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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah corporation; LDS FAMILY SERVICES, Plaintiffs, v. RJ MM, BN, and LK, individuals, Defendants.	**COMBINED MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR PRELIMINARY INJUNCTION, and IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT FOR DECLARATORY JUDGMENT** Civil No. 2:16-cv-00453-RJS Judge Robert J. Shelby

I. INTRODUCTION

In their Motion for Preliminary Injunction, Plaintiffs (the "Church Entities") ask this Court to enjoin Defendants from proceeding with their claims in the Navajo Tribal Court (the "Tribal Court Actions") because:

1. The Navajo Tribal Court (the "Tribal Court") lacks subject matter jurisdiction over the Church Entities because none of the relevant conduct took place on the Navajo reservation;

2. The Church Entities will suffer irreparable harm if forced to litigate in Tribal Court;

3. The balance of harms supports enjoining Defendants; and

4. The public interest will not be harmed by enjoining Defendants.

In response, Defendants have objected to the Motion for Preliminary Injunction and moved to dismiss the Church Entities' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). They argue that the Church Entities have failed to state a claim because: (1) the Church Entities have not exhausted the jurisdictional argument in Tribal Court; (2) the Tribal Court has jurisdiction; (3) the Church Entities have failed to join indispensable parties; and (4) pursuant to what is known as the *Brillhart* Rule, the Court should decline to hear this case. Defendants are wrong on all counts.[1]

First, because the tortious conduct alleged in the Tribal Court Actions did not occur on the Navajo reservation, *Montana's* general rule that tribes lack jurisdiction over non-members controls. *Montana's* exceptions do not come into play. Second, because the Tribal Court is so clearly without jurisdiction, exhaustion would serve no purpose other than delay. Third, the Tribal Court and tribal judge are not necessary parties because they will apply this Court's decision on jurisdiction. Finally, the *Brillhart* Rule does not apply in tribal jurisdiction cases.

[1] Defendants' objection focuses solely on whether the Church Entities are likely to prevail on the merits of this case. They do not address the other factors supporting a preliminary injunction or deny that those factors weigh in favor of the Church Entities. As noted in the Church Entities' motion, "where irreparability exists and the balance of hardships tips in favor of a movant, the probability-of-success requirement may be relaxed: '(I)t will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.'" *Community Comm. Co., Inc. v. City of Boulder, Colo.*, 660 F.2d 1370, 1375-76 (10th Cir. 1981) (citations omitted). The Church Entities have satisfied that requirement and Defendants' failure to address the remaining factors tips the scale in favor of a preliminary injunction.

This case is not complex. The single issue is whether the Tribal Court may exercise subject matter jurisdiction over the Church Entities. To establish jurisdiction, Defendants must show, as a threshold matter, that the Church Entities engaged in tortious conduct on the reservation. They cannot. The conduct on which Defendants' claims are based indisputably occurred outside the reservation. As such, the Tribal Court lacks jurisdiction. And, because that result is so clear, exhaustion in Tribal Court is not required. Therefore, the Court should grant the Church Entities' Motion for Preliminary Injunction.

II. ARGUMENT

A. THE TRIBAL COURT LACKS JURISDICTION

1. The *Montana* Rule, Not its Exceptions, Controls.

Tribal court authority "centers on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 327 (2008). Consequently, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544 (1981). The *Montana* Rule is not without exception, but those exceptions only come into play when the actionable conduct occurs on tribal lands. *See id.* at 565 ("Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations*." (emphasis added).); *see also Plains Commerce Bank*, 554 U.S. at 332 ("*Montana* and its progeny permit tribal regulation of non-member *conduct* inside the reservation….") (emphasis in original); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998) ("[n]either *Montana* nor its progeny purport to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring outside their reservations"); *Philip Morris*

USA, Inc. v. King Mountain Tobacco Co, Inc., 569 F.3d 932, 938 (9th Cir. 2009) ("[T]ribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries." (citing *Atkinson Trading Co.*, 532 U.S. at 658 n. 12, 121 S. Ct. 1825)).

The conduct for which Defendants seek redress under their first five causes of action falls into three categories. [2] Defendants claim that: (1) the Church Entities are vicariously liable for the "sexual abuse" and "assault and battery" that allegedly occurred while they lived in the homes of ISPP host families outside the reservation, *see, e.g.*, LK Comp. at ¶¶ 19-31; (2) the Church Entities negligently placed them with unfit families (outside the reservation) and negligently failed to supervise those families, *see id.* at ¶¶ 32-42; and (3) the Church Entities negligently failed to report the alleged abuse. *See id.* None of the alleged tortious conduct occurred on the reservation.

First, no act of "sexual abuse" or "assault and battery" is alleged to have occurred on the reservation. Clearly, the Tribal Court would lack jurisdiction over the alleged abusers. By the same token, claimed vicarious liability for that alleged conduct cannot trigger tribal jurisdiction.

Second, Defendants were indisputably placed in homes outside the reservation. The act of placing Defendants in homes off the reservation is not conduct on the reservation. Similarly, an alleged failure to supervise host families living outside the reservation is not on-reservation conduct.[3]

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[2] Defendants' fifth cause of action alleging intentional infliction of emotional distress is derivative of the vicarious liability and negligence claims. It alleges no new conduct.

[3] Defendants attempt to shift the focus to where placement decisions were made. To begin with, Defendants are factually incorrect; decisions were made at LDS Social Services offices off the

Defendants argue that the "location" of the agreement to participate in the ISPP and their removal from the reservation support jurisdiction. But, there was nothing tortious about the agreement to participate in the ISPP or Defendants' transport to off-reservation locations. Non-tortious conduct, even if it took place, in part, on the reservation, cannot create tribal jurisdiction over claims for tortious conduct off the reservation. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001).

Finally, a purported failure to report is not *conduct* that could create tribal jurisdiction. Defendants claim the Church Entities failed to report the abuse after Defendant RJ allegedly disclosed it to an ISPP representative when he was visiting the reservation. Mot. to Dis. at 5-6 (emphasis added).[4] But, a failure to act is not *conduct* occurring on the reservation. Rather, it is non-conduct that Defendants claim should have occurred on the reservation, but did not. Claims of inaction cannot give rise to tribal jurisdiction. *See Plains Commerce Bank*, 554 U.S. at 332 ("*Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation…." (emphasis in original).)

(Cont.)
reservation. See Declaration of Roger Van Komen (Ex. D to Amended Motion for Preliminary Junction) at ¶4. But, more importantly, decisions are not torts. Tortious placement, not decisions about placement, is the basis for Defendants' claims.

[4] Defendants state that the other Defendants "have similar allegations" to those of RJ. Mot. to Dis. at 6. While alleged failures to report are not relevant to the jurisdictional question, to correct the record, the Church Entities note that no other Defendant alleges that he or she notified an agent of the Church Entities on the reservation.

In a final attempt to invoke jurisdiction, Defendants urge that the Church Entities have maintained a "significant presence" on the reservation for many years.[5] Mot. to Dis. at 5. But, again, they fail to identify any tortious conduct over which a court could exercise jurisdiction. For example, Defendants claim that "Plaintiffs' agents in the ISPP baptized Defendants in the Navajo Nation." Mot. to Dis. at 5. But, there is nothing tortious about Defendants being baptized. And because their baptism has nothing to do with the alleged vicarious or negligent conduct for which Defendants seek damages, it cannot create tribal jurisdiction. *See Atkinson*, 532 U.S. at 656 ("A nonmember's consensual relationship in one area … does not trigger tribal civil authority – it is not in for a penny, in for a pound.").

2. The *Montana* Exceptions

Pointing to their agreement to participate in the ISPP, Defendants claim that the exceptions to the *Montana* rule govern this case. But like the *Montana* rule itself, both exceptions require actionable conduct on tribal lands:

> 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 [and] may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands *within its 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 565-566 (emphasis added).

[5] Defendants' argument appears to confuse concepts of subject-matter jurisdiction with those of general personal jurisdiction. "Significant presence" does not confer subject-matter jurisdiction under *Montana* or its progeny.

a. The Consensual Relationship Exception

The geographic limitation inherent in Montana's consensual relationship exception is exemplified by *Dolgencorp, Inc. v. The Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), *aff'd by an equally divided Court* No. 13-1496, 2016 U.S. LEXIS 4056 (June 23, 2016). There, the court focused on the location of the conduct giving rise to the claim. Dolgencorp operated a Dollar Store on the reservation, and agreed to participate in a tribal program that placed tribal youth in unpaid positions with local businesses. 746 F.3d at 169. A thirteen-year-old tribal member was assigned to the Dollar Store where he was sexually assaulted by the manager. The court confirmed that not every consensual relationship between a non-member and the tribe or a tribal member will support jurisdiction. Rather, for jurisdiction to exist, the conduct giving rise to the cause of action had to occur on tribal lands:

> The conduct for which Doe seeks to hold Dolgencorp liable is its alleged placement, in its Dollar General Store *located on tribal lands*, of a manager who sexually assaulted Doe while he was working there. This conduct has an obvious nexus to Dolgencorp's participation in the YOP. In essence, a tribe that has agreed to place a minor tribe member as an unpaid intern in a business *located on tribal land on a reservation* is attempting to regulate the safety of the child's workplace. Simply put, the tribe is protecting its own children *on its own land*. It is surely within the tribe's regulatory authority to insist that a child working for a *local business* not be sexually assaulted by the employees of the business.

Id. at 173-174 (emphasis added); *accord John Doe BF v. Diocese of Gallup*, 2011 Navajo Sup. LEXIS 16 (Nav. Nat. Sup. Ct. 2011) ("the location of events giving rise to the action is also relevant to the Montana test, which not only asks where the event took place, but who controls and polices that location").

If the ISPP had engaged in placing youth with non-member families on the reservation, *Dolgencorp* might be argued as a basis for tribal jurisdiction. But, that is not the case, and *Montana's* first exception does not apply.[6]

b. The "Health and Welfare" Exception

The second *Montana* exception explicitly requires actionable conduct within the reservation. *See Montana*, 450 U.S. at 566 ("[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands *within its 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" (emphasis added)). Referencing their sixth, seventh, and eighth

[6]This is confirmed by the U.S. Supreme Court's list of cases that fall under *Montana's* first exception:

> *Montana's* list of cases fitting within the first exception indicates the types of activities the U.S. Supreme Court had in mind. *See Williams* v. *Lee*, 358 U.S. 217, 223 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on reservation sales transaction between nonmember plaintiff and member defendants); *Morris* v. *Hitchcock*, 194 U.S. 384 (1904) (upholding tribal permit tax on nonmember owned livestock within boundaries of the Chickasaw Nation); *Buster* v. *Wright*, 135 F. 947, 950 (CA8 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority . . . to prescribe the terms upon which noncitizens may transact business within its borders"); *Colville*, 447 U. S., at 152-154 (tribal authority to tax on reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status").

Strate v. A-1 Contractors, 520 U.S. 438, 456-57 (1997) (emphasis added). "Measured against these cases, the [allegation of off-reservation conduct] presents no 'consensual relationship' of the qualifying kind. *Id.* at 457.

causes of action, Defendants argue that this exception applies because LDS Church doctrine and policies harmed the health and welfare of the tribe. This argument must be rejected.

Defendants' sixth cause of action is actually just a prayer for injunctive relief. The requested relief includes requiring that every LDS Church leader be a mandatory reporter regardless of whether applicable state law so requires. Defendants also ask the Court to preclude the Church Entities from "challeng[ing] the constitutionality or legitimacy of any laws pertaining to the reporting of child abuse. In addition, Defendants seek an injunction requiring the Church Entities to write a letter of apology to the Navajo Nation for the ISPP and requiring them to establish and fund a "task force" to implement programs to enhance Navajo culture and restore harmony using "traditional Navajo healing methods." (*see, e.g.*, LK Comp. at ¶¶52(c),(f); 66(b)-(c)).[7]

Defendants' requested relief is unconstitutional on its face, treading on the Church Entities' First Amendment Rights to manage church internal affairs and freely speak. Plaintiffs ask the Tribal Court to compel speech, override state laws that protect the clergy-parishioner

[7] A prayer for injunctive relief is not a cause of action over which courts, tribal or otherwise, can exercise jurisdiction. *See, e.g.*, *Sang v. Hai*, 951 F. Supp. 2d 504, 531 n.11 (S.D.N.Y. 2013) ("A permanent injunction … is a remedy, not a claim."); *Sullivan v. JP Morgan Chase Bank, NA*, 725 F. Supp. 1087, 1099 (E.D. Cal. 2010) (dismissing "cause of action" for injunctive relief because "an injunction is a remedy, not a claim in and of itself"); *Mills v. Deutsche Bank Nat'l Trust Co.*, 2014 WL 130548, *5 (S.D. Ohio Jan. 12, 2014) ("The problem with Plaintiff's injunction 'claim' is that it is not a claim at all …."); *Johnson v. Henry Vogt Mach. Co.*, 544 F.Supp. 2d 1276, 1281 n.2 (D. Utah 2008) (stating that a remedy cannot be plead as an independent cause of action because remedies "must be requested in conjunction with a cognizable cause of action"); *accord Al-Fouzan v. Activecare, Inc.*, No. 2:15-CV-373-BCW, 2016 WL 1092495, at *6 (D. Utah Mar. 21, 2016) (dismissing a separate cause of action for attorneys' fees and interest because they should be plead as a prayer for relief and not as a separate count.)

privilege, impose nationwide mandatory reporting obligations on the Church that conflict with state law requirements, and impose Church personnel policies. *See* LK Comp. ¶¶ 56-64, 73. A "long line of Supreme Court cases [has] affirm[ed] the fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996) (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)). *See Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (prior restraint); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (political speech). The Church Entities should not be subjected to these constitutional instrusions. See *Nevada v. Hicks*, 533 U.S. 353, 384 (2001).

Defendants' seventh cause of action is for "common law nuisance." *See* LK Comp. at p. 13. Defendants' factual allegations show, however, that this is not a nuisance claim. [8] They do not claim that LDS Church polices on reporting abuse are unlawful or that those policies caused them to suffer harm different from society at large. Rather, they simply disagree with the LDS

[8] Defendants must allege the following elements to state a nuisance claim:

> (1) the alleged nuisance consisted of "*unlawfully* doing any act or omitting to perform any duty," (2) the "act or omission ... in any way render[ed] three or more persons insecure in life or the use of property," (3) Plaintiffs "suffered damages different from those of society at large," (4) Defendants caused or are responsible for the nuisance complained of; and (5) "[D]efendant[s'] conduct was unreasonable,".

Whaley v. Park City Mun. Corp., 2008 UT App 234, ¶ 13, 190 P.3d 1 (emphasis in original) (citations omitted).

Church's lawful policies. In other words, Defendants wish that state law required the implementation of different policies than it does. But that is not a basis to ask a court to label lawful policies as a "nuisance."

Similarly, Defendants' eighth cause of action under "Navajo Common Law" is not a cause of action over which a tribal court could exercise jurisdiction over a nonmember. That claim focuses on what Defendants characterize as the "curse doctrine" and, is supposedly "aimed at restoring the cultural harm brought to the tribe by the ISPP." Mot. to Dis. at 8-9. Defendants describe the so-called "curse doctrine" as stemming from the teachings of the Book of Mormon. LK Comp. at ¶ 9. According to Defendants, based on its religious doctrine, the LDS Church desired to convert Native Americans and "assimilate" them into Mormon culture. *Id.* There is no suggestion that this doctrine has anything to do with child abuse—it is the doctrine itself that Defendants' challenge. Defendants seek to put the entire ISPP and its alleged doctrinal underpinnings on trial on behalf of the Navajo Tribe. *See* LK Comp. at ¶ 65 ("While this [ISPP] may have been well-intentioned by Defendant because of their own religious and cultural reasons, the social and cultural harm to the Navajo Nation and its people must be addressed.").

Giving cognizance to this claim would violate the LDS Church's First Amendment rights. "Clearly, the application of tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power. When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred." *Paul v. Watchtower Bible & Tract Soc'y of New York, Inc.*, 819 F.2d 875, 880 (9th Cir. 1987). Civil courts cannot "engage in the forbidden process of interpreting and weighing church doctrine," such process "can play *no* role in any … judicial proceedings" because it

unconstitutionally "inject[s] the civil courts into substantive ecclesiastical matters." *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Prebyterian Church*, 393 U.S. 440, 450-52 (1969).

The First Amendment embodies "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. *See also Petrell v. Shaw*, 902 N.E.2d 401, 409-10 (Mass. 2009) (First Amendment "places beyond [the court's] jurisdiction disputes involving church doctrine, canon law, policy, discipline, and ministerial relationships"); *Bohrer v. DeHart*, 943 P.2d 1220, 1229 (Colo. App. 1996) (where "the alleged wrongdoing results from expectations created by the beliefs and doctrine of the religion" or "[r]esolution of the claim would require that the courts become embroiled in a religious dispute requiring the interpretation and weighing of that doctrine" then "[t]he First Amendment requires that we abstain from doing so ….").

Defendants cannot seek judicial relief simply because they disagree with their conception of LDS Church doctrine. But what matters here is that the LDS Church's doctrine and policies cannot create tribal jurisdiction. Doctrine and policies do not constitute conduct occurring on the reservation. The Court should decline Defendants' invitation to find that the LDS Church's free exercise of religion somehow gives rise to tribal jurisdiction.

Montana's "presumption against tribal-court civil jurisdiction squares with … an overriding concern that citizens who are not tribal members be 'protected … from [such] unwarranted intrusions on their personal liberty.'" *Nevada*, 533 U.S. at 384 (Souter, J., concurring) (quotation omitted). Asserting tribal jurisdiction in cases such as this "runs the risk

of subjecting nonmembers to tribal regulatory authority without commensurate consent." *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 337 (2008).

> Tribal sovereignty, it should be remembered, is a sovereignty outside the basic structure of the Constitution. The Bill of Rights does not apply to Indian tribes. Indian courts differ from traditional American courts in a number of significant respects. And nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. 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.

Id. (internal quotation marks and citations omitted).

The irreparable harm caused by the threatened loss of these First Amendment guarantees is the reason tribal courts are not allowed to exercise jurisdiction over non-members except in the limited circumstance where on-reservation conduct gives rise to a claim, and only then when that conduct undermines tribal sovereignty or when jurisdiction is consensual. Because the alleged wrongful conduct claimed by Defendants did not occur on the Navajo reservation, the Court should reject Defendants' attempt to strip away the Church Entities' constitutional rights and enjoin Defendants from proceeding in Tribal Court.

B. EXHAUSTION IS NOT REQUIRED

"When a dispute involves non-Indian activity occurring outside the reservation, [] the policies behind the tribal exhaustion rule are not so obviously served." *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1377 (10th Cir. 1993). For this reason, federal courts recognize exceptions to the exhaustion requirement, including "where it is clear that the tribal court lacks jurisdiction and that judicial proceedings would serve no purpose other than delay." *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1238 (10th Cir. 2014) (citations omitted).

Here, where the jurisdictional question is not a close call, exhaustion is not required. *See, e.g., Crowe & Dunlevy*¸ 640 F.3d at 1149; *see also Strate*, 520 U.S. at 459; *Hornell Brewing Co.*, 133 F.3d at 1093 (seeing "no need for further exhaustion" because it was "plain that the Breweries' conduct outside the Rosebud Sioux Reservation does not fall with the Tribe's inherent sovereign authority.")

While Defendants acknowledge that there are exceptions to the exhaustion rule, they ignore the primary exception the Church Entities rely on—undue delay. The Church Entities contend that tribal jurisdiction is so clearly lacking that exhaustion is unnecessary and would only serve to delay the proceeding. Defendants superficially address this argument, stating that delay "is the last thing on their minds." Motion to Dismiss at 5. But Defendants' motives are not the issue.

Rather, consistent with numerous cases discussing the delay exception, the Church Entities assert it would be a waste of time and resources to require exhaustion in this case.[9] This is particularly true because the Tribal Court has no applicable mechanism for interlocutory appeal. *See* Nav. Nat. R. Civ. P. 54(b) (stating that a court may enter judgments that dispose of fewer than all of the parties but, "unless specifically excepted by other rules or by case law these are not final judgments from which an appeal lies"). In other words, if exhaustion were required

[9] The delay exception is distinct from the futility exception, focusing on the delay caused by requiring a litigant to make the jurisdictional argument in tribal court when it is clear the tribal court lacks jurisdiction. Contrary to Defendants' briefing, the futility exception "applies where the federal court plaintiff will not have an adequate opportunity to challenge the tribal court's jurisdiction" because, for example, the tribe's constitution does not create a judiciary. *Thlopthlocco* 762 F.3d at 1239. The futility exception is not applicable here, and the Church Entities have not argued that it is.

and the Tribal Court denied a motion to dismiss for lack of jurisdiction, the Church Entities would have to litigate the entire case on the merits. They would then be required to appeal the jurisdictional decision to the Navajo Supreme Court. Only after that could the Church Entities finally make their way back to this Court for its decision on the jurisdictional question. That prolonged process makes no sense here where tribal jurisdiction is obviously lacking.

C. THE TRIBAL COURT AND JUDGE ARE NOT NECESSARY PARTIES

Defendants argue that this case should be dismissed because the Church Entities have not joined the Tribal Court and tribal judge. While Defendants correctly reference the general rule regarding joinder of parties, they fail to cite any case holding that a tribal court or tribal judge are necessary parties in a federal case challenging tribal jurisdiction.

The Church Entities acknowledge that it would be permissible to name the Tribal Court or the tribal judge. But joinder is not required where the Church Entities only seek to enjoin Defendants. This is consistent with case law directly on point holding that the tribal court and judge are not necessary parties. *See Yellowstone Cnty. v. Pease,* 96 F.3d 1169, 1172-73 (9th Cir. 1969) ("[I]t is not necessary to join the tribal court as a party to Pease's suit for the simple reason that tribal judges, like state judges, are expected to comply with binding pronouncements of the federal courts"); accord *John Doe BF v. Diocese of Gallup*, 2011 Navajo Sup. LEXIS 16 n. 1 (stating that while there is no statutory mandate "to apply the decisions of federal courts…[the Navajo courts] do so in the area of our civil jurisdiction over nonmembers out of the need to participate in, essentially, a political relationship"). *See also Amerind Risk Mgt. Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011) (challenge to tribal jurisdiction and request for injunction litigated and appealed despite absence of tribal court and judge as parties.)

Because the tribal court can be expected to apply the decisions of this Court with regard to jurisdiction, it does not have an interest that would be impaired by its absence. *See* Fed. R. Civ. P. 19. And, because the Church Entities are not asking the Court to enjoin the Tribal Court or tribal judge (as Defendants wrongly suggest), complete relief can be afforded without their joinder. Therefore, the Tribal Court and tribal judge are not necessary parties.

D. THE *BRILLHART* RULE DOES NOT APPLY

Finally, Defendants argue that, pursuant to what is known as the *Brillhart* Rule, this Court should decline to exercise jurisdiction. Defendants' reliance on *Brillhart* is misplaced.

In *Brillhart v. Excess Ins. Co. of Amer.*, 316 U.S. 491, 62 S.Ct. 1173 (1942), an insurer commenced a federal diversity case seeking a declaration that it was not liable under an insurance policy. The district court dismissed the action in light of the pendency of a state case to which the insurer had been named as a defendant. After the 10th Circuit reversed the district court, the U.S. Supreme Court analyzed the issue and held that, "[o]rdinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties." *Id.* at 495. More recently, in *Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S. Ct. 2137 (1995), the U.S. Supreme Court re-examined *Brillhart* and clarified that "at least where another suit involving the same parties and presenting opportunity for ventilation of the *same state law issues is pending in state court*, a district court might be indulging in '[g]ratuitous interference,' if it permitted the federal declaratory action to proceed." *Wilton*, 515 U.S. at 283 (emphasis added).

Since the *Brillhart* decision in 1942, numerous federal cases have been filed seeking a declaration regarding tribal jurisdiction. No court has applied *Brillhart*, and the reasons are clear. In a tribal jurisdiction case, there is no parallel state court case, and federal law, not state law, governs. As such, there is no "opportunity for ventilation of the same *state law issues*." *Wilton*, 515 U.S. at 283 (emphasis added). *See John Doe BF v. Diocese of Gallup*, 2011 Navajo Sup. LEXIS 16 (resolving the jurisdictional question by looking to *Montana* and its progeny).[10] Simply put, Defendants' novel argument must be rejected.

III. CONCLUSION

The Church Entities have satisfied the four elements required for a preliminary injunction. They will likely prevail on the merits because tribal jurisdiction is unquestionably lacking. They face irreparable harm if forced to proceed in a forum with no jurisdiction and there is no unfair prejudice to Defendants, who may pursue their claims in state court. Finally, the public interest would be served by appropriately limiting the jurisdiction of the Tribal Court.

The Court should deny Defendants' Motion to Dismiss and grant the Church Entities' Motion for Preliminary Injunction.

[10] Additionally, because the Church Entities seek coercive relief in the form of an injunction, *Brillhart* does not apply. *See U.S. v. City of Las Cruces*, 289 F.3d 1170, 1181-82 (10th Cir. 2002) (citing *Safety Nat'l Cas. Corp. v. Bristol-Myers Squibb Co.*, 214 F.3d 562, 564 (5th Cir. 2000) (holding that in a suit seeking coercive relief as well as a declaratory judgment, *Brillhart* Rule not applicable).)

DATED: July 28, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that that on the 28th day of July 2016, I caused a true and correct copy of the foregoing **COMBINED MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR PRELIMINARY INJUNCTION, and IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT FOR DECLARATORY JUDGMENT** to be served electronically on the following:

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