Ethel Branch, Attorney General
The Navajo Nation

K. Andrew Fitzgerald, Bar #8944
Attorney at Law,
P.O. Box 1088
Moab, UT 84532
435-260-8593
andrewmoablawyer@icloud.com

Colin Bradley, Attorney
NAVAJO NATION DEPARTMENT OF JUSTICE
Post Office Box 2010
Window Rock, Navajo Nation (AZ) 86515-2010
Tele: (928) 871-6935/6936/6937
Cbradley@nndoj.org

Counsel for Intervenor

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah corporation sole; LDS FAMILY SERVICES, a Utah Non-Profit corporation, **Plaintiffs** **v.** **RJ, MM, BN and LK, individuals,** **Defendants** **and** **NAVAJO NATION** **Intervenor.**	**Case No. 2:16-cv-00453-RJS** **MOTION TO DISMISS FOR FAILURE TO EXHAUST TRIBAL COURT REMEDIES** **(ORAL ARGUMENT REQUESTED)** Judge: Robert J. Shelby Magistrate Judge: Brooke C. Wells

Intervenor, the Navajo Nation, hereby moves this Court to dismiss Plaintiffs' Complaint for failure to exhaust tribal court remedies. This motion is supported by the accompanying

Memorandum of Law below. Finally, this motion is filed as the "pleading" concurrently with the Motion to Intervene as required by rule 24(c). Fed. R. Civ. P. 24(c).

MEMORANDUM OF LAW

FACTS

The present case arises out of several complaints filed by Defendants, former participants in Plaintiffs' Indian Student Placement Program or Lamanite Placement Program (the "ISPP"), in the Window Rock District Court ("Tribal Court") on or about April 21, 2016, May 27, 2016, and June 6, 2016. Plaintiffs' Second Amended Complaint, ¶ 1; RJ and MM Complaint, ¶ 9; BN Complaint, ¶ 8; LK Complaint, ¶ 8. Defendants allege they suffered harm due to Plaintiffs' on and off reservation conduct. RJ and MM Complaint, ¶¶ 9-25; BN Complaint, ¶¶ 13-19; LK Complaint, ¶¶ 8-18. Defendants claim that the Tribal Court has proper jurisdiction because all parties resided or conducted activities on the Navajo Nation, there was a consensual relationship between Plaintiffs and Defendants and Plaintiffs and the Nation, and, because Plaintiffs' conduct threatened the health, welfare, and cultural well-being of the Nation. RJ and MM Complaint, ¶¶ 1-3; BN Complaint, ¶¶ 1-3; LK Complaint, ¶¶ 1-3.

Rather than contesting Defendants' allegations in the Tribal Court, Plaintiffs filed a Complaint for Declaratory Judgment (Complaint) in the United States District Court for the District of Utah, Central Division on May 31, 2016. In Plaintiffs' Complaint, they allege that the Tribal Court does not have jurisdiction over RJ and MM's Complaint because Plaintiffs' conduct did not occur on the reservation. Complaint, ¶ 23. After filing the Complaint, Defendants filed further documents contesting whether their conduct occurred on the reservation. Plaintiffs'

Second Amended Complaint, ¶¶ 22, 26; Declaration of Roger Van Komen, ¶ 4; Plaintiffs' Response to Defendants' Motion to Dismiss, at 2.

Prior to Plaintiffs instituting this action, the Tribal Court was not permitted to make a determination in regards to its jurisdiction, or lack thereof, over Defendants' claims.

INTRODUCTION

In this case, Plaintiffs are attempting to challenge the subject matter jurisdiction of the Tribal Court. In fact, Plaintiffs claim that "[t]his case is not complex" and that "[t]he single issue is whether the Tribal Court may exercise subject matter jurisdiction over the Church Entities [in the Tribal Court action]." Plaintiffs' Response to Defendants' Motion to Dismiss, at 3. Therefore, because "the single issue" is whether the Tribal Court has subject matter jurisdiction over Defendants' claims in the Tribal Court, this matter must be abated, or dismissed, due to Plaintiffs' failure to exhaust their tribal court remedies.

LEGAL ARGUMENT

I. A MOTION TO DISMISS FOR FAILURE TO EXHAUST TRIBAL COURT REMEDIES IS A NON-JURISDICTIONAL MATTER OF COMITY.

A Motion to Dismiss for failure to exhaust is a non-jurisdictional matter of comity. *Valenzuela v. Silversmith*, 699 F.3d 1199, 1206 (10th Cir. 2012). As such, it is presented as an unenumerated motion under Rule 12(b) of the Federal Rules of Civil Procedure. *Dish Network Corp. v. Tewa*, No. CV 12-8077-PCT-JAT, 2012 WL 5381437, at *2 (D. Ariz. Nov. 1, 2012) (unpublished) (stating "[r]ather, Defendants' motion to dismiss for failure to exhaust tribal court remedies should be treated as an unenumerated 12(b) motion"). Accordingly, Intervenor files this Motion to Dismiss as an unenumerated motion under Rule 12(b).

II. PLAINTIFFS MUST EXHAUST THEIR TRIBAL COURT REMEDIES.

Relevant to this matter, the Supreme Court has stated that where a party seeks to challenge the jurisdiction of a tribal court, such a party must first "exhaust their remedies in the tribal judicial system." *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985). Specifically, the Supreme Court stated that an analysis of the relevant tribal court's jurisdiction "should be conducted in the first instance in the Tribal Court itself," otherwise, if a tribal court is not allowed to develop the case and "rectify any errors it may have made," there is the inherent risk of creating a "procedural nightmare." *Id*., at 856-57 (internal quotation marks omitted). Furthermore, exhaustion is required in order for "a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *Id.*, at 856. Therefore, prior to a federal court determination that a tribal court lacks jurisdiction, the relevant tribal court must first develop the factual record and determine if it has jurisdiction. Additionally, the doctrine of tribal court exhaustion requires "[a]t a minimum. . . that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987). Therefore, tribal court exhaustion requires fact-finding in a lower tribal court, a determination by said lower court, and the decision must be appealed to a tribal appellate court in order for exhaustion to be complete.

In this case, tribal exhaustion was far from complete; namely, the Tribal Court did not make any determination prior to Plaintiffs filing this action. Therefore, because Plaintiffs have not exhausted their tribal court remedies on the Nation, this case should be abated or dismissed until tribal court exhaustion of the matter is complete. *See Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1241 (10th Cir. 2014) (stating "[a]lthough we require exhaustion, abatement of

this action is preferable to dismissal pending exhaustion of tribal court remedies") (hereinafter "*Stidham*").

A. Plaintiffs' have failed to make a substantial showing of an exception to exhaustion.

Though tribal court exhaustion is required as "a matter of comity, not as a jurisdictional prerequisite," the Tenth Circuit requires tribal court exhaustion absent "a substantial showing of eligibility" that one of four narrow exceptions will prevent exhaustion. *Iowa Mut. Ins. Co.,* 480 U.S. at 16; *Stidham*, 762 F.3d at 1238. Moreover, said "exceptions are applied narrowly where tribal courts are not given the first opportunity to determine their jurisdiction." *Stidham*, 762 F.3d at 1239 (internal quotations omitted). Therefore, in this matter, Plaintiffs are required to make a "substantial showing of eligibility" that one of the exceptions to exhaustion is applicable in this case; and, this Court must construe these exceptions "narrowly" because the tribal court has not been given the first opportunity to determine its jurisdiction. Furthermore, in order to defeat a substantial showing of eligibility, the non-moving party is only required to demonstrate that tribal court jurisdiction is merely "colorable." *Id.*, at 1240. Here, Plaintiffs are attempting to invoke the fourth exception exhaustion, by claiming that "it is clear that the tribal court lacks jurisdiction and that judicial proceedings would serve no purpose other than delay." *Id.*, at 1238 (internal quotations omitted); *see* Plaintiffs Response to Defendants' Motion to Dismiss, at 13-14. However, as will be demonstrated below, Plaintiffs have failed to make the requisite substantial showing that jurisdiction in this matter is not colorable in the Tribal Court.

1. It is not clear that the Tribal Court lacks jurisdiction.

In this matter, the jurisdiction of the Tribal Court is, at the very least, colorable; and, because jurisdiction is colorable, this Court should dismiss or abate this matter. *See Stidham*, 762 F.3d at 1240. Specifically, this Court does not—and should not—make a determination in

regards to the merits of the Tribal Court's jurisdiction without a full, developed factual record from the Tribal Court. *Nat'l Farmers Union Ins.*, 471 U.S. at 856 (stating "the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed"). Here, though the Tribal Court has not been given the chance to hear the case, the Tribal Court's jurisdiction over Plaintiffs is sufficiently colorable to require exhaustion.

a. It cannot be "clear" that the Tribal Court lacks Jurisdiction when key facts are contested and undeveloped.

Here, there is a dispute between Plaintiffs and Defendants regarding some key facts in the case. *See* Plaintiffs' Second Amended Complaint, ¶¶ 22, 26; Declaration of Roger Van Komen, ¶ 4; Plaintiffs' Response to Defendants' Motion to Dismiss, at 2. Given the factual dispute, exhaustion should be required because "policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Nat'l Farmers Union Ins.*, 471 U.S. at 856. Because the Tribal Court has not been afforded the opportunity to develop the factual record—and determine what actually occurred in this case—there should not be a determination in regards to the merits of jurisdiction. Indeed, allowing the Tribal Court to develop the record and make a determination in regards to jurisdiction gives this Court "the benefit of their [tribal court] expertise in such matters in the event of further judicial review." *Id*., at 857. Certainly, in a case where the facts themselves are in dispute, any determination in regards to jurisdiction will be incomplete—and exhaustion should be necessary.

b. The application of federal law is unclear in this case.

In regards to federal Indian law generally, it is unclear what type of analysis would apply to this case. Specifically, it is unclear in this case—given the thin factual record—whether a *Montana v. United States,* 450 U.S. 544 (1981), analysis should be performed or not. On the one hand, some Supreme Court opinions support the notion that the Nation has the inherent right to regulate nonmember conduct on the reservation. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 159 (1982). On the other hand, the *Montana* exceptions may be more appropriate in this matter. While it is difficult to determine which analysis is proper given the thin factual record, under either theory, exhaustion should be required in this case because in either case the jurisdiction of the Tribal Court is colorable.

c. Tribal Court jurisdiction is colorable because the claims involve tribal lands.

In this case, because there are facts alleging nonmember activities, and agreements with tribal members and the tribe, all possibly occurring on the reservation, the jurisdiction of the Tribal Court is colorable under the theory that tribal courts "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations." RJ and MM Complaint, ¶¶ 1-3; BN Complaint, ¶¶ 1-3; LK Complaint, ¶¶ 1-3; *Montana*, 450 U.S. at 565.

The Supreme Court has stated that when non-member activities occur on the reservation, the status of the land can be the dispositive factor. *See Nevada v. Hicks*, 533 U.S. 353, 360 (2001). Moreover, where a tribe has the right to exclude nonmembers, this can mean that the tribe also retains the right to regulate. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144–45 (1982).[1] And, importantly, the Nation's Treaty of 1868 with the United States ensures that the

[1] Stating "[n]onmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation."

Nation has the right to exclude non-members. *See* Treaty of 1868, at Article II;[2] *see also Donovan v. Navajo Forest Products Indus.*, 692 F.2d 709, 711–12 (10th Cir. 1982);[3] *see Williams v. Lee*, 358 U.S. 217, 223 (1959).[4] Because the Nation has the right to exclude nonmembers, the Nation has retained the right to regulate nonmember conduct on the reservation. Therefore, under federal law, the Nation has the inherent right to regulate some forms of nonmember conduct on the reservation.

In this matter, Defendants have claimed some of Plaintiffs' conduct occurred on tribal land. *See* RJ and MM Complaint, ¶¶ 1-3; BN Complaint, ¶¶ 1-3; LK Complaint, ¶¶ 1-3. This is significant in regards to a colorable claim of jurisdiction because "tribes retain considerable control over nonmember conduct on tribal land." *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997). And, in terms of exhaustion, this is significant because "[v]irtually all of the cases that have held tribal exhaustion is required have concerned a single incident occurring on or near tribal land or a contract directly with a tribal member." *Philip Morris USA, Inc. v. King*

---

[2] Stating "this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article."

[3] Stating "[t]he Navajo treaty language set forth in Article II makes it clear, in our view, that in order to achieve an end to conflict and ensure peace, the United States Government agreed to leave the Navajos alone on their reservation to conduct their own affairs with a minimum of interference from non-Indians, and then only by those *expressly* authorized to enter upon the reservation."

[4] Stating "[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it."

Mountain Tobacco Co., 569 F.3d 932, 943 (9th Cir. 2009). Though Plaintiffs have a different view from Defendants as to what constitutes "conduct" sufficient to invoke tribal jurisdiction, Plaintiffs acknowledge that some of their actions took place on the reservation. *See* Plaintiffs' Amended Motion for Preliminary Injunction, at 4, 10 n.9 (stating "Tribal members who wished to participate in the program did so voluntarily" and, "it is true that there are LDS Churches on the reservation and, at times, missionaries have proselyted there"). For example, Plaintiffs do not deny, and in some instances admit, that they maintained churches on the reservation (which requires an agreement with the Nation[5]), proselytized members on the reservation, entered into agreements with tribal members on the reservation, took tribal children from their homes on the reservation, and were notified of, and failed to report, abuse on the reservation. *See id.*; Plaintiffs' Second Amended Complaint, ¶¶ 12, 26.[6] Though Plaintiffs contest whether these actions are "conduct" for jurisdictional purposes, the fact that Plaintiffs do not dispute that many of their actions took place on the reservation means it cannot be clear that the tribal court lacks jurisdiction. *See* Plaintiffs' Second Amended Complaint, ¶ 26; Declaration of Roger Van Komen, ¶ 4; Plaintiffs' Amended Motion for Preliminary Injunction, at 9-10.

In light of the thin factual record, and alleged conduct occurring on the reservation, the Tribal Court should be given the opportunity to develop a full factual record and make the initial jurisdictional determination. Without the necessary facts, any determination in regards to jurisdiction will be incomplete. However, it is important to note that it is undisputed that *some* of Plaintiffs' actions took place on the reservation. And, "[w]hen the activity at issue arises on the

[5] *See* 25 U.S.C.A. § 415 (e)(1)(B); *see* 16 N.N.C. § 1151(B).

[6] Though, Plaintiffs disagree where the "decisions" in regards to the agreement were made, Plaintiffs do not disagree that the agreements themselves were made with members on the reservation. *See* Plaintiffs' Second Amended Complaint, ¶ 26 (stating "decisions regarding placement of tribal members with host families were made outside the reservation").

reservation, these [tribal court exhaustion] policies almost always dictate that the parties exhaust their tribal remedies before resorting to a federal forum." *Texaco v. Zah*, at 1378. Therefore, at the very least, the Tribal Court should be able to develop the factual record to determine the extent of activity that occurred on the reservation and make the jurisdictional decision in the first instance.

d. Tribal Court jurisdiction is colorable under the first exception to Montana.

Here, if this Court were to perform a *Montana* analysis, jurisdiction is also colorable because Plaintiffs entered into a consensual relationship both the Nation and its members on the reservation.

The first exception to *Montana* states "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. In this matter, Plaintiffs have consensual relationships with the Nation and its members regarding activities on the reservation, though the full extent of those relationships are unclear from the existing factual record.[7] However, as it was stated in *Crowe & Dunlevy*, there must be a "nexus" between the consensual relationships and the conduct that is the subject of this action. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1151 (10th Cir. 2011).

Here, there arguably is a "nexus" between an alleged agreement with the Nation and the agreement with its members, in order that the jurisdiction of the Tribal Court is at least colorable. Specifically, there is a nexus between agreements to care for Defendants, and, the tortious claims

[7] Plaintiffs, by law, must have an agreement with the Nation to operate on the reservation, though it is unclear from the existing record what type of agreements were made. Further, Plaintiffs had agreements with Defendants' families to remove them from the reservation.

regarding a duty to report/failure to warn of suspected child abuse. Also, there is a nexus between the ISPP itself, an agreement with the Nation, and agreements with the families to Defendants' claims alleging on-reservation conduct.

Though Plaintiffs claim that they did not perform any activities giving rise to Defendants' claims on the reservation, Defendants' failure to warn/duty to report claim undoubtedly "occurred" on the reservation. *See* Plaintiffs' Response to Defendants' Motion to Dismiss, at 5. Specifically, Nation law recognizes failure to warn as an offense—as does the law of many other jurisdictions[8]—by stating "any other person having reason to believe that serious injury or injuries have been inflicted upon the child as a result of abuse, neglect or starvation, shall report the matter." 9 N.N.C. § 1123(A). While it is not clear that such a claim constitutes a tort under Navajo law, a failure to report/duty to warn in regards to child abuse has been established as a tort claim in other jurisdictions. *See e.g. Beggs v. State, Dep't of Soc. & Health Servs.,* 247 P.3d 421, 425-26 (Was. 2011). Furthermore, in regards to torts claims and exhaustion, the Tenth Circuit has required tribal court exhaustion where a tort claim involved non-member activity on the reservation. *See Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1509 (10th Cir. 1997). Because this case involves an agreement with the Nation, an agreement with its members, activities that occurred on the reservation, and a tort claim that has a nexus to said agreements, it is at the very least not "clear" that the tribal court lacks jurisdiction.

Therefore, for all the above-mentioned reasons, there is a colorable claim that the tribal court has jurisdiction over some of Defendants' claims. As such, Plaintiffs should be required to exhaust their tribal court remedies in this matter.

2. There is no undue delay.

[8] *See e.g.* Ariz. Rev. Stat. Ann. § 13-3620; *see e.g.* Utah Code Ann. § 62A-4a-403.

Here, because Plaintiffs are attempting to invoke the exception "where it is clear that the tribal court lacks jurisdiction and that judicial proceedings would serve no purpose other than delay, a federal court may excuse exhaustion." *Stidham*, 762 F.3d at 1238 (internal quotations omitted); *see* Plaintiffs Response to Defendants' Motion to Dismiss, at 13-14. In order to invoke this exception, Plaintiffs are required to make a substantial showing that it is clear the Tribal Court lacks jurisdiction over Defendants' claims, and, as such, jurisdiction would serve no purpose other than delay. In this case, as discussed above, Plaintiffs have not made a substantial showing that it is clear the tribal court lacks jurisdiction. Thus, the second part of the exception, that the proceedings would serve no purpose other than delay, is less important. Nonetheless, Plaintiffs alleged claims that they would incur "undue delay" are equally unavailing. Plaintiffs' Response to Defendants' Motion to Dismiss, at 14.

In support of Plaintiffs' claim, they state "the primary exception the Church Entities [Plaintiffs] rely on—[is] undue delay." *Id*. Moreover, Plaintiffs claim that undue delay "is particularly true [in this case] because the Tribal Court has no applicable mechanism for interlocutory appeal." *Id*. Essentially, Plaintiffs believe that exhaustion should not be required in this case because they falsely believe that the Nation does not have an appeal mechanism to challenge a jurisdictional determination of the Tribal Court. However, besides being an inaccurate characterization of Nation law, the lack of an interlocutory appeal is not sufficient grounds to invoke this exception to exhaustion.

Similar to the Navajo Rules of Civil Procedure, in *Iowa Mutual*, the Blackfeet Tribal Code did "not allow interlocutory appeals from jurisdictional rulings." *Iowa Mut. Ins. Co.*, 480 U.S. at 12. Despite clearly recognizing that "appellate review of the Tribal Court's jurisdiction can occur only after a decision on the merits," the Supreme Court stated:

> At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. In this case, the Tribal Court has made an initial determination that it has jurisdiction over the insurance dispute, but Iowa Mutual has not yet obtained appellate review, as provided by the Tribal Code , ch. 1, § 5. Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.

Id., at 12, 17. Clearly, the Supreme Court foreclosed just the argument Plaintiffs are attempting to make in this case.

Additionally, despite the fact that Plaintiffs' argument was foreclosed in *Iowa Mutual*, Plaintiffs claim that the Nation does not have the authority to hear an interlocutory appeal. However, this is a mischaracterization of Nation law, because 7 N.N.C. Section 303 allows the Navajo Nation Supreme Court to hear writs of prohibition—which is analogous to an interlocutory appeal in that a party can challenge a jurisdictional determination of a lower court or tribunal prior to a final order. A party can file a writ of prohibition to the Navajo Nation Supreme Court to challenge a determination of a lower Navajo court that it has jurisdiction to hear the case. *See Budget and Finance Committee of the Navajo Nation Council v. Navajo Nation Office of Hearings and Appeals*, No. SC-CV-64-05 (Nav. Sup. Ct. Jan. 4, 2006); *Cabinets Southwest, Inc. v. Navajo Nation Labor Comm'n*, 8 Nav. R. 435 (Nav. Sup. Ct. 2004); *Peabody Western Coal Co. v. Navajo Nation Labor Comm'n*, 8 Nav. R. 488 (Nav. Sup. Ct. 2004). Additionally, the Ninth Circuit expressly recognized the Nation's writ of prohibition as a means for complying with tribal court exhaustion. *See Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1216 (9th Cir. 2007). Therefore, Plaintiffs' assertion that the "the Tribal Court has no applicable mechanism for interlocutory appeal" is false.

For all the reasons set forth above, Plaintiffs have failed to make a substantial showing that an exception to exhaustion is applicable in this case, because the Tribal Court's jurisdiction is at least colorable.

III. PLAINTIFF'S RELIGIOUS FREEDOM CLAIMS ARE BASELESS.

In Plaintiffs' Complaint, they put forward the proposition that they can essentially never be regulated by the Tribal Court because they will not be afforded, as a religious organization, the right to freedom of religion on the reservation. *See* Plaintiffs' Second Amended Complaint, ¶ 25; Plaintiffs' Response to Defendants' Motion to Dismiss, at 12-13. However, this is also a mischaracterization of Navajo Nation law—and federal Indian law generally. Namely, the Indian Civil Rights Act and the Navajo Bill of Rights provide the exact protection Plaintiffs claim they lack in the courts of the Navajo Nation. The Indian Civil Rights Act states "[n]o Indian tribe in exercising powers of self-government shall . . . make or enforce any law prohibiting the free exercise of religion." 25 U.S.C.A. § 1302(A)(1). Moreover, the Navajo Bill of Rights ensures the same protection by stating "[t]he Navajo Nation Council shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." 1 N.N.C. § 4. Therefore, clearly, Plaintiffs' assertions that they are not guaranteed freedom of religion on the Navajo Nation is false. Thus, the entire proposition that they are immune from tribal court determinations because they are not afforded the freedom of religion is built upon a false premise, and should be ignored. Regardless, the alleged lack of a constitutional right has never been recognized as a reason, in and of itself, that a tribal court cannot have jurisdiction over a litigant.

IV. CONCLUSION

Based on the above, the Nation moves the Court to dismiss this case to require Plaintiffs to exhaust their remedies in the Nation's courts. In the alternative, the Nation requests a stay pending the outcome of the proceedings in the Nation's courts.

DATED this 19th day of August, 2016.

/s/ K. Andrew Fitzgerald
Attorney for Intervenor

CERTIFICATE OF SERVICE

I hereby certify that that on the 19th day of August 2016, I a true and correct copy of the foregoing **MOTION TO DISMISS** to be served electronically on the following:

David J. Jordan
David J. Williams
Jordan C. Bledsoe
STOEL RIVES LLP
201 S. Main Street, Suite 1100
Salt Lake City, UT 84111

Craig K. Vernon
Wes S. Larsen
James, Vernon & Weeks, P.A.
1626 Lincoln Way
Coeur D'Alene, ID 83814
cvernon@jvwlaw.net

William R. Keeler
Keeler & Keeler, LLP
108 E. Aztec Ave.
Gallup, NM 87301
billkeeler@keelerandkeeler.com