RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA

RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,

Plaintiff,

v.

CENTURYTEL OF THE MIDWEST-KENDALL, LLC

Defendant.

Appellate Case No. 19-AP-02

Tribal Court Case No. 2019-cv-09

BRIEF OF APPELLEE RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OPPOSING APPELLANT'S APPEAL AND MANDAMUS PETITION

Attorneys for Plaintiff, Red Cliff Band of Lake Superior Chippewa Indians

Brian L. Pierson, State Bar No. 1015527
Godfrey & Kahn, S.C.
833 East Michigan Street, Suite 1800
Milwaukee, WI 53202-5615
Phone: 414-273-3500
bpierson@gklaw.com

Jonathan T. Smies, State Bar No. 1045422
200 South Washington Street, Suite 100
Green Bay, WI 54301-4298
Phone: 920-432-9300
Fax: 920-436-7988
jsmies@gklaw.com

David M. Ujke, Tribal Attorney
Red Cliff Band of Lake Superior Chippewa
88385 Pike Road, Hwy 13
Bayfield, WI 54814
Phone: 715-779-3725
Dave.ujke@redcliff-nsn.gov

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INTRODUCTION

The Tribe filed this trespass action to protect its vital interest in preventing unlawful incursions into its sovereign, treaty-reserved territory. Centurytel of the Midwest-Kendall, LLC ("Centurytel" or the "Appellant") moved to dismiss for lack of subject matter jurisdiction on the grounds that (1) the Amended Complaint does not adequately identify the lands trespassed by Appellant,[1] (2) as a non-Indian, the Appellant is immune from tribal jurisdiction under the rule of *Montana v. United States*. 450 U.S. 544, 566, 101 S.Ct. 1245, 1245 1981)(hereafter "*Montana*"), (3) federal law preempts the Tribe's trespass ordinance, and (4) penalties under the Trespass Ordinance violate the Indian Civil Rights Act, 25 U.S.C. § 1302 ("ICRA") and federal Due Process principles. After the Trial Court denied the motion to dismiss, the Appellant filed both an appeal and a petition for a writ of mandamus. Both filings essentially seek a ruling from this Court that jurisdiction is lacking or, alternatively, an order directing the trial court to rule explicitly on the jurisdictional issue. This brief will address the arguments raised both in the Appellant's 29-page "Petition for Writ of Mandamus or Alternatively Writ of Prohibition" (hereafter "Mandamus Petition) and Appellant's 60-page Appellant's Written Brief (hereafter "Appellate Brief.")

JURISDICTIONAL STATEMENT

The appeal must be dismissed for lack of jurisdiction. As we demonstrate at Section I.A., below, Red Cliff Code of Laws ("RCCL") § 31.3 limits this Court's jurisdiction to review of *final* orders, judgments and decrees of the Trial Court and an aggrieved litigant may appeal only

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[1] The Tribe has filed a Second Amended Complaint ("SAC") in an attempt to obviate the need to continue to waste time on this non-substantive issue. See Appendix, App-4. Predictably, the Appellant challenges the validity of the SAC on technical grounds, arguing that the Trial Court was divested of jurisdiction by its unilateral "appeal" of a non-final order and that the Tribe was required to file a motion to amend. Both arguments are specious, as the Tribe's Notice of Motion and Motion demonstrate. See Appendix, App. 11-15.

a *final* order, decree or judgment. RCCL § 31.4. Federal law provides for an appeal from a non-final order ("interlocutory appeal") under specific circumstances - none of which applies to the Appellant - but there is no similar Tribal law. Because the Trial Court has not entered a final judgment, the Appellant has no right of appeal and this Court has no jurisdiction.

Nor can the Appellant obtain interlocutory by means of mandamus, a narrow remedy permissible in *some* jurisdictions under *extraordinary* circumstances. As we explain at Section II.A., mandamus jurisdiction in the federal and state judicial systems is supported by *statutes* but no similar Red Cliff ordinance supports the exercise of mandamus jurisdiction by the Red Cliff judiciary. At Section II.C, below, we show that, even if mandamus were available under Red Cliff law, the Appellant would be entitled to no relief because mandamus requires the petitioner to show that (1) in the absence of mandamus relief, the petitioner has "no other adequate means to attain the relief" it seeks, (2) the lower court's lack of jurisdiction is "clear and indisputable" and (3) the appellate court, in the exercise of its discretion, is satisfied that the writ is appropriate under the circumstances. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380-81, 124 S.Ct. 2576, 2586-87 (2004). The Appellant can satisfy none of these conditions because (1) appeal following final judgment is an adequate means of attaining relief, (2) the trial court's jurisdiction, far from being clearly and indisputably absent, is supported by ample federal appellate authority, and (3) even if conditions (1) and (2) were satisfied, a writ is not appropriate under the circumstances of this case, where Appellant's obvious intent is to prematurely cut off the Trial Court's fact-finding.

The Appellate Brief consists almost entirely of arguments that this Court can review only after the factual record has been developed by the Trial Court and the Trial Court has entered a final judgment. The same is true of the many jurisdictional arguments raised in the Mandamus

Petition. As we show at Section I.C., Judge Boulley correctly determined that he had sufficient jurisdiction to oversee the litigation, pending the development of facts to the contrary. The Appellant will have future opportunities to the Court's jurisdiction by means of summary judgment or at trial, *after* the facts have been developed and the issues have been narrowed.

To summarize: The Court lacks appellate jurisdiction because there has been no final judgment. The Court lacks mandamus jurisdiction because mandamus is not an available remedy under Red Cliff law.

RELIEF SOUGHT BY THE TRIBE

The Tribe has alleged jurisdiction based on the two exceptions to the general rule against tribal jurisdiction over non-Indians identified by the United States Supreme Court in *Montana* and on its "traditional and undisputed right to exclude." *Plains Commerce Bank v. Long Family Land and Cattle Company*, 554 U.S. 316, 128 S.Ct. 2709 (2008). Under *Montana,* jurisdiction depends on whether the Appellant has entered into "consensual relationships with the tribe or its members" and whether its conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," 450 U.S. 544, 566, 101 S.Ct. 1245, 1245 1981). A determination of the Tribe's jurisdiction pursuant to its right to exclude will depend on an analysis of that right in light of the Appellant's facilities, or lack thereof, on the Reservation. Jurisdiction depends on facts yet to be determined, e.g. the Appellant's relationships with the Tribe and its members, whether they are consensual, whether they are sufficiently related to the Tribe's claims, the nature and extent of facilities that the Appellant maintains on the Reservation, their impact on political integrity, economic security, health or welfare of the tribe, etc.

The Appellant, obviously vexed at the notion of being called to account for its trespass on *tribal* lands in a *tribal* court, wishes to abort the proceedings. The normal means by which non-Indians seek to avoid tribal jurisdiction is a federal court lawsuit challenging the Tribe's jurisdiction and seeking an injunction against further tribal court proceedings. The U.S. Supreme Court has approved such challenges but normally only *after* the litigant has exhausted tribal court remedies on the jurisdictional issue. Thus, the sooner the Appellant can persuade this Court to issue a "final" ruling on subject matter jurisdiction, the sooner Appellant can file in federal court.

This Court should decline both appellate jurisdiction and mandamus jurisdiction in this matter, since it is not ripe for review and mandamus jurisdiction is unavailable. This Court has no reason to make exceptions to Red Cliff law or to create common law writs in order to abet the Appellant's attempt to make an end-run around the Trial Court's fact-finding role with respect to jurisdictional and other issues. Judge Boulley denied the Appellant's motion to dismiss but left the issue of subject matter jurisdiction open for reconsideration once the facts have been developed. This was, and is, the correct approach.

The Tribe does *not* seek a final determination by this Court that the Court has subject matter jurisdiction. Such a ruling would open the door to the Appellant's federal court challenge. The Tribe does not believe that a federal district court – or this Court – can properly address the issue of jurisdiction before the facts have been developed and Judge Boulley has had an opportunity to rule based on those facts. The Tribe requests, therefore, that this Court:

(1) dismiss the appeal for lack of jurisdiction in the absence of a final order; and

(2) decline to exercise mandamus jurisdiction on the ground that mandamus is not an available remedy under Red Cliff law

ARGUMENT

I. APPELLANT HAS NO RIGHT TO INTERLOCUTORY APPEAL

A. Red Cliff Law Permits Interlocutory Appeals Only from Final Decisions and Orders

RCCL Section 31.3 and 31.4 provide:

> 31.3.1 The Appellate Court shall have jurisdiction to review all *final* orders, judgments and decrees of the Red Cliff Tribal Court.
>
> 31.4 SECTION 4: RIGHT OF APPEAL
>
> 31.4.1 Any party who is aggrieved by a *final* order, decree or judgment of the Trial Court may appeal in the manner prescribed by this chapter.

(Emphasis added).

These provisions are unambiguous. Because Judge Boulley's order denying the motion to dismiss is not final, the appeal must be dismissed.

RCCL Section 31.3 has a federal counterpart, 28 U.S.C. § 1291, which provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all *final* decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. …

(Emphasis added).

As the U.S. Supreme Court has observed, "the term 'final decision' has a well-developed and longstanding meaning. It is a decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 86 (2000) (internal citations and quotations omitted.)[2]

[2] See Wright & Miller Federal Practice and Procedure § 3909.

Because Judge Boulley's decision denying the Appellant's motion to dismiss does not fall within this definition, the appeal must be dismissed.

The Supreme Court has explained the reasons behind the final judgment on numerous occasions. Two examples will suffice:

> As we explained in Firestone *Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), the final judgment rule serves several salutary purposes: "It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of avoiding the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration."

Cunningham v. Hamilton County, 527 U.S. 198, 203-04, 119 S.Ct. 1915, 1919-20 (1999).

> An interlocutory appeal can make it more difficult for trial judges to do their basic job—supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.

Johnson v. Jones, 515 U.S. 304, 309, 115 S.Ct. 2151, 2154 (1995)

These considerations are highly pertinent here. The Appellant is inflicting considerable costs on the Tribe and attempting to coerce this Court to make a final subject matter jurisdiction determination before the parties have conducted discovery and before the Trial Court has had an opportunity to make factual findings or make rulings that narrow the legal issues that this Court

must address. In short, the Appellant is attempting to prevent the Trial Court from doing its job of reviewing and analyzing the facts with respect to subject matter jurisdiction.

The federal judiciary act addresses interlocutory appeals at 28 U.S.C. § 1292. But 28 U.S.C. § 1292 does not apply in this case. Red Cliff law applies. Red Cliff law does *not* provide for interlocutory appeals.

Even if the Tribe *did* have a counterpart to 28 U.S.C. § 1292, it would not support the Appellant's tactics. Section 1292 identifies limited circumstances under which a litigant may obtain interlocutory review of a trial court ruling, including orders relating to injunctions, appointment of receivers and admiralty matter. Notably absent from the list are orders denying motions to dismiss, whether on subject matter jurisdiction or any other grounds.

Under certain circumstances, Section 1292(b) permits a federal *district court* to apply to the Court of Appeals to hear an otherwise non-appealable case if the district court believes "an immediate appeal from the order may materially advance the ultimate termination of the litigation." The Appellate Court may accept or reject such an application at its discretion. No request for such an application was made to Judge Boulley in this case nor, in the absence of any factual record, would it have been appropriate.

Finally, the federal courts have developed a "collateral order" doctrine that permits interlocutory appeals where the lower court has denied a motion to dismiss based on a defendant's claim to immunity from suit:

> As a general rule, the district court must issue a final judgment before an appellate court has jurisdiction to entertain an appeal under 28 U.S.C. § 1291. It is well established, however, that certain types of interlocutory orders denying immunity defenses in civil cases may be appealed immediately under the collateral order doctrine, regardless of whether the denied motion was a motion to dismiss or a motion for summary judgment.

Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 667 (7th Cir. 2012).

This immunity exception to the final judgment rule has no bearing on this case because the Appellant has no immunity and claims none.

The Appellant repeatedly implies that a special rule entitles a litigant to interlocutory appellate review when a trial court declines to dismiss on the ground of subject matter jurisdiction. No Tribal law supports this argument and the U.S. Supreme Court *rejected* it in both *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985) ("*National Farmers Union*") and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971 (1987) ("*Iowa Mutual Insurance*"), the two key Supreme Court decisions that establish and define the requirement that litigants wishing to challenge the subject matter jurisdiction of a tribal court must first exhaust tribal court remedies. In *National Farmers Union*, the Court explained the reasons for the rule:

> Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the *first opportunity to evaluate the factual and legal bases for the challenge*. Moreover the orderly administration of justice in the federal court will be served by *allowing a full record to be developed in the Tribal Court* before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a *full opportunity to determine its own jurisdiction* and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

471 U.S. at 855-57 (emphasis added).

In *Iowa Mutual Insurance*, the Court directly rejected the Appellant's principal argument – that denial of a motion to dismiss based on jurisdiction warrants immediate appellate review:

> The Tribal Court also addressed the issue of subject-matter jurisdiction, holding that the Tribe could regulate the conduct of non-Indians engaged in commercial relations with Indians on the reservation. Since the Tribe's adjudicative jurisdiction was coextensive with its legislative jurisdiction, the court concluded that it would have jurisdiction over the suit. Although the Blackfeet Tribal Code establishes a Court of Appeals, see ch. 11, § 1, it does not allow interlocutory appeals from jurisdictional rulings. *Accordingly, appellate review of the Tribal Court's jurisdiction can occur only after a decision on the merits*.

480 U.S. at 12 (emphasis added).

The Court's "Accordingly" conclusion is especially noteworthy here. The Court does *not* say "The defendant being especially eager to get to federal court, the Blackfeet Tribe must accordingly make an exception to allow the plaintiff's appeal." The Court does *not* say "Appellate review being unavailable and the defendant being especially eager to get to federal court, the Blackfeet Court of Appeals must accordingly grant a mandamus petition on the issue of subject matter jurisdiction." Instead, Court affirms precisely the position the Tribe asserts in this Brief: Appellate review of the Tribal Court's jurisdiction can occur only *after* a decision on the merits.

The Ninth Circuit applied the same rule in *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir. 2009). In *Elliott,* the White Mountain Apache Tribe had brought tribal court trespass and other claims against a non-Indian who had started a forest fire on the Tribe's reservation:

> Plaintiff (the defendant in that action) filed a motion to dismiss for lack of jurisdiction. The tribal trial court denied the motion, holding that it had jurisdiction under the relevant United States Supreme Court cases.

> Plaintiff sought interlocutory appellate review of that decision in the tribal appellate court, but the tribal appellate court issued an order denying Plaintiff's request for appellate review. The tribal appellate court held that, under its rules of appellate procedure as promulgated by the tribal legislature, it cannot entertain interlocutory appeals. It therefore dismissed the appeal from a nonfinal order for lack of appellate jurisdiction and returned the case to the tribal trial court for further proceedings.
> Plaintiff then brought this action in federal district court. Plaintiff seeks injunctive and declaratory relief against Defendants White Mountain Apache Tribe, Honorable John Doe Tribal Judge, and White Mountain Apache Tribal Court, and from conducting any further proceedings in tribal court. The district court held that Plaintiff must exhaust her tribal court remedies and granted Defendants' motion to dismiss. The district court dismissed the action without prejudice to its refiling after Plaintiff has exhausted her tribal court remedies.

566 F.3d at 845.

> …
>
> This issue is controlled by *Iowa Mutual*. The relevant facts were identical: "Although the Blackfeet Tribal Code establishes a Court of Appeals, see ch. 11, § 1, it does not allow interlocutory appeals from jurisdictional rulings. Accordingly, appellate review of the Tribal Court's jurisdiction can occur only after a decision on the merits." 480 U.S. at 12, 107 S.Ct. 971.

566 F.3d at 847.

These leading Indian law decisions directly contradict the Appellant's arguments.[3] Like the tribal ordinances at issue in the *Iowa Mutual* and *Elliott* cases, the Red Cliff Court Code

[3] Numerous non-tribal cases also contradict Appellant's position. See *Wabtec Corp. v. Faiveley Transport Malmo AB*, 525 F.3d 135, 137 (2d Cir. 2008)("[D] But denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable:") *Petroleos Mexicanos Refinacion v. M/T KING A (EX-TBILISI)*, 377 F.3d 329, 333 (3d Cir. 2004)("interlocutory orders finding subject matter jurisdiction are ordinarily not appealable under the collateral order doctrine"); *Triad Associates, Inc. v. Robinson*, 10 F.3d 492, 496-97 n. 2 (7th Cir. 1993)(denial of a motion to dismiss for lack of standing does not qualify as a final judgment and is not eligible for interlocutory review); *Briggs & Stratton Corp. v. Local 232*, 36 F.3d 712, 714 (7th Cir. 1994) ("To the extent the union wants us to review the district court's failure to dismiss the case outright, it hasn't a leg to stand on."); *Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343, 348 (3d Cir. 1997)(" The denial of a motion to dismiss for lack of subject matter jurisdiction is not appealable.")

"does not allow interlocutory appeals from jurisdictional rulings." As in those cases, the appeal should be dismissed and the case remanded to the trial court for further proceedings.

B. The Appellant Ignores Applicable Law and Instead Cites Legal Authorities that Do Not Support Its Appeal

In the "Jurisdictional Statement" in its Appellate Brief, p. 2-3, Appellant cites two decisions in support of its statement that "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."[4] Appellate Brief, p. 3. Those decisions fell within the collateral order doctrine referenced above because, unlike this case, they involved the issue of sovereign immunity. The Appellant seeks to bootstrap these decisions, stating that "the jurisdictional order here is likewise effectively unreviewable from a final judgment," but the two situations are not equivalent and, as we have shown above, the courts have not extended the collateral order doctrine to jurisdictional rulings.

In the Argument Section of its 60-page Appellate Brief, p. 20, Appellant devotes a single paragraph to the issue that determines the outcome of its appeal. Instead of acknowledging and addressing the above-described obstacles to its appeal, the Appellant cites irrelevant authorities in support of an erroneous standard of review. In *Oakland Police & Fire Retirement System v. Mayer Brown*, LLP, 861 F.3d 644 (7th Cir. 2017) and *Apex Digital, Inc. v. Sears, Roebuck & Co.,* 572 F.3d 440 (7th Cir. 2009), the plaintiffs were entitled to appellate review because they had appealed from a *final judgment* dismissing their suits. Similarly, in *Judy v. White*, 5 Am. Tribal Law 418 (2004), the Navajo Supreme Court considered the defendants' appeal following a *final judgment* in the lower court. The defendants in *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d

[4] Based on two flips, it could be said with equal truth that "flipped coins consistently turn up heads."

661 (7th Cir. 2012) were entitled to interlocutory review of a non-final judgment under the collateral order doctrine because their motion to dismiss was based on sovereign immunity. The Appellant's purported reliance on these cases, without acknowledging, much less addressing, the key distinctions that make them irrelevant, is troubling.[5]

C. The Brevity of the Trial Court's Order Denying the Appellant's Motion to Dismiss Is Irrelevant

The Appellant's Briefs in support of its motion to dismiss in the Trial Court totaled thirty pages. So far, in this Court alone, the Appellant has filed a 29-page "Petition for Writ of Mandamus or Alternatively Writ of Prohibition," a 68-page "Petitioner's Appendix," a 12-page "Statement of Grounds for Appeal," a 22-page "Supplemental Authority" and the 60-page Brief to which our Brief principally responds. The Petition, Statement and Brief all say the same thing over and over. It is unclear whether the Appellant hopes to overwhelm the Court with paper or sincerely believes that weak arguments are strengthened through sheer repetition.

Judge Boulley does not share Appellant's penchant for prolixity. Unpersuaded by its arguments, he denied Appellant's motion to dismiss with the terse statements:

> In consideration to these documents I am finding that the Red Cliff Tribe has a trespass ordinance and that NSPW has physical facilities located with the boundaries of the Red Cliff Reservation." In that light, I am denying the motion to dismiss. The issues raised within the documents can be raised on the trial phase.[6]

Appellant argues that Judge Boulley's ruling is an "abdication of the Tribal Court's threshold obligation to determine its own jurisdiction to hear this case." Appellant's Brief, p. 2.

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[5] Cf. ABA Comment 4 to SCR 20:3.3, Rules of Professional Conduct for Attorneys: "… A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. … The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case."

[6] The Tribe believes that the Court intended to permit jurisdiction to be raised again through summary judgment proceedings once the facts have been developed and would certainly not object to the issue being raised in that manner, assuming the requirements for summary judgment have been met.

The mandamus petition seeks a writ "directing the Tribal Court to rule upon the jurisdictional arguments raised in CenturyTel's motion to dismiss." Petition for Writ, p. 3.

But in rejecting the Appellant's arguments, Judge Boulley necessarily *did* determine that he had subject matter jurisdiction to conduct further proceedings, pending reconsideration once the factual record is developed. The Appellant concedes as much: "Allowing litigation to continue to the trial phase of the case is in and of itself an exercise of jurisdiction over CenturyTel." Appellant's Brief, p. 2.

Nothing in Red Cliff law requires a trial court judge to gratify a litigant by engaging in extending discussion of the litigant's arguments before rejecting them. The Court Code, RCCL Chapter 4, does not even address procedures for motions to dismiss, much less mandate the form in which the Court issues its decisions.

Judge Boulley's decision was entirely appropriate. Subject matter jurisdiction depends on whether the Appellant has entered into "consensual relationships with the tribe or its members," whether its conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *Montana v. United States*. 450 U.S. 544, 566, 101 S.Ct. 1245, 1245 1981), or whether the Tribe has jurisdiction to regulate based on its "traditional and undisputed right to exclude." *Plains Commerce Bank v. Long Family Land and Cattle Company*, 554 U.S. 316, 128 S.Ct. 2709 (2008). These are largely fact-based determinations: The Appellant sells telecommunications services to the Tribe and its members. This necessarily involves relationships - presumably consensual. These relationships and the related contracts, invoices etc. have not been introduced into evidence. What do they say? How do they relate to the Tribe's claims? Under what circumstances were the Appellant's facilities installed on the Reservation? How do they impact tribal operations or the Tribe's right of self-government? We

don't know the answer to any of these questions because there are, quite literally, zero facts in evidence.[7]

It will be Judge Boulley's responsibility to make a decision, either on a motion for summary judgment or after trial, *based on a fully developed record*. At that time, he will have an opportunity to fully address subject matter jurisdiction in light of the *relevant jurisdictional facts*. The Appellant will have the right to appeal that decision to this Court, which will then be in a position to make a thorough review *based on the facts*, with the benefit of the trial court's analysis. This is how the system is supposed to work.

This Court should dismiss the appeal, determine that mandamus is not an available remedy under Red Cliff law and send the case back to the Trial Court, thereby "allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *National Farmers Union*, 471 U.S. at 856.

II. APPELLANT IS NOT ENTITLED TO A WRIT OF MANDAMUS OR PROHIBITION[8]

A. Red Cliff Law Does Not Provide for Mandamus Relief

In the federal system, the authority of an appellate court to issue a writ of mandamus or prohibition is explicitly authorized under the All Writs Act, 28 U.S.C. § 1652(a), which provides: "The Supreme Court and all courts established by Act of Congress may issue all writs

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[7] Consistent with its "kitchen sink" approach to this litigation, Appellant also contends that jurisdiction is lacking because (i) penalties under the trespass ordinance allegedly exceed limitations under the Indian Civil Rights Act and Due Process (they don't), (ii) allegedly requiring the Court to invalidate ordinance in its entirety (it doesn't), (iii) thus allegedly depriving the Court of subject matter jurisdiction over the Tribe's trespass claim (it doesn't). Judge Boulley was under no obligation to casually strike down a tribal ordinance without knowing whether the Appellant is liable for *any* penalties, much less excessive ones and without any factual foundation for a jurisdictional ruling under *Montana v. United States or the Tribe's inherent authority to exclude*.

[8] A Writ of Prohibition tells a lower court what it may not do. A writ of mandamus tells a lower court what it must do. Because the standards for the two writs are the same, *Memorial Hosp. v. Shadur*, 664 F.2d 1058, 1059 n. 1 (7th Cir. 1981); *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1063 n. 4 (D.C. Cir. 1998); *Calderon v. U.S. Dist. Court*, 134 F.3d 981, 983 n.3 (9th Cir. 1998), our discussion relating to mandamus applies equally to the Appellant's petition for a writ of prohibition.

necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Wis. Stats. Ch. 783 (Mandamus and Prohibition) provides a statutory basis for these writs under Wisconsin law.

Unlike the legal codes of the United States and Wisconsin, the Red Cliff Code of Laws does *not* authorize courts to exercise mandamus jurisdiction. The Appellant's cites RCCL §4.25 (Temporary Restraining Orders and Injunctions) but that provision, which authorizes the *trial* court to issue restraining orders and injunctions, has no more to do with appellate mandamus authority than Fed. R. Civ. P. 65 (Injunctions and Restraining Orders), the federal rule upon which it is based.

A few tribal courts have held that they possess the power to issue writs of mandamus as a matter of their tribe's common law. Common law, of course, is simply law that judges make up based on precedent and custom.[9] Law-making by the judicial branch should always be approached with caution but especially here, where the Red Cliff Tribal Appellate Court is composed of judges drawn from tribes who are *not* Red Cliff members and the Court's composition changes with each appellate case. The best course of action for this Court is to either determinate that mandamus is not available under Red Cliff law or, alternatively, reserve judgment on whether such a remedy exists until there is a case in which a petitioner has satisfied the requirements for such relief. As we show below, the Appellant clearly has not done so here.

B. A Writ of Mandamus Ordering the Trial Court to Rule on the Appellant's Motion Is Inappropriate Because the Trial Court Has Already Ruled

To the extent that the Appellant seeks a writ "directing that the Tribal Court, before proceeding to trial, rule upon the jurisdictional challenges CenturyTel squarely presented in its

[9] Black's Law Dictionary – Common law (11h ed.). 2014. p. 344. "1. The body of law derived from judicial decisions, rather than from statutes or constitutions; [synonym] CASE LAW [contrast to] STATUTORY LAW."

motion to dismiss," Mandamus Petition, p. 1, its petition is based on the false premise that Judge Boulley did not rule on the Appellant's jurisdictional challenges. The Appellant presented a hodgepodge of arguments in support of its position that the Tribal Court lacks jurisdiction. As we explain in Section I.C., above, Judge Boulley appropriately considered and rejected them but acknowledged that the issue could be raised again after development of the relevant facts. Appellant's purportedly puzzlement over the meaning of Judge Boulley's rejection of its motion is disingenuous. He may not have provided the explanation the Appellant desired but there is no doubt that, by rejecting the Appellant's arguments, Judge Boulley correctly concluded that he had sufficient jurisdiction to proceed based on the allegations of the Complaint, while explicitly acknowledging the Appellant's right to raise the issue again once the factual record has been adequately developed.

C. The Appellant Meets None of the Three Requirements for Mandamus Relief

1. Mandamus Is A Drastic Remedy Reserved for Really Extraordinary Cases

This Court may one day encounter a case so grave and so extraordinary that the Court feels compelled to adopt the common law remedy of mandamus. This is not that case. In *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380, 124 S.Ct. 2576, 2586-87 (2004), the Supreme Court explained the truly extraordinary nature of mandamus relief:

> The common-law writ of mandamus against a lower court is codified at 28 U.S.C. § 1651(a). … *This is a "drastic and extraordinary" remedy "reserved for really extraordinary causes*." *Ex parte Fahey*, 332 U.S. 258, 259–260, 67 S.Ct. 1558, 91 L.Ed. 2041 (1947). "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Roche v. Evaporated Milk Assn*., 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed. 1185 (1943). Although courts have not "confined themselves to an arbitrary and technical definition of 'jurisdiction,' " *Will v. United States*, 389

> U.S. 90, 95, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967), *"only exceptional circumstances amounting to a judicial 'usurpation of power,'* " ibid., or a "clear abuse of discretion," *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383, 74 S.Ct. 145, 98 L.Ed. 106 (1953), *"will justify the invocation of this extraordinary remedy," Will*, 389 U.S., at 95, 88 S.Ct. 269.

Because of the extraordinary nature of mandamus relief, the Supreme Court has set three separate conditions, each of which must be met, before a writ may issue:

> As the writ is one of "the most potent weapons in the judicial arsenal," id., at 107, 88 S.Ct. 269, three conditions must be satisfied before it may issue. *Kerr v. United States Dist. Court for Northern Dist. of Cal*., 426 U.S. 394, 403, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976). *First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires,"* ibid.—a condition designed to ensure that the writ will not be used as a *381 substitute for the regular appeals process, *Fahey*, supra, at 260, 67 S.Ct. 1558. *Second, the petitioner must satisfy " 'the burden of showing that [his] right to issuance of the writ is "clear and indisputable." ' " Kerr*, supra, at 403, 96 S.Ct. 2119 (quoting *Bankers Life & Casualty Co.*, supra, at 384, 74 S.Ct. 145). *Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. Kerr*, supra, at 403, 96 S.Ct. 2119 (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 112, n. 8, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964)).

Cheney, 542 U.S. at 380-81

In the following Sections, we address the three conditions for mandamus described by the Court. The Appellant's failure to satisfy even one of them dooms its petition. As we demonstrate, the Appellant fails on all three.

2. The Appellant Has Other Adequate Means of Relief – An Appeal Following Final Judgment

Although limiting a lower court to its prescribed jurisdiction is, indeed, a traditional use of mandamus, the word "mandamus" does not, as the Appellant essentially argues, have magical qualities that allow litigants to avoid the final judgment rule. On the contrary,

> It has been Congress' determination since the Judiciary Act of 1789 that as a general rule "appellate review should be postponed . . . until after final judgment has been rendered by the trial court." [Cites omitted.] A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress.

Kerr v. U.S. District Court, 426 U.S. 394, 402-03, 96 S.Ct. 2119, 2123-24 (1976).

At page 16 of its Mandamus Petition, Appellant argues "Unless, however, this Court deems the motion to dismiss order to be a final appealable order under the collateral order doctrine or some other basis and thus exercises appellate jurisdiction over CenturyTel's concurrently-filed notice of appeal, CenturyTel is left with no adequate remedy for the lower court's failure to assess its jurisdiction on the motion to dismiss." Appellant cites *Abelesz v. OTP Bank*, 692 F.3d 638, 651 (7th Cir. 2012). The Seventh Circuit in *Abelecz,* granted the writ under the extraordinary circumstances of that case but, far from supporting the Appellant's position, squarely *rejected* it:

> As a general rule, appellate courts are not in the business of reviewing routine denials of motions to dismiss—not by using pendent appellate jurisdiction, not by using the collateral order doctrine, and certainly not by issuing a writ of mandamus. "The final-judgment rule exists to reduce piecemeal litigation and encroachment on the special role district judges play in managing litigation. …. *Furthermore, until a case is over, litigants do not know whether an individual claim of error actually matters, and appellate courts usually benefit from having an entire record in front of them*.

692 F.3d at 651 (Emphasis added.). (See, supra, pp. 16-17).

More recently, in the case of *In re HTC Corporation*, 889 F.3d 1349, 1353 (Fed. Cir. 2018), the Federal Circuit cited *Comfort Equipment* and *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 379–84, 74 S.Ct. 145, (1953) in rejecting a mandamus petition similar to Appellant's:

> Although Petitioner argues that it should 'not be forced to litigate this case in an improper venue through a final judgment before it can contest venue via appeal,' Pet'r's Br. 6, the Supreme Court rejected this same argument in *Bankers Life*, explaining *that "the extraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial."*

(Citations omitted).

Appellant leads its "governing standards for mandamus" argument, Mandamus Petition, p. 13, with the quotation from *In re Hot-Hed,* 477 F.3d 320 (5th Cir. 2007) that "[w]hen the writ of mandamus is sought from an appellate court to confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ almost as a matter of course."[10] The Appellant heavily relies on this gross misstatement of the law of mandamus without disclosing that the Fifth Circuit has all but disavowed *Hot-Hed*. In the case of *In re Crystal Power Co., Ltd*., 641 F.3d 82 (5th Cir. 2011), the Court first granted, then, en banc, denied a petition for mandamus seeking an order that a district court remand a removed case back to state court. In doing so, the Court acknowledging that controlling Supreme Court decisions "cast a heavy shadow"[11] on *Hot-Hed*. The Court addressed and repudiated Appellant's argument that it is entitled to interlocutory review of the Tribal Court's denial of its motion to dismiss on jurisdictional grounds:

> We withdraw our prior order and deny the petition for a writ of mandamus directing remand of this removal action to state court. We are now persuaded that the petition does not meet the stringent demands of the All Writs Act for extraordinary relief. Supreme Court precedent does not ordinarily allow mandamus review of district court decisions that, while not immediately appealable, can

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[10] The *Hot-Hed* Court provides the following authority for this quote: "*In re Reyes*, 814 F.2d 168, 170 (5th Cir.1987) (quoting *Schlagenhauf v. Holde*r, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964))." 477 F.3d at 323, n. 3. The citation is incorrect. No such quote appears in *Schlagenhauf v. Holder*. The source of the quote is *United States v. Denson*, 603 F.2d 1143, 1145 (5th Cir.1979).

[11] 641 F.3d at 84, n.5

> be reviewed at some juncture. *The Court has *84 instructed that our review of an erroneous refusal to remand must await appeal from a final judgment, even when this forces the parties to submit to proceedings before a tribunal that lacks competent jurisdiction over their dispute. To the same end, the Court has advised that the ordinary costs of trial and appeal are not a sufficient burden to warrant mandamus relief.*

641 F.3d at 83-84. (Emphasis added.)

All of the relevant decisions reject the Appellant's assertion that an appeal after a final trial court judgment fails to constitute an adequate remedy for purposes of the first mandamus requirement. The Appellant does not distinguish these authorities. It simply ignores them or, in the case of *Abelecz*, misrepresents them.

A litigant must satisfy all three of the conditions for the drastic remedy of mandamus. The Appellant's failure to satisfy the first condition is fatal to its petition. As we show below, however, the Appellant fails to meet either of the two remaining conditions.

3. The Trial Court's Lack of Subject Matter Jurisdiction Is Not "Clear and Indisputable"

(a) The "Clear and Indisputable" Standard

Contrary to the Appellant's arguments, a litigant is not entitled to mandamus relief simply by virtue of an adverse trial court ruling on subject matter jurisdiction. Mandamus is not appropriate to correct a lower court's subject matter jurisdiction ruling unless the court's lack of jurisdiction is "clear and indisputable." *Cheney*, 542 U.S. at 381. See also, *In re Chicago, R.I. & P. Ry. Co*., 255 U.S. 273, 275-76, 41 S.Ct. 288, 289 (1921)("If, however, the jurisdiction of the lower court is doubtful, or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record, or if the complaining party has an adequate remedy by appeal or otherwise, the writ will ordinarily be denied."(Cites omitted.)); *Comfort Equipment Co v.*

Steckler, 212 F.2d 371, 372-73 (7th Cir. 1954)(" The challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error."); *In re School Asbestos Litigation*, 921 F.2d 1310, 1314 (3d Cir. 1990)(mandamus writ to review denial of subject matter jurisdiction challenge on three grounds denied because lack of jurisdiction was not clear); *In re State of South Dakota*, 692 F.2d 1158 (8th Cir. 1982)(writ denied where there was no showing that the trial court was plainly wrong and argument could be presented on appeal); *In re Thornburgh*, 869 F.2d 1503, 1506-07, 1517-18 (D.C. Cir. 1989)(mandamus writ would not be granted where lack of jurisdiction was not "clear and indisputable"); *In re American Lebanese Syrian Associated Charities, Inc*., 815 F.3d 204, 206 (5th Cir. 2016), denying relief ("To obtain mandamus relief, Petitioners 'must do more than prove merely that the court erred.... A mere showing of error, after all, may be corrected on appeal.' Rather, they 'must show not only that the district court erred, but that it *clearly and indisputably erred*."(Emphasis in original).)

The Appellant's argument to this Court – that a tribal court "clearly and indisputably" lacks jurisdiction over a trespass on the tribe's own lands – is beyond brazen. The affront is compounded by the Appellant's insistence that the Tribe not be permitted the opportunity to conduct discovery to establish the factual foundations for jurisdiction and that the Trial Court not be permitted to find facts, based on the record, upon which this Court would ultimately base its decision on appeal.

(b) It Is Not "Clear and Indisputable" that the Court Lacks Jurisdiction Under the *Montana* Exceptions or Under the Right to Exclude

In *Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245 (1981), the Supreme Court cited two specific exceptions to the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 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." 450 U.S. at 565. 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." Id. at 566. This Court has jurisdiction over the Tribe's suit under both *Montana* exceptions, as well as under the power to exclude, which the Ninth Circuit has characterized as an "independent source of regulatory power over nonmember conduct on tribal land." *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 900 (9th Cir. 2019).

The Appellant has not denied that it has entered into consensual relations with the Tribe and its members but argues, at pages 44-48 of its Appellate Brief, that the individual agreements under which tribal members pay for telecommunications services are not sufficient "consensual relations" to satisfy the first *Montana* exception or, alternatively, that they undermine the Tribe's trespass argument. There is no inconsistency between arguing, on the one hand, that the Appellant has agreements with tribal members pursuant to which it is paid for services while arguing, on the other hand, that Appellant's revenues are derived from its maintenance of lines that are not in compliance with tribal law and, therefore, in trespass. Appellant's argument that

there is not a sufficient nexus between the agreements and the trespass is premature because the agreements have not been entered into evidence and the Court has no way of evaluating them.

The *Montana* line of cases has primarily addressed the authority of tribes to regulation nonmember conduct on *non-tribal fee* land.[12] As the *Montana* Court recognized, however, tribes retain expansive jurisdiction over nonmember activities on *trust* and other tribal land based on the right to exclude and condition entry:

> The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, 604 F.2d, at 1165-1166, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits. Ibid.

450 U.S. at 557.

The Tribe's trespass ordinance is grounded in the Tribe's inherent power to exclude non-members from the reservation and to condition nonmembers' presence on compliance with tribal regulations. It is "axiomatic" that "the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004). Tribal sovereignty has inarguably been diminished by tribes' incorporation into the United States. What remains, however, including the right to exclude, is especially precious and vital to the Tribe's political integrity.

This power to exclude not only falls within the second *Montana* exception for conduct that "imperil[s] the political integrity, the economic security, or the health and welfare of the

[12]The Supreme Court has applied the *Montana* analysis to nonmember conduct on trust land just once, in *Nevada v. Hicks*, 533 U.S. 353 121 S. Ct. 2304 (2001). The *Hicks* Court acknowledged that the trust status of the land is an important, sometimes "dispositive," factor in determining tribal jurisdiction. 533 U.S. at 360. However, with respect to the particular facts in *Hicks*, the Court concluded that state officials did not need a tribal warrant to search an allottee's property for evidence of a crime the member had allegedly committed *off-reservation* because of the state's strong interest in addressing that *off-reservation* activity. In contrast to *Hicks*, there is no strong state interest in this matter.

tribe," *Montana*, 450 U.S. at 566, but, as the Ninth Circuit has held, constitutes an "independent source of regulatory power over nonmember conduct on tribal land." *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 900 (9th Cir. 2019). The power to exclude has been repeatedly affirmed by the federal courts and provides a solid jurisdictional basis for this Court's jurisdiction.

In *Plains Commerce Bank v. Long Family Land and Cattle Company*, 554 U.S. 316, 128 S.Ct. 2709 (2008), Justice Roberts,[13] writing for the Court, expressly acknowledges tribal jurisdiction based on the tribes' "undisputed" power to exclude nonmembers and regulate their activities on trust land:

> The regulations we have approved under *Montana* all flow directly from these limited sovereign interests. *The tribe's "traditional and undisputed power to exclude persons" from tribal land*, *Duro*, 495 U.S., at 696, 110 S.Ct. 2053, *for example, gives it the power to set conditions on entry to that land* via licensing requirements and hunting regulations. See *Bourland*, supra, at 691, n. 11, 113 S.Ct. 2309 ("Regulatory authority goes hand in hand with the power to exclude"). Much taxation can be justified on a similar basis. See *Colville*, 447 U.S., at 153, 100 S.Ct. 2069 (taxing power "may be exercised over ... nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions" (quoting Powers of Indian Tribes, 55 I.D. 14, 46 (1934); some emphasis added)). The power to tax certain nonmember activity can also be justified as "a necessary instrument of self-government and territorial management," *Merrion*, 455 U.S., at 137, 102 S.Ct. 894, insofar as taxation "enables a tribal government to raise revenues for its essential services," to pay its employees, to provide police protection, and in general to carry out the functions that keep peace and order, ibid.

554 U.S. at 335 (emphasis added).

[13]The Defendant quotes Justice Roberts' statement that a tribe must show that nonmember conduct must "imperil the subsistence of the community," Appellant Brief. p. 11. We don't know what this means but it doesn't matter in view of his express acknowledgement of tribes' jurisdiction based on the right to exclude.

If a tribe can enact an ordinance to license, tax and otherwise regulate based on its power to exclude then, obviously, it can enact an ordinance to exclude based on its power to exclude. This is precisely the power that the Tribe exercised when it enacted RCCL Chapter 25. It is difficult to imagine a more "necessary instrument of self-government and territorial management."

The Tenth Circuit's recent decision in *Norton v. UTE Indian Tribe of the Uintah and Ouray Reservation*, 862 F.3d 1236, 1245 (10th Cir. 2017), cert. denied 138 S.Ct. 1001 (2018) (hereafter "*Norton*"), includes an extensive discussion of the right to exclude and holds, contrary to Appellant's arguments in this Court, that tribal court trespass claims fall within its scope:

> In light of these repeated confirmations of tribes' right to exclude nonmembers from tribal lands, we think it plausible that the Tribal Court possesses jurisdiction over the trespass claim. See *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss*. in Iowa , 609 F.3d 927, 937 (8th Cir. 2010) ("Each claim must be analyzed individually in terms of the *Montana* principles to determine whether the tribal court has subject matter jurisdiction over it."). The Court has described the right to exclude as within the regulatory, rather than adjudicative, authority of tribes. See, e.g. , *Plains Commerce Bank* , 554 U.S. at 335, 128 S.Ct. 2709. But tribal court jurisdiction "turns upon whether the actions at issue in the litigation are regulable by the tribe." *Hicks* , 533 U.S. at 367 n.8, 121 S.Ct. 2304. And "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." *Strate* , 520 U.S. at 453, 117 S.Ct. 1404 (quotation and alteration omitted).

The Eighth Circuit reached the same conclusion with respect to tribal court jurisdiction over trespass claims in *Attorney's Process and Investigation Services, Inc. v. Sac & Fox*, 609 F.3d 927, 940 (8th Cir. 2010) (hereafter "*Attorney's Process*")(emphasis added):

> Finally, there remains "the critical importance of land status" to questions of tribal jurisdiction under Montana. *Plains Commerce Bank*, 128 S.Ct. at 2725. Here, the Tribe does not seek to assert jurisdiction over non Indian fee land. The facilities API raided are

> on tribal trust land. The Tribe's trespass and trade secret claims thus seek to regulate API's entry and conduct upon tribal land, and they accordingly "stem from the tribe's 'landowner's right to occupy and exclude.' " *Elliott*, 566 F.3d at 850 (quoting *Hicks*, 533 U.S. at 359, 121 S.Ct. 2304). *A "tribe's 'traditional and undisputed power to exclude persons' from tribal land ... gives it the power to set conditions on entry to that land." Plains Commerce Bank*, 128 S.Ct. at 2723 (quoting *Duro v. Reina*, 495 U.S. 676, 696, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990)). *Tribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner.* See *Hicks*, 533 U.S. at 370, 121 S.Ct. 2304 ("[T]ribal ownership is a factor in the *Montana* analysis, and a factor significant enough that it may sometimes be dispositive.") (ellipsis and quotation marks omitted); *Strate*, 520 U.S. at 454, 117 S.Ct. 1404; *Elliott*, 566 F.3d at 849-50. *Adjudication of the trespass* and trade secret *claims is accordingly well within the Tribe's retained power under Montana*.

The Ninth Circuit, too, has rejected the Appellant's argument that tribes may not exercise jurisdiction over trespass claims. In *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 849-50 (9th Cir. 2009), the Court rejected the plaintiff's argument that she was not required to exhaust tribal court remedies before challenging the Tribe's tribal court lawsuit based on its trespass law:

> The tribe seeks to enforce its regulations that prohibit, among other things, trespassing onto tribal lands, setting a fire without a permit on tribal lands, and destroying natural resources on tribal lands. The Supreme Court has strongly suggested that a tribe may regulate nonmembers' conduct on tribal lands to the extent that the tribe can " 'assert a landowner's right to occupy and exclude.' " (Cites omitted). The tribal regulations at issue stem from the tribe's "landowner's right to occupy and exclude." Trespass regulations plainly concern a property owner's right to exclude, and regulations prohibiting destruction of natural resources and requiring a fire permit are related to an owner's right to occupy. *See Hicks*, 533 U.S. at 359, 121 S.Ct. 2304 (discussing a landowner's right to occupy and exclude); *Strate*, 520 U.S. at 455-56, 117 S.Ct. 1404 (same). Accordingly, the tribe's ownership of the land may be dispositive here. See *Hicks*, 533 U.S. at 370, 121 S.Ct. 2304 ("[T]ribal ownership is a factor in the *Montana* analysis, and a factor significant enough that it may sometimes be

> dispositive." (alteration and internal quotation marks omitted)); id. at 359, 121 S.Ct. 2304 (suggesting strongly that regulations concerning a "landowner's right to occupy and exclude" are permissible against nonmembers).

The Appellant cites *Reservation Telephone Co-op v. Henry*, 278 F. Supp.2d 1015 (D.N.D. 2003) for the statement that "a court has already squarely rejected the second exception's applicability to a telecommunications utility on Indian land" and "no reasonable argument has been made, or could be made, that such [telecommunications] services pose a threat to the tribe or endanger its political integrity so as to invoke the second *Montana* exception." Appellate Brief, p. 48. The Appellant fails to acknowledge that *Henry* involved tribal regulation of telecommunications facilities that were *not* in trespass and did not, therefore, implicate the Tribe's territorial integrity. It is also noteworthy that the *Henry* case came to the tribal appellate court after the trial court had determined that there were no disputed issues of fact and granted summary judgment to the Tribe. In the case at bar, discovery has not even begun.

More significantly, the Appellant's argument that the second *Montana* exception standard "cannot be met here, where the conduct at issue is the provision of telecommunications services that provide important benefits to the Tribe." Appellate Brief, p. 18, misstates the issue. The issue is not whether the presence of telecommunications lines imperils the Tribe's existence but whether the right to control entry on to the Tribe's lands is essential to the political integrity and economic security of the Tribe and whether, conversely, the loss of that right would imperil the Tribe's existence as a sovereign Indian nation. The Fifth Circuit's decision in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014)(hereafter "*Dolgencorp*"), affirmed by an Equally Divided Court in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S.Ct. 2159 (2016). illustrates the proper approach for evaluating the second *Montana* exception. The Court in *Dolgencorp* found that the Mississippi Choctaw Tribe had

jurisdiction over a claim that an employee of the non-Indian defendant had abused a tribal adolescent employee. The Court rejected the defendant's argument that the incident could not meet the second *Montana* exception standard:

> We do not interpret *Plains Commerce* to require an additional showing that *one specific relationship*, in itself, "intrude[s] on the internal relations of the tribe or threaten[s] self-rule." It is hard to imagine how a single employment relationship between a tribe member and a business could ever have such an impact. On the other hand, at a higher level of generality, the *ability to regulate the working conditions* (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government. Nothing in *Plains Commerce* requires a focus on the highly specific rather than the general.

746 F.3d at 175 (emphasis added).

Likewise here, the ability to regulate entry onto tribal lands and to impose sanctions for trespass is "plainly central to the tribe's power of self-government" in this case. The Seventh Circuit Court of Appeals in *Jackson v. Payday Financial LLC*, 764 F.3d 765, 783 n. 43 (7th Cir. 2014) acknowledged the appropriateness of this broader perspective, quoting *Dolgencorp's* reference to "the ability to regulate the working conditions … of tribe members employed on reservation land" and noting that an "equivalent tribal concern" was absent in that case.

The authorities the Appellant cites to contest the Tribe's authority to enact a trespass ordinance under its right to exclude, Appellate Brief, pp. 48-52, are either too remote in subject matter or too general to be relevant. No federal, state or tribal court has embraced the Appellant's extraordinary thesis that a sovereign tribe may not exercise jurisdiction over trespassers on its own lands. The Appellant offers nothing to counter the three federal appellate court decisions discussed above that directly contradict its arguments. In the absence of any factual record and accepting the allegations of the complaint as true, as it must on a motion to dismiss, the

Appellant's task of showing that the Tribe clearly and indisputably lacks jurisdiction is simply impossible.

(c) It is Not "Clear and Indisputable" that the Tribal Court Lacks Jurisdiction Based on Federal Preemption

The Appellant argues that tribes have no power to regulate trespassers on their lands because a "comprehensive federal scheme" regarding rights-of-way has divested them of this elemental jurisdiction. (Appellant's Appellate Brief, pp. 31-35.) Under Appellant's argument, any person may violate the Tribe's territory sovereignty but the Tribe's legislature is powerless to enact a law forbidding it and the Tribe's judiciary is powerless to provide a remedy. The arguments advanced in support of the Appellant's collapse on contact with legal authorities.

It is established that the exhaustion requirement does not apply if a tribe's lack of jurisdiction is "plain," *Strate v. A–1 Contractors*, 520 U.S. 438, 450, 117 S.Ct. 1404 (1997) or if the assertion of tribal jurisdiction is for "no purpose other than delay." Id. at 459 n. 14. In the previous Section, we cite and quote from federal appellate decisions of the Eighth (*Attorneys Process*), Ninth (*Elliott*) and Tenth (*Norton*) circuits in which the court enforced the tribal exhaustion requirement despite a litigant's argument that a tribe lacked jurisdiction to enforce its trespass laws against a non-Indian. If a body of federal law "clearly and indisputably" preempted tribal trespass laws, as the Appellant argues in this case, these Courts would have been compelled to decide in favor of the non-Indian challengers. The Appellant's argument is impossible to reconcile with these important Indian law decisions.

The federal Right of Way Act of 1948, 62 Stat. 17, codified at 25 U.S.C. §§323-328, is silent on the issue of trespass but it does authorize the Secretary to prescribe regulations. Those regulations unambiguously *repudiate* Appellant's preemption argument and highlight the central role of *tribal law* with respect to ROWs on tribal land:

> § 169.1(a) What is the purpose of this part?
> ... This part is … 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.*
>
> § 169.9 What laws apply to rights-of-way approved under this part?
>
> In addition to the regulations in this part, rights-of-way approved under this part:
> (a) Are subject to all applicable Federal laws;
> (b) *Are subject to tribal law*; except to the extent that those tribal laws are inconsistent with applicable Federal law; and
> (c) Are generally not subject to State law or the law of a political subdivision thereof.
>
> …
> § 169.413 What if an individual or entity takes possession of or uses Indian land or BIA land without a right-of-way or other proper authorization?
>
> If 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. An unauthorized use within an existing right-of-way is also a trespass*. We may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law. *The Indian landowners may pursue any available remedies under applicable law*, *including applicable tribal law*.

(Emphasis added). As the BIA explained in comments to the Part 169 regulations:

> Consistent with 25 U.S.C. 325, the general trust relationship between the United States and the Indian tribes and individual Indians, and *deference to tribal sovereignty*, the final rule requires that the compensation granted to Indian landowners is just. *The final rule does not establish any ceiling on compensation; to do so would unduly restrict landowners' ability to get the maximum compensation for their land interest.* The Department's role is to ensure that the compensation is "just" for the Indian landowners.

80 Fed. Reg. 72492 (Emphasis added).

> *The final rule provides that BIA will defer to the tribe's determination that compensation is in its best interest*. Tribes have the right, through self-governance and self-determination, to charge more than fair market value for their land. … Not only is it not BIA's role to ensure that the compensation is predictable and reasonable for the applicant, *BIA does not have the legal authority to limit the amount that Indian landowners charge for a right-of-way.*

Id. at 72512.

The Appellant relies heavily on the Eighth Circuit's decision in *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019)("*Kodiak*"), a case easily distinguishable. The issue in *Kodiak* was the right of allottee members of the Three Affiliated Tribes of the Fort Berthold Reservation, also known as the Mandan, Hidatsa and Arikara Nation ("MHA Nation"), to bring a tribal court action to recover royalties on gas that Kodiak Oil & Gas (USA) Inc. ("Kodiak") had flared off on from their allotments under leases approved by the BIA under the Mineral Leasing Act of 1938 and the Indian Mineral Development Act of 1982. The plaintiffs relied on a lease provision that required Kodiak to "exercise reasonable diligence in drilling and operating wells for oil and gas ... having due regard for the prevention of waste of oil or gas developed on the land ...." After the MHA Nation appellate court had held that the tribal court had jurisdiction, Kodiak sued in federal court to enjoin additional tribal court proceedings. The District Court found that the tribal court lacked jurisdiction and the Eighth Circuit affirmed, holding that (1) the MHA Nation Court had no jurisdiction over federal claims, (2) to the extent that the plaintiffs' claims purportedly arose under tribal law, they were preempted by federal law[14] and (3) neither of the two *Montana* exceptions was satisfied.

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[14] Building on *Kodiak*, Appellant contends, Appellate Brief, p. 32-33, that the Tribe pleaded a federal cause of action. As is obvious from the SAC, the Tribe's suit is based on the Tribe's trespass ordinance.

Appellant's enthusiasm for Judge Grasz' opinion in *Kodiak* is understandable in view of its dismissive attitude toward tribal sovereignty and its leaps of logic in support of Kodiak's position. Still, the decision undercuts more than supports the Appellant's argument. First, the BIA had approved Kodiak's lease under the Mineral Leasing Act of 1938 and the Indian Mineral Development Act of 1982, not the ROW Act. The regulations at issue in *Kodiak* are far more detailed and extensive than the regulations at 25 C.F.R. Part 169 ("Part 169 Regulations) that govern rights of way under the ROW Act. Moreover, they specifically address royalties and flaring, the precise issue at the core of the plaintiffs' claims:

> Federal regulations control nearly every aspect of the leasing process, such as how leases are awarded, id. § 212.20, the size of land that may be included in a single lease, id. §§ 211.25, 212.25, the duration of leases, id. §§ 211.27, 212.27, the spacing of oil wells, id. § 212.28(h), the rates of royalties for oil and gas leases, id. § 212.41, the manner of payment, id. §§ 211.40, 212.40, and more. And the Bureau of Land Management extensively regulates and monitors oil and gas drilling operations. See 43 C.F.R. pt. 3160; see also 25 C.F.R. § 212.4.
>
> Federal law also controls the entire process of royalty payments under the Federal Oil and Gas Royalty Management Act. See 30 U.S.C. §§ 1701–1759. Royalties are paid to the Department of Interior's Office of Natural Resources Revenue, which in turn disburses the royalties to the allottees, see id.; 30 C.F.R. §§ 1218.100–1218.105, 1219.103, and federal law provides for penalties for failure to pay royalties due under a lease, see 30 U.S.C. § 1719. Relevant to this case, the Department of the Interior has issued a notice specifically addressing the issue of "Royalty or Compensation for Oil and Gas Lost" by flaring. U.S. Dep't of the Interior Geological Survey Conservation Div., NTL-4A ("Flaring Notice") (1980). In sum, "[t]he total of these regulations is comprehensive, giving wide powers to [the Department of the] Interior as to all aspects of the leasing arrangement." *Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987); see also *Jicarilla Apache Nation v. U.S. Dep't of the Interior*, 892 F. Supp. 2d 285, 292 (D.D.C. 2012) ("[T]he royalties program for federal and Indian oil and gas leases is 'a complex and highly technical regulatory program' which requires 'significant expertise' and the 'exercise of judgment grounded in policy concerns' by the

> Department [of the Interior]." (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994))).

Kodiak, 932 F.3d at 1136.

> Federal law and regulation exhaustively occupies the field of oil and gas leases on allotted Indian lands. And more specifically, federal law exhaustively addresses the collection and distribution of royalties on such leases and the practice of flaring natural gas as it relates to royalty payments. See 30 U.S.C. §§ 1701–1759; 30 C.F.R. §§ 1281.100–1218.105, 1219.103; Flaring Notice. Congress has left no room for tribal law to supplement this comprehensive regulatory scheme.

Id., at 1137.

The Appellant can point to no similar features in the ROW Act or the Part 169 Regulations. On the contrary, the Part 169 Regulations explicitly recognize the applicability of *tribal* law governing ROWs, the authority of *tribes* to set compensation requirements, and the availability of *tribal* remedies for trespass. The fact that a federal court has found certain activities on *individual allotted trust land* to be preempted by one set of federal statutes and regulations obviously proves nothing about the preemptive effect of *different* federal regulations relating to different activities on *tribally-owned* lands.

Second, the cause of action in the *Kodiak* case was a breach of contract under a BIA-approved lease. Unlike the plaintiffs in *Kodiak,* the Tribe here is suing for trespass. A comprehensive federal statutory/regulatory scheme governing ROWs might preempt certain tribal ROW regulations that are inconsistent with the federal scheme. It does not follow that such a federal ROW scheme would preempt tribal trespass laws simply because the trespass might be remedied with a valid ROW. As discussed below, there is no "Federal law and regulation [that] exhaustively occupies the field" of trespass on tribal lands in the manner described in the *Kodiak* decision.

Third, in *Kodiak,* for purposes of *Montana,* the sole consensual relationship alleged was the BIA- approved mineral lease, which the Court was able to bring within the federal government's "comprehensive federal scheme." The "consensual relations" relevant in this case are individual service agreements not yet in evidence. It may have been appropriate for the MHA Nation appellate court to rule on the jurisdiction issue but undeveloped jurisdictional facts preclude a premature ruling in this case. Indeed, the *Kodiak* court acknowledged that "development of a factual record may generally be required where a challenge to tribal court jurisdiction turns on disputed factual questions." 932 F.3d at 1134.

Finally, for purposes of the second *Montana* exception, the individual allottee plaintiffs' entitlement to royalties for flared gas, the interest at stake in *Kodiak*, does not implicate sovereign tribal interests or, arguably, *any* tribal interests. The issue here – the Tribe's right to protect the Reservation from trespass – is fundamental to its sovereignty.

The "federal common law" that, according to the Appellant, Appellate Brief, pp. 40-44, preempts tribal trespass, fails on multiple grounds to serve the Appellant's purpose. First, the preemption doctrine flows from the Supremacy Clause of the U.S. Constitution, Art. VI, Cl. 2. Typically applied to state law, the doctrine depends on a judicial finding of *congressional* intent to preempt, as the Supreme Court explained in *Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008):

> *Our inquiry into the scope of a statute's pre-emptive effect is guided by the rule that " '[t]he purpose of Congress is the ultimate touchstone' in <u>every</u> pre-emption case."* [Cites omitted.] Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose. … If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains. Pre-emptive intent may also be inferred if the scope of the statute indicates that

> Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law. … When addressing questions of express or implied pre-emption, *we begin our analysis "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."* *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947) (Emphasis added).

Common law, by definition, is *judge*-made law. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 319 n. 14 (1981)("federal courts create federal common law only as a necessary expedient when problems requiring federal answers are not addressed by federal statutory law"). Because the Appellant cannot, obviously, point to any the "clear and manifest purpose of *Congress*" to prohibit tribes from enacting trespass ordinances, its preemption argument necessarily fails.

Second, the "federal" common law that purportedly preempts tribal trespass remedies is a phantom. The Tenth Circuit's recent explanation in *Davilla v. Enable Midstream*, 913 F.3d 959, 966 (10th Cir. 2019) unmasks the Defendant's argument: "Because we *lack* a federal body of trespass law to protect Allottees' federal property interests, we must borrow *state* law *to the extent it comports with federal policy*." (Emphasis added.) The "federal" common law applied in *Etalook v. Exxon*, 831 F.2d 1330 (9th Cir. 1987)[15] consisted of a combination of Kentucky, Missouri and Alaska *state* law. "Federal common law," it turns out, is typically just the law of state where the federal court happens to be sitting. A federal court applies "federal" (i.e., state) common law because there *is* no federal body of trespass law and, even then, common law applies only to the extent that it comports with federal *policy*. But here, there *is* a federal policy relating to tribal trespass law and that policy, expressed in the Part 169 regulations, is deference

[15] The Ninth Circuit in *Etalook* affirmed trespass damages and a condemnation award in a case brought under 25 U.S.C. § 357 and state law. Section 357 applies only to allotments and has no relevance to tribally-owned lands.

to tribal law. The Appellant essentially asks the Court to ignore the federal policy of deference to tribal sovereignty, ignore Section 169.413, ignore RCCL Chapter 25 and apply Wisconsin trespass law, despite Part 169's express mandate that state law not apply. No federal court would accept this bizarre argument and neither should this Court.

Third, while Section 169.413 explicitly recognizes tribal authority to enact ordinances providing remedies for trespass, the Part 169 regulations make no mention of "federal common law." There is no theory of regulatory interpretation to support Appellant's insistence that the Court ignore the former, adopt the latter and nullify Chapter 25's trespass remedies[16].

Appellant's preemption argument is based on the false premise that the existence of parallel tribal and federal laws addressing the same subject matter, but with different remedial schemes, mandates preemption of the former by the latter. For purposes of the preemption doctrine, however, a state law conflicts with a federal law only when it is "impossible for a private party to comply with both state and federal requirements … or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)(internal quotations and citations omitted.) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, for example, prohibits various forms of discrimination. Title VII does not, however, preempt the Wisconsin Fair Employment Act, Wis. Stat. § 111.31, which addresses the same subject matter but provides a separate cause of action and distinct remedies. The same is true of federal and state statutes addressing labor relations, public safety, occupational safety and many other matters. The same

[16] The Appellant also cites to Section 169.9. This section addresses the question ""[w]hat laws apply to rights-of-way approved under this part?," not laws that apply to trespass situations where there is no approved ROW. Section 169.9 provides no support for the Appellant's argument that tribal trespass laws or their enforcement provisions be consistent with the federal common law of trespass.

is true of federal trespass remedies available in federal court and tribal trespass remedies available in tribal court.

Quite obviously, the tribal law requirement that Appellant enter and remain on the reservation only in accordance with tribal and federal law entirely accords with federal law. The Tribe's prescribed trespass damages pose no obstacle to the "purposes and objectives of Congress" because Congress has not spoken on the issue of such damages. Even the alleged "federal common law" of damages argued by the Appellant have as their purpose the deterrence of trespasses on to tribal lands – precisely the same purpose behind the Tribe's trespass ordinance.

Appellant further attempts to stand preemption law on its head when it asserts that tribal law is only "permitted to the extent allowed by federal law under [the ROW] regulatory scheme; otherwise it is preempted" - despite Part 169's clear statement that any available remedies for trespass can be pursued under tribal law. To turn this trick, the Appellant misleadingly quotes a single sentence from the BIA comments to the Final Rule, "The Federal statutes and regulations governing rights-of-way on Indian lands occupy and preempt the field of Indian rights-of-way" but the Appellant omits the following sentence that clarifies, its meaning: "The Federal statutory scheme for rights-of-way on Indian land is comprehensive, and accordingly precludes *State* taxation." 80 Fed. Reg. 72505 (emphasis added).

In a desperate attempt to overcome Section 169.413's clear statement acknowledging the right of tribes and other Indian land owners to pursue "any available remedies" for trespass, including those under applicable tribal law, Appellant cites a few irrelevant cases that distinguish

the use of "remedies" and "penalties" under certain inapplicable statutes.[17] In *Williams v. King Bee Delivery, LLC*, a Kentucky district court examined the particular language and use of the terms in the Kentucky Wage and Hour Act and found that, as used in that statute, only the government, as opposed to aggrieved individuals, could collect penalties. 199 F. Supp. 3d 1175, 1186 (E.D. Ky. 2016).[18] Similarly, *Saad v. SEC* and *Kokesh v. SEC* address penalties under inapplicable securities and statute of limitations laws.

In contrast to the Appellant's citation to irrelevant case law, Part 169 makes clear that BIA treats remedies and penalties interchangeably. Section 169.405 references the remedies available under an ROW grant while Section 169.406 makes clear that those remedies include penalties:

> 169.405 What will BIA do if the grantee does not cure a violation of a right-of-way grant on time?
>
> (a) If the grantee does not cure a violation of a right-of-way grant within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, communicate with Indian landowners for individually owned Indian land, and determine whether:
>
> * * *
>
> (2) *The Indian landowners wish to invoke any remedies available to them under the grant;*

(Emphasis added).

* * *

> Section 169.406: "Late payment charges and *penalties* will apply as specified in the grant."

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[17] The Appellant's attempt to focus the Court on a phony distinction between penalties and remedies also obscures the larger point that, while the Part 169 regulations contradict the Appellant's preemption argument, the Tribe's authority to enact legislation relating to trespasses on its lands is inherent and in no way derives from or depends on the Part 169 regulations.

[18] Ironically, this is exactly what the Tribal government is seeking to do in this matter. Thus, *Williams* provides Appellant absolutely no support.

(Emphasis added).

BIA's inclusion of penalties among applicable remedies is entirely consistent with the ordinary dictionary definition of remedy, which according to Merriam Webster, broadly includes any "legal means to recover a right or to prevent or *obtain redress for a wrong*." https://www.merriam-webster.com/dictionary/remedy (emphasis added). *See also* https://www.dictionary.com/browse/remedy (providing that, in the legal context, remedy broadly means "legal redress; the *legal means of* enforcing a right or *redressing a wrong*.") (emphasis added). The penalties under the Tribe's Trespass Ordinance do just this, since they redress the wrong of trespass by imposing monetary fees.[19]

Finally, any ambiguity surrounding the preemptive effect of the ROW Act must be resolved in the Tribe's favor under the well-established Indian canon of construction:

> When we are faced with … two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: "Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."

County of Yakima v. Yakima Nation, 502 U.S. 251, 268-69, 116 S.Ct. 683, 116 L.Ed.2d (1992), quoting *Montana v. Blackfeet*, 471 U.S. 759, 766 (1985)

The Seventh Circuit recently summarized the canon in *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1081 (7th Cir. 2015):

[19]Moreover, Merriam Webster's definition of the noun "redress" includes "retribution." https://www.merriam-webster.com/dictionary/redress. In turn, Merriam Webster's definition of retribution includes "the dispensing or receiving of reward or punishment" . . . "something given or exacted in recompense especially : PUNISHMENT." *See also* https://www.dictionary.com/browse/redress?s=t (broadly defining redress as "the setting right of what is wrong: *redress of abuses.")* (italics in original).

> The leading treatise in the field summarizes the canons that the Supreme Court follows in cases construing laws affecting Indians as follows:
>
> > [T]reaties, agreements, statutes, and Executive Orders [must] be liberally construed in favor of Indians, and ... all ambiguities resolved in their favor. In addition, treaties and agreements are to be construed as Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous.
> >
> > COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] (2012 ed.). [cites omitted].
>
> These canons have been widely accepted. This court has acknowledged the special approach to statutory construction that Indian law demands. … Our sister circuits are in accord.

The Appellant also cites *U. S. ex rel. Chase v. Wald*, for the assertion that a *per diem* penalty is inappropriate, 557 F.2d 157 (1977) but the court in *Chase* merely held that per diem penalties could not be imposed under a regulation if its governing statute did not authorize them. ("the question boils down to whether the per diem penalty prescribed by the 1969 regulation is warranted by s 179; if it is not so warranted, it cannot stand"). *Id*. at 161.

For all of the reasons stated above, it is obvious that the Appellant cannot meet its burden of showing that Tribe's trespass ordinance is "clearly and indisputably" preempted.

(d) It Is Not "Clear and Indisputable" that the Court Lacks Jurisdiction Because Remedies Under the Tribe's Trespass Ordinance Purportedly Violate the Indian Civil Rights Act

The Appellant argues, at pages 54 to 60 of its Appellate Brief, that damages and penalties prescribed under the Tribe's Trespass ordinance violate Indian Civil Rights Act's ("ICRA") $5,000 limit "for conviction of any 1 offense," 25 U.S.C. § 1302(a)(7) and the ICRA's guarantee of Due Process under 25 U.S.C. § 1302(a)(8).

First, the argument is not jurisdictional. If, as we do *not* believe, the prescribed penalties run afoul of the ICRA, it does not follow that the Trial Court lacks subject matter jurisdiction. The Trial Court is arguably free to impose such remedies as do not trigger ICRA violations.

Second, the argument is premature. The Appellant complains about "astronomical" penalties but no evidence has been introduced and no penalties have been imposed. The Trial Court was under no obligation to determine whether allegedly excessive penalties that *might be* imposed violated the ICRA before hearing evidence regarding whether the Appellant was subject to *any* penalties at all. At such time as the Tribe has presented evidence relating to damages and penalties, the Trial Court can consider the parties' positions with respect to (i) whether those putative penalties violate the ICRA and (ii) if so, what options are available to the Court.

Third, the Appellant cites no case holding that the $5,000 limitation for penalties imposed for a "conviction" applies to civil damages and penalties. Civil judgments are not "convictions." As discussed below, other sovereigns certainly have the power to impose civil penalties far in excess of $5,000. We understand that Congress imposed a $5,000 limit because of its concerns regarding the capabilities of tribal courts in *criminal* cases but to extend that limitation to civil cases would violate the "principle deeply rooted in this Court's Indian jurisprudence" that "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Yakima Nation*, 502 U.S. 251, 268-69, 116 S.Ct. 683, 116 L.Ed.2d (1992) (cites omitted).

Fourth, the authorities that the Appellant cites are not relevant or do not support its position. The Fifth Circuit's decision in *Dolgencorp* directly contradicts the Appellant's argument that the $5,000 limit applies to civil cases:

> Dolgencorp argues that the tribal court lacks jurisdiction over Doe's claims because Doe seeks punitive damages. Because the

inherent sovereign authority of Indian tribes does not include criminal jurisdiction over non-Indians, Indian tribes "do not have inherent jurisdiction to try and to punish non-Indians." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195, 212, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). Dolgencorp argues, based on *Oliphant,* that Indian tribes likewise have no jurisdiction to impose civil punitive damages on a nonmember. Dolgencorp notes that "the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes." *Hicks*, 533 U.S. at 383, 121 S.Ct. 2304 (Souter, J., concurring). Dolgencorp also notes that an award of punitive damages may implicate constitutional protections against excessive punishment, in that "grossly excessive" punitive damages awards violate the Due Process Clause of the Fourteenth Amendment. *BMW of North America v. Gore*, 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). Dolgencorp therefore argues: "Because these protections are not present in tribal court, federal recognition of tribal jurisdiction over non-Indians in claims for punitive damages would in and of itself violate the Due Process clause. The federal government simply cannot waive a citizen's constitutional right by making them subject to the jurisdiction of a court where constitutional rights do not apply."

Dolgencorp identifies no authority applying *Oliphant* in the context of civil punitive damages or otherwise holding that Indian tribes are categorically prohibited from imposing punitive damages on nonmembers. Although punitive damages share many characteristics of criminal punishment, they are distinct; for example, punitive damages in civil cases do not invoke double jeopardy concerns. See, e.g., *Hudson v. United States*, 522 U.S. 93, 103, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (a penalty that is "civil in nature" does not implicate double jeopardy). Furthermore, Dolgencorp's broader argument simply proves too much. If the federal government could never "waive a citizen's constitutional right" by subjecting him to the jurisdiction of a court lacking full constitutional protections, a non-Indian could never be subjected to tribal court jurisdiction. Yet the Supreme Court has acknowledged that by entering certain consensual relationships with Indian tribes, a nonmember may implicitly consent to jurisdiction in a tribal court that operates differently from federal and state courts. Accordingly, we conclude that the availability of punitive damages has no effect on the tribal court's jurisdiction over Doe's claims against Dolgencorp.

746 F.3d at 177.

That the Trespass Ordinance includes civil penalties does not transform it into a criminal statute governed by *Oliphant* or the ICRA[20]. It is common practice for statutes to have civil penalties. For example, Wisconsin's air statute includes civil penalties that can be *five* times as high as those in the Trespass Ordinance:

> Except as provided in s. 285.57 (5) or 285.59 (8), any person who violates this chapter or *any* rule promulgated, *any* permit issued or *any* special order issued under this chapter shall forfeit not less than $10 or more than *$25,000 for each violation. Each day of continued violation is a separate offense*.

Wis. Stat. 285.57(1) (emphasis added).

The penalties apply to any violation, including failure to have a proper permit, even if the violation is not intentional and results in no pollution. The statute includes significantly *greater* penalties, up to $50,000 per day, for intentional criminal activity. Wis. Stat. 285.57(2).

Fifth, the Trespass Ordinance, ICRA. RCCL § 25.18.4, was recently amended to provide that a separate trespass occurs "with respect to each parcel of land on which a trespass is committed under sections 25.18.1 and 25.18.3 *and each day on which a trespass occurs*" thus removing the possibility that an offense could result in a penalty exceeding $5,000. RCCL § 25.1.5 was amended 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

[20] Appellant also cites *Duro v. Reina* for the principle that the power to exclude does not inherently include "jurisdiction to try and punish an offender." 495 U.S. 676, 697 (1990). However, *Duro v. Reina* is a criminal case and relates to criminal, not civil, penalties.

Civil Rights Act and the requirements of Due Process." The amendments remove any doubt regarding the Ordinance's compliance with the ICRA.[21] Appendix, App-1.

The Appellant also contends that recent amendments to the Trespass Ordinance violate the prohibitions of Bills of Attainder and *Ex Post Facto* laws. The Tribe acknowledges that the change in the definition of trespass at RCCL § 25.18.4 was intended to clarify that the Tribe's Trespass Ordinance does not provide for a penalty of more than $5,000 for a single violation, and that this clarification could further weaken Appellant's tenuous arguments under the ICRA. Section 25.1.5, however, fully protects Appellant from any adverse consequences by assuring that penalties will in no event exceed the limitations imposed by Due Process. Other than citing to Black's Law Definition, the Appellant provides no authority establishing that the Tribe's Trespass ordinance constitutes a bill of attainder. According to Black's, a bill of attainder is: "A special legislative act that imposes a death sentence on a person without a trial" or "A special legislative act prescribing punishment, without a trial, for a specific person or group." Black's Law Dictionary, "Bill of Attainder" (11th Ed. 2019). The Tribe's Trespass Ordinance was enacted "to strengthen Band sovereignty and protect its right to exclude unauthorized persons from tribal lands." RCCL § 25.16.2. It applies not just to a specified person or group but to *any* trespasser. It imposes no penalties except following trial, with full due process. Appellant also cites Black's definition of an Ex Post Facto law:

> A statute that criminalizes an action and simultaneously provides for punishment of those who took the action before it had legally become a crime; specif., a law that impermissibly applies

[21] The Appellant argues that "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." Appellate Brief, p. 59. We think it is quite clear that RCCL § 25.18.4 is the definition that the Court must apply at the time it decides the case. It is even more obvious that the mandate of RCCL 25.1.5 applies to any penalty or damage award rendered after the date of the amendment. RCCL 25.1.5 would be "retroactive" if the Court applied it to a judgment rendered before the amendment, clearly not the case here. Since we represent the Tribe, we make these assertions confidently.

> retroactively, esp. in a way that negatively affects a person's rights, as by making into a crime an action that was legal when it was committed or increasing the punishment for past conduct.

Black's Law Dictionary, "Ex post facto law" (11th Ed. 2019).

RCCL Chapter 25 is a *civil* law. It imposes no criminal penalties. Therefore, it is not an *ex post facto* law.[22]

(e) It Is Not "Clear and Indisputable" that the Tribe Lacks Jurisdiction Because the Tribe Allegedly Failed to Plead an Ownership Interest in the Trespassed Lands

Appellant argues at pages 23-25 of the Appellate Brief that Court lacks standing because the Tribe has not alleged an ownership interest in tribal lands. In paragraph 8 of its Amended Complaint, the Tribe used the capitalized term "Tribal Lands" to describe Reservation lands owned by the tribe and tribal members. The Tribe employed tribal lands uncapitalized or capitalized inconsistently. What is not disputed is that (1) the Tribe brought its claims under RCCL Chapter 25, which defines tribal lands to mean lands in which the Tribe has a legal interest and (2) the Tribe asserted that the Appellant had trespassed on "tribal land" (uncapitalized).

The Appellant, in its motion to dismiss at the Trial Court and its argument before this Court, has seized upon the broader definition of "Tribal Lands" to assert that the Tribe has no standing to bring its trespass claims because the paragraph 8 definition includes lands owned by tribal members so the tribal land referred to at paragraph 19 may be comprised entirely of land

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[22] Appellant makes additional assertions regarding retroactivity, which should be addressed at end of the case, after a full factual record has been created. *See Landgraf v. USI Film Products*, 511 U.S. 244, 269, 114 S.Ct. 1483 (1994). ("The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.") Moreover, even if the Applicant is able to demonstrate retroactivity concerns with respect to its trespasses prior to passage of the Trespass Ordinance or its amendments at the end of the Trial Court process, Appellant's trespasses are continuing. The Ordinance and its amendments clearly apply to those ongoing trespasses, and therefore the Appellant's retroactivity arguments have no effect on the Trial Court's jurisdiction.

owned by members, in which the Tribe lacks any ownership interest. The Appellant's standing argument is entirely lacking in substance. The Appellant well knows that it maintains lines on property in which the Tribe owns an interest. If the Court had granted the motion to dismiss on this ground, it would have been without prejudice. The result would have been simply for the Tribe to file an amended complaint, removing the potentially over-broad definition of Tribal Lands at paragraph 8. The Appellant does not make this standing argument because it thinks the Tribe lacks a legal interest in the trespassed parcels but to throw up yet another cloud of dust to confuse and complicate the proceedings.

In an effort to head off yet another round of briefing on this meaningless issue, the Tribe filed a Second Amended Complaint clarifying that the RCCL Chapter 25 definition of tribal lands is the operational one. See Tribe's Appendix. P. App-4. In response, Appellant argues that the Tribe may not file a Second Amended Complaint because Appellant, by filing an interlocutory appeal without leave of the Trial Court and contrary to tribal law, unilaterally deprived the Trial Court of jurisdiction. Appellate Brief, p. 16. Appellant provides no authority for this proposition because the law is to the contrary. See, *JP Morgan Chase Bank, N.A. v. Asia Pulp & Paper Co., Ltd.*, 707 F.3d 853, 860 n.7 (7th Cir. 2013) ("Although the filing of a timely notice of appeal confers jurisdiction over the matter on the court of appeals and divests the district court of its control, that rule does not operate … where there is a purported appeal from a nonappealable order.") (citations and quotation marks omitted).

The Appellant also complains that the SAC "does not limit its trespass claims to any specific lands owned by the Tribe." Id. Identifying the lands with the specificity demanded by the Appellant would have required the Tribe to (i) map the locations of the Appellant's facilities, (ii) attempt to superimpose them on a GIS land parcel ownership map and (iii) reproduce the

legal descriptions in the SAC. This sort of undertaking is not required at the pleading stage of litigation. The exact parcels at issue will become apparent through discovery when the Appellant, finally, provides the Tribe with documentation relating to its facilities.

While the Tribe has satisfied the pleading standards commonly applied by state and federal courts, we note that the Tribe has not adopted a version of Fed. R. Civ. P. Rule 8. The requirements for a complaint are set forth at RCCL § 4.26.2. In addition to providing the information relating to the defendant, the case number and the command that the defendant appear, a plaintiff need only provide a "brief statement, including approximate date and place, of the transaction or occurrence giving rise to the action" and the "relief requested." The Tribe more than meets these simple requirements. RCCL § 4.38.1 is also relevant tribal law. It provides: "In all cases, each party shall be allowed to present evidence and argument and to examine witnesses to the extent deemed appropriate by the Court for full disclosure of the pertinent facts." It was Judge Boulley's intention to follow the mandate of this rule and allow the parties to present evidence regarding Appellant's jurisdictional and other issues. The Appellant's "standing" argument is, frankly, silly, and Judge Boulley was right to ignore it. This Court should do the same.

(f) Appellant fails to satisfy the third condition for mandamus

Finally, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381. What are the circumstances here? The Appellant, eager to avoid answering for its trespass in a tribal court, has buried this Court and counsel in repetitious arguments, obscuring rather than illuminating the relevant legal principles, so that it can make a premature dash into federal court.

Abelesz, a case that the Appellant erroneously cites in support of its position,[23] illustrates the high bar for mandamus relief. In that case, Holocaust survivors sued Hungarian banks (MKB and OTP) in a federal district court in Chicago seeking to hold them financially responsible for approximately $75 billion in damages for their role in assisting the Third Reich in expropriating Jewish assets during the Second World War. In granting the writ, the Court cited "an unusual combination of the extraordinary nature of this litigation and the complete absence of any arguable basis for exercising general personal jurisdiction" and remarked that the case "demonstrates some of the limits in trying to use civil courts on another continent to obtain legal relief for those crimes, now more than 60 years old." 692 F.2d at 645.

> *The extraordinary nature of this litigation*, however, makes the district court's denial of MKB's and OTP's motions to dismiss for lack of personal jurisdiction anything but routine. Plaintiffs seek compensation for events that occurred on another continent *more than 65 years ago.* The case has appreciable foreign policy consequences, and the financial stakes are astronomical. Plaintiffs seek to impose joint and several liability on each defendant bank for *$75 billion in damages*—an amount that is nearly 40 percent of Hungary's annual gross domestic product. The consequences for the plaintiffs themselves are also very substantial. If the claims against these defendants do not belong in U.S. courts, no matter how compelling the claims might be on the merits, we would do the plaintiffs no favors by allowing them to spend more time and money to proceed further toward an inevitable dismissal. It is the confluence of these specific factors, together with *the crystal clarity of the personal jurisdiction issue* that removes this case from the category of "ordinary" denials of motions to dismiss.

692 F.3d at 651.

Do the circumstances the Appellant's advance in support of their petition bear sufficient resemblance to the circumstances of *Abelesz* to justify the same appellate court ruling? To ask the question is to answer it. The same is true of the other authorities cited by the Appellant.

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[23] See discussion at pp. 11-12, 18-19, supra.

D. Appellant's Use of Federal Authorities Governing Mandamus is Misleading

The Appellant repeatedly cherry-picks quotes from federal court decisions that superficially support its position without candidly acknowledging features of the cases that render them irrelevant or that actually undermine the Appellant's arguments. The appellant leads off its Section entitled "Governing Standards" with a citation to an obsolete Fifth Circuit case to the effect that writs of mandamus relating to jurisdiction should be issued "almost as a matter of course"[24] without acknowledging that (1) the cited case has been superseded by more recent Fifth Circuit authority, (2) mandamus is a "drastic" remedy, appropriate only in "extraordinary" circumstances,[25] (3) the courts have repeatedly rejected mandamus as a tactic to avoid the rule that appellate review requires a final judgment and (4) the court have rejected the Appellant's argument that a litigant satisfies the first mandamus condition if it must wait for appellate review until after trial.[26] These are not minor omissions.

At pages 9-10 of its Mandamus Petition, the Appellant has essentially compiled a list of cases in which courts granted mandamus for any reason, no matter how irrelevant to this case, while ignoring the controlling principles discussed above and the vastly greater number of decisions denying mandamus petitions. The Court granted a mandamus petition in *Bailey v. Sharp*, 782 F.2ds 1366, 1369 (7th Cir. 1986) because district court judge had extended the time for the filing of a motion for a new trial contrary to the unambiguous requirements of Fed. R. Civ. P. 59(b); *In re Ford Motor Co.*, 591 F.3d 406 (5th Cir. 2009) involved a trial court's failure to follow binding precedent: "Petitioners submitted to jurisdiction in Mexico, and our caselaw

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[24] Mandamus Petition, p. 13

[25] See Section II.C.1, supra

[26] See Section II.C.2, supra

plainly holds that Mexico is an available forum. It was patently erroneous for the MDL court to ignore this binding precedent and equally erroneous for the transferor court to accept that decision." *In re Hijazi*, 589 F.3d 401, 403, 414 (7th Cir. 2009) involved the question whether a federal district court was required to rule on a motion brought by a Lebanese citizen residing in Kuwait to dismiss a criminal indictment filed by federal authorities in Chicago, where the judge refused to rule unless the defendant appeared, the defendant refused to travel to the United States and Kuwait had no extradition treaty. Since the government admitted that "any harm suffered by *Hijazi* cannot be remedied by the regular appeals process," 589 F.3d at 407, the Seventh Circuit granted the writ, concluding that the right to the writ was "clear and indisputable. … under the unusual circumstances of this case." 589 F.3d at 408. These cases have no bearing on the Appellant's argument that it must have immediate appellate review because it was denied dismissal on jurisdictional grounds.

The cases that the Appellant cites in support of its argument that Judge Boulley failed to rule, Mandamus Petition, pp. 2, 14-16, stand for nothing more than the basic principle that a court must determine its jurisdiction over a case in order to adjudicate it.[27] None of these cases touches on the level of prolixity that a court must assume in denying a motion to dismiss based on an alleged lack of subject matter jurisdiction. None contradicts the universally accepted principle that a trial court may defer final ruling on jurisdiction where the facts are undeveloped.

The United States Supreme Court decisions cited on page 15 of the Mandamus Petition affirm that the burden of establishing one of the exceptions to *Montana* rests on the Tribe but

[27] *Crawford v. U.S.*, 796 F.2d 924 (7th Cir. 1986) is a statute of limitations case in which mandamus is not mentioned.

none of these cases supports the Appellant's contention that the Tribe must be denied the opportunity to meet that burden whenever a defendant, in a factual vacuum, contests jurisdiction.

The Appellant cites *National Farmer's Union* without mentioning that the Supreme Court in that case *rejected* Appellant's core argument that denial of a motion to dismiss based on subject matter jurisdiction necessarily entitles a litigant to immediate appellate review.[28] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) doesn't address the Appellant's arguments but instead supports the Tribe's positions, (1) affirming that "[d]ismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy,' 523 U.S. at 89, (2) commenting that the Court had "reserved the question whether we had jurisdiction to issue a writ of prohibition or mandamus because the petitioner had not exhausted all available avenues before seeking relief under the All Writs Act, Id. at 100, and (3) observing that "This case is on appeal from a Rule 12(b) motion to dismiss on the pleadings, so we must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations." Id. at 104.

E. Appellant's Use of Tribal Authorities to Support Creation of Mandamus Procedure is Misleading

The Appellant likewise cherry-picks a small number of tribal court decisions for the statements that "Tribal and federal appellate courts alike have repeatedly recognized that such a writ should issue where the court has exceeded its jurisdiction," Appellate Brief, p. 4 and "Tribal appellate courts have repeatedly recognized their inherent authority to issue writs of mandamus."

[28] See quote, supra, p. 8.

Mandamus Petition, p. 11. There are 573 federally recognized tribes. The Tribe respects the judicial systems of other tribes but is *not* subject to them. Nor do we understand there to be a particularly indigenous dimension to mandamus, a Latin word connoting a legal doctrine rooted in English common law. Attempting to identify a particularly tribal version of mandamus from the hundreds of tribal court systems is a fruitless task.

The Appellant's broad mischaracterizations notwithstanding, the tribal court authorities cited do not plug the holes in the Appellant's arguments. Five of the decisions the Appellant cites were handed down by the Navajo Supreme Court. These cases are inapposite because a Navajo Statute, 7 NNC § 303, explicitly vests the Navajo Supreme Court with "the power to issue any writs or orders …. To prevent or remedy any act of any court which is beyond its jurisdiction." There is no indication that, in the absence of its explicit statutory mandamus authority, the Navajo Supreme Court would simply invoke "common law" to grant itself this power. Even if Red Cliff had a mandamus ordinance like's Navajo's, the Navajo decisions are easily distinguishable and would not support mandamus in our case. *See Judy v. White*, 2004 Navajo Sup. LEXIS 19 (Navajo Aug. 2, 2004)(Appeal from final judgment holding that mandamus may be available for failure of trial court to transfer case of another district); *Yellowhorse, Inc. v. Window Rock, Dist. Ct*., 5 Nav. R. 85, 88, 1986 Navajo Sup. LEXIS 5 (Navajo 1986)(writ denied where petition could not meet strict requirements for writ and stating that the Supreme Court would "not order a district judge to dismiss a complaint before the lower court has had an opportunity to review the facts and applicable law and render a decision."); *N. Edge Casino v. Window Rock, Dist. Court*, 2017 Navajo Sup. LEXIS 2 (Navajo 2017)(Writ of prohibition issued where trial court denied motion to dismiss based on sovereign immunity); *Kang v. Chinle Family Court,* 2018 Navajo Sup. LEXIS 2 (Navajo 2018)(Writ issued where trial court failed to rule on

motion in divorce case); *Duncan v. Shiprock*, Dist. Court, 2004 Navajo Sup. LEXIS 17 (Navajo 2004)(Writ issued to order trial court judge hold jury trial required by trial law).

Some of the tribal appellate decisions cited order lower court judges or tribal officials to carry out duties required by a clear trial law mandate, a circumstance in which there is no remedy other than mandamus. The *In Re Galanda* decision of the Nooksack Court of Appeals, highlighted by the Appellant, falls into this category. In support of its mandamus jurisdiction, the Court cited a Nooksack law providing that "any officer … of the Nooksack Nation may be sued in this court to compel him/her to perform his/her non-discretionary duties." The Appellant argues that the authority conferred on Red Cliff courts under RCCL §§ 4.25, 31.3.1 and 31.9.1 is the same thing. To the contrary, the trial court's authority under Section 4.25 to issue temporary restraining orders and injunctions pursuant to written complaints filed by "applicants" against "adverse parties" bears no resemblance to the Nooksack law explicitly authorizing suits to compel tribal officials to carry out their duties. RCCL § 31.3.1 limits this Court's review authority to *final* orders, judgments and decrees of the tribal court. The authority of the Trial or this Court under Section 31.9.1 to stay or modify *injunctive* orders or judgments pending appeal plainly relates to injunctions issued by the Trial Court. See also, *Ellis v. Muscogee Creek Nation Nat'l Council*, 2012 Muscogee Creek Nation Supreme LEXIS 7, * 1 (Muscogee Sup. Ct. Jan. 19, 2012) (Writ of Mandamus issued in moot case requiring Respondent to fund a Special Election on various proposed constitutional amendments); *In re Petitioner Seeking Writ of Mandamus on Judges May & Marcellais*, 2004 Turtle Mt. App. LEXIS 3, *4 (Turtle Mt. Ct. App. Oct. 14, 2004) (Appellate Court recognized mandamus jurisdiction in case involving trial court failure to make decisions where tribal law provided that the Court of Appeals "shall have the power to issue any writs or orders necessary and proper to the complete exercise of it jurisdiction").

In several other cases cited by the Appellant, the tribal appellate court adopted the collateral order doctrine, which applies only when a trial court denies a motion to dismiss based on the defendant's *immunity*, also not applicable here.. *Hwal 'Bay Ba:J Enters. v. Beattie*, 2009 Hualapai App. LEXIS 1 (Hualapai Nation Ct. App. Apr. 2, 2009); *One Hundred Eight Emps. v. Crow Tribe of Indians*, 2001 ML 5093 (Mont. Crow Ct. App. Nov. 21, 2001); *N. Edge Casino v. Window Rock Dist. Court*, 2017 Navajo Sup. LEXIS 2 (Navajo 2017). Others are just irrelevant to mandamus or interlocutory appeals. *Norwest v. Confederated Tribes of Grande Ronde*, 2001 Grand Ronde Trib. LEXIS 35 (Grand Ronde Tribal Ct. July 26, 2001) (Enrollment case involving neither mandamus nor collateral order doctrine. *Gobin v. Tulalip Tribes' Bd. Of Dirs*., 2002 Tulalip App. LEXIS 2, *19 (Tulalip Tribal Ct. App. Dec. 6, 2002)(Appeal from final judgment of trial court zoning decision unrelated to mandamus or interlocutory jurisdiction).

What is most revealing about the tribal court cases cited by the Appellant is the absence of a single decision in which a tribal appellate court issued a writ of mandamus because the trial court had denied a motion to dismiss based on alleged lack of subject matter jurisdiction.

III. CONCLUSION

Red Cliff law requires a litigant to obtain a final judgment before filing an appeal. The Tribe has not adopted the federal statutory exceptions at 28 U.S.C. § 1292 but those would not apply here in any case. Nor has the Tribe adopted the "collateral order" doctrine which, in the federal system, supports appellate interlocutory jurisdiction where a lower court has denied a motion to dismiss based on a defendant's immunity from suit. That doctrine would not help the Appellant even if the Tribe had adopted it because the Appellant has no immunity. Finally, in extraordinary circumstances, the federal courts have permitted interlocutory review of trial court orders by mandamus if there is no other adequate means of relief, if the petitioner's legal position is "clear and indisputable" and if, pursuant the appellate court's discretion, mandamus relief is appropriate under all the circumstances. Unlike some of the tribes whose decisions are cited by the Appellant, the Red Cliff Tribe has not vested its appellate court with mandamus authority. While a few tribal courts have created this authority as a matter of tribal common law, this Court should decline to do so in this Case, where the Appellant clearly fails to meet all requirements for mandamus.

The Tribe respectfully requests that the Court not address the question of subject matter jurisdiction but instead (1) dismiss the appeal for lack of jurisdiction in the absence of a final judgment and (2) decline to exercise mandamus jurisdiction on the ground that mandamus is not an available remedy under Red Cliff law and (3) remand the case to the Trial Court. The Appellant will have the opportunity to return to this Court when the facts have been developed and the legal issues narrowed in the Trial Court.

Respectfully submitted this 1st day of October, 2019.

Brian L. Pierson

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GODFREY & KAHN, S.C.

Brian L. Pierson, State Bar No. 1015527
Godfrey & Kahn, S.C.
833 East Michigan Street, Suite 1800
Milwaukee, WI 53202-5615
Phone: 414-273-3500
bpierson@gklaw.com

Jonathan T. Smies, State Bar No. 1045422
200 South Washington Street, Suite 100
Green Bay, WI 54301-4298
Phone: 920-432-9300
Fax: 920-436-7988
jsmies@gklaw.com

David M. Ujke, Tribal Attorney
Red Cliff Band of Lake Superior Chippewa
88385 Pike Road, Hwy 13
Bayfield, WI 54814
Phone: 715-779-3725
Dave.ujke@redcliff-nsn.gov

Attorneys for Red Cliff Band of Lake Superior Chippewa Indians

21130314.9