Appellate Case No. 19-APP-02
Tribal Court Case No. 2019-cv-09

Appellate Court of the Red Cliff Band of Lake Superior Chippewa

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Red Cliff Band of Lake Superior Chippewa Indians,

Plaintiff - Appellee,

vs.

CenturyTel of the Midwest-Kendall, LLC,

Defendant - Appellant.

APPELLANT'S WRITTEN BRIEF

September 3, 2019

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CORPORATE DISCLOSURE STATEMENT

Appellant CenturyTel of the Midwest-Kendall, LLC is a wholly-owned subsidiary of CenturyTel of the Northwest, Inc., which is a wholly-owned subsidiary of CenturyTel Holdings, Inc., which is a wholly-owned subsidiary of CenturyLink, Inc., a publicly held corporation.

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INTRODUCTION

The Red Cliff Band of Lake Superior Chippewa Indians (the "Tribe") brought this suit in Tribal Court against CenturyTel of the Midwest-Kendall, LLC ("CenturyTel"), a nonmember telecommunications service provider. The Tribe seeks to recover penalties ranging from $2 million to more than $100 million under a newly-enacted tribal right-of-way and trespass ordinance against CenturyTel for purportedly installing and maintaining buried cables and other above-ground facilities, purportedly without the Tribe's consent. These facilities were in place since well before the ordinance was even enacted, and provide important telecommunications services such as internet and telephone land lines.

The Tribe is without jurisdiction to pursue, and the Tribal Court is without jurisdiction to adjudicate, this claim. It is well-established that "tribes do not, as a general matter, possess authority over non-Indians who come within their borders." *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008). In fact, the Supreme Court "ha[s] never held that a tribal court had jurisdiction over a nonmember defendant." *See Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001). Here, jurisdiction is lacking on numerous grounds, all of which CenturyTel promptly raised in its motion to dismiss, including: (1) the Tribe's failure to plead it had any legal interest in the lands at issue, and its corresponding failure to establish standing; (2) federal law's comprehensive regulation of utility rights-of-way through Indian lands, and its limits and preemptive force upon the applicability of tribal law; (3) the absence of tribal legislative or adjudicatory jurisdiction over CenturyTel as a nonmember under *Montana v. United States*, 450

U.S. 544 (1981) and its progeny, including under any inherent right to exclude; and (4) the Tribe's violation of the protections afforded CenturyTel under the Indian Civil Rights Act.

The Tribal Court, however, refused to even address the jurisdictional issues raised in CenturyTel's motion. Instead, it found 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 Order) ("Order") (attached at Addendum 1). It denied the motion to dismiss solely on that basis, leaving all remaining issues to "be raised at the trial phase." *Id.* This was an abdication of the Tribal Court's threshold obligation to determine its own jurisdiction to hear this case. Allowing litigation to continue to the trial phase of the case is in and of itself an exercise of jurisdiction over CenturyTel that the Tribe and Tribal Court lack. CenturyTel is entitled to immediate appellate review of the Tribal Court's Order. This Court should reverse that Order, and remand with instructions to dismiss the action with prejudice for lack of jurisdiction.

JURISDICTIONAL STATEMENT

This appeal in Appellate Case No. 19-APP-02 was docketed by this Court as arising from both CenturyTel's Notice of Appeal from the Tribal Court's denial of CenturyTel's motion to dismiss, as well as CenturyTel's concurrently filed Petition for Writ of Mandamus or Alternatively Writ of Prohibition regarding the same order. *See* Email from Heather Deragon, Clerk of Court, Red Cliff Tribal Court, to

Forrest Tahdooahnippah (Aug. 14, 2019, 11:24 CST) (on file with counsel). That Order—which effectively denied CenturyTel's arguments against jurisdiction—presents threshold issues that are immediately appealable now, before the Tribal Court continues to exercise its challenged jurisdiction over CenturyTel into the discovery and trial phases of the case. This brief is in support of both CenturyTel's Notice of Appeal and its Petition for Writ of Mandamus or Alternatively Writ of Prohibition.

Tribal appellate courts have consistently recognized that a tribal court's order exercising jurisdiction is one that is effectively "final" and immediately appealable under the collateral order doctrine. *See One Hundred Eight Emps. v. Crow Tribe of Indians*, 2001 ML 5093, at ¶¶33-38 (Mont. Crow Ct. App. Nov. 21, 2001); *Hwal'Bay Ba:J Enters. v. Beattie*, 2009 Hualapai App. LEXIS 1, at *2-9 (Hualapai Nation Ct. App. Apr. 2, 2009). And while the jurisdictional issue in both of those cases involved the tribe's assertion of sovereign immunity, the jurisdictional order here is likewise effectively unreviewable from a final judgment. Just as "an 'essential attribute' of the immunity is 'an entitlement not to stand trial,'" *see One Hundred Eight Emps.*, 2001 ML 5093, at ¶37 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)), it is correspondingly fundamental that a tribal court's adjudicative jurisdiction only permits it to hear a lawsuit over those parties and for those claims for which the tribal court has jurisdiction. A failure to review the jurisdictional issues now means that "otherwise the parties will spend their time and resources on a case over which the court may not have jurisdiction." *Hwal'Bay Ba:J Enters.*, 2009 Hualapai App. LEXIS 1, at *8.

Alternatively, the issues in this brief are immediately reviewable pursuant to CenturyTel's Petition for Writ of Mandamus or Alternatively Writ of Prohibition. Tribal and federal appellate courts alike have repeatedly recognized that such a writ should issue where the trial court exceeded its jurisdiction. *See N. Edge Casino v. Window Rock Dist. Court*, 2017 Navajo Sup. LEXIS 2 (Navajo Jul. 31, 2017) (issuing writ of prohibition dismissing suit against the Navajo Nation because district court lacked jurisdiction); *Kang v. Chinle Family Court*, 2018 Navajo Sup. LEXIS 2 (Navajo Sept. 21, 2018) (issuing writ of prohibition against the Chinle Family Court because it was "proceeding without jurisdiction and Petitioner has no plain, speedy and adequate remedy at law"); *Erno Kalman Abelesz v. OTP Bank*, 692 F.3d 638, 661 (7th Cir. 2012) (issuing "writ of mandamus to confine the district court to the exercise of its lawful jurisdiction" and ordering claims dismissed); *Bailey v. Sharp*, 782 F.2d 1366, 1369 (7th Cir. 1986) (issuing 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 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*, 28 U.S.C. §157; *In re Hot-Hed Inc.*, 477 F.3d 320, 326 (5th Cir. 2007) (issuing writ of mandamus, vacating district court's 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 and ordering dismissal for *forum non conveniens*).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Tribal Court erred by failing to consider its own jurisdiction.

2. Whether the Tribe failed to allege its own standing or plead a claim for which relief could be granted where the Tribe failed to allege it had any legal interest in any of the allegedly trespassed lands.

3. Whether the Tribe and Tribal Court lacked jurisdiction to pursue and adjudicate the trespass claim under the Indian Right-of-Way Act, 25 U.S.C. §§323-28, 25 C.F.R. pt. 169; the exceptions to the presumptive absence of jurisdiction over non-Indians established by *Montana v. United States*, 450 U.S. 544 (1981) and its progeny; and any inherent right to exclude.

4. Whether the Tribe and Tribal Court lack authority and jurisdiction to pursue and adjudicate the trespass claim under the Indian Civil Rights Act of 1968, 25 U.S.C. §§1301-03.

STATEMENT OF THE CASE

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 that include buried fiber optic cables, buried copper cables, aerial fiber cables, pedestals, poles and wires. *See* First Amended Complaint ("FAC") ¶¶2, 5, 12 (attached at Addendum 2). CenturyTel is not a tribally-owned or operated entity. *See* FAC ¶5. Rather, it is a Delaware limited liability company registered to do business in Wisconsin, and whose business includes providing services and operating and maintaining facilities throughout Wisconsin, including on lands within the Red Cliff Reservation ("Reservation") of the Red Cliff Band of Lake Superior Chippewa Indians ("Tribe"). *See* FAC ¶¶5, 8, 12, 19.

II. CenturyTel's Telecommunications Services and Facilities Are Subject to Comprehensive Federal Regulation.

Federal law sometimes requires telecommunications providers to obtain rights-of-way through Indian lands for their facilities. All rights-of-way through Indian land are subject to the federal government's comprehensive regulation. *See* FAC ¶7. *See generally* 25 U.S.C. §§311-28. Telecommunication rights-of-way through Indian lands have been explicitly governed by federal statutes dating back over 100 years to the turn of the twentieth century, when Congress passed a law authorizing and empowering the Secretary of the Interior to "grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation. . . ." Act of March 3, 1901, ch. 832, §3,

31 Stat. 1058, 1083 (1901) (codified as amended at 25 U.S.C. §319); *see also* Act of Mar. 2, 1899, ch. 374, 30 Stat. 990 (1899) (granting railroad companies "a right of way for a railway, telegraph and telephone line through any Indian reservation") (codified as amended at 25 U.S.C. §312); Act of Feb. 15, 1901, ch. 372, 31 Stat. 790, 790-91 (1901) ("rights of way through the public lands, forest and other reservations of the Unites States . . . for electrical plants . . . , and for telephone and telegraph purposes") (codified as amended at 43 U.S.C. §959); Act of May 27, 1952, ch. 338, 66 Stat. 95, 95-96 (1952) (authorizing rights of way through public lands, Indian, and other reservations for power and communications facilities) (codified as amended at 43 U.S.C. §961); Act of Jan. 12, 1983, Pub. L. No. 97-459, 96 Stat. 2515 (1983) (codified as amended at 25 U.S.C. §2218 (authorizing rights-of-way across individual allotments)); Act of Mar. 3, 1871, ch. 120, §3, 16 Stat. 544, 570 (1871) (codified as amended at 25 U.S.C. §81(b) ("No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary")); Act of June 30, 1834, ch. 161, §12, 4 Stat. 730 (1834) (governing any "purchase, grant, lease, or other conveyance of lands . . . from any Indian nation or tribe of Indians") (codified as amended at 25 U.S.C. §177).

Nearly fifty years later, in 1948, Congress enacted the Indian Right of Way Act ("IRWA"), 80 Pub. L. No. 407, 62 Stat. 17 (1948) (codified as amended at 25 U.S.C. §§323-28), which—while not repealing any of the prior existing statutory authority, 25 U.S.C. §326—empowered the Secretary of the Interior "to grant

rights-of-way for all purposes" across any Indian lands, 25 U.S.C. §323, so long as they were not made "without the consent of the proper tribal officials," 25 U.S.C. §324, or "without the payment of such compensation as the Secretary of the Interior shall determine to be just," 25 U.S.C. §325.

The IRWA also empowered the Secretary of the Interior to promulgate corresponding regulations. *See* 25 U.S.C. §328. Such regulations were promulgated by the Bureau of Indian Affairs ("BIA") in 1968, 33 Fed. Reg. 19803 (Dec. 27, 1968), re-designated in 1982, 47 Fed. Reg. 13327 (Mar. 30, 1982), and revised in November 2015 and March 2016 with an effective date of April 21, 2016, 80 Fed. Reg. 72492 (Nov. 19, 2015), 81 Fed. Reg. 14976 (Mar. 21, 2016) (codified as amended at 25 C.F.R. pt. 169). Both the pre-2015 and post-2016 versions of the regulations were comprehensive. They described those circumstances when a right-of-way was required, and also those circumstances when one was not. For example, a "service line," *i.e.*, a utility line from the main line to provide the utility service to a house or other structure for the owner's (or authorized occupants or users) use, did not require a right-of-way, but instead only a service line agreement between the utility and the landowner. 25 C.F.R. §169.22 (2015); 25 C.F.R. §§169.51-169.56 (2016). Moreover, where a right-of-way was required, the regulations set forth the application and bond requirements, 25 C.F.R. §169.5 (2015), 25 C.F.R. §§169.101-169.105 (2016); the requirements for when tribal or individual landowner consent was required, 25 C.F.R. §169.3 (2015); 25 C.F.R. §§169.106-169.109 (2016); requirements as to the term of the grant, 25 C.F.R. §§169.18, 169.26 (2015); 25 C.F.R. §169.201 (2016); and compensation

requirements, 25 C.F.R. §169.12 (2015); 25 C.F.R. §§169.110-169.122 (2016). With respect to compensation, while that was subject to negotiation, "fair market value" was the presumptive default and minimum, plus any severance damages, 25 C.F.R. §169.12 (2015), as well as other fees, taxes, and assessments that may be required under federal law, 25 C.F.R. §169.120 (2016); *see also* 25 C.F.R. §169.112 (2016).

The new post-2016 regulations were "intended to support tribal self-determination and self-governance by acknowledging and incorporating tribal law and policies in processing a request for a right-of-way across tribal lands and defer to the maximum extent possible to Indian landowner decisions regarding their Indian land." 25 C.F.R. §169.1 (2016). This new language, however, did not create or expand tribal jurisdiction. For example, even the new regulations only provide that "[t]he Secretary's grant of a right-of-way will clarify that it does not *diminish* to any extent," the Indian tribe's otherwise existing jurisdiction. 25 C.F.R. §169.10 (2016) (emphasis added). Likewise, the regulations emphasized that the rights-of-way "[a]re subject to *all* applicable [f]ederal laws," and that tribal laws will not apply to the extent "those tribal laws are *inconsistent* with applicable [f]ederal law." 25 C.F.R. §169.9 (2016) (emphasis added).

Whether the new or old version of the regulations govern depends upon when the right-of-way grant was issued or applied for. A right-of-way granted before April 21, 2016 is not subject to the "[n]on-procedural provisions" of the new regulations, and is only subject to the procedural provisions if they do not "conflict with the explicit provisions of the right-of-way grant or statute

authorizing the right-of-way document." 25 C.F.R. §169.7(b) (2016). Moreover, applications submitted but not granted before April 21, 2016 could be either withdrawn and resubmitted under the new regulations, or else not withdrawn and reviewed under the old regulations. 25 C.F.R. §169.7(c) (2016). Based on the allegations in the Tribe's First Amended Complaint—which sought relief for a period of 1095 days (three years) from the filing of the original complaint dated April 30, 2019—CenturyTel's facilities were installed prior to April 30, 2016. *See* Complaint; FAC Request for Relief.

III. The Tribe Enacts a New Trespass Law Purporting to Govern Telecommunications Facilities CenturyTel Had Already Installed.

On December 19, 2017, after CenturyTel's facilities were already installed, the Tribe enacted Chapter 25 of its Code, governing Rights of Way, Service Lines and Trespass ("Ordinance"). *See* FAC ¶11; Red Cliff Band of Lake Superior Chippewa Code of Laws ("RCCL"), ch. 25. The Ordinance purportedly was passed, in part, "[t]o take advantage of opportunities for greater self-determination presented by the BIA's 2016 revision of right-of-way regulations." RCCL §25.1.1(a). But the Tribe also expressly recognized that its Ordinance only applied "*to the extent not preempted by federal law.*" RCCL §25.1.5 (emphasis added). The default annual compensation for a right-of-way under the Ordinance was "not less than $0.50 per year in 2017 dollars, adjusted annually in accordance with the consumer price index, multiplied by the length (in feet) of the line." RCCL §25.8.1. Likewise, a right-of-way application for existing but unauthorized facilities requires payment of the same amount for the number of years the facilities were present without authorization. RCCL §25.5.2.

The new Ordinance also includes a trespass section, predicated on the Tribal Council's finding that "[t]he Band possesses the inherent sovereign power to exclude unauthorized persons and entities from its lands." RCCL §25.16.1(a). The trespass section of the Ordinance was specifically limited to "Tribal Land"—which did not extend to all Reservation land—but instead "means *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." RCCL §25.17.9 (emphasis added). There was no corresponding restriction, however, limiting the Ordinance's application for trespass claims to only tribal members. Instead, any "person"[1] commits a trespass if they "intentionally and without the Tribe's consent" enter Tribal Land, remain on Tribal Land, or fail to remove from Tribal Land an object they had a duty to remove. RCCL §25.18.1. The Ordinance also specifies that "[a] separate violation of this ordinance is committed with respect to each parcel of land on which a trespass is committed." RCCL §25.18.4. The remedies include ejectment and an accounting. RCCL §25.18.5(a), (b). Moreover, despite being cast as a "civil trespass," the Ordinance also provided for "Damages and Penalties," stating that "[f]or each act of trespass the Tribe shall be entitled to the *greater* of:

(1) An amount equal to:

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[1] Under the Ordinance, "'Person' includes a natural individual, partnership, corporation, association, other legal or fiduciary entity, and a public entity." RCCL §25.17.4.

(i) Rents, profits and any avoided costs derived from the trespassed property; and

(ii) Damages caused to the trespassed property; or

(2) The penalty determined by the Tribal Court, which shall be not less than $100 and no more than $5,000 for each day that a trespass occurs or occurred, based on the size, scope, and impact of the trespass, and whether the trespasser knew or should have known it or its property was or is on Tribal Land; or

(3) Three times the property taxes due for the entire time period of the trespass based on the tax rates under present Tribal law for structures, chattel or other objects on Tribal Land.

RCCL §25.18.5(c) (emphasis added).

IV. The Tribe Tries to Use Its New Ordinance to Govern Telecommunications Facilities CenturyTel Had Already Installed.

Just two days after the Tribe enacted its new Ordinance—on December 21, 2017—the Tribe sent CenturyTel a letter demanding that it: provide the Tribe with copies of Rights-of-Ways ("ROW"); comply with the newly enacted Ordinance; and apply for a ROW under the new Ordinance and the federal regulations. FAC ¶15. At no time since the new Ordinance's passage did the Tribe ask CenturyTel to remove its facilities or advise that it had a duty to do so.

V. The Tribe Brings a Trespass Suit Seeking More than $100 Million in Penalties.

Notwithstanding CenturyTel's subsequent filing of an initial ROW application with the Tribe, the Tribe commenced this action on April 30, 2019.[2] In its First Amended Complaint, the Tribe alleged that CenturyTel had not produced

[2] The operative First Amended Complaint was filed on July 10, 2019.

other sufficient documentation of its legal right to maintain the facilities on the Reservation, and claimed 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 further alleged that "the Tribe estimates that the trespassing CenturyTel Facilities extend for at least 25 miles and crosses at least 20 parcels of tribal land." FAC ¶19. But "tribal land" in the First Amended Complaint was not confined to that term's definition in the Ordinance, but rather defined to be co-extensive with the Reservation itself. *See* FAC ¶8.

Although the First Amended Complaint claimed a "trespass under tribal and federal law," FAC ¶18, the relief sought was specifically tied to the "Damages and Penalties" provided in RCCL §25.18.5(c), FAC Request for Relief. Consistent with its actions up to that time, the Tribe did not seek an order requiring CenturyTel to remove its facilities or stop providing telecommunications services to the Tribe. The Tribe did not assert any claim for ejectment or an accounting, *see* RCCL §25.18.5(a); and the FAC expressly disclaimed any order granting a right-of-way or otherwise permitting CenturyTel to continue to maintain its facilities upon payment of compensation to the Tribe. FAC Request for Relief. Instead, the Tribe explicitly sought "the *greater* of" the three amounts provided for in the "Damages and Penalties" section, which includes a penalty of "not less than $100 and no more than $5,000 for each day that a trespass occurs or occurred" or "[t]hree times the property taxes due for the entire period of the trespass . . . ." RCCL §25.18.5(c); *see* FAC Request for Relief. And as noted above, the Tribe seeks damages and penalties for each parcel for a period of 1095 days—preceding

even the Ordinance's enactment by more than a year and a half—in an amount that under the per-day penalty equals anywhere from $2,190,000 to $109,500,000, and comes to $594,000 for the property tax penalty.[3]

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

CenturyTel timely moved to dismiss the Tribe's First Amended Complaint. It argued the Tribe failed to state a claim for the same reason the Tribe failed to plead standing—the Tribe had not alleged that it had any legal interest in the lands at issue. *See* Mot. to Dismiss 5-7; CenturyTel's Reply in Supp. of Mot. to Dismiss ("Reply") 3-8.

CenturyTel also challenged the Tribe's assertion of Tribal Court jurisdiction as alleged in the First Amended Complaint. *See* FAC ¶2. First, CenturyTel argued that the "extensive and comprehensive scheme" promulgated by the federal government over utility right-of-ways means that the Tribe has no sovereign authority to invoke jurisdiction to impose the tribal damages and penalties sought here. *See* Mot. to Dismiss 8 (quoting *Kodiak Oil & Gas U.S., Inc. v. Burr*, 303 F. Supp. 3d 964, 979-80 (D.N.D. 2018); *see generally id.* at 8-10; Reply 13-15.

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[3] Given that the Tribe's First Amended Complaint alleges that 20 parcels were trespassed, this amounts to a penalty of not more than $109,500,000 for 1095 days at $5,000 for each parcel ($5,475,000 per parcel). Even at the low end of $100 for each of the 20 parcels for 1095 days, that still amounts to $2,190,000 ($109,500 per parcel). For the property tax, RCCL §16.10.8 provides a $0.50 tax for each foot of utility line per year—the same default amount of compensation provided for in RCCL §25.8.1. 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.

CenturyTel also argued jurisdiction could not rest on either of the two limited exceptions under *Montana v. United States* through which a tribe may exercise jurisdiction over nonmembers, nor could it rest on any claimed inherent power to exclude. Reply 9-10. 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"), which included a penalty cap of not more than $5,000 for any one offense, and protects litigants' due process rights. Mot. to Dismiss 10 (citing 25 U.S.C. §§1302(a)(7), 1302(a)(8)); Reply 18-20.

VII. 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 four days after CenturyTel filed its reply brief. *See* 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 (including, presumably, the various jurisdictional issues raised in the motion) 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, filing the notice of appeal and petition for a writ of mandamus or alternatively a writ of prohibition on

August 2, 2019.[4]

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[4] The Tribe has not filed any documents in this Court regarding either the notice of appeal or the writ petition. Instead, on August 13, 2019, the Tribe purported to file a Second Amended Complaint ("SAC") in the Tribal Court, and on August 20, 2019 passed three amendments to Chapter 25 of its Tribal Code. Neither, however, bear on this appeal.

With respect to the SAC, the filing of the notice of appeal divested the Tribal Court of jurisdiction. Moreover, even if the Tribal Court retained jurisdiction, the Tribe failed to request leave to amend. Regardless, the SAC does not cure the FAC's jurisdictional defects, but instead simply obscures them in vagueness. For example, while the SAC now pertains to "lands owned by the Tribe," it does not limit its trespass claim to any specific lands owned by the Tribe, while conceding that "certain of CenturyTel's Facilities traversing lands owned by the Tribe may be authorized under existing ROWs . . . ." SAC ¶18. Likewise, while the SAC no longer quotes the penalties provisions of the Ordinance, it still makes clear that it is requesting relief "as prescribed by RCCL §25.18.5(c)," and only recognizes "any judicial modifications the Court may deem necessary pursuant to the Indian Civil Rights Act," while disregarding other jurisdictional bars on the relief sought. SAC Request for Relief.

As for the amendments to the Ordinance, while the Tribal notice says that the "amendments shall be effective immediately," the amendments do not state that they are retroactively applicable. The three amendments: (1) amend the "Applicable Law" clause (§25.1.5) to provide that "The Court shall remit or modify any damages, assessments or penalties prescribed by this Chapter, as may be necessary to assure compliance with the Indian Civil Rights Act and the requirements of Due Process"; (2) amend the "Separate Acts of Trespass" clause (§25.18.4) to provide that "each day on which a trespass occurs" is a separate violation of the Ordinance; and (3) amend the "Remedies" clause (§25.18.5) to include "Legal and other costs incurred by the Tribe in enforcing this ordinance." But as explained elsewhere, not only are these amendments inapplicable retroactively, the amendments only reinforce the jurisdictional infirmities for the Tribe and the Tribal Court over this matter. *See infra* Pts. IV.C.3, IV.D, V. Moreover, because the Tribe has not expressed its position as to the effect these amendments have, if any, on this pending litigation, CenturyTel respectfully reserves the right to respond in writing through a reply

SUMMARY OF ARGUMENT

The Supreme Court has repeatedly made clear 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, and has in fact "*never* held that a tribal court had jurisdiction over a nonmember defendant," *Hicks*, 533 U.S. at 358 n.2 (emphasis added). Yet the Tribe persists in pursuing—and the Tribal Court persists in adjudicating—a claim for trespass penalties for a minimum of $2 million and potentially up to $109 million against CenturyTel. Those figures exponentially dwarf both what the Tribe itself sets as baseline reasonable compensation and the limits for penalties under the ICRA, all under an Ordinance that was not even enacted until after CenturyTel's facilities were already in place. Jurisdiction is absent and dismissal is compelled.

Standing is a threshold jurisdictional requirement that must be assessed at the outset of the case, and which the Tribe cannot meet. The Ordinance is explicit—the Tribe may only pursue a trespass claim for land "in which the Tribe has a legal interest." RCCL §25.17.9. Yet, nowhere in the First Amended Complaint does the Tribe allege that is has any legal interest in the 20 parcels of Reservation lands upon which its First Amended Complaint is based. Dismissal is compelled on that basis alone.

Jurisdiction is also lacking over the Tribe's trespass claim because it is preempted by the relevant federal scheme over rights-of-way on Indian land, and

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brief or otherwise when and if the Tribe makes its position known.

any inherent sovereign authority of the Tribe does not extend to a nonmember and non-Indian like CenturyTel. First, the federal government comprehensively regulates rights-of-way on Indian lands through statutes and regulations the BIA and the Tribe have already recognized as having preemptive force. Whether examined under the pre- or post-2016 regulations, the effect is the same: nothing gives the Tribal Court jurisdiction to adjudicate any federal trespass claim or any tribal trespass claim that arises under federal law. And to whatever extent tribal law may apply, it does not allow the Tribe to pursue the astronomical penalties sought here, which are fundamentally inconsistent with federal law.

Nor can jurisdiction be predicated on any inherent sovereign authority. The Tribe's inherent authority is limited to *Montana*'s two narrow exceptions permitting tribal jurisdiction over non-Indians. The first exception requires a "consensual relationship with the tribe or its members." 450 U.S. at 565. But case law is clear that the federal regulatory scheme itself cannot create, and instead can foreclose, any such consensual relationship under the first exception's rubric. Nor can any telecommunications service agreements constitute the required "consensual relationship" when they lack any nexus to the property rights surrounding CenturyTel's facilities and the penalties the Tribe is pursuing here. The second exception is likewise inapplicable, which only permits regulation over the conduct of non-Indians that "imperil[s]" the very existence of the Tribe. *Id.* at 566. That standard cannot be met here, where the conduct at issue is the provision of telecommunications services that provide important benefits to the Tribe.

Nor can the Tribe assert jurisdiction by invoking its power to exclude. The

Supreme Court and Seventh Circuit have made clear that the "power to exclude" is not a free-standing, independent source of inherent authority. Rather, a tribe's right to manage its land is merely one interest for courts to consider under the *Montana* analysis. Moreover, even if the power to exclude were a source of authority, it is not implicated here because the Tribe has made no effort to eject or evict CenturyTel or to have CenturyTel's facilities removed. Nor is the claim here aimed at conditioning CenturyTel's presence on the land with certain regulatory conditions, given that the Tribe's First Amended Complaint likewise disclaims any relief that would give CenturyTel consent subject to certain compensation. Instead, the sole aim of the relief sought in the First Amended Complaint is to punish CenturyTel—the very thing the Supreme Court has made clear is *not* part of a Tribe's inherent power to exclude. Moreover, the very authority the Tribe invokes makes clear that the power to exclude cannot be applied retroactively, thus foreclosing the Ordinance's application to CenturyTel's facilities which were already on the Reservation well before the Ordinance's enactment.

Finally, dismissal is also independently compelled because the Tribe's claim, and the Tribal Court's adjudication, violate the Indian Civil Rights Act. The ICRA requires due process protections for all persons—protections that squarely foreclose the penalties pursued by the Tribe and the retroactive application of the Ordinance. Moreover, the ICRA also imposes specific caps on the penalties that a Tribe can impose. Those caps—of $5,000 for one violation or $15,000 for repeat offenses—do not allow for any "per day" accrual, and cannot be squared with the millions of dollars in penalties the Tribe is pursuing here. And any argument that

the ICRA's limits only apply to criminal proceedings only compels that tribal courts be categorically foreclosed from exercising civil jurisdiction over non-Indians, as the Supreme Court has already held in the criminal context.

Under any of these bases, the result is the same: the First Amended Complaint must be dismissed for lack of jurisdiction.

ARGUMENT

I. Standard of Review.

A lower court's decision on a motion to dismiss for failure to state a claim is reviewed *de novo*. *Oakland Police & Fire Ret. Sys. v. Brown*, 861 F.3d 644, 649 (7th Cir. 2017).[5] The appellate court must accept as true the facts alleged in the plaintiff's complaint, but not alleged legal conclusions. *Id.* Similarly, a lower court's decision regarding subject matter jurisdiction is reviewed *de novo*. *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 669-70 (7th Cir. 2012); *see also Judy v. White*, 2004 Navajo Sup. LEXIS 19 at *4 (Navajo Aug. 2, 2004) (reviewing motion to dismiss for lack of subject matter jurisdiction *de novo*). "Facial challenges" to jurisdiction "require only that the court look to the complaint and see if the plaintiff has sufficiently *alleged* a basis of subject matter jurisdiction." *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009) (emphasis in original).

[5] The RCCL does not provide any appellate standard of review. Therefore, CenturyTel cites federal case law as persuasive authority as to the standard of review.

II. The Tribal Court Had a Clear Legal Duty to Assess Its Jurisdiction, and CenturyTel Was Entitled to that Determination, Before Proceeding with this Lawsuit.

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." *Hicks*, 533 U.S. at 358-59 (emphasis added) (quoting *Montana*, 450 U.S. at 564-65). This presumption against tribal jurisdiction over nonmembers is at its zenith here, when it concerns not only a tribe's legislative jurisdiction over nonmembers, but also a tribal court's adjudicative jurisdiction. While the Supreme Court has made clear that, at a minimum, "a tribe's adjudicative jurisdiction does not *exceed* its legislative jurisdiction," *Strate v. A-1 Contrs.*, 520 U.S. 438, 453 (1997) (emphasis added), "whether a tribe's adjudicative jurisdiction over nonmember defendants *equals* its legislative jurisdiction" is an open question. *Hicks*, 533 U.S. at 358 (emphasis in original). Notably, the Supreme Court "ha[s] *never* held that a tribal court had jurisdiction over a nonmember defendant." *Id.* at 358 n.2 (emphasis added).

Likewise, "[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 (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654 (2001)). Thus, CenturyTel had a clear legal right not to be subjected to Tribal Court jurisdiction unless and until the Tribe had established that such jurisdiction exists—a burden the Tribal Court never found was met. Without such a finding, this case cannot proceed beyond

CenturyTel's motion to dismiss.

The Tribal Court has a duty to assess its jurisdiction when it is challenged at the outset of a case, and cannot simply assume jurisdiction exists or wait until later phases of the lawsuit to consider the issue. "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception,'" and likewise extends to tribal courts. *Hwal'Bay Ba:J Enters.*, 2009 Hualapai App. LEXIS 1, at *5-6 (quoting *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). This threshold duty to assess jurisdiction is only magnified here, given that "tribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Kodiak Oil & Gas (USA) Inc. v. Burr*, __ F.3d __, 2019 U.S. App. LEXIS 23368, at *19, 2012 WL 3540423 (8th Cir. Aug. 15, 2019) (quoting *Plains Commerce Bank*, 554 U.S. at 328). 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. While this Court can address the jurisdiction issues here—which for the reasons explained below compels dismissal on a variety of grounds—this appeal at a minimum requires a remand ordering the Tribal Court to assess its jurisdiction in the first instance before proceeding on the merits of the case against CenturyTel.

III. Dismissal Is Compelled for Lack of Standing and Failure to State a Claim Because the Tribe Failed to Plead It Had Any Legal Interest in Any of the Allegedly Trespassed Lands.

The Tribe's First Amended Complaint fails for lack of standing for the same reason it fails to state a claim for which relief can be granted—the Tribe failed to plead it had any legal interest in any of the allegedly trespassed lands. Mot. to Dismiss 2, 6 n.2; Reply 3-8. Whether "the plaintiff below, has standing to sue," is a "threshold jurisdictional question." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998); *see id.* at 95-96; *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990). 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, at *19 (Tulalip Tribal Ct. App. Dec. 6, 2002). Indeed, to properly invoke the jurisdiction of the Tribal Court, the Tribe was required to plead a violation of tribal law. *See* RCCL § 4.1.1 (vesting Tribal Court "with jurisdiction over all violation [sic] of [the RCCL], and all disputes arising under the laws of the Red Cliff Band of Lake Superior Chippewa Indians").

Whether the issue is addressed as one of standing or failure to state a claim, "the same basic principles apply in both situations." *See Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 730 (1st Cir. 2016). This includes that, "[j]ust as the plaintiff bears the burden of plausibly alleging a viable cause of action, so too the plaintiff bears the burden of pleading facts necessary to demonstrate standing." *Id.* (citation omitted); *see also Silha v. ACT, Inc.*, 807 F.3d 169, 173-74 (7th Cir. 2015).

Here, the First Amended Complaint fails to meet that standard. The

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, 25.18.3, 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 (emphasis added). 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, or lands held in trust for individual tribal members, rather than the Tribe itself. Yet the First Amended Complaint, while using the same "Tribal Lands" term as the Ordinance, instead defined that term as coextensive with the Reservation itself, while only alleging "*most* of which is owned by the Tribe or its members in trust status." FAC ¶8 (emphasis added). In other words, there is nothing in the First Amended Complaint alleging that the "Tribal Lands" that "CenturyTel has entered onto," or 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 ¶¶12, 19. This is fatal to the First Amended Complaint, since it is fundamental that for a trespass claim, the plaintiff must identify what property was allegedly trespassed upon, and must have a valid legal interest in that property. *See, e.g.*, *Junction Pipeline Co., LLC v. Plains All Am. Pipeline, L.P.*, No. CV H-18-3347, 2019 U.S. Dist. LEXIS 17617, at *32-34, 2019 U.S. Dist. LEXIS 17617 (S.D. Tex. Feb. 4, 2019) (dismissing trespass claim where plaintiff failed to identify purportedly trespassed property); *Brown v. Whirlpool Corp.*, 996 F. Supp. 2d 623,

641, n.8 (N.D. Ohio 2014) (same); *McDaniels v. Hardin*, No. 18-cv-06274, 2018 U.S. Dist. LEXIS 184195, at *4-5, 2018 WL 5316170 (N.D. Cal. Oct. 26, 2018) (same); *see also Smith v. Riverwalk Entm't LLC*, Civil Action No. 05-1416, 2008 U.S. Dist. LEXIS 60636, at *50, 2008 WL 3285909 (W.D. La. Aug. 8, 2008) ("A plaintiff who brings a trespass action bears the burden of proving his ownership.") (citation omitted).

Notably, the Tribal Court in its Order acknowledged the distinction between the definitions of "Tribal Land" in the First Amended Complaint and the Ordinance, 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 Ordinance. *See* Order. What the Tribal Court failed to recognize, however, is that this deprived the Tribe of standing and compelled dismissal. A recent decision by the United States Court of Federal Claims makes this clear. In that case, a member of the Sioux Indian Tribe of South Dakota filed a complaint alleging that the federal government had taken various improper actions that denied him "all economically viable use [of] Indian land resources and enjoyment of Indian land." *Godfrey v. United States*, 131 Fed. Cl. 111, 120 (Fed. Cl. 2017). The court recognized that "[a]t a minimum, standing requires the plaintiff to suffer 'an invasion of a legally protected interest which is . . . concrete and particularized.'" *Id.* at 121 (alteration in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The court then dismissed the claim for lack of standing, reasoning that the complaint "does not allege that

Plaintiff had any valid real property interest in the 'Indian land' at issue," and has, therefore, "failed to allege an 'invasion of a legally protected interest' that is particularized." *Id.*

The same reasoning compels the same result here. The Tribe's First Amended Complaint nowhere alleges that the Tribe itself had any valid real property interest in the allegedly trespassed lands at issue. The "20 parcels" vaguely identified in the First Amended Complaint, even if "within the boundaries of the Red Cliff Reservation" as the Tribal Court found, could be owned by individual members of the Tribe or nonmembers, and does not plausibly plead a trespass of any "land in which the Tribe has legal interest." *See* RCCL §25.17.9; *see also Parsley v. Norfolk & W. Ry. Co.*, 2018 U.S. Dist. LEXIS 23134, at *7, 2018 WL 851341 (S.D. W. Va. Feb. 13, 2018) ("Plaintiff has not sufficiently pled enough facts to demonstrate the necessary privity of contract or ownership interest in the property and therefore has failed to sufficiently demonstrate standing to bring this suit."). The Tribe's First Amended Complaint "fail[s] to allege an 'invasion to a legally protected interest' that is particularized" as to the Tribe, and thus compels dismissal for lack of standing. *See Godfrey*, 131 Fed. Cl. at 121.

IV. The Tribe and Tribal Court Lacked Jurisdiction to Pursue and Adjudicate the Trespass Claim Under the IWRA, the *Montana* Exceptions, or Any Inherent Right to Exclude.

A. Governing Principles of Tribal Court Jurisdiction over Nonmembers and Non-Indians.

Jurisdiction here 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. The Tribe's jurisdiction to

pursue its trespass claim against CenturyTel—and the Tribal Court's jurisdiction to adjudicate that claim—are governed and foreclosed by the Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981) and its progeny, including *Strate*,[6] *Hicks*, and *Plain Commerce Bank*. The foundational principle, as explained by these cases, is that "absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate*, 502 U.S. at 445. Thus, the starting point for any analysis of tribal jurisdiction is whether there has been any "congressional direction enlarging tribal-court jurisdiction," *see id.* at 453, or in turn any action by Congress pursuant to its "plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

Montana, in turn, applies in absence of any congressional directive. It drew upon the principles from *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), which "held that Indian tribes lack criminal jurisdiction over non-Indians," to establish the more "general proposition" that "'the inherent sovereign powers of an Indian tribe'—those powers a tribe enjoys apart from express provision by treaty or statute—'do not extend to the activities of nonmembers of the tribe.'" *Strate*, 520 U.S. at 445-46 (quoting *Montana*, 450 U.S. at 565); *see also Hicks*, 533 U.S. at 358-60. This general rule against tribal jurisdiction, however, is subject to two

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[6] *Strate* dealt with a civil tort suit against a non-Indian entity related to a car accident that occurred on a right-of-way under the IRWA, 25 U.S.C. §§323-328. *See Strate*, 520 U.S. at 454-55.

narrow exceptions. First, "[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." *Strate*, 502 U.S. at 446 (emphasis added) (quoting *Montana*, 450 U.S. at 565-66). Second, "[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." *Strate*, 502 U.S. at 446 (quoting *Montana*, 450 U.S. at 565-66). As the Court has consistently clarified, however, "[t]hese exceptions are 'limited' ones, and cannot be construed in a manner that would 'swallow the rule,' or 'severely shrink it.'" *Plains Commerce Bank*, 554 U.S. at 331 (quotations omitted).

Moreover, *Strate* made clear that *Montana* governs not just with respect to a tribe's legislative jurisdiction, but also its adjudicative jurisdiction, based on the principle that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate*, 502 U.S. at 453; *see Plains Commerce Bank*, 554 U.S. at 332. Thus, the governing framework, as *Strate* summarized, is that "[s]ubject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'does not extend to the activities of nonmembers of the tribe.'" *Strate*, 502 U.S. at 453.

The Supreme Court's subsequent decisions in *Hicks* and *Plain Commerce Bank* have brought three further, important clarifications to the issue of jurisdiction

over nonmembers. First, *Hicks* made clear that while "the non-Indian ownership status of the land was central to the analysis in both *Montana* and *Strate* . . . , the general rule of *Montana* applies to both Indian and non-Indian land." *Hicks*, 533 U.S. 359-60. "The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'" *Id.* at 360. Moreover, the Supreme Court's subsequent decision in "*Plains Commerce Bank* . . . leaves no doubt that *Montana* applies regardless of whether the actions take place on fee or non-fee land." *Stifel v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207 (7th Cir. 2015) (citing *Plains Commerce Bank*, 554 U.S. at 328).[7]

Second, *Strate* made clear that, where the plaintiffs "ground their defense of tribal-court jurisdiction exclusively on the concept of retained or inherent sovereignty *Montana* . . . is the controlling decision for this case." *Strate*, 5520 U.S. at 456. *Hicks* and *Plains Commerce Bank*, moreover, highlight that this includes *Montana* governing any invocation of a tribe's inherent sovereign authority to exclude. *See Hicks*, 533 U.S. at 359-60 (holding the invoked right to exclude, and in turn condition upon entry to tribe-owned land within the reservation, is subject to *Montana* framework); *Plains Commerce Bank*, 554 U.S.

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[7] The Seventh Circuit also pointed out that the Ninth Circuit's contrary position in *Water Wheel Camp Recreational Area v. LaRance*, 642 F.3d 802 (9th Cir. 2011) (a case on which the Tribe may rely) that *Montana* does not reach to tribal land, cannot "be reconciled with the language that the Court employed in *Hicks* and *Plains Commerce Bank*." *Stifel*, 807 F.3d at 207 n.60.

at 335 (observing "[t]he regulations we have approved under *Montana* all flow directly from these limited sovereign interests," including "[t]he tribe's 'traditional and undisputed power to exclude persons from tribal land' . . . ." (quoting *Duro v. Reina*, 495 U.S. 676, 696 (1990))).

Third, *Hicks* made clear that while "a tribe's adjudicative jurisdiction does not *exceed* its legislative jurisdiction," that does not necessarily mean a tribal court will always have adjudicatory jurisdiction over nonmember defendants whenever legislative jurisdiction exists. *Hicks*, 533 U.S. at 358-59 (emphasis added) (quoting *Strate*, 520 U.S. at 453). As *Hicks* noted, "we have never held that a tribal court had jurisdiction over a nonmember defendant," and the Court there expressly "le[ft] open the question of tribal-court jurisdiction over nonmember defendants in general." *Id.* at 358 n.2. Thus, while any restrictions on the Tribe's authority to regulate CenturyTel necessarily also limits the Tribal Court's authority to adjudicate such a claim, the Tribal Court's adjudicative jurisdiction may be even more proscribed.

This Supreme Court framework controls the analysis here. The Tribe asserted jurisdiction under its new Ordinance and "pursuant to the Tribe's inherent sovereign authority over its territory." FAC ¶2. However, the exercise of any jurisdiction by the Tribe and Tribal Court is necessarily proscribed by Congress's passage of the IRWA and its corresponding regulations, which are comprehensive and foreclose jurisdiction for the trespass claim pursued here. Second, any invocation of the Tribe's inherent sovereignty is governed by *Montana* and its progeny, and the jurisdiction asserted by the Tribe and Tribal Court do not fall

within *Montana*'s narrow exceptions. *See* FAC ¶2. And while *Montana* also governs the Tribe's invocation of its "right to exclude," *see id.*, even when viewed in isolation, any such right does not give the Tribe nor the Tribal Court jurisdiction to pursue or adjudicate this claim.

B. The Comprehensive Federal Scheme Has Divested the Tribe and Tribal Court of Jurisdiction.

The Tribe in its First Amended Complaint, like the plaintiffs in *Strate*, "refer to no treaty or statute authorizing" the Tribal Court's jurisdiction, but instead "ground their defense of tribal-court jurisdiction exclusively on the concept of retained or inherent sovereignty." *Strate*, 520 U.S. at 456; FAC ¶2. But here, where the Tribe is attempting to assert jurisdiction with respect to an area federal law has comprehensively regulated, that federal scheme necessarily bears upon and restricts the scope of the Tribe's jurisdiction. The Eighth Circuit made this clear in its decision this year in *Kodiak Oil & Gas (USA) Inc. v. Burr.* 2019 U.S. App. LEXIS 23368, at *1-2. In that case, "[s]everal members of the MHA Nation sued numerous non-tribal oil and gas companies in MHA tribal court . . . alleg[ing] the companies owed royalties from wastefully-flared gas" on lands within the reservation on which the plaintiffs owned mineral rights. *Id.* The "comprehensive" and "exhaustive[]" nature of the federal government's regulation of this area factored large in the Eighth Circuit's "conclu[sion] suits over oil and gas leases on allotted trust lands are governed by federal law, not tribal law, and the tribal court[s] lack[] jurisdiction over the non-member oil and gas companies." *Id.* The same is true here. The Tribe's and Tribal Court's assertion of jurisdiction is necessarily governed by, subject to, and restricted by, the federal government's

comprehensive regulation of rights-of-way through all Indian lands, including through the IRWA and its corresponding regulations. And like in *Kodiak Oil*, that federal regulatory scheme dictates that jurisdiction to pursue and adjudicate this claim against CenturyTel in Tribal Court is lacking.

1. The Tribal Court Lacks Jurisdiction over the Trespass Claim to the Extent It Is Pleaded as a Federal Cause of Action and Requires an Adjudication of Federal Law.

The first argument the nonmember defendants raised in *Kodiak Oil*, and with which the Eighth Circuit agreed, is that that "tribal court lacks jurisdiction because: (a) tribal court adjudicatory jurisdiction is, in the absence of congressional authorization, limited to tribal law, and (b) the suit at issue here is a federal cause of action." *Id.* at *13. The same conclusion is compelled here.

First, as the Eighth Circuit observed, "[i]n *Hicks*, the Supreme Court held that tribal courts are not courts of general jurisdiction . . . ." *Id.* (quoting *Hicks*, 533 U.S. at 366). As the Eighth Circuit then properly held, this means that, "tribal courts lack jurisdiction to adjudicate federal causes of action absent congressional authorization." *Id.* at *15.

Second, the Tribe's First Amended Complaint makes clear that it is pleading a federal trespass claim, and that even the tribal trespass claim requires adjudicating federal law. The FAC squarely alleges that "CenturyTel's continued maintenance and operation of the CenturyTel facilities constitutes an intentional and deliberate trespass under tribal and *federal law*." FAC ¶18 (emphasis added). Indeed, the Tribe's trespass claim is predicated on allegations that CenturyTel was required under federal law to obtain rights-of-way approved by the BIA but failed

to do so. FAC ¶¶ 10, 17. For this same reason, even the Tribe's allegations of a trespass violation under *tribal* law still arise under and depend upon an adjudication of *federal* law. This is further confirmed by the Ordinance itself, which expressly incorporates the federal requirements under 25 C.F.R. pt. 169 throughout, and particularly as it concerns a Right-of-Way Agreement. *See e.g.*, RCCL §§25.2.18, 25.2.22, 25.4.1, 25.4.2(d), 25.6.6, 25.12.4(b)(2), 25.13.1.

But the Tribal Court has no jurisdiction over a federal claim, or one arising under federal law, unless there is some specific congressional authorization. None exists here. Like the federal scheme in *Kodiak Oil*, here too "[f]ederal regulations control nearly every aspect" of the right-of-way process, including how rights-of-way are awarded, compensation, and remedies for violations. *Compare Kodiak Oil*, 2019 U.S. App. LEXIS 23368, at *15-19, *with supra* Statement of Case Pt. II (detailing pre-2015 and post-2016 federal regulations). Moreover, there is nothing in either the pre-2015 or post-2016 version of the federal regulations granting jurisdiction to tribal courts to hear federal claims. The pre-2015 regulations make no reference to tribal law. And the post-2016 version, while referencing tribal law and tribal jurisdiction, does nothing to create or expand tribes' rights in this regard.[8] Rather the regulations are clear that they are only clarifying that the grant of a right-of-way "does not *diminish* to any extent" the Indian tribe's otherwise

[8] The dates alleged in the First Amended Complaint make it unclear whether the pre- or post-April 21, 2016 version of the regulations govern, although the original complaint does implicitly plead that CenturyTel's facilities were already in place as of April 2016. What is clear, however, is that dismissal is required and the Tribe and Tribal Court lack jurisdiction under either version of the regulations.

existing jurisdiction. *See* 25 C.F.R. §169.10 (2016) (emphasis added). Moreover, the trespass provision providing that "[t]he Indian landowners may pursue any *available remedies* under applicable law, including *applicable tribal* law," does nothing to vest jurisdiction with tribal courts as to *federal* law, particularly as to the substantive determination of liability as distinct from remedies. 25 C.F.R. §169.413 (2016) (emphasis added). To the extent the Tribe is seeking to bring a federal trespass claim, and a tribal trespass claim that arises under and requires a determination of federal law, the Tribal Court lacks jurisdiction to adjudicate the action.

2. The Tribal Court Lacks Jurisdiction over the Trespass Claim to the Extent It Is Inconsistent with, or Preempted by, Federal Law.

For similar reasons to those explained in *Kodiak Oil*, the federal regulatory scheme also dictates that—to the extent the Tribe is instead attempting to proceed with its trespass claim under tribal law—that claim is preempted, at least as to the Tribe's claimed relief. *See Kodiak Oil*, 2019 U.S. App. LEXIS 23368, at *18- ("Finally, we note that if the tribal court plaintiffs were attempting to proceed under tribal contract law, such tribal law would be preempted."). As *Kodiak Oil* highlighted, where "[f]ederal law and regulation exhaustively occupies the field," as it did there with respect to oil and gas leases on allotted Indian lands, "Congress has left no room for tribal law to supplement this comprehensive regulatory scheme," and tribal law is preempted. 2019 U.S. App. LEXIS 23368, at *18-19.

The comprehensive and exhaustive scope of federal law over Indian rights-of-way has similar preemptive force. As the BIA itself has expressed, "[t]he

[f]ederal statutes and regulations governing rights-of-way on Indian lands occupy and preempt the field of Indian rights-of-way." 80 Fed. Reg. 72505 (Nov. 19, 2015). Tribal law, then, is only permitted to apply to the extent allowed by federal law under this regulatory scheme; otherwise it is preempted. Under the pre-2015 regulations, there is no express allowance for tribal law. And while the post-2016 regulations state that rights-of-way "are subject to tribal law," that is subject to an express limitation: "except to the extent that those tribal laws are inconsistent with applicable [f]ederal law." 25 C.F.R. §169.9 (2016). Likewise, the post-2016 regulations explicitly restrict what actions may be taken "[i]f an individual or entity takes possession of, or uses, Indian land or BIA land without a right-of-way and a right-of-way is required" and commits a trespass. 25 C.F.R. §169.413 (2016). The BIA, for its part, "may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law." *Id.* And "[t]he Indian landowners may pursue any available remedies under applicable law, including applicable tribal law." *Id.* This last sentence places important restrictions upon what relief a tribe is permitted to seek. As addressed below, to the extent the tribal law trespass claim is not by an "Indian landowner," does not seek a "remedy," or is not "applicable," it is preempted and must be dismissed, as is required here.

a. Federal Law Requires that the Tribe Can Only Bring a Trespass Claim if It Owns an Interest in the Indian Land.

Other than the BIA, the pursuit of any trespass-related relief under 25 C.F.R. §169.413 (2016) is specifically limited to "Indian landowners." *Id.* This is a

defined term, whereby "*Indian landowner* means a tribe or individual Indian who owns an interest in Indian land." 25 C.F.R. §169.2 (2016). In other words, the federal regulations are explicit that the Tribe can only pursue relief for a purported trespass if it "*owns an interest in Indian land.*" Thus, for all the reasons already stated as to why the Tribe lacks standing under its own Ordinance for failing to allege that it has any legal interest in the lands at issue, *see supra* Pt. III, the Tribe is also precluded from bringing this suit under the restrictions of 25 C.F.R. §§169.2 and 169.413.

b. Federal Law Only Permits the Pursuit of Civil Remedies, Not Penalties.

The post-2016 federal regulations under §169.413 also preempt and foreclose tribal law claims that seek to impose a "penalty," given that the regulation instead explicitly limits an Indian landowner to "pursu[ing] any available *remedies* under applicable law . . . ." 25 C.F.R. §169.413 (2016) (emphasis added). "Penalties" and "remedies" are not the same thing. The Tribe's request for relief in an amount that could total more than $100 million, based on a provision in the Ordinance that is explicitly called a "penalty," "ignore[s] the fundamental distinction between 'penalties' and 'remedies.'" *Williams v. King Bee Delivery, LLC*, 199 F. Supp. 3d 1175, 1186 (E.D. Ky. 2016).

Because the federal regulations for Indian rights-of-way only permit an Indian landowner to pursue *remedies*, "whether a sanction is a penalty rather than a remedy" is a distinction of critical importance. *See Saad v. SEC*, 873 F.3d 297, (D.C. Cir. 2017) (Kavanaugh, J., *concurring*) (examining whether a sanction was a

penalty or a remedy as relevant to whether SEC may approve expulsion or suspension of a securities broker). The principles underlying this distinction date back more than a century, and were recently reaffirmed by the Supreme Court:

> A "penalty" is a "punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws." *Huntington v. Attrill*, 146 U.S. 657, 667 (1892). This definition gives rise to two principles. First, whether a sanction represents a penalty turns in part on "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." *Id.* at 668. Although statutes creating private causes of action against wrongdoers may appear—or even be labeled—penal, in many cases "neither the liability imposed nor the remedy given is strictly penal." *Id.* at 667. This is because '[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the State." *Ibid.* Second, a pecuniary sanction operates as a penalty only if it is sought "for the purpose of punishment, and to deter others from offending in like manner"—as opposed to compensating a victim for his loss. *Id.* at 668.

Kokesh v. SEC, 137 S. Ct. 1635, 1642 (2017).

For the same reasons the Court explained in *Kokesh* and its prior decisions, the types of relief sought here by the Tribe—which are labeled as "penalties", *see* RCCL §25.18.5(c)—are also "penalties," not remedies, as a matter of federal law. As to the first factor, critically, the relief being requested under the Ordinance can *only* be sought by the Tribe, *see* RCCL §§25.18.1, 25.18.3, and is thus completely unavailable to "an aggrieved individual" other than the Tribe itself, or "for the purpose of redressing a private injury,'" *Kokesh*, 137 S. Ct. at 1643 (quoting *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 423 (1915)). As to the second factor, the penalties under the Ordinance that the Tribe seeks here are *not* "compensatory." *Id.* at 142-44 (discussing *Brady v. Daly*, 175 U.S. 148, 154

(1899); *Meeker*, 236 U.S. at 423). Rather, compensatory damages are already provided for in the Ordinance to the extent it permits recovery of "[a]n amount equal to: (i) Rents, profits and any avoided costs derived from the trespassed property; and (ii) Damages caused to the trespassed property." RCCL §25.18.5(c)(1). In contrast, there is nothing compensatory about the Tribe's recovery of "(2) The penalty determined by the Tribal Court, which shall be not less than $100 and no more than $5,000 for each day that a trespass occurs or occurred . . . ; or (3) Three times the property taxes due for the entire period of the trespass . . . ." RCCL §25.18.5(c)(2)-(3). Those sanctions are penalties, not remedies. *See also Landgraf v. Usi Film Prods.*, 511 U.S. 244, 247, 281 (1994) ("The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions.").

Accordingly, the penalties the Tribe is pursuing under RCCL §25.18.5(c)(2) and (3) are foreclosed and preempted by federal law and must be dismissed.

c. The Tribal Law Trespass Claim Pleaded Here Is Not "Applicable Tribal Law."

The trespass claim pleaded by the Tribe—to the extent it is based on the Ordinance—is not "applicable tribal law" and compels dismissal for two distinct reasons.

First, under the Ordinance, a trespass can only occur if a person "intentionally and without the Tribe's consent" enters Tribal Land, remains on Tribal Land, or fails to remove an object from Tribal land. RCCL §25.18.1; *see*

also RCCL §25.18.3. Here, however, the First Amended Complaint does not allege that CenturyTel entered or has remained on the Reservation without consent. *See generally* FAC. Nor does the complaint seek to evict CenturyTel or its facilities from the lands at issue. *See id.* at Request for Relief. Instead, the Tribe only alleges that a ROW is required by law, and that CenturyTel has failed to prove it has a ROW, or has failed to provide the required information to process a ROW application. *See* FAC ¶¶10-17. But that is wholly insufficient to plead a trespass claim under the Ordinance, which in no way hinges tribal consent on obtaining a ROW. *See* RCCL §25.18. Without having plead that consent is absent—which the Tribe failed to do here—the tribal law trespass claim fails as a matter of law, and there is no "applicable tribal law." And to the extent the reference to a purported absence of a ROW *may* be sufficient to plead a *federal* trespass claim under 25 C.F.R. §169.413,[9] for the reasons already stated, the Tribal Court lacks jurisdiction to adjudicate any federal claim. *See supra* Pt. IV.B.1. Moreover, for the reasons explained in the next section, any available relief under federal law would be significantly more constrained than that sought here under the Ordinance. *See infra* Pt. IV.B.2.d.

Second, the Ordinance is not "*applicable* tribal law" to the extent the Tribe seeks to apply it retroactively to dates prior to the Ordinance's December 19, 2017

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[9] CenturyTel does not concede that the Tribe has adequately pleaded a federal claim. But unlike the Ordinance, 25 C.F.R. §169.413 specifically provides that "[i]f an individual or entity takes possession of, or uses, Indian land or BIA land *without a right-of-way and a right-of-way is required, the unauthorized possession or use is a trespass*." 25 C.F.R. §169.413 (emphasis added).

effective date. The Supreme Court has made clear that statutory compensatory and punitive damages provisions do *not* apply retroactively "in the absence of clear congressional intent." *Landgraf*, 511 U.S. at 283 (holding amendments giving a right to recover compensatory and punitive damages for Title VII violations did not apply retroactively); *see also infra* Pt. V. Here, there is nothing in the post-2016 amendments reflecting 25 C.F.R. §169.413 applies retroactively.[10] Nor is there anything in the Ordinance itself indicating it has retroactive application. "Elementary considerations of fairness," if not the Constitution itself, dictate that the Tribe is improperly pursuing its claim under an Ordinance that is not applicable to acts that occurred prior to that Ordinance's enactment. *See Landgraf*, 511 U.S. at 265-66.

d. The Tribal Law Penalties Are Inconsistent with Federal Law.

Finally, the relief the Tribe seeks is also preempted and foreclosed because the "available remedies under . . . *applicable* tribal law," 25 C.F.R. §169.413 (2016) (emphasis added), do *not* include "tribal laws [that] are *inconsistent* with applicable [f]ederal law," 25 C.F.R. §169.9 (2016) (emphasis added).

First, federal common law trespass principles—particularly in cases for

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[10] 25 C.F.R. §169.7 specifically provides that the only retroactive application is as to *procedural* provisions for rights-of-way granted before April 21, 2016, and even then, only to the extent the procedural provisions do not conflict with the provisions of the right-of-way grant or authorizing statute. *See* 25 C.F.R. §169.7(b) (2016). Here, however, the Tribe's reliance on the Ordinance is substantive as to both liability and damages and penalties. In that respect, §169.7(b) is clear: "Non-procedural provisions of this part do not apply." *Id.*

trespass on Indian lands—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) (internal citations omitted) (addressing damages for trespass of Indian lands); *see* Reply 13 (and authorities cited therein). *See also Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, Case No. C15-0543RSL, 2017 U.S. Dist. LEXIS 88449, at *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 *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 *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994)); *Pend Oreille*, 28 F.3d at 1549-51 (addressing proper measure for the value of tribal lands for damages as to trespass on Indian lands). Thus, for the same reasons just addressed, *see supra* Pt. IV.B.2.b, the penalties the Tribe seeks here are inconsistent with federal law and thus cannot be pursued here.

Second, the penalties the Tribe is pursuing are inconsistent with the limited circumstances that federal common law may permit an individual to recover exemplary or punitive damages for a trespass. Exemplary or punitive damages, to the extent they are available at all, are only recoverable "where the injury has been wanton and malicious, or gross and outrageous." *Day v. Woodworth*, 54 U.S. 363, 371 (1852) (explaining when exemplary damages are available for trespass); *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 409 (2009) ("Punitive damages have long been an available remedy at common law for wanton, willful, or outrageous

conduct."); *see also Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440, (9th Cir. 1987) (punitive damages properly dismissed in trespass claim over Indian allotment where there was no showing of "outrageous" conduct). The penalties sought by the Tribe, however, are inconsistent with this standard because the Ordinance does not condition their award on any finding of wanton, malicious, gross, or outrageous conduct on CenturyTel's part. Rather, a violation of the Ordinance only requires that the person act "intentionally and without the Tribe's consent." RCCL §25.18.1. And neither of the "penalties" provided for under the Ordinance require any additional finding of wanton, willful, or outrageous conduct. *See* RCCL §25.18.5(c)(2)-(3). The daily penalty of "not less than $100 and no more than $5,000 for each day that a trespass occurs or occurred" is to be determined by the Tribal Court "based on the size, scope, and impact of the trespass, and whether the trespasser knew or should have known it or its property was or is on Tribal Land." RCCL §25.18.5(c)(2). Notably, there is nothing in that list of considerations for the Tribal Court that requires it to make a finding of wanton, willful, or outrageous conduct. Even if the Tribal Court were to find that the size, scope, and impact of the trespass was *de minimis*, and that the trespasser did not know, nor should it have known its property was on Tribal Land, the Tribal Court would still be required to assess a penalty of at least $100 per day. Even at this mandatory minimum amount of $100 per day that would amount to a penalty of $2,190,000—an amount *11 times greater* than the $0.50 per year, per foot, baseline annual payment of just compensation for a right-of-way under the Ordinance. *See* RCCL §25.8.1. And the penalty of "[t]hree times the property taxes due" requires no

additional findings by the Tribal Court." *See* RCCL §25.18.5(c)(3). The compelled award of such a penalty—even in the absence of any finding of wanton, malicious, gross, or outrageous conduct—is inconsistent with federal law, is preempted, and requires dismissal of all such claimed relief here.

Third, the size of the penalty sought here—ranging from at least $2,190,000 up to $109,500,000—is inconsistent with federal due process limitations on damages. Federal due process protections prevent 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 of N. Am. v. Gore*, 517 U.S. 559, 562, 575 (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 is *de minimis*, where the burden of telecommunications facilities (such as buried cables, *see* FAC ¶12) is not significant; and 3) the "penalties" sought by the Tribe are grossly disproportionate to the civil penalties the federal regulations do permit for trespass related to forestry and Indian agricultural land, which are limited to (a) three times the value of the resources, (b) costs associated with damage to the land, and (c) costs associated with enforcement of the regulations. *See* 25 C.F.R. §§163.29(a)(3),

166.812 (2019). Moreover, for the same reasons, the penalties the Tribe is pursuing here violate the Indian Civil Rights Act's due process protections and limits on fines and penalties, and is thus also "inconsistent" with federal law on that basis. *See infra* Pt. V.

In sum, as *Kodiak* explains, any federal trespass claim brought by the Tribe cannot be brought in Tribal Court, and therefore must be dismissed. And to the extent the Tribe seeks to enforce its Ordinance, "the enforcement of such tribal law would not only be impermissible under *Montana* and its progeny, as discussed below, but would also be preempted," for the reasons just described. *Kodiak Oil*, 2019 U.S. App. LEXIS 23368, at *18-19.

C. The *Montana* Exceptions Do Not Apply.

The Tribe asserts jurisdiction to bring its tribal trespass claim against CenturyTel—a nonmember and non-Indian—based upon its "inherent sovereign authority over its territory." FAC ¶2. This is governed by *Montana* and its general dictate that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," subject to two narrow, limited exceptions. *Montana*, 450 U.S. at 565; *see supra* Pt. IV.A. The Tribe cannot establish that either of these limited exceptions apply here as to its legislative or adjudicative jurisdiction, nor give it jurisdiction pursuant to any inherent right to exclude.

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

Montana's first exception allows that "[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." No such jurisdiction-conferring "consensual relationship," however, exists here.

The Tribe's First Amended Complaint simply parrots back the *Montana* exception's language, averring 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 does not give the Tribe, nor the Tribal Court, any jurisdiction over CenturyTel. First, if the agreements being referenced are the rights-of-way themselves, as a court has already explained, "[t]he rights-of-way obtained by the [utility] Cooperatives through a Congressional grant do not equate to a 'consensual relationship' with the tribe because federal law requires the Cooperatives to obtain rights-of-way and provides a statutory mechanism to acquire the rights-of-way." *Reservation Tel. Coop. v. Henry*, 278 F. Supp. 2d 1015, 1023 (D. N.D. 2003) (finding no tribal jurisdiction to assess possessory interest tax against telecommunications utility); *see also Hicks*, 533 U.S. at 359 n.3 (making clear that an "other arrangement" under *Montana*'s first exception "is clearly another *private consensual* relationship" (emphasis in original)); *cf. Kodiak Oil*, 2019 U.S. App. LEXIS 23368, at *21 (federal control undermines tribal regulation even if consensual relationship exists). Similarly, 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 §25.18.1. And conversely, while the absence of any such agreement may be necessary to plead a trespass claim's requirement of being on

tribal land without the Tribe's consent, it also necessarily undermines any assertion of jurisdiction based on a "consensual relationship."[11]

In its opposition to CenturyTel's motion to dismiss, the Tribe instead hinted that the agreements to which it is referring are service agreements by CenturyTel to provide telecommunications services to customers. *See* Opp. to Mot. to Dismiss 4 ("Centurytel has numerous contractual relationships with the Tribe and its members, from which it derives significant revenues."). But this too is insufficient to confer jurisdiction, 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). An agreement to provide telecommunication services has no nexus to the property rights regarding the land on which CenturyTel's facilities lie, nor to the penalties the Tribe seeks, which are

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[11] The Ninth Circuit, in applying the first *Montana* exception, has observed that, "[a]s for the trespass claim, there is no legal or logical basis to require a consensual relationship between a trespasser and the offended landowner." *Water Wheel*, 642 F.3d at 819. The fact that a "consensual relationship" is inconsistent with the very nature of a trespass claim, however, necessarily requires that tribal jurisdiction over a nonmember must rest on the second exception, if at all.

In arguing to the contrary, the Tribe may cite *Water Wheel*, in which the Ninth Circuit held that the requirement for a "consensual relationship" can be disregarded but the first *Montana* exception still found to apply. *See id.* at 818-19. Disregarding the plain requirements of the *Montana* test is inconsistent with Supreme Court precedent, and the Seventh Circuit has already questioned the *Water Wheel* decision. *See supra* note 7 (discussing *Stifel*, 807 F.3d at 207 n.60).

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). Thus, the Tribe's invocation of the first *Montana* exception fails.

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

Nor does the second *Montana* exception apply, which provides that "[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." *Montana*, 450 U.S. at 566. Here too, the Tribe has not raised any specific allegations, but instead merely parrots *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) (emphasis added). In other words, "that tribal power must be necessary to avert catastrophic consequences." *Plains Commerce Bank*, 554 U.S. at 341 (quoting

Cohen §4.02[3][c], at 232, n.220).

Again, a court has already squarely rejected the second exception's applicability to a telecommunications utility on Indian land, explaining: "The Cooperatives provide valuable telecommunications services to the Reservation and no reasonable argument has been made, or could be made, that such services pose a threat to the tribe or endanger its political integrity so as to invoke the second *Montana* exception." *Henry*, 278 F. Supp. 2d 1024. The same result is compelled here. In notable contrast, 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 imperiling threat exists here, where CenturyTel's facilities *help* the Tribe by providing it with telecommunications services.

3. *Montana* Forecloses Tribal Legislative or Adjudicative Jurisdiction for the Trespass Claim Under a Purported Right to Exclude.

The Tribe additionally tries to rest jurisdiction in its asserted "right to exclude the Defendant from Tribal lands," which it claims "includes the right to regulate the Defendants' activities on those lands and to exercise adjudicative jurisdiction over claims arising from such activities." FAC ¶2. But this assertion of jurisdiction fails as to the trespass claim asserted here.

The Supreme Court has made clear that the invocation of a right to exclude from tribal lands is also subject to *Montana*'s framework. *See Plains Commerce Bank*, 554 U.S. at 335. As the Court has explained, some of the "regulations we have approved under *Montana*" flow from "[t]he tribe's 'traditional and undisputed power to exclude persons' from tribal land," which, "for example, gives it the power to set conditions on entry to that land via licensing requirements and hunting regulations," and is also a justification for much taxation. *Id.*; *see also Hicks*, 533 U.S. at 359-60; *see supra* Pt. IV.A.

But this power—particularly as it applies to nonmembers and non-Indians—is not unlimited. Rather, it is first and foremost a power to *exclude*. Thus, as the Supreme Court explained in the *Duro* case cited by *Plains Commerce Bank*, tribes' "traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands" means that "[t]ribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them." *Duro*, 495 U.S. at 696-97. And it is also recognized that "[t]his power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct," *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982), such that, "[r]egulatory authority goes hand in hand with the power to exclude," *South Dakota v. Bourland*, 508 U.S. 679, 691 n.11 (1993). But the Supreme Court has made clear that the power to exclude does *not* inherently include "jurisdiction to try and punish an offender." *Duro*, 495 U.S. at 697. Instead, "[w]here jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport

him to the proper authorities." *Id.*[12]

Tribal jurisdiction is thus absent for the trespass claim here because it is exclusively aimed at trying and punishing CenturyTel in Tribal Court—the very thing the power to exclude does not include. Noticeably absent from the Tribe's First Amended Complaint is any request for CenturyTel's "ejectment," despite its explicit inclusion in the Ordinance as a remedy the Tribe may pursue. *See* RCCL §25.18.5(a). Moreover, while the Tribe may retain the lesser power to place conditions on CenturyTel's entry, continued presence, or reservation conduct—such as requiring that a right-of-way be obtained based on certain conditions—the First Amended Complaint explicitly disclaims any relief that would in some manner authorize CenturyTel to maintain its facilities upon payment of compensation to the Tribe. FAC Request for Relief. Rather than place a condition on CenturyTel's continued presence on Tribal Land, or actually eject CenturyTel, the First Amended Complaint instead simply seeks to "try and punish" CenturyTel by imposing staggering "penalties" that could total more than $100 million.

That the Tribe lacks jurisdiction to pursue this claim, and the Tribal Court lacks adjudicatory jurisdiction to hear it, is further reinforced by the *Montana*

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[12] In *Duro*, a case that involved a "defendant who is an Indian but not a tribal member," the Supreme Court "h[e]ld that the retained sovereignty of the tribe . . . does not include the authority to impose criminal sanctions against a citizen outside its own membership." *Duro*, 495 U.S. at 679. The Court subsequently held—following an amendment by Congress—that Congress has authority to "permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians." *United States v. Lara*, 541 U.S. 193, 210 (2004). But that case did not address the issue of whether the Constitution "prohibit[s] tribes from prosecuting a nonmember citizen of the United States." *Id.* at 205.

exceptions themselves. The first exception is clear as to what a tribe may do when a "consensual relationship" exists—"[a] tribe may *regulate*, through taxation, licensing, or other means, the activities of nonmembers . . . ." *Montana*, 450 U.S. at 565 (emphasis added). Here, however, the relief the Tribe is seeking is not aimed at regulation, but punishment. Likewise, as to the second exception, any argument that CenturyTel's conduct "'imperil[s] the subsistence' of the tribal community" falls flat when the Tribe is making no effort to actually expel CenturyTel.[13] *See Plains Commerce Bank*, 554 U.S. at 341.

Finally, that the Tribe's jurisdiction does not extend to pursuing or adjudicating this trespass claim is reinforced by the Supreme Court's repeated emphasis that:

> [W]hat is necessary to protect tribal self-government and control internal relations can be understood by looking at the examples of tribal power to which *Montana* referred: tribes have authority "[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members."

Hicks, 533 U.S. at 361 (quoting *Strate*, 520 U.S. at 459 (alteration in original) (quoting *Montana*, 450 U.S. at 564)); *see also Stifel*, 807 F.3d at 208-09. Here, the

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[13] This fundamentally distinguishes this case from the Ninth Circuit's decision in *Water Wheel* (which the Tribe may cite in its response) finding jurisdiction under a right to exclude and the second *Montana* exception. *Water Wheel*, 642 F.3d at 819. There, no penalties were sought against the non-Indian defendant. Instead, the tribe brought a claim for eviction, and unpaid rent and damages from the tribe's loss of use, after the defendant refused to vacate the property after the lease expired and had been failing to make his rent payments. *Id.* at 804-05.

focus of this trespass suit, based upon the relief sought, is "to punish tribal offenders." But as *Montana* itself made clear, it was the application of these same "general principles in *Oliphant*" that led the Supreme Court to "*reject*[] a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians." *Montana*, 450 U.S. at 565 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)) (emphasis added). Thus, even if the Tribe has authority to *regulate* rights-of-way, "the *Oliphant* case would seriously restrict the ability of a tribe to *enforce* any purported regulation of non-Indian[s]." *Id.* at 565 n.14 (addressing restricted ability to enforce "regulation of non-Indian hunters and fishermen" at issue in *Montana*) (emphasis added). That is only magnified here, where constitutional due process and equal protection are implicated by the Tribe's effort to impose staggering penalties radically in excess of the maximum fines permitted under the Indian Civil Rights Act. *See infra* Pt. V. The Tribe lacks jurisdiction to pursue this claim, and the Tribal Court lacks jurisdiction to adjudicate it. Dismissal is required.

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

For the reasons just explained, the Tribe's right to exclude is still governed by *Montana* and its progeny as it relates to nonmembers and non-Indians, and leaves the Tribe and Tribal Court without jurisdiction here. *See supra* Pt. IV.C.3. The Tribe's First Amended Complaint, however, seeks to invoke its right to exclude independent of the *Montana* framework, citing to the Ninth Circuit's decision in *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 2019 WL 1145150 (9th Cir. 2019) (now at 922 F.3d 892). FAC ¶2. But the Ninth

Circuit's reasoning is an outlier compared to other jurisdictions, as *Knighton* itself recognized, 922 F.3d at 900, and its reasoning cannot be squared with *Hicks* or *Plains Commerce Bank*, as the Seventh Circuit has pointed out, *see Stifel*, 807 F.3d at 207 n.60.

Regardless, the Tribe's claim here fails even under the standard established in *Knighton*. As *Knighton* explained, "[a] tribe's power to exclude nonmembers from tribal lands permits a tribe to condition a nonmember's entry or continued presence on tribal land, but this inherent power does not permit the Tribe to impose new regulations upon Knighton's conduct retroactively when she is no longer present on tribal land." *Id.* at 902. It was thus critical to the tribe's jurisdiction in *Knighton* that "Knighton's alleged conduct violated the Tribe's regulations that were in place at the time of her employment." *Id.* In contrast, here, it is impossible for CenturyTel to have violated the Tribe's regulations that were in place at the time it installed its facilities, because the Ordinance was not even enacted until years after CenturyTel's facilities were in place. Thus, in clear contravention of the very authority upon which it relies, the Tribe is impermissibly seeking to impose penalties under a newly-enacted Ordinance as to telecommunications facilities that already existed when the Ordinance was passed.[14]

Furthermore, the power to exclude is subject to the plenary power of

[14] This would only be compounded were the Tribe to seek to apply the new August 20, 2019 amendments to its trespass claim against CenturyTel in this case. *See supra* Statement of the Case Pt. VII note 4.

Congress, a point even *Knighton* acknowledged. *See Knighton*, 922 F.3d at 901 (recognizing tribal sovereignty regarding the right to exclude can be limited by "explicit authorization from Congress"); *see also Hicks*, 533 U.S. at 389 (O'Connor, J. concurring) (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 BIA to promulgate a comprehensive and extensive regulatory scheme that preempts the claim the Tribe asserts. *See supra* Statement of Case Pt. II; Arg. Pt. IV.B. In addition, the Indian Civil Rights Act also limits the Tribe's ability to impose the trespass penalties it seeks, as discussed below. *See infra* Pt. V. Therefore, the Tribe, and in turn the Tribal Court, are without jurisdiction over the tribal trespass claim here.

V. There Is No Jurisdiction Where the Penalties Sought by the Tribe Violate CenturyTel's Due Process Rights and the Indian Civil Rights Act.

Lastly, the Tribe and Tribal Court are without jurisdiction to pursue or adjudicate the penalties sought here under the Indian Civil Rights Act. That Act expressly prohibits an Indian tribe from denying "any person"—member or non-Indian alike— of "due process," and sets strict limits on the imposition of fines and penalties, both of which are violated by the astronomical penalties being pursued here. 25 U.S.C. §1302(a)(7)-(8). The Tribal Court thus has no authority to adjudicate these trespass claims through trial while such penalties remain among the relief being sought. This is particularly true given that 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.

First, for the reasons already explained, the astronomical size of the penalties sought here—at a minimum $2,190,000 and up to $109,500,000—violate CenturyTel's due process's protection against such "grossly excessive" punitive damages awards. *See supra* Pt. IV.B.2.d (discussing *Gore*, 517 U.S. at 562, 575). Moreover, due process and "[e]lementary notions of fairness enshrined in our [U.S.] constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574-75; *see also Landgraf*, 511 U.S. at 265 (invoking same principle to hold that new provisions permitting recovery of compensatory and punitive damages for certain Title VII violations do not apply retroactively). This in turn compels that at a minimum, the Ordinance cannot apply to the Tribe's conduct before its enactment on December 19, 2017, which was silent on the subject of retroactivity. *See Landgraf*, 511 U.S. at 284 (stating that, in no case "in which Congress had not clearly spoken, have we [the Supreme Court] read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment").; *see also Vartelas v. Holder*, 566 U.S. 257, 266-75 (2012) (applying *Landgraf* and presumption against retroactivity); *Norwest v. Confederated Tribes of Grande Ronde*, 2001 Grand Ronde Trib. LEXIS 35, at *9-15 (Grand Ronde Tribal Ct. July 26, 2001) (applying *Landgraf* and finding amendment to constitution did not apply retroactively).

Second, the Ordinance's penalty of a maximum of "$5,000 for each day that

a trespass occurs or occurred," RCCL §25.18.5(c)(2), plainly violates the specific provision of the ICRA on which that maximum penalty amount is modeled. The ICRA expressly 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). The 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 Ordinance disregards the ICRA's mandate that $5,000 is the maximum for "*any 1 offense*." That does not permit "*each day* that a trespass occurs" to constitute a separate offense, particularly where the Ordinance itself is clear that instead, "[a] separate violation of this ordinance is committed with respect to *each parcel of land* on which a trespass is committed . . . ." RCCL §25.18.4. That means that under ICRA §1302(a)(7)(B), the maximum "penalty" that could be imposed is $5,000 for each of the 20 parcels of land purportedly trespassed. Even under §1302(a)(7)(C), which concerns repeat offenses, the maximum allowable penalty is $15,000, while the $100 per day *minimum* penalty under tribal law totals $2,190,000, well above the jurisdictional limits.

This attempted gamesmanship of Congress's mandate is impermissible. *See United States ex rel. Chase v. Wald*, 557 F.2d 157, 161 (8th Cir. 1977). This is made clear by *Chase*, where a federal statute imposed "a penalty of $1 for each animal" that trespassed Indian lands, 25 U.S.C. §179, while the corresponding regulation—similar to the Ordinance here—held the owner "liable to a penalty of

$1 per head for each animal thereof *for each day of trespass*." *See Chase*, 557 F.2d at 159 (emphasis added). The Eighth Circuit struck down the regulation, and correspondingly, the lower court judgment finding the defendant liable for $9,000 based on the per day penalty for only 200 head of cattle. *Id.* at 161. As the Eighth Circuit reasoned, "it is one thing to penalize a person $1.00 per head with respect to livestock which he permits to trespass on the lands of another and a quite different thing to penalize him $1.00 per day per head for the duration of the trespass." *Id.* Just as the court found that "[t]here is simply no basis in the statute for the per diem penalty that the Secretary has undertaken to impose by his 1969 regulation," *see id.*, there is likewise no basis in the ICRA for the per diem penalty the Tribe has sought to impose through its Ordinance. In the same manner that the court in *Chase* found "the $9,000 penalty adjudged against the defendants by the district court was excessive by $8800.00," *id.*, likewise the penalty pursued here—which for each of the 20 parcels is a $109,500 minimum to a $5,475,000 maximum—is radically excessive compared to the ICRA's $5,000 or $15,000 statutory limits, *see 25* U.S.C. §1302(a)(7)(B)-(C), and also violates the ICRA's more general prohibition on "excessive fines," 25 U.S.C. §1302(a)(7)(A). *See also Tulalip Tribes v. 2008 White Ford Econoline Van*, 11 Am. Tribal Law 199 (Tulalip Tribal Ct. App. 2013) (holding civil forfeiture subject to excessive fines clause of the ICRA, 25 U.S.C. §1302(a)(7)(A)).

Finally, any finding that the prohibitions in §1302(a)(7) apply only to criminal proceedings, and do not apply to what the Ordinance casts as "civil" penalties here (but which are penal in nature, as discussed in *supra* Pt. IV.B.2),

raises Constitutional due process and equal protection concerns that compel extending the Supreme Court's bar on tribes' authority to exercise criminal jurisdiction over non-Indians so as to also prohibit tribal court jurisdiction over nonmember and non-Indian defendants here as well. *See Hicks*, 533 U.S. at 358 n.2. It cannot be the case that a tribe may pursue, and a tribal court award, penalties that exponentially dwarf the caps allowed under the ICRA by simply characterizing them as "civil," particularly when that only has the effect of further stripping the defendant of the adjudicatory protections afforded to criminal defendants under the ICRA. *See generally* 25 U.S.C. §1302. Tribal jurisdiction is absent and the claim must be dismissed.

The Tribe, following CenturyTel's arguments regarding the ICRA's limitations on the Ordinance and the penalties sought in this case, has now amended the Ordinance to specifically provide that "[t]he Court shall remit or modify any damages, assessments or penalties prescribed in this Chapter, as may be necessary to assure compliance with the Indian Civil Rights Act and the requirements of Due Process." *See supra* Statement of the Case Pt. VII note 4. This amendment is a recognition by the Tribe that the ICRA applies, and that its "penalties" are criminally punitive in nature. Critically, however, that concession confirms the Tribe and Tribal Court's lack of jurisdiction here. As already explained, the federal right-of-way regime only permits Indian landowners to seek "remedies," not "penalties"; a tribe's right to exclude does not include jurisdiction to try and punish non-Indian offenders; and the Supreme Court has categorically foreclosed tribe's from exercising criminal jurisdiction over non-Indians. *See*

supra Pts. IV.A, IV.B.2.B, IV.C.3.

Nor can the Tribe save its claim to the astronomical penalties sought here by having now amended the Ordinance to provide that a separate violation is committed for "each day on which a trespass occurs." *See supra* Statement of the Case Pt. VII note 4. That amendment only serves to highlight that the original version of the Ordinance did *not* allow each day of the trespass to constitute a separate violation, and thus the penalties ran afoul of the ICRA. But the Tribe cannot impose this new amendment against CenturyTel retroactively. There is nothing in the Ordinance's text (which is silent as to retroactivity) that would permit the new amendments to be applied retroactively to CenturyTel here. In fact, the amendment's acknowledgment of the ICRA's applicability precludes the amendment's application here to CenturyTel, given that the ICRA explicitly bars any tribe from "pass[ing] any bill of attainder or ex post facto law," or abridging "due process." *See* 25 U.S.C. §1302(a)(8)-(9). The bill of attainder prohibition precludes the Tribe from meting out punishment under new amendments to the Ordinance directly aimed at countering CenturyTel's arguments in this litigation, while the ex post facto bar forbids the Tribe from increasing CenturyTel's punishment retroactively by now making each day of a trespass its own separate violation of the Ordinance.[15] And due process is implicated by retroactive legislation. *See supra.* Indeed, because "[r]etroactive imposition of punitive damages would raise a serious constitutional question," the amendment here—

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[15] *See* Black's Law Dictionary, "Bill of Attainder" (11th ed. 2019); *see also* Black's Law Dictionary, "Ex Post Facto Law" (11th ed. 2019).

which would increase CenturyTel's penalty by a factor of 1095—cannot apply to this action. *See Landgraf*, 511 U.S. at 281. The new amendments do not apply to CenturyTel in this case, and rather, only reinforce the jurisdictional infirmities in the Tribe's pursuit, and the Tribal Court's adjudication, of this claim.

CONCLUSION

For the foregoing reasons, jurisdiction is lacking, and CenturyTel thus respectfully requests that the Court reverse the Tribal Court and order the case dismissed. Alternatively, the Court at a minimum should remand the case with orders that the Tribal Court address the jurisdictional issues in the first instance and before proceeding with the lawsuit. Moreover, to the extent the Court finds that the Tribal Court's order was not immediately appealable, this Court should issue a writ of mandamus directing the Tribal 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,

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Dated: September 3, 2019

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