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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DISTRICT

CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah Corporation, LDS FAMILY SERVICES, a Utah Corporation, Plaintiffs, vs. FD, an individual, Defendant.	**DEFENDANT FD'S OPPOSITION TO PLAINTIFFS' MOTION TO REMAND** Case No. 2:20-cv-507-CW-DAO Judge Clark Waddoups Magistrate Judge Daphne A. Oberg

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Defendant FD ("FD") hereby opposes the Plaintiffs Corporation of the President of The Church of Jesus Christ of Latter-day Saints and LDS Family Services' (together, the "Church") Motion to Remand (Dkt. No. 19).

INTRODUCTION

This case is governed by federal law. The Church maintains the claims are brought under state law and they must be decided by the Utah Fourth District Court. But these arguments are misplaced. The claims are preempted by federal common law and statute. In fact, applicable federal law provides that Utah state courts lack jurisdiction over the claims. As set forth below, federal questions are alleged on the face of the Complaint and through the "substantial question" arm of federal jurisdiction.

First, both causes of action arise under federal law. They relate to a disputed settlement agreement in a Navajo court case, where the Church seeks to enjoin FD from proceeding with her claims. State jurisdiction over the subject matter of this case is preempted by federal law. To wit, the Navajo court proceedings are in Arizona, which is outside the scope of Utah's civil adjudicatory jurisdiction. Regardless, whether a member of the Navajo Nation has the right to pursue her existing Navajo tort action is presumptively a federal question, over which this Court has jurisdiction.

Second, tribal exhaustion is a substantial federal question. No state or federal court can enjoin a tribe-member from pursuing tribal tort claims unless the party seeking the injunction has exhausted all tribal remedies. There is no drafting around tribal

exhaustion in this case. Thus, even if the Church's claims were brought under state law, they would still present a substantial federal question.

The motion to remand should be denied.

FACTUAL BACKGROUND

A. The Navajo court case

1. On May 31, 2016, FD filed her complaint against the Church. RJN, Ex. A. The claims include (1) childhood sexual abuse, (2) assault and battery, (3) negligence, (4) negligent supervision/failure to warn, (5) intentional infliction of emotional distress, (6) equitable relief, (7) common law nuisance, and (8) common law restoration of Navajo culture. (Dkt. No. 2-1, 2:19-cv-62).[1]

2. FD filed the complaint in the Navajo Nation District Court in Window Rock, Arizona. The Navajo Nation is a federally recognized tribe whose reservation lies within the boundaries of the states of Arizona, Utah and New Mexico. The Utah portion of the Navajo Nation lies wholly in San Juan County.

B. The first federal case

3. On June 3, 2016, the Church responded with a complaint in this Court, seeking a declaration that the Navajo District Court lacked subject matter jurisdiction over FD's case. Among other things, the Church alleged: "Tribal courts have no jurisdiction over conduct that does not occur on the tribe's reservation." (Dkt. No. 7 at 4,

[1] FD hereby requests judicial notice of the court files in the related cases discussed herein and in the notice of removal, and those referenced in the Complaint. *See Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2016); *see also Eden v. Voss*, 105 F. App'x 234, 240 n.6 (10th Cir. 2004) (unpublished).

2:16-cv-453) (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332 ("*Montana* and its progeny permit tribal regulation of non-member conduct inside the reservation . . . .") (emphasis in original)).

4. On November 16, 2016, Judge Shelby dismissed the case for the Church's failure to exhaust tribal remedies. (Dkt. No. 40, 2:16-cv-453).

C. The first state case

5. FD's prior counsel sent an email to the Church's counsel alleging they had reached an agreement to settle the Navajo case. The following day, however, FD's current counsel wrote a letter to prior counsel stating that FD never made such agreement. To date, FD has denied ever entering such agreement.

6. On August 17, 2018, the Church responded to FD's rejection of the settlement offer, stating "[i]t may take several years before the tribal jurisdiction is fully resolved[.]" (Dkt. No. 2-4, 2:19-cv-62).

7. Ever since, the Church has sought to enforce prior counsel's email as a binding settlement, *viz.*, through three lawsuits. First, on October 17, 2018, the Church filed a complaint for declaratory relief in the Fourth District Court for Utah, seeking a declaration that "the settlement agreement is binding." (Dkt. No. 2, 2:19-cv-62).

8. On January 7, 2019, the Utah court signed a default judgment in the Church's favor. In part, the default order stated: "On August 2, 2018, Plaintiffs and Defendant entered into a valid and binding settlement agreement with respect to the claims alleged by Defendant in her complaint filed in the Navajo Nation district court dated May 27, 2016." (Dkt. No. 4-2, 2:19-cv-62).

D. The 2019 federal case

9. Relying on the default judgment, the Church renewed its effort to seek federal injunctive relief. On January 28, 2019, the Church brought two claims in this Court. Both claims were brought under the Declaratory Relief Act, 28 U.S.C. § 2201. The first, "seek[ing] a declaration that the Navajo District Court does not have subject-matter jurisdiction over [FD's] claims and that the Navajo District Court is barred from proceeding with [FD's] claims." (Dkt. No. 11-1 at 13). The second, "seek[ing] a declaration that, pursuant to the Settlement Agreement, any claims [FD] has or could have asserted against [the Church] in the Navajo District Court are moot and that [FD] is barred from proceeding with her claims." *Id.* at 14–15

10. Specific allegations include the following:

a. "In May 2016, [FD] filed a complaint in the Navajo Nation District Court, District of Window Rock, Arizona[.]" *Id.* at 2.

b. "[The Church] first filed a motion in the Navajo District Court to dismiss [FD's] complaint for lack of subject matter jurisdiction, which was denied." *Id.* at 2–3.

c. "[The Church[then filed a writ of prohibition in the Navajo Nation Supreme Court contesting the Navajo District Court's subject-matter jurisdiction. The Navajo Supreme Court denied the writ." *Id.* at 3 (parentheticals excluded).

d. "[The Church] agreed to pay [FD] a certain amount in exchange for a release of the claims that she had or could have asserted in the Navajo District Court action." *Id.*

e. "[The Church] now seek judgment from this Court declaring that the Navajo District Court lacks subject-matter jurisdiction over [FD's] claims and that [FD's] claims are moot." *Id.*

f. "There are two independent grounds for [the Church's] requested relief: (a) The Navajo District Court lacks subject-matter jurisdiction over [FD's] claims because [the Church] are nonmembers of the Navajo Tribe and [FD's] claims did not arise from conduct on the Navajo Nation. (b) [FD's] claims pending in the Navajo District Court are moot because they have been settled and released." *Id.*

g. "Plaintiff Corporation of the President of The Church of Jesus Christ of Latter-day Saints . . . is named as a defendant in the Navajo District Court action." *Id.*

h. "Plaintiff LDS Family Services . . . is named as a defendant in the Navajo District Court action." *Id.*

i. "[FD] is an . . . enrolled member of the Navajo Tribe." *Id.* at 5.

j. "An actual controversy . . . now exists regarding whether the Navajo District Court has subject-matter jurisdiction over [FD's] claims against [the Church]." *Id.* at 13.

k. "Plaintiffs seek a declaration that the Navajo District Court does not have subject-matter jurisdiction over [FD's] claims and that the Navajo District Court is barred from proceeding with [FD's] claims." *Id.*

l. "Plaintiffs have a legally protectable interest in the present controversy because Plaintiffs are named as defendants in the action pending in the Navajo District Court." *Id.* at 14.

m. "An actual controversy . . . now exists . . . regarding whether [FD's] claims filed in the Navajo District Court are moot pursuant to the Settlement Agreement." *Id.*

n. "Plaintiffs seek a declaration that, pursuant to the Settlement Agreement, any claims [FD] has or could have asserted against Plaintiffs in the Navajo District Court are moot and that [FD] is barred from proceeding with her claims." *Id.* at 14–15.

o. "Plaintiffs have a legally protectable interest in the controversy because Plaintiffs are parties to the Settlement Agreement and named as defendants in the Navajo District Court action." *Id.* at 15.

11. In addition to the complaint, the Church filed a motion for preliminary injunction. (Dkt. No. 7, 2:19-cv-62). FD responded to the complaint with a motion to dismiss. (Dkt. No. 17, 2:19-cv-62).

12. On October 23, 2019, the Court denied both motions and stayed the case until the Church has exhausted all tribal remedies. (Dkt. No. 45 at 14–15, 2:19-cv-62).

E. This case

13. On December 13, 2019, the Church filed this case in the Fourth Judicial District Court for Utah. (Dkt. No. 11-2) ("Compl.").

14. The Church brings two causes of action in this case. The first is for declaratory relief under the Utah Declaratory Relief Act, Utah Code § 78B-6-408. There, the Church seeks to enforce "a legally protectable interest" related an alleged "Settlement Agreement" in the "Navajo court action" where the Church is a party. Through that purported agreement, the Church seeks a declaration of release from FD's Navajo claims.

15. The Church's second claim alleges breach of contract. It addresses the same disputed settlement, which the Church maintains FD "has materially breached and continues to materially breach . . . by proceeding with her claims against [the Church] in the Navajo court action[.]" Compl. ¶ 25. For the alleged breach, the Church seeks "preliminary and permanent injunctive relief to prevent [FD] from proceeding with her claims against [the Church] in the Navajo court action." Compl. ¶ 26.

16. Specifically, the Complaint includes the following allegations:

a. "This Court has jurisdiction over this matter pursuant to Utah Code § 78B-3-205." Compl. ¶ 4.

b. "[FD] filed a complaint in the Navajo Nation District Court, District of Window Rock, Arizona[.]" Compl. ¶ 6.

c. "[FD] agreed to settle her claims pending in the Navajo court action." "Plaintiffs agreed to pay [FD] . . . for a release of the claims that [FD] asserted or could have asserted against Plaintiffs in the Navajo court action." Compl. ¶ 7.

d. "Plaintiffs filed a declaratory judgment action in this Court . . . seeking a declaration that . . . Plaintiffs were released from any claims that [FD] asserted or could have asserted against them in the Navajo court action." Compl. ¶ 9;

e. "Plaintiffs were released from any claims that [FD] asserted or could have asserted against them in the Navajo court action." Compl. ¶ 13.

f. "[FD] continues to pursue her claims against Plaintiffs in the Navajo court action. For example [FD] recently served discovery requests on Plaintiffs in the Navajo court action." Compl. ¶ 14.

g. "An actual controversy . . . has arisen . . . regarding whether Plaintiffs have been released from any claims that [FD] asserted or could have asserted against them in the Navajo court action." Compl. ¶ 16.

h. "Plaintiffs seek a declaration that . . . Plaintiffs are released from any claims that [FD] asserted or could have asserted against them in the Navajo court action." Compl. ¶ 18.

i. "Plaintiffs have a legally protectable interest in the controversy because Plaintiffs . . . are named as defendants in [FD's] Navajo court action." Compl. ¶ 21.

j. "Defendant has materially breached . . . by proceeding with her claims against Plaintiffs in the Navajo court action" Compl. ¶ 25.

k. "Plaintiffs are entitled to preliminary and permanent injunctive relief to prevent [FD] from proceeding with her claims against Plaintiffs in the Navajo court action." Compl. ¶ 26.

l. "Plaintiffs request judge and relief against [FD] . . . For a judgment declaring that Plaintiffs have been released from any claims that [FD] asserted or could have asserted against them in the Navajo court action[.] For an order enjoining [FD] . . . from proceeding with [FD's] claims against Plaintiffs in the Navajo court action[.]" Compl. ¶ 5.

17. After service of the Complaint, FD removed the case to this Court, asserting federal question jurisdiction. (Dkt. No. 11)

18. On August 14, 2020, the Church filed a motion to remand the case back to state court, arguing the Complaint does not present a federal question. (Dkt. No. 19).

ARGUMENT

A. Legal Standard

"Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). 28 U.S.C. 1441(a) provides the right to remove cases involving a federal question. Whether federal question removal is proper depends upon whether the federal court has jurisdiction under 28 U.S.C. 1331, which grants federal court jurisdiction over cases "arising under the Constitution, laws, or treaties of the United States." "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a

federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar*, 482 U.S. at 392. Plaintiffs "may avoid federal jurisdiction by exclusive reliance on state law." *Id.*

"The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim." *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998). "[A] plaintiff may not defeat removal by omitting to plead necessary federal questions." *Id.* (quoting *Franchise Tax Bd. of Cal. V. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 22 (1983)). "If a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Id.* In addition, the Supreme Court "has concluded that the pre-emptive force of a statute [may be] so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (quoting *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 65 (1987)).

"[I]n certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). "The doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues[.]" *Id.* Under the substantial-federal-question doctrine, "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3)

substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

B. State jurisdiction over tribal court cases is preempted by federal law.

"Indian tribes occupy a unique status under our law." *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). "[T]he power of the Federal Government over the Indian tribes is plenary." *Id.* "Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes." *Id.*

Williams v. Lee set the default standard, 358 U.S. 217 (1959). Like here, a non-Navajo sued a Navajo in state court for conduct arising on the Navajo reservation. *Id.* at 218. According to the Supreme Court, the non-Navajo's claims should have been brought in the Navajo courts. *Id.* at 222. The court's analysis started with *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832), where Chief Justice Marshall held that, as a matter of federal law, Georgia law had no force on the Cherokee Nation. *Williams*, 358 U.S. at 219; *see also The Kansas Indians*, 5 Wall. 737, 755–756 (1867). The court's review of *Worcester* and its progeny boiled down to this: "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. Emphasizing the advancements of the Navajo legal system nearly a century ago, the court's holding resonates today. That is, "[t]here can be no doubt that to allow the exercise of state jurisdiction . . . would undermine the authority of the tribal courts over

Reservation affairs and hence would infringe on the rights of Indians to govern themselves." *Id.* at 221–222.

Consistent with *Williams*, the Supreme Court ruled in *Kennerly v. District Court* that state adjudicatory jurisdiction is preempted by federal statutes that prescribe the exclusive means by which states may obtain civil and criminal jurisdiction over Indians within Indian country, 400 U.S. 423 (1971) (per curiam) (holding that the Blackfeet Tribe's consent to state jurisdiction through passage of a tribal resolution was a nullity because it circumvented the requirements of PL 280, 25 U.S.C. §§ 1321-1326).

The Supreme Court addressed similar issues in *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987). There, an insurance company brought a declaratory relief action in federal district court against a member of the Blackfeet Tribe, alleging diversity jurisdiction under 28 U.S.C. § 1332. *Id.* at 13. The underlying case was about the insurance company's contractual duty to indemnify and defend its policyholders in a lawsuit pending in tribal court. *Id.* But the coverage arguments were left for another day. The question for the court was "whether a federal court may exercise diversity jurisdiction before the tribal court system has an opportunity to determine its own jurisdiction." *Id.* at 11. The answer was no because "the issue of jurisdiction [must] be resolved by the Tribal Courts in the first instance." *Id.* at 19.

At bottom, federal law occupies the field when tribal courts are involved. *Id.* at 14 (collecting cases). "The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute." *Id.* "If state-court jurisdiction over Indians or activities on Indian lands would interfere with

tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law." *Id.* at 15. "The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts." *Id.* at 16–17. As before, to further that policy, the end result is a unique category of federal preemption where "[c]ivil jurisdiction . . . presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18.

Accordingly, tribes "retain considerable control over nonmember conduct on tribal land." *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997). A "tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through . . . contracts . . . or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981). "Tribal sovereignty, it should be remembered, is a sovereignty outside the basic structure of the Constitution." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (internal quotes and citations omitted). And tribal sovereignty extends to matters of "internal self-government," for which tribes retain "the right to prescribe laws applicable to tribe members and to enforce those laws." *United States v. Wheeler*, 435 U.S. 313, 322 (1978). "The question whether an Indian tribe retains the power to compel a non-Indian . . . to submit to the civil jurisdiction of a tribal court is one that *must* be answered by reference to federal law and is a 'federal question' under § 1331." *National Farmers*, 471 U.S. at 852 (emphasis added).

With these jurisdictional principles serving as a well-established backdrop, 25 U.S.C. § 1322(a) provides the conditions upon which the federal government grants state

civil adjudicatory jurisdiction. Under federal mandate, states may exercise jurisdiction over claims arising "in the areas of Indian country situated within such State . . . with the consent of the tribe . . . ." 25 U.S.C. § 1322(a). In addition, as the *Kennerly* court emphasized, adherence to the Congressionally-mandated process under 25 U.S.C. §§ 1322 and 1326 is not discretionary with either state courts or with a tribe's elected governing body: "The unilateral action of the [Blackfeet] Tribal Council was insufficient to vest [the State of] Montana" with adjudicatory jurisdiction over civil causes of action involving Indians that arise within the boundaries of the Blackfeet Indian Reservation, 400 U.S. at 427.

C. Federal law preempts state jurisdiction in this case.

The Church argues that state law controls because the "causes of action are based exclusively on state law[.]" (Dkt. No. 19 at 9). Federal law states otherwise. The Church's claims relate to activity on the Navajo reservation, in Arizona, including FD's right to proceed on claims brought under Navajo law. The Complaint thus states a federal question.

1. State jurisdiction is a necessary federal question.

State jurisdiction is a federal question carved into the Complaint. "As a general matter, defendants may remove to the appropriate federal district court 'any civil action brought in a State court of which the district courts of the United States have original jurisdiction.'" *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997) (quoting 28 U.S.C. § 1441(a)). Federal district courts have "original jurisdiction to determine whether 'federal law precludes state court-jurisdiction over a claim against

Indians arising on the reservation.'" *Ute Indian Tribe of Uintah & Ouray Reservation v. Lawrence*, 289 F. Supp. 3d 1242, 1269 (D. Utah 2018) (hereinafter "*Lawrence II*") (quoting *Ute Indian Tribe v. Lawrence*, 875 F.3d 539, 549 (10th Cir. 2017) (hereinafter "*Lawrence I*")).

"[I]t is clear that whether the state court has jurisdiction to hear [the Church's] claim[s] is a matter of federal law." *Lawrence I*, 875 F.3d at 543. The claims are brought against a member of the Navajo Nation and they arise from activities on the Navajo reservation. (Dkt. No. 2-1, 2:19-cv-62) (Dkt. No 2 at 5, 2:19-cv-62). Specifically, those activities include tribal court proceedings situated in Window Rock, Arizona. Compl. ¶ 6. And the allegations relate to a disputed settlement of claims that were brought under the adjudicatory authority of the Navajo courts.[2] That relates to FD's rights on tribal lands. *See Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 667-75 (1974) ("[T]he assertion of a federal controversy . . . [rests on] possessory rights to tribal lands, wholly apart from the application of state law principles which normally and separately protect a

[2] Settlement of Navajo court cases are guided by Navajo customary practices, which are deeply rooted in Navajo culture and self-governance. Such customs are enshrined in the Navajo Rules of Civil Procedure for which this Court may take judicial notice:

> The development of our court system plainly imposes a duty on our Navajo Nation judges to use Diné methods of informal discussion whenever permissible, primarily to aid horizontal decision-making by the parties themselves. . . . [T]he Supreme Court has determined that Rule 16(a) clearly provides a window for a court to informally proceed using Diné methods of dispute resolution to facilitate settlement, during which the court is not constrained by rule-based formalities.

Navajo Nation Supreme Court Commentary, Nav. R. Civ. P. 16(a) (citing *Manning v. Abeita*, No. SC-CV-66-08 (Nav. Sup. Ct. Aug 1, 2011).

valid right of possession.") (hereinafter "*Oneida I*"); *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244 (1985) (holding that contract claims related to Indian property rights were governed by federal common law) (hereinafter "*Oneida II*"). The relief sought by the Church is an order, injunction, judgment, and/or declaration that FD (and anyone she knows) cannot proceed against the Church in Navajo courts. Compl. at 5. Thus, the Church's claims reside on the Navajo reservation, and his Court has original jurisdiction over a bona fide federal question established through the well-pleaded-complaint rule.

Lawrence I and *Iowa Mutual* inform the federal question analysis. As the Tenth Circuit recognized, "sovereign immunity and a court's lack of subject-matter jurisdiction are different animals." *Lawrence I*, 875 F.3d 539 at 545. To be sure, *Lawrence I* involved a tribal plaintiff seeking an injunction in federal court, but the court's distinction between the two doctrines applies here. *Iowa Mutual* does the rest of the work. There, the non-Indian insurance company plaintiff sought a judicial declaration of noncoverage for an insurance policy held by the Indian tortfeasor, 480 U.S. at 13. The court noted that tribal law governs the contract. *Id.* at 16 ("[T]ribal courts are best qualified to interpret and apply tribal law."); *see also Montana*, 450 U.S. at 565 ("[a] tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe['s] members, through . . . contracts . . . or other arrangements."). Other courts, including this Court, have reached the same conclusion. *E.g.*, *Lawrence II*, 289 F. Supp. 3d at 1269; *Ninigret Dev. Corp.*, 207 F.3d at 28. In other words, contracts related to tribal court proceedings

are presumptively within the tribal court's jurisdiction, not state courts, because federal law requires the promotion of tribal court systems.

As noted, the baseline rule is this: state jurisdiction interferes with the tribal court authority over tribal affairs and infringes upon tribal self-governance. *Williams*, 358 U.S. at 223. The claims in this case were designed to interfere with the Navajo court process. (Dkt. No. 19 at 17). Such intrusion is preempted by federal law.

2. Utah courts lack jurisdiction over the claims as a matter of federal preemption.

The Court's original jurisdiction over state court jurisdiction is one ground to deny remand, and the Public Law 280 inquiry is the next. Congress, pursuant to its plenary authority to affect the sovereignty of Indian tribes, declared by Public Law 280, as amended, 25 U.S.C. §§ 1321–1326, that states can assume civil jurisdiction over Indian reservations only if the tribe consents to the state's assumption of jurisdiction through a special election conducted for the members of the tribe. To acquire civil jurisdiction over the Navajo reservation and its tribal members, Utah must follow the federal procedure. *Kennerly*, 400 U.S. at 428–429. "[C]ongressional approval is *necessary*—i.e., it is a threshold requirement that must be met—before states and tribes can arrive at an agreement altering the scope of a state court's jurisdiction over matters that occur on Indian land." *Navajo Nation v. Dalley*, 896 F.3d 1196, 1205 (10th Cir. 2018) (collecting authority) (emphasis added).

While Utah has enacted statutes (Utah Code § 9-9-201) to assume such jurisdiction, the Navajo Nation has not consented to the exercise of civil jurisdiction by

Utah. The tribe's consent is required by 25 U.S.C. § 1326 and Utah's own statute, Utah Code § 9-9-201. Unless Congress has provided a means by which states can obtain jurisdiction over Indian lands, the internal sovereignty of the Navajo Nation is unaffected. *McClanahan v. Arizona State Tax Commissioner*, 411 U.S. 164, (1973). In addition, the Utah Enabling Act provides that the people of Utah:

> [F]orever disclaim all right and title to the unappropriated public lands within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereof shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . .

28 Stat. 107, Sec. 3 (Second).

Congress authorizes state court jurisdiction over claims arising "in the areas of Indian country situated *within such State* . . . ." 25 U.S.C. § 1322(a) (emphasis added). As a matter of federal law, Utah state courts lack jurisdiction over the Church's claims because Window Rock, Arizona (where the "Navajo court action" is pending) is not situated in Utah. *See* Compl. ¶ 6. "Congress has not consented to, nor has [Utah] sought, extension of [Utah] jurisdiction over this or other proceedings arising on Indian reservations outside the borders of [Utah]." *See Matter of Adoption of Buehl*, 555 P.2d 1334, 1339 (1976).

The Navajo Nation, pursuant to its inherent sovereign powers "to make [its] own laws and be ruled by them," *Williams*, 358 U.S. at 220, and to protect the "economic security, or the health or welfare of the Tribe," *Montana*, 450 U.S. at 566, has developed a judicial system within its government which is authorized to adjudicate causes of action

such as that pursued by the Church here.[3] Congress prioritizes "enhancing tribal court systems and improving access to those systems serve[] the dual Federal goals of tribal political self-determination and economic self-sufficiency." 25 U.S.C. § 3651(7).

When a tribal forum is available that forum must be used to the exclusion of a state or federal court. *R. J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 983 (9th Cir. 1983). This principle of law has been recognized by the Supreme Court. After an extensive discussion of the Congressional policy in favor of furthering Indian self-government, the court noted that "tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

There is also a very practical reason for denying state jurisdiction in this case. State courts cannot enforce their judgments against Indians on property located on an Indian reservation. *Annis v. Dewey County Bank*, 335 F.Supp. 133 (D.S.D. 1971). For example, the enforcement of a state writ of garnishment on reservation property was considered by the Tenth Circuit. In *Joe v. Marcum*, the court enjoined enforcement of a New Mexico state judgment by garnishing wages of a Navajo Indian who lived on the Navajo Reservation, 621 F.2d 358, 363 (1980). That same principle applies here.

3. Based on the circumstances of this case, tribal exhaustion is a substantial federal question.

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[3] 7 N.T.C. 253(2) states: "The District Courts of the Navajo Nation shall have original jurisdiction over: All civil actions in which the defendant: (1) is a resident of Navajo Indian Country ; or (2) has caused an action or injury to occur within the territorial jurisdiction of the Navajo Nation."

Exhaustion of tribal remedies is mandatory except where "an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the [tribal] court's jurisdiction." *National Farmers*, 471 U.S. at 856, n.21. Also, where it is clear that the tribal court lacks jurisdiction and that judicial proceedings would serve "no purpose other than delay." *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1238 (10th Cir. 2014) (quoting *Nevada v. Hicks*, 533 U.S. 353, 369 (2001)). Finally, "[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by [the main rule established in *Montana v. United States*]." *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006) (quoting *Strate*, 520 U.S. at 459 n. 14).

None of the exceptions apply here. This case was removed to avoid the harassment and delay associated with the Church's failure to exhaust tribal remedies, which this Court already directed. FD seeks justice through the Navajo court system but, instead, has been forced to field multiple collateral court cases seeking to avoid that process.

The Tenth Circuit "has taken a strict view of the tribal exhaustion rule, the exceptions are applied narrowly." *Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 862 F.3d 1236, 1243 (10 Cir. 2017) (citing *Kerr McGee*, 115 F.3d at 1507; *Thlopthlocco*, 762 F.3d at 1239) (internal citations omitted). "Exceptions typically will not apply so long as tribal courts can 'make a colorable claim that they have

jurisdiction.'" *Id.* (quoting *Thlopthlocco*, 762 F.3d at 1240). "In considering whether tribal jurisdiction is 'colorable', [the courts] emphasize that 'Indian Tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.'" *Id.* (quoting *Thlopthlocco*, 762 F.3d at 1240; *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

This Court has already recognized that the Navajo courts have a colorable claim of jurisdiction. The disputed settlement agreement "constitutes a new challenge to the tribal court's subject matter jurisdiction—which requires them to exhaust their tribal remedies before making that challenge in this court." (Dkt. No. 45 at 22 n.6, 2:19-cv-62). The Church fails to justify its decision to run roughshod over the Court's ruling. *See*, *e.g.*, *City of Vista v. Gen. Reinsurance Corp.*, 295 F. Supp. 3d 1119, 1124 (S.D. Cal. 2018) ("When considering whether to exercise jurisdiction over a declaratory relief action and remand a case '[t]he district court should avoid needless determination of state law issues; it should discourage litigants from filing declaratory relief actions as a means of forum-shopping; and it should avoid duplicative litigation.'"). Allowing this practice "might give rise to a scheme where plaintiffs overwhelmingly chose to litigate in state court instead of tribal court—a state of affairs that would wholly subvert the federal policy of encouraging the development of tribal court systems." *Harvey v. Ute Indian Tribe of Uintah and Ouray Reservation*, 416 P.3d 401 (2017) (Himonas, J., concurring).

Federal law requires the Church to respect the Navajo court process, and each of the foregoing federal questions are necessary barriers to the Church's efforts otherwise.

Important here, they are jurisdictional questions arising from the allegations in the Complaint.

CONCLUSION

For these reasons, the motion to remand should be denied.

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Respectfully submitted,

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