counted by my word processing program), excluding caption and certificates of service and compliance, printed in at least 14 points and is double spaced, except for indented quotations.

/s/Terryl T. Matt
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