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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF UTAH
CENTRAL DIVISION

ANGELITA M. CHEGUP, TARA J. AMBOH, MARY CAROL JENKINS, LYNDA M. KOZLOWICZ, Plaintiffs, v. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a federally recognized Indian tribe; *et al.*, Defendants.	**No. 2:19-cv-00286-BSJ** **PLAINTIFFS' REPLY RE: SECRETARIAL APPROVAL**

I. INTRODUCTION

Glaringly absent from the Defendants ("Tribe")'s briefing is any answer to the Court's question: What is the status of Ordinance 14-004, and what effect does that status have on Plaintiff's exhaustion argument? Instead, the Tribe submits that the Court should defer to the Ute Tribal Court's opinion on the status of Ordinance 14-004. But the Ute Tribal Court has not issued an opinion on the status of Ordinance 14-004; or, at least, the Tribe does not say that it has or what

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it is. The Tribe then relies on that judicial silence to conclude that Ordinance 14-004 is valid, and that exhaustion would therefore not be futile. The Tribe's Escherian Stairwell should be rejected.

Ordinance 14-004 was not approved by the Secretary of the Interior.[1] The Tribe has not submitted evidence or argument providing otherwise. As such, it is undisputedly a "null and void" provision of tribal law. *Bunch v. Cole*, 263 U.S. 250, 253 (1923). Ordinance 13-022, however, is valid, operative law—and it rescinded from the Ute Tribal Court the jurisdiction to hear this dispute.[2] A *habeas* "petitioner must exhaust **available** tribal remedies before instituting suit in federal court." *Iowa Mut. Ins. v. LaPlante*, 480 U.S. 9, 19 (1987) (emphasis added). A court without jurisdiction to hear a dispute does not present an "available" remedy. *Id.* Here, because there were no tribal remedies available to Plaintiffs, exhaustion of tribal remedies was not required.

II. LAW AND ARGUMENT

A. INTERPRETATION OF TRIBAL LAW

Where a tribal court lacks jurisdiction to hear a particular matter, "exhaustion would be futile and serve no purpose other than delay." *United Keetoowah Band of Cherokee Indians in Oklahoma v. Barteaux*, 527 F. Supp. 3d 1309, 1323 (N.D. Okla. 2020). "[S]heer common sense indicates that if there are no existing remedies, there is nothing to exhaust." *Id.* (quotation omitted).

The Tribe does not contest this proposition, or even argue that the (at the time secret)[3] Ordinance that allegedly created remedies constituted valid, operative law. Instead, it submits that the Court has no choice in the matter; whether the Ute Tribal Court offered Plaintiffs a tribal court remedy is a matter "that must be decided by the Ute Indian Tribal Courts, not this Court."[4] What this logic fails to recognize, though, is that it was the Tribe, not Plaintiffs, that asked the Court to

[1] ECF No. 115-1.
[2] ECF No. 127-3.
[3] *See* ECF No. 110, at 9-10 (citing *Torres v. I.N.S.*, 144 F.3d 472, 474 (7th Cir. 1998); *United States v. Washabaugh*, No. 07-253, 2008 WL 203012, at *1 n.1 (S.D. Ohio Jan. 22, 2008)).
[4] ECF No. 128, at 5.

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interpret tribal law to determine the jurisdiction of Plaintiffs' *habeas* petition.[5] In this context, federal courts have no choice but to interpret tribal law, and frequently do. *See, e.g., O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1143 (8th Cir. 1973); *Necklace v. Tribal Ct. of Three Affiliated Tribes of Fort Berthold Rsrv.*, 554 F.2d 845, 846 (8th Cir. 1977); *Means v. Wilson*, 522 F.2d 833, 837 (8th Cir. 1975); *N. States Power v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 463 (8th Cir. 1993); *Burlington N. R. v. Crow Tribal Council*, 940 F.2d 1239, 1246 (9th Cir. 1991); *Quair v. Sisco*, 359 F. Supp. 2d 948, 980 (E.D. Cal. 2004). In fact, the Tribe itself has urged in other proceedings that where the Tribe's Constitution requires secretarial approval and the document is "not approved by the Secretary of the Interior" the Court should construe it as "'absolutely null and void.'" *Ute Indian Tribe of Uintah v. Lawrence*, 312 F. Supp. 3d 1219, 1250 (D. Utah 2018), *rev'd on other grounds*, 22 F.4th 892 (10th Cir. 2022) (quoting *Bunch*, 263 U.S. at 253).

The cases cited by the Tribe do not stand for the contrary and are unavailing. In fact, some of them support Plaintiffs' contentions.

The plaintiff in *Wheeler v. U.S. Dep't of Interior, Bureau of Indian Affs.*, for instance, sued the Bureau of Indian Affairs ("BIA") for not "interfer[ing] in a tribal election dispute" when he "alleg[ed] irregularities in the election procedures" and requested "an FBI investigation, a recount, a runoff election and participation in developing procedures for the requested recount." 811 F.2d 549, 550 (10th Cir. 1987). The court ruled that the BIA had no authority to intervene in the matter and, at any rate, "[a]ny election dispute can be resolved by Cherokee tribal forums, without any [BIA] involvement." *Id.*, at 552. Notably, in coming to the latter conclusion, the court interpreted

[5] *See, e.g.*, ECF No. 45, at 13 ("Plaintiffs were banished pursuant to Tribal Ordinance 14-004, [which] provides that, 'The Tribal Court shall have exclusive authority to hear appeals from orders of exclusion and/or removal after a hearing has been held thereon before the Ute Tribal Business Committee.'").

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the tribe's election law to determine what tribal remedies might be available to the plaintiff and found that the election laws were valid and "approved by the Department" of the Interior. *Id.*

Native Am. Church of N. Am. v. Navajo Tribal Council was an action to enjoin enforcement of ordinance adopted by Navajo tribal council making it offense to bring peyote onto the tribal land. 272 F.2d 131 (10th Cir. 1959). The trial court dismissed the suit for failing to state a claim and the Tenth Circuit affirmed, holding that federal courts do not have jurisdiction to regulate tribal laws or regulations. *Id.*

In *Prescott v. Little Six*, former employees brought suit against a tribally chartered corporation alleging that they were denied payment of benefits under employee benefit plans purportedly created by the corporation. 387 F.3d 753, 754 (8th Cir. 2004). While a tribal suit on the same issue was pending, they brought suit in federal district court under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1053 (2000), seeking benefits under the plans and equitable relief. *Id.*, at 755. The district court dismissed the action, holding that the Plaintiffs were required to exhaust their tribal remedies before the district court could exercise jurisdiction. *Id.* (citing *Prescott v. Little Six*, 897 F.Supp. 1217, 1222 (D. Minn. 1995)). The tribal court matter then wound its way up the tribal appellate process, with the tribal court of appeals holding that the employee benefit plans were invalid under tribal law. *Id.*

The plaintiffs then filed a second action in federal court, alleging that the tribal court interpreted its own law incorrectly, and asking it to rule that the plan was in fact valid under tribal law. *Id.* The trial court held that because "the standard for the existence of an ERISA plan is supplied by federal, not tribal, law," it had jurisdiction to review and overrule the tribal appellate court. *Prescott v. Little Six*, 284 F. Supp. 2d 1224, 1229-30 (D. Minn. 2003). On appeal, the Eighth Circuit disagreed, holding that the "legal status of the . . . benefit plans was a matter governed by tribal law" and should thus have been governed by the "'deferential, clearly erroneous

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standard'" as opposed to the less forgiving *de novo* standard applied to interpretations of federal law. *Prescott*, 387 F.3d at 757 (quoting *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994)); *see also Duncan Energy*, 27 F.3d at 1300 (holding that a tribal court's "determinations of Tribal law" are reviewable, but "should be accorded more deference" than determinations of federal law) (citing *FMC v. Shoshone–Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990)).

In *Basil Cook Enterprises v. St. Regis Mohawk Tribe*, the plaintiffs brought an action against the St. Regis Mohawk Tribe "to enforce or seek damages relating to a management agreement concerning the operation of a bingo hall." 914 F. Supp. 839, 840 (N.D.N.Y. 1996). As to tribal court exhaustion, the plaintiffs argued that they should be excused from compliance "because the tribal court does not exist,[6] that it is biased, and that it is corrupt" because it was created only "as a means of avoiding an honest adjudication of the tribe's unlawful actions." *Id.*, at 842 n.6. While "recogniz[ing] that the St. Regis tribal court [was] in its infancy," the trial court disagreed, holding that "[i]t is not for this court to question the motives of the St. Regis tribe" in creating its court. *Id.*, at 842. On appeal, the Second Circuit agreed with the district court, holding that exhaustion was required because "judicial recourse, encompassing a trial and an appeal, is provided for in the tribal constitution" and because the tribal court itself had "issued a decision holding that it has jurisdiction." *Basil Cook Enterprises v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2d Cir. 1997).

None of these cases stand for the proposition that the Court cannot interpret tribal law. In fact, in both *Weheeler*, 811 F.2d 549, and *Prescott*, 387 F.3d 753, the courts did just that. None of the cases involved 25 U.S.C. §1303 or any of the other parallel *habeas* statutes. More importantly,

[6] Although they were currently litigating in it. *See Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 80 (2d Cir. 2001) (noting that in *Basil Cook* "the plaintiff was litigating a previously-filed, ongoing tribal court action, and was asking the federal court to interfere with those tribal proceedings")

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none of the authority relied on by the Tribe involves a situation such as the one before the Court; where *the Tribe itself* is the party asking the Court to interpret tribal law.[7]

Essentially, the Tribe is saying: "Look, here's a law that says the Tribal Court has jurisdiction – you can't look too closely though." How absurd. Judicial interpretation provisions of law requiring Secretarial approval—and the invalid status of a document that does not have said approval—are commonplace. *Feezor v. Babbitt*, 953 F. Supp. 1, 5 (D.D.C. 1996) (noting the Department of the Interior's "policy of including provisions for secretarial approval of subsequent ordinances in tribal constitutions"); *Conoco v. Shoshone & Arapahoe Tribes*, 569 F. Supp. 801, 804 (D. Wyo. 1983) (finding "as a matter of law that Secretarial approval is a precondition to ordinance validity"). The authority cited by the Tribe does not direct otherwise.

B. REMAND

The Tribe is correct that Tenth Circuit remanded this action to this Court to answer the exhaustion issue. This necessarily involves interpreting the law that the Tribe asserts should be understood as requiring exhaustion. The Tribe's argument otherwise would result in an odd, confusing, and unjust "heads I win, tails you lose" mandate from the Tenth Circuit. This suggestion should be rejected.

III. CONCLUSION

Ordinance 14-004 was not approved by the Secretary of the Interior. As such, it is a "null and void" provision of tribal law. *Bunch*, 263 U.S. at 253. Ordinance 13-022, however, is valid, operative law—and it rescinded from the Ute Tribal Court the jurisdiction to hear this dispute.

A court without jurisdiction to hear a dispute does not present an available remedy. Here, because there were no tribal remedies available to Plaintiffs, exhaustion of tribal remedies was not required.

[7] *See, e.g.*, ECF No. 45, at 13.

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DATED this 18th day of August, 2022.

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CERTIFICATE OF SERVICE

I, Ryan Dreveskracht, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue NE, Ste. L1, Seattle, WA 98115.

3. Today I served the foregoing document, via U.S. Mail and through this Court's ECF system, on the following parties:

Ute Indian Tribe of the Uintah and Ouray Reservation
6964 East 1000 South
Ft. Duchesne, UT 84026

The foregoing Statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, this 18th day of August, 2022.

s/Ryan Dreveskracht
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