Case No. _____

Appellate Court of the Red Cliff Band of Lake Superior Chippewa

In re CENTURYTEL OF THE MIDWEST-KENDALL, LLC,

Petitioner.

On Petition for Writ of Mandamus or Alternatively Writ of Prohibition to the Tribal Court of the Red Cliff Band of Lake Superior Chippewa, Case No. 2019-CV-09, Honorable Steven E. Boulley

PETITION FOR WRIT OF MANDAMUS OR ALTERNATIVELY WRIT OF PROHIBITION

August 2, 2019

DORSEY & WHITNEY LLP
Skip Durocher
Forrest Tahdooahnippah
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402
(612) 340-2600

Counsel for Petitioner

INTRODUCTION

CenturyTel[1] petitions this Court for a writ of mandamus directing that the Tribal Court, before proceeding to trial, rule upon the jurisdictional challenges CenturyTel squarely presented in its motion to dismiss. It is well-established that "tribes do not, as a general matter, possess authority over non-Indians who come within their borders," and that "[t]he burden rests on the tribe" to establish an applicable exception conferring jurisdiction. *Plains Commerce Bank v. Long Family Land & Cattle Co*, 554 U.S. 316, 328, 330 (2008). Here, the Tribe brought a trespass claim under tribal law against CenturyTel—a nonmember—for its telecommunications facilities within the Reservation, and sought the astronomical sum of more than $100 million as a statutory penalty, and property tax penalties of nearly $600,000. CenturyTel promptly moved to dismiss the complaint, alleging that the Tribe had failed to plead a violation of the trespass ordinance because there was no allegation that the Tribe itself had a legal interest in the purportedly trespassed land. CenturyTel also brought a number of jurisdictional challenges: 1) that the Tribe lacked standing to sue on the same ground; 2) that the Tribe lacked any inherent sovereign authority, and that the limited grounds for jurisdiction under *Montana v. United States*, 450 U.S. 544 (1981) or under any inherent power to exclude were inapplicable; and 3) that adjudicating the claim for the exorbitant penalties pursued here exceeded the Tribal Court's jurisdiction under the explicit limits imposed by the Indian Civil Rights Act.

---

[1] CenturyTel is identified in the case caption as CenturyTel of the Midwest-Kendall, LLC.

The Tribal Court entirely abdicated its threshold obligation to determine its jurisdiction over this suit. It is axiomatic that "no case can properly go to trial if the court is not satisfied that it has jurisdiction." *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986). Yet that is precisely what the Tribal Court did here, finding only "that the Red Cliff Tribe has a trespass ordinance and that CenturyTel has physical facilities located within the boundaries of the Red Cliff Reservation." *Red Cliff Band of Lake Superior Chippewa v. Century Link of the Midwest-Kendall, LLC*, No. 2019-cv-09, Order (July 19, 2019) (hereinafter "Order"). The Tribal Court "den[ied] the motion to dismiss" on that basis and completely ignored CenturyTel's jurisdictional arguments, instead concluding that "[t]he issues raised within the [motion to dismiss] documents can be raised at the trial phase." *Id.*

This compels a writ of mandamus directing the Tribal Court to assess its jurisdiction—or a writ of prohibition ordering the case be dismissed—as other courts have done where "the district court grievously delayed in carrying out its duty to timely consider jurisdiction." *N. Edge Casino v. Window Rock Dist. Court*, 2017 Navajo Sup. LEXIS 2 (Navajo 2017) (issuing writ on this basis). After all, "[c]onfining courts to the lawful exercise of their jurisdiction is the traditional use of the writ," *Bailey v. Sharp*, 782 F.2d 1366, 1369 (7th Cir. 1986), and "a petition for mandamus is a proper vehicle by which to require a district court that has refused to consider the merits of an issue to do so," *In re Sch. Asbestos Litig.*, 977 F.2d 764, 798 (3d Cir. 1992).

RELIEF SOUGHT

CenturyTel respectfully petitions for a writ of mandamus directing the Tribal Court to rule upon the jurisdictional arguments raised in CenturyTel's motion to dismiss before proceeding to the trial phase of the case. Alternatively, CenturyTel petitions for a writ of mandamus or writ of prohibition directing the Tribal Court to dismiss the case for lack of jurisdiction.

ISSUES PRESENTED

1. Whether the Tribal Court's failure to consider CenturyTel's arguments to dismiss for lack of jurisdiction—instead ruling that the issues "can be raised at the trial phase"—is a "grievous[] delay[] in carrying out its duty to timely consider jurisdiction"[2] that compels the issuance of a writ of mandamus.

2. Whether a writ of mandamus or writ of prohibition should issue ordering that the case be dismissed on one (or more) of the following grounds raised in CenturyTel's motion to dismiss:

   a. The Tribe lacks standing to sue for claims of trespass for lands that it has not pleaded it has a legal interest;

   b. There is no jurisdiction to enforce tribal law against the nonmember CenturyTel under the Tribe's inherent sovereign authority; *Montana v. United States*, 450 U.S. 544 (1981) and its progeny; or any inherent power to exclude;

   c. The Tribal Court lacks jurisdiction and authority to adjudicate this claim because doing so would violate the Indian Civil Rights Act of 1968, 25 U.S.C. §§1301-1303.

---

[2] Quoting *N. Edge Casino*, 2017 Navajo Sup. LEXIS 2.

FACTUAL BACKGROUND

I. CenturyTel's Telecommunications Services

CenturyTel is a telecommunications service provider that provides services such as internet and telephone to the public through a network of facilities such as buried fiber optic cables, buried copper cables, aerial fiber cables, pedestals, poles and wires. *See* First Amended Complaint ("FAC") ¶¶5, 12. This includes providing services and operating and maintaining facilities within the Reservation of the Red Cliff Band of Lake Superior Chippewa Indians ("Tribe"). *See* FAC ¶¶8, 12, 19.

II. The Tribe Enacts a Trespass Law Purporting to Govern Telecommunications Facilities CenturyTel had Already Installed

On December 19, 2017—after CenturyTel had already installed facilities within the Reservation[3]—the Tribe enacted Chapter 25 of its Code, governing Rights of Way, Service Lines and Trespass. *See* FAC ¶11; RCCL, Chapter 25. Two days later, the Tribe sent CenturyTel a letter demanding that it provide the Tribe with copies of Rights-of-Ways ("ROW"); requiring compliance with the newly enacted Chapter in order to maintain its facilities on Tribal lands; and directing CenturyTel to apply for a ROW under the new Chapter and federal law's corresponding regulations. FAC ¶15.

---

[3] The Tribe seeks relief for a period of 1095 days (three years), which dates back to April 2016 based on the filing of the original complaint. *See* FAC Request for Relief.

III. The Tribe Brings a Trespass Suit Seeking More Than $100 Million in Penalties

Notwithstanding that CenturyTel has now filed an initial ROW application with the Tribe, on April 30, 2019, the Tribe filed the Complaint in this matter,[4] alleging that CenturyTel had not produced other sufficient documentation, and claiming that "CenturyTel's continued maintenance and operation of the CenturyTel Facilities constitutes an intentional and deliberate trespass under tribal and federal law." FAC ¶¶17-18.

The Tribe's newly-enacted trespass ordinance, that the Complaint accuses CenturyTel of violating, applies to any "person" "who intentionally and without the Tribe's consent" entered, remained, or failed to remove an object from "Tribal Land." RCCL §25.18. "Tribal Land" is in turn specifically defined as "land in which the Tribe has a legal interest," which includes "land held in trust by the United States for the benefit of the Tribe . . . and fee simple land owned, wholly or in in part, by the Tribe." RCCL §25.17.9. In addition to the remedies of "Ejectment," an "Accounting," and "Damages," the trespass section also specifically provides for "Penalties" to be determined by the Tribal Court for "not less than $100 and no more than $5,000 for each day that a trespass occurs or occurred" as well as "[t]hree times the property taxes due for the entire period of the trespass . . . ." RCCL §25.18.5. Here, the Tribe seeks damages and penalties[5]

---

[4] The operative First Amended Complaint that is at issue here was filed on July 10, 2019.

[5] While the First Amended Complaint references the "inherent power to exclude," the Tribe's Request for Relief does not seek an order requiring CenturyTel to

for each parcel for a period of 1095 days—preceding even the enactment of the trespass law by more than a year and a half—in an amount that could equal over $100 million in penalties and nearly $600,000 for the property tax penalty.[6]

IV. CenturyTel Moves to Dismiss for Failure to State a Claim and Lack of Jurisdiction

CenturyTel timely moved to dismiss. It argued that the Tribe's complaint failed to state a claim for the same reason the Tribe also failed to plead it had standing to sue—the Tribe had not alleged that it had any legal interest in the lands at issue. *See* Mtn. to Dismiss 5-7; Reply 3-8. Unlike the definition of "Tribal Land" in the Code, the complaint—though using the same term—alleged only that the parcels at issue in which CenturyTel maintained facilities were on the Reservation, which could include lands owned by tribal members or nonmembers in which the Tribe has no legal interest. *See id.*

CenturyTel also challenged the Tribe's assertion of Tribal Court jurisdiction as alleged in FAC ¶2.

First, CenturyTel argued that the "extensive and comprehensive scheme" promulgated by the federal government over utility right-of ways means that the

---

remove any facilities

[6] Given that the Tribe's complaint alleges that 20 parcels were trespassed, this amounts to damages of not more than $109,500,000.00 for 1095 days at $5,000 for each parcel. As for the property tax, RCCL §16.10.8 provides a $0.50 tax for each foot of utility line per year. At the 25 miles alleged in the complaint, this amounts to $66,000 per year. Three times this amount for three years results in a punitive tax claim of roughly $594,000. *See* Mot. to Dismiss 4; FAC Request for Relief; FAC ¶19.

Tribe has no sovereign authority to invoke jurisdiction to impose tribal damages and penalties upon nonmembers for any purported utility right-of-way-related trespass violations. *See* Mot. to Dismiss 8 (quoting *Kodiak Oil & Gas (USA) Inc. v. Burr*, 303 F. Supp. 3d 964, 978-81 (D. N.D. 2018); *see id.* at 8-10; Reply 13-15.

CenturyTel also argued jurisdiction could not rest on either of the two limited exceptions under *Montana* through which a tribe can exercise jurisdiction over nonmembers. Under the first exception, while the "Tribe 'may regulate, through taxation licensing, or other means, the activities of nonmembers who enter consensual relationship with the tribe or its members,'" this "requires a *nexus* between the 'consensual relationship' and the regulation sought to be imposed on the nonmember." Reply 9. But any such nexus would require a "'consensual relationship' regarding the placement of CenturyTel's facilities," which in turn would amount to "[t]he Tribe's consent to facilities," and "a complete defense to trespass under tribal law." *Id.* As for the second exception, there was no way in which the presence of facilities providing telecommunications could rise to the level of what courts have deemed conduct that "threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe" sufficient to confer jurisdiction over a nonmember's conduct. Reply 9-10.

CenturyTel further argued that the Tribe could not rest jurisdiction on its claimed inherent power to exclude, particularly where any such authority cannot be applied retroactively as the Tribe had done here. Reply 11-12.

Finally, CenturyTel argued that the Tribal Court was without jurisdiction to issue the relief sought by the Tribe under the Indian Civil Rights Act ("ICRA").

The Tribe's claimed entitlement to penalties that could amount to more than $100 million and nearly $600,000 in "tax" penalties, clearly violated the ICRA's penalty cap of not more than $5,000 for any one offense, as well as the Act's protection of litigants' due process rights. Mot. to Dismiss 10 (citing 25 U.S.C. §§1302(a)(7), 1302(a)(8)); Reply 18-20.

V. The Tribal Court Summarily Denies the Motion to Dismiss, Ignores the Jurisdictional Arguments, and Rules All Issues can be Raised at Trial

The Tribal Court ignored CenturyTel's request for oral argument, *see* Reply 20, and instead issued a one-page order. The order entirely ignored CenturyTel's jurisdictional arguments, found only that the Tribe has a trespass ordinance and that CenturyTel has facilities within the Reservation's boundaries, and said everything else can be raised at trial. The full text of the Court's reasoning is as follows:

> In consideration to [sic] these documents [the briefs filed by the parties] I am finding that the Red Cliff Tribe has a trespass ordinance and that CenturyTel has physical facilities located within the boundaries of the Red Cliff Reservation. In that light I am denying the motion to dismiss. The issues raised within the documents filed can be raised at the trial phase.

Order.

CenturyTel promptly moved for this Court's review, concurrently filing a notice of appeal as well as this petition for a writ of mandamus or alternatively a writ of prohibition.

ARGUMENT WHY THE WRIT SHOULD ISSUE

I. Mandamus is the Recognized Vehicle to Compel Lower Courts to Address Issues Left Undetermined and Obtain Immediate Appellate Review of Jurisdictional Orders

Unless this Court exercises appellate jurisdiction over CenturyTel's concurrently-filed notice of appeal, a writ of mandamus is CenturyTel's only remaining means of obtaining meaningful appellate review of the Tribal Court's exercise of jurisdiction in this case. These are the precise circumstances for which the writ was intended; "[c]onfining courts to the lawful exercise of their jurisdiction is the traditional use of the writ." *Bailey*, 782 F.2d at1369; *see Schlagenhauf v. Holder*, 379 U.S. 107, 109-10 (1964).

Tribal and federal appellate courts alike have thus recognized that a writ of mandamus (or prohibition) should issue where the trial court exceeded its jurisdiction. *See N. Edge Casino*, 2017 Navajo Sup. LEXIS 2 (issuing a writ of prohibition dismissing the suit against the Navajo Nation because of lack of jurisdiction); *Kang v. Chinle Family Court*, 2018 Navajo Sup. LEXIS 2 (Navajo 2018) (issuing writ of prohibition against the Chinle Family Court because it was "proceeding without jurisdiction and Petition[er] has no plain, speedy, and adequate remedy at law"); *Erno Kalman Abelesz v. OTP Bank*, 692 F.3d 638 (7th Cir. 2012) (issuing "a writ of mandamus to confine the district court to the exercise of its lawful jurisdiction" and ordering claims dismissed); *Bailey*, 782 F.2d at 1369 (issuing a writ of mandamus to vacate a trial court's decision to grant a new trial because the trial court was without jurisdiction to make that decision); *In re Kaiser Steel Corp.*, 911 F.2d 380, 392 (10th Cir. 1990) (issuing a writ of mandamus to

vacate the lower court's decision to hold a jury trial where the bankruptcy court lacked jurisdiction to hold a jury trial) (superseded by statute on other grounds); *In re Hot-Hed*, 477 F.3d 320 (5th Cir. 2007) (writ of mandamus issued vacating finding of federal question jurisdiction and remanding for determination of diversity jurisdiction); *In re Ford Motor Co.*, 591 F.3d 406, 417 (5th Cir. 2009 (issuing writ of mandamus ordering dismissal on forum non conveniens grounds).

Likewise, both tribal and federal courts have also recognized that "a petition for mandamus is a proper vehicle by which to require a district court that has refused to consider the merits of an issue to do so." *In re Sch. Asbestos Litig.*, 977 F.2d at 798; *Duncan v. Shiprock Dist. Court*, 2004 Navajo Sup. LEXIS 17, *3 (Navajo 2004) (issuing writ of mandamus ordering the district court to hold a jury trial on counterclaims, after district court denied first motion and "did not rule" on the second made after the pleadings were amended); *N. Edge Casino*, 2017 Navajo Sup. LEXIS 2 (issuing writ after noting that "the district court grievously delayed in carrying out its duty to timely consider jurisdiction"); *In re Hijazi*, 589 F.3d 401, 403, 414 (7th Cir. 2009) (issuing writ of mandamus "order[ing] the district court to promptly rule on [the petitioner's] motions to dismiss" which "[t]he district court refuses to rule on").

Under these principles and precedents from other courts, a writ of mandamus is the clear vehicle for this Court's review of the Tribal Court's abdication of its duty to consider the arguments squarely placed before it contesting the court's jurisdiction.

II. This Court Has Authority to Issue the Writ of Mandamus

Not only is the issuance of a writ of mandamus the *generally*-recognized procedure for confining a trial court to its lawful jurisdiction, it is also the proper procedure for *this Court*, which has the inherent authority to issue the writ. Tribal appellate courts have repeatedly recognized their inherent authority to issue writs of mandamus.[7] *See e.g.*, *In re Gabriel s. Galanda*, No. 2016-CI-CL-002, Order (Nooksack Ct. App. 2016) (issuing a writ to require the tribal court to accept and file complaints from the petitioner); *Ellis v. Muscogee Creek Nation Nat'l Council*, 2012 Muscogee Creek Nation Supreme LEXIS 7, *1 (Muscogee Sup. Ct. Jan. 19, 2012) (finalizing a preliminary order that issued a writ of mandamus requiring funding for proposals at a constitutional convention); *In re Petitioner Seeking Writ of Mandamus on Judges May & Marcellais*, 2004 Turtle Mt. App. LEXIS 3, *4 (Turtle Mt. Ct. App. Oct. 14, 2004) (recognizing the court's authority to issue a writ of mandamus, but declining to do so "because no justiciable controversy currently exists").

The recent explanation of the Nooksack Tribal Court of Appeals in issuing a writ of mandamus in *In re Gabriel s. Galanda*, is particularly instructive. No. 2016-CI-CL-002, Order (Nooksack Ct. App. 2016). There, the appellate rules in the Nooksack Tribal Code—like the rules in Chapter 31 of the Red Cliff Tribal Code of Laws—do not govern writs of mandamus. *See Gabriel*, Order at 2. But

---

[7] The Navajo Nation Supreme Court has recognized that its "power to issue writs . . . against a lower court is based upon its supervisory authority over inferior courts," which is also codified in 7 N.N.C. §303. *See Kang*, 2018 Navajo Sup. LEXIS 2.

this Court's power to issue a writ of mandamus—like that of the Nooksack appellate court—lies instead in its injunctive authority. *See id.* at 2-4. Both tribal courts have the codified authority to issue injunctions. *Compare id.* at 3, *with* RCCL ¶4.25. And this authority likewise extends to the appellate court, which here has administrative overlap with the Tribal Court;[8] has authority to review the Tribal Court's orders, judgments, and decrees; and can "stay or modify injunctive orders" pending appeal. RCCL §§31.3.1, 31.9.1; *see Gabriel*, Order at 3-4. This provides this Court with the power to issue the writ of mandamus. *See Gabriel*, Order at 5. Moreover, as the Nooksack Tribal Court of Appeals held, the governing procedure for petitioning for such a writ—in light of the absence of any specific rule in the Red Cliff Code of Laws—is that writs directed at the conduct of the Tribal Court may first be filed in the Appellate Court, and are guided by the requirements for doing so under Federal Rule of Appellate Procedure 21. *See Gabriel*, Order at 5-6; *see also* RCCL §4.1.4 (permitting the adoption of any federal rules of procedure if the Red Cliff Code of Laws is otherwise silent as to the governing procedure). Those are the requirements CenturyTel has adhered to in this Petition.[9]

---

[8] For example, the Clerk for the Appellate Court is the Clerk of the Red Cliff Tribal Court, and the Chief Judge of the Appellate Panel is appointed by the Chief Judge of the Tribal Court. *See* RCCL §§31.1.7, 31.2.3.

[9] This includes conformity to the required sections of the petition, the inclusion of the order and relevant parts of the record below, and the word limit, all as prescribed under Federal Rule of Appellate Procedure 21.

III. A Writ of Mandamus Ordering the District Court to Assess Jurisdiction Must Issue Here

Having established that the issuance of a writ of mandamus is within this Court's power, and that such a writ is the proper means for challenging a trial court's assertion of jurisdiction, or its failure to rule on the issue, the remaining question is the scope of the writ here. As explained below, whether applying the standards used by tribal, federal, or the Wisconsin courts, a writ ordering the Tribal Court to rule upon the jurisdictional arguments raised in the motion to dismiss is required. Alternatively, however, as discussed in the final section, this Court may issue a writ of mandamus or writ of prohibition ordering that the case be dismissed for lack of jurisdiction.

A. The Governing Standards for Mandamus

"When the writ of mandamus is sought from an appellate court to confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ almost as a matter of course." *In re Hot-Hed*, 477 F.3d at 322-23. While the specific factors considered by tribal, federal, and Wisconsin courts in issuing writs of mandamus are framed slightly differently, the overarching considerations are largely the same. The U.S. Supreme Court has established the following test: "First, the party seeking the writ must demonstrate that the challenged order is not effectively reviewable at the end of the case, that is, without the writ the party will suffer irreparable harm. Second, the party seeking the writ must demonstrate a clear right to the writ. Last, the issuing court must be satisfied that issuing the writ is otherwise appropriate." *Erno Kalman Abelesz*, 692 F.3d at 652 (citing *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 380-81 (2004)). The Navajo

Nation Supreme Court, for its part, "will issue a writ of mandamus against a court to compel a judge to perform a duty required by law if there is no plain, speedy and adequate remedy at law." *Duncan*, 2004 Navajo Sup. LEXIS 17, at *3 (citing *Yellowhorse, Inc. v. Window Rock Dist. Ct.*, 5 Nav. R. 85, 87, 1986 Navajo Sup. LEXIS 5 (Navajo 1986)). This requires that the petitioner show "(1) he or she has a legal right to have the particular act performed; (2) the judge has a legal duty to perform that act; and (3) the judge failed or neglected to perform the act." *Id.* (citing *Yellowhorse*, 5 Nav. R. at 87). The Wisconsin Supreme Court has framed its standard for issuing a writ of mandamus as requiring "1) a clear legal right to relief; 2) a positive and plain legal duty on the part of the official or body to whom the writ is directed; 3) substantial damage due to the nonperformance of the duty; and 4) no adequate remedy at law." *Mount Horeb Cmty. Alert v. Vill. Bd. of Mount Horeb*, 665 N.W.2d 229, 233 (Wis. 2003).

Synthesized together, the issuance of a writ of mandamus requires (1) a clear legal duty on the court, and clear legal right on the part of the petitioner; (2) no other adequate remedy at law; and (3) issuance of the writ being otherwise appropriate in this case. Under these factors, the writ must issue here.

B. The Tribal Court had a Clear Legal Duty to Assess Its Jurisdiction, and CenturyTel a Clear Legal Right to that Determination

CenturyTel, as a nonmember of the Tribe, had a clear legal right to a determination by the Tribal Court as to its jurisdiction, given the Supreme Court's repeated emphasis that the "'general proposition [is] that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the

tribe.'" *Nevada v. Hicks*, 533 U.S. 353, 358-59 (2001) (quoting *Montana*, 450 U.S. at 565). This was something the Tribe was required to prove, since the Supreme Court has made clear that "[t]he burden rests on the tribe to establish one of the exceptions" that would confer jurisdiction. *Plains Commerce Bank*, 554 U.S. at 330 (quoting and citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651 (2001)). Nor was jurisdiction something the Tribal Court could simply assume or wait until trial to consider, when "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" *Id.* at 330 (quoting and citing *Atkinson*, 532 U.S. at 651, 654, 659). CenturyTel thus had a clear legal right to not be subjected to Tribal Court jurisdiction unless the Tribe had established that such jurisdiction exists. And the Tribal Court in turn had a duty to assess its jurisdiction, particularly given that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *See id.* (quoting *Strate v. A-1 Constrs.*, 520 U.S. 438, 453 (1997)). The Supreme Court's "belie[f] that examination of [tribal court jurisdiction] should be conducted in the first instance in the Tribal Court itself," *see Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985), necessarily dictates that the Tribal Court has a clear legal duty to actually assess its jurisdiction. The Tribal Court's failure to do so here, instead simply stating that "[t]he issues . . . can be raised at the trial phase," was a clear abdication of its obligation to assess its jurisdiction, particularly given that those jurisdictional challenges were squarely argued to the court in a motion to dismiss. This compels issuance of the writ.

C. Mandamus Must Issue Because No Other Adequate Remedy at Law Exists

Issuance of a writ of mandamus is required, because no other adequate remedy exists for review of these jurisdictional issues. "The requirement that jurisdiction be established as a threshold matter" is well-established, "'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). Unless, however, this Court deems the motion to dismiss order to be a final appealable order under the collateral order doctrine or some other basis and thus exercises appellate jurisdiction over CenturyTel's concurrently-filed notice of appeal, CenturyTel is left with no adequate remedy for the lower court's failure to assess its jurisdiction on the motion to dismiss. *See Abelesz*, 692 F.3d at 650-61 (issuing writ of mandamus where otherwise no immediate right to appeal from jurisdictional order).

"[N]o case can properly go to trial if the court is not satisfied that it has jurisdiction," and "decisions that fail to remark [on] a jurisdiction issue are not assumed to have resolved it by their silence." *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986) (internal citations omitted). Yet that is precisely what will happen here if the writ does not issue. Moreover, this is not an issue that can be rectified following trial on an appeal from the final judgment in this case. Tribal courts have repeatedly affirmed that issuance of a writ is appropriate when "the district court grievously delayed in carrying out its duty to timely consider jurisdiction," *N. Edge Casino*, 2017 Navajo Sup. LEXIS 2, or exercised jurisdiction when it was lacking. *Kang*, 2018 Navajo Sup. LEXIS 2. Moreover,

the Seventh Circuit has recognized that "the prospect of protracted litigation" in a case where exorbitant damages are claimed, "may place intense pressure on the defendants to settle," thus making the question of jurisdiction effectively unreviewable in the absence of a writ of mandamus.[10] *Abelesz*, 692 F.3d at 652-53. It is well-established that the writ should issue for threshold jurisdictional issues of this nature.

D. Issuance of the Writ to Compel the Tribal Court to Assess its Jurisdiction Is Otherwise Appropriate in This Case

The issuance of the writ to compel the Tribal Court to assess the jurisdictional arguments raised in the motion to dismiss is otherwise appropriate and compelled in this case. As the Seventh Circuit explained regarding this factor in issuing a writ of mandamus on a question of the district court's jurisdiction, "[i]ssuance of a writ in this case does what the writ was intended to do—confine the district court to a lawful exercise of its prescribed jurisdiction." *Abelesz*, 692 F.3d at 653. And as already explained, tribal and federal courts alike have held that a writ of mandamus appropriately issues not only when a trial court has exceeded its jurisdiction, but also where it has refused to consider the merits of an

---

[10] As was pointed out to the Tribal Court, a federal court approved a settlement involving an affiliated company of CenturyTel concerning rights-of-way in New Mexico, which granted 631 miles of permanent of rights-of-way for approximately $2.5 million. Reply 14 (citing *Fager v. CenturyLink Communs., LLC*, No. 14-cv-00870 JCH/KK, 2015 U.S. Dist. LEXIS 190790, at *85 (D. N.M. June 25, 2015); *Fager v. CenturyLink Communs., LLC*, No. 14-cv-00870 JCH/KK, 2015 U.S. Dist. LEXIS 190795, at *4 (D. N.M. June 25, 2015)). Here, the Tribe's allegations concern only 4% of the land, yet 43 times the amount of damages.

issue it was obligated to address. *See supra* Part I. Thus, a writ of mandamus should issue directing the district court to address the jurisdictional issues raised in CenturyTel's motion to dismiss but that the Tribal Court failed to address, before the case may be permitted to proceed to the trial phase.

IV. Alternatively, the Court Should Issue a Writ of Mandamus or Writ of Prohibition Ordering the Case Dismissed for Lack of Jurisdiction

While at a minimum, the Tribal Court must be ordered to decide the jurisdictional issues raised but unaddressed in its order, this Court is also fully empowered to decide the issue itself and issue a writ of mandamus or writ of prohibition ordering that the case be dismissed for lack of jurisdiction. *See N. Edge Casino*, 2017 Navajo Sup. LEXIS 2 (in a challenge to the tribal court's jurisdiction, "[r]ather than issue a writ of mandamus providing guidance, we hereby issue a writ of prohibition dismissing the suit . . . ."); *Kang*, 2018 Navajo Sup. LEXIS 2 ("Rather than issue a permanent writ of mandamus . . . as though the Chinle Family Court has jurisdiction, pursuant to this Court's discretionary authority, we hereby issue a Writ of Prohibition against the Chinle Family Court," and "[t]he Chinle Family Court is ORDERED to dismiss [the case] for lack of jurisdiction."). A dismissal for lack of jurisdiction can be supported on any one of three independent grounds, all of which were raised by the motion to dismiss: 1) lack of standing; 2) lack of jurisdiction under the Tribe's inherent sovereign authority, the exceptions under *Montana*, or the Tribe's inherent right to exclude; or 3) lack of jurisdiction under the Indian Civil Rights Act.

A. Dismissal Is Compelled for Lack of Standing

It is well established that whether "the plaintiff below, has standing to sue,"

is a "threshold jurisdictional question." *Steel*, 523 U.S. at 102; *see id.* at 95-96; *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990) ("It is well established . . . that before a federal court consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue."). This principle applies with equal force to tribal courts, which have recognized that "[t]he plaintiff must have standing in order for the court to have jurisdiction." *Gobin v. Tulalip Tribes' Bd. of Dirs.*, 2002 Tulalip App. LEXIS 2, *19 (Tulalip Tribal Ct. App. Dec. 6, 2002). And, as CenturyTel argued in its motion to dismiss, the Tribe failed to allege its own standing. Mtn. to Dismiss 2, 6 n.2; Reply 2-8.

The Red Cliff trespass ordinance under which this suit was brought is explicit—the Tribe may bring a trespass claim only as it relates to "Tribal Land," *see* RCCL §25.18.1, which is specifically defined as "land in which the Tribe has legal interest, including but not limited to, land held in trust by the United States for the benefit of the Tribe or jointly for the benefit of the Tribe and others and fee simple land owned, wholly or in part by the Tribe," *id.* §25.17.9. This is *not* coextensive with all lands within the Tribe's Reservation, which can also include fee land owned by members or non-members of the Tribe. Yet that is all that the complaint alleged, defining "Tribal Lands" in the complaint not under the definition of that term in the trespass ordinance, but instead as coextensive with the Reservation itself, and only alleging "*most* of which is owned by the Tribe or its members in trust status." FAC ¶8. Nor does the complaint allege that the 25 miles and 20 parcels of "tribal land" that the CenturyTel facilities allegedly cross are in fact lands in which the Tribe has a legal interest. *See* FAC ¶19.

Notably, the Tribal Court acknowledged this distinction in its Order, finding only "that CenturyTel has physical facilities located within the boundaries of the Red Cliff Reservation," and not making any finding that the Tribe had pleaded that these facilities were "Tribal Land" in which the Tribe has a legal interest as required by the trespass ordinance. *See* Order. It was improper for the Tribal Court to simply find that the issues surrounding standing "can be raised at the trial phase." *See id.* Instead, "[w]hile it is true that, at the pleading stage, general factual allegations will suffice, a plaintiff must still plead facts sufficient to establish that he has standing to bring his claims." *Parsley v. Norfolk & W. Ry. Co.*, 2018 U.S. Dist. LEXIS 23134 at *5 (S.D. W. Va. Feb. 13, 2018) (omission in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)) (dismissing complaint for lack of standing). The Tribe has failed to establish its standing here, and thus this Court should issue a writ directing that the Tribe's complaint be dismissed.

B. There Is No Jurisdiction Under the Tribe's Inherent Sovereign Authority, the Exceptions Under *Montana*, or the Tribe's Inherent Right to Exclude

Jurisdiction independently fails under the basic principle that "tribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Plains Commerce Bank*, 554 U.S. at 328. While the complaint pleaded in a conclusory manner that the Tribal Court had jurisdiction pursuant to the Tribe's inherent sovereign authority, the exceptions under *Montana*, and an inherent right to exclude, those asserted bases all fail for the reasons raised in CenturyTel's motion to dismiss –but left unaddressed in the Tribal Court's order.

1. The Comprehensive Federal Scheme Has Divested the Tribe of Jurisdiction to Seek Trespass Damages Under Tribal Law

Although the Tribe invoked the Tribal Court's jurisdiction over this tribal trespass action pursuant to "the Tribe's inherent sovereign authority over its territory," FAC ¶2, it is well-established that "Congress has plenary authority to limit, modify or eliminate powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978) (citing, *inter alia*, *Talton v. Mayes*, 163 U.S. 376, 384 (1896)). Thus, where Congress and the accompanying federal regulatory scheme over an area is extensive and comprehensive, such regulation then lies "outside the control of tribes." *See Kodiak Oil & Gas United States, Inc. v. Burr*, 303 F. Supp. 3d 964, 980,982 (D. N.D. 2018). And because "[a]s to nonmembers a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," the effect is that the Tribal Court is without jurisdiction. *See Hicks*, 533 U.S. at 357-58 (internal quotation marks and ellipsis omitted); *see Kodiak*, 303 F. Supp. 3d at 973—85 (entering preliminary injunction enjoining tribal court from adjudicating claims against nonmembers on the basis of extensive federal scheme for flaring of natural gas on Indian lands).

Here, the federal government has promulgated an extensive and comprehensive statutory and regulatory scheme governing right-of-ways for utility lines across tribal lands, as the Tribe recognized in its complaint. FAC ¶10; *see* 25 U.S.C. §§323-328; 25 C.F.R. Pt. 169; 43 U.S.C. §961. Although the federal regulatory regime permits the application of tribal law in certain circumstances,

tribal law is inapplicable "to the extent that those tribal laws are inconsistent with applicable Federal law." 25 C.F.R. §169.9(b). This includes with respect to 25 C.F.R. §169.413, which provides that the possession or use of Indian land without a right-of-way when one is required is a trespass; permits the BIA "to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law"; and also provides that "[t]he Indian landowners may pursue any applicable remedies under applicable law, including applicable tribal law." Critically, federal common law trespass principles dictate that "[*d*]*amage remedies for trespass are essentially compensatory and not punitive*," *Hammond v. Cty. of Madera*, 859 F.2d 797, 804 (9th Cir. 1988) (emphasis added) (internal citations omitted); *see* Mot. to Dismiss 13 (and authorities cited therein). *See also Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 2017 U.S. Dist. LEXIS 88449, *3, 2017 WL 2483071 (W.D. Wash. June 8, 2017) ("Issues pertaining to tribes, including actions for trespass on tribal lands, are the exclusive province of federal law.") (citing, *inter alia*, *Oneida Cty. v. Oneida Indian Nation of N.Y.*, 414 U.S. 661, 667 (1985)); *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009) ("Federal common law governs an action for trespass on Indian lands.") (citing, *inter alia*, *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994))

The Tribe's pursuit of punitive trespass remedies (explicitly identified in the trespass ordinance as "penalties") in an amount exceeding $100 million, is plainly inconsistent with federal law's requirement that trespass damages be compensatory and not punitive, and renders both the Tribe, and the Tribal Court, without

jurisdiction. *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 782, (7th Cir. 2014) ("[A] tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction")(quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008)). Neither of the exceptions for tribal jurisdiction under *Montana*, nor any inherent right to exclude, can confer tribal jurisdiction that the federal government has taken away. *See Kodiak*, 303 F. Supp. 3d 964.

2. The *Montana* Exceptions Do Not Apply

The Supreme Court has made clear that "the general rule of *Montana* applies to both Indian and non-Indian land," *Hicks*, 533 U.S. at 360, which is that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," *Montana*, 450 U.S. at 565. *See also Stifel v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 206-07 (7th Cir. 2015). There are two narrow, recognized exceptions to this general rule: 1) "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." 2) "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." *Id.* at 566. Neither applies here, and thus a writ ordering dismissal is compelled.

a. *Montana*'s First Exception Does Not Apply

The Tribe in its complaint, and without attaching any exhibits, generally

avers that CenturyTel, "while present on the Tribe's Reservation, has entered into consensual relationships with the Tribe and its members, through commercial dealings, contracts and other arrangements." FAC ¶2. This conclusory allegation, however, is insufficient to confer jurisdiction under the first *Montana* exception. That is because "[t]he first *Montana* exception . . . requires that a tribe's regulation of the nonmember . . . 'have a nexus to the consensual relationship itself.'" *Stifel*, 807 F.3d at 207-08 (quoting *Atkinson*, 532 U.S. at 656) (both cases reject tribal jurisdiction on that basis). In its opposition to CenturyTel's motion to dismiss, the Tribe hinted that the agreements it is referring to are service agreements by CenturyTel to provide telecommunications services to customers. *See* Opp. to Mtn. to Dismiss 4-5 ("Centurytel has numerous contractual relationships with the Tribe and its members, from which it derives significant revenues."). But, if this is the case, an agreement to provide telecommunication services has no nexus to the penalties the Tribe seeks, which are measured by the number of feet or number of parcels on which CenturyTel has facilities. *See Atkinson*, 532 U.S. at 656 (finding first *Montana* exception inapplicable when the tribe's attempt to enforce a hotel occupancy tax was instead "grounded in petitioner's relationship with its nonmember hotel guests"); *see also Big Horn Cty. Elec. Coop. v. Adams*, 219 F.3d 944, 951 (9th Cir. 2000) (holding that first *Montana* exception did not apply to tax on value of property, notwithstanding utility's provision of electricity to tribal members). And, if agreements exist with the property-holders concerning CenturyTel's utility crossings on their property, any such agreement would constitute consent, which is a complete defense to a trespass action. *See* RCCL

§25.18. No tribal jurisdiction can be found to exist under *Montana*'s first exception.

b. *Montana*'s Second Exception Does Not Apply

Nor does the second *Montana* exception apply. Here too, the Tribe has not raised any specific allegations, but instead merely parroted *Montana*'s language, averring that CenturyTel, "while present on the Tribe's Reservation, has engaged in conduct that threatens the political integrity, economic security and welfare of the tribe." FAC ¶2. Such a threat, however, must rise to existential levels—"[t]he impact must be demonstrably serious and must *imperil* the political integrity, the economic security, or the health and welfare of the tribe." *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 431 (1989). Thus, cases where the second *Montana* exception has applied have generally involved extreme conduct, such as an armed takeover of a tribe's government buildings and casino. *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 939 (8th Cir. 2010). And correspondingly, the second *Montana* exception has been found *not* to apply to cases concerning groundwater contamination, employment law, hunting, fishing, and gathering rights, and sexual assault. *See Fort Yates Pub. Sch. Dist. #4 v. Murphy*, 786 F.3d 662, 670 n.7 (8th Cir. 2015) (collecting cases). No such imperiling threat exists here, where CenturyTel's facilities *help* the tribe by providing it with internet and telecommunications services.

3. The Tribe's Power to Exclude Does Not Confer Jurisdiction

Lastly, the Tribe asserts jurisdiction on the basis that "the Tribe's right to

exclude the Defendant from Tribal lands includes the right to regulate the Defendant's activities on those lands and to exercise adjudicative jurisdiction over claims arising from such activities." FAC ¶2. However, the Tribe has not alleged that it owns any of the land at issue, and therefore has no power to exclude.

Moreover, the Tribe's attempted reliance upon a recent Ninth Circuit decision as the basis for the Tribe's argument, *see* Opp. 4 (citing *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 900 (9th Cir. 2019), ignores that the Supreme Court's decisions "leave[] no doubt that *Montana* applies regardless of whether the actions take place on fee or non-fee land.," *Stifle*, 807 F.3d at 207 (citing *Plains Commerce Bank*, 554 U.S. at 328). The Tribe also ignores that even *Knighton* recognized that this "inherent power [to exclude nonmembers from tribal lands] does not permit the Tribe to impose new regulations . . . retroactively . . . ." *Knighton*, 922 F.3d at 902. Yet that is precisely what the Tribe has done here by seeking to impose penalties under a newly-enacted tribal right-of-way and trespass ordinance as to telecommunications facilities that already existed when the law was passed.

Furthermore, the power to exclude is subject to the plenary power of Congress. *Nevada v. Hicks*, 533 U.S. 353, 389 (2001) (noting that federal government can take away power to exclude); *Oneida Tribe of Indians v. Vill. of Hobart*, 542 F. Supp. 2d 908, 915 (E.D. Wis. 2008). As discussed above, Congress limited that power by authorizing the Bureau of Indian Affairs to promulgate a comprehensive and extensive regulatory scheme that preempts the claim the Tribe asserts. In addition, the Indian Civil Rights Act also limits the Tribe's ability to

impose the trespass penalties it seeks, as discussed below. Therefore, the Tribe, and in turn the Tribal Court, are without jurisdiction to impose tribal trespass law.

C. There Is No Jurisdiction Under the Indian Civil Rights Act

Lastly, the Tribal Court's jurisdiction independently fails because it is without authority to adjudicate the Tribe's claim under the Indian Civil Rights Act ("ICRA"). That Act, by its plain terms, prohibits "for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both," 25 U.S.C. §1302(a)(7)(B), and also prohibits "depriv[ing] any person of liberty or property without due process of law," §1302(a)(8). Each of these provisions independently forecloses the Tribal Court's jurisdiction for the exorbitant "penalties" of more than $100 million sought by the Tribe, as well the $594,000 in tax penalties.

The trespass ordinance makes no effort to hide that the "$5,000 for each day that a trespass occurs" is a "penalty" that attempts to fall within the scope of §1302(a)(7)(B); it explicitly describes the charge as a "penalty" and caps that penalty at the statutory maximum permitted under the ICRA. But the trespass ordinance disregards the ICRA's mandate that $5,000 is the maximum for "*any 1 offense*." Instead, "[*f*]*or each act of trespass*," the ordinance permits an aggregating tally of up to "$5,000 *for each day that a trespass occurs* or occurred," RCCL §25.18.5(c)(2) (emphasis added). The astronomical sums sought here as statutory and tax penalties are effectively criminally punitive in nature and run squarely afoul of ICRA §1302(a)(7)(B). *See also* Reply 15-17.

Nor can the size of the penalties sought here survive the ICRA's due process

protection, which prevents the imposition of a "grossly excessive" punitive damages award on a tortfeaser, as determined by three guideposts: 1) "the degree of reprehensibility"; 2) "the disparity between the harm or potential harm suffered . . . and [the] punitive damages award"; and 3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *BMW v. Gore*, 517 U.S. 559, 574-75 (1996) (finding $2 million punitive damages award grossly excessive and violating due process). The penalties pursued here clearly violate these principles, given that: 1) no "reprehensible" conduct is alleged; rather, CenturyTel provides important telecommunications services to the Tribe and its members); 2) the harm from any trespass to the person with a legal interest in the land would often be de minimis, particularly as it pertains to buried cables as alleged, *see* FAC ¶12; and 3) the "penalties" sought by the Tribe are all in excess of the damages permitted for trespass under federal law, which is compensatory, not punitive, in nature, *see supra* Part IV.B.1.

The Tribal Code makes clear that "[a]ll proceedings in Tribal Court shall be conducted in conformity with the Indian Civil Rights Act of 1968, 25 U.S.C. §§1301-1303." RCCL §4.1.5. The Tribal Court thus has no authority to adjudicate these trespass claims to trial while such penalties remain among the relief being sought. The writ should issue ordering the suit dismissed.

CONCLUSION

CenturyTel respectfully requests that the Court issue a writ of mandamus directing the district court to address the jurisdictional issues raised in CenturyTel's motion to dismiss but unaddressed in the Tribal Court's order, or

alternatively issue a writ of mandamus or writ of prohibition ordering the Tribal Court to dismiss the suit for lack of jurisdiction.

Respectfully submitted,

DORSEY & WHITNEY LLP

Dated: August 2, 2019

By _____
Skip Durocher
Forrest Tahdooahnippah
Suite 1500, 50 South Sixth Street
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600