

MATT LAW OFFICE, PLLC

Terryl T. Matt, Esq.

Joseph F. Sherwood, Esq.

310 East Main Street

Cut Bank, MT 59427

Telephone: (406) 873-4833

Fax No.: (406) 873-0744

terrylm@mattlawoffice.com

joes@mattlawoffice.com

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA, GREAT FALLS DIVISION

GLACIER COUNTY REGIONAL PORT
AUTHORITY,

Plaintiff,

vs.

LAURIE ESAU, MONTANA HUMAN
RIGHTS BUREAU,

Defendants.

Case No. CV-22-81-GF-BMM-JTJ

**REPLY IN SUPPORT OF RULE 65
MOTION FOR PRELIMINARY
INJUNCTION AND TEMPORARY
RESTRAINING ORDER**

COMES NOW, Glacier County Port Authority ("Port Authority"), by and
through its counsel of record, Terryl T. Matt, and hereby files its *Reply in Support of Rule
65 Motion for Preliminary Injunction and Temporary Restraining Order*.

ARGUMENT

I. The Port Authority is likely to succeed on the merits of its claim because it is subject to the Blackfeet Tribe's inherent civil authority to regulate activities of non-Indians to protect the health or welfare of the Tribe.

Defendants assert "there are no federal or tribal interests that conflict with the continued prosecution of Myers' discrimination before MHRB." (Def.'s Resp., at 11).

Defendants' statement completely ignores that the Port Authority is *required* to follow the Blackfeet Tribe's ordinances when conducting meetings on the Tribe's land. Defendants' enforcement of § 49-2-312, MCA, against the Port Authority on tribal land directly conflicts with the Tribe's ability to enforce its own public health ordinances, including Ordinance 121, and places the Port Authority in the impossible situation of being unable to comply with both laws at once. Defendants' continued enforcement of § 49-2-312, MCA, against the Port Authority in this case is an attempt to circumvent tribal sovereignty and authority.

Defendants cite *Oklahoma v. Castro-Huerta*, ____ U.S. ____, 142 S. Ct. 2486 (June 29, 2022), for the broad proposition that a state has concurrent jurisdiction with the federal government over non-Indian conduct on tribal land. Defendants misconstrue *Castro-Huerta's* holding. *Castro-Huerta* involved narrow jurisdictional questions arising under the General Crimes Act, 18 U.S.C. 1152, and the Major Crimes Act, 18 U.S.C. § 1153. *See* 142 S. Ct. 2486, 24 ("We conclude that the Federal Government and the State have

1 concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians
2 in Indian country.”). *Castro-Huerta’s* holding left undisturbed the rule articulated in
3 *United States v. Cooley* that an Indian tribe has the inherent power to exercise *civil*
4 authority over the activities of non-Indians within its reservation “when that conduct
5 threatens or has some direct effect on the political integrity, the economic security, or
6 the health or welfare of the tribe.” ____ U.S. ____, 141 S. Ct. 1638, 1643 (2021) (quoting
7 *Montana v. United States*, 450 U.S. 544, 566, 101 S. Ct. 1245, 1258 (1981)).
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9 Federal law, not state law, defines the limits of a tribe’s right to exercise authority
10 over non-Indians. *UTE Indian Tribe of the Uintah v. Lawrence*, 875 F.3d 539, 542 (10th Cir.
11 2017). As *Castro-Huerta* discusses in the context of criminal jurisdiction, “[s]tate
12 prosecution would supplement federal authority, not supplant federal authority”
13 because tribes already lack the authority to prosecute crimes committed by non-Indians
14 for crimes committed against Indians in Indian Country. *Castro-Huerta*, 142 S. Ct. 2486,
15 19 (citing *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 195 (1978)). Additionally, a state’s
16 criminal prosecution of a non-Indian “does not involve the exercise of state power of
17 any Indian or over any tribe.” *Castro-Huerta*, 142 S. Ct. 2486, 19.
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20 This is not the case here, where Defendants’ continued enforcement of § 49-2-312,
21 MCA, against the Port Authority supplants the Tribe’s ability to enforce its own public
22 health ordinances, including Ordinance 121, an authority which has not been limited by
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1 Congress. The Port Authority (and the charging party, J.R. Myers) are required to
2 follow the Blackfeet Tribe's laws and ordinances while on tribal land. Simultaneous
3 compliance with Ordinance 121 and § 49-2-312, MCA, is not possible.

4 Defendants also argue that the doctrines of ripeness, exhaustion, and *Younger*
5 abstention preclude the Court from issuing a preliminary injunction and temporary
6 restraining order in this case.

7 As discussed in the Port Authority's response to Defendants' *Motion to Dismiss*,
8 none of these doctrines apply here.

9
10 **A. Ripeness nor exhaustion apply to preclude the Port Authority from**
11 **succeeding on the merits of its case.**

12 The ripeness doctrine requires courts to "adjudicate live cases or controversies."
13 *Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1153 (9th Cir. 2017) (quotations omitted).
14 Ripeness includes a constitutional and prudential component. *Bishop Paiute*, 863 F.3d at
15 1153. Constitutional ripeness "focuses on whether there is sufficient injury," whereas
16 prudential ripeness focuses on "whether there is an adequate record upon which to
17 base effective review." *Portman v. County of Santa Clara*, 995 F.2d 898, 902-03 (9th Cir.
18 1993).

19 The essence of the Port Authority's request in this case is that Defendants lack
20 jurisdiction to subject the Port Authority to its administrative enforcement of § 49-2-312,
21 MCA, for activities occurring on tribal land. That threshold jurisdictional question
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1 remains to be resolved regardless of whether a final agency decision has been rendered
2 in the underlying administrative proceeding, creating an actual controversy.

3 The Port Authority has already experienced sufficient harm by expending
4 significant time and resources defending itself during the informal investigation phase,
5 see § 49-2-504, MCA, during which Defendants issued a reasonable cause finding. The
6 Defendant's findings implicated further administrative procedures, including
7 conciliation, see § 49-2-504(2)(c), MCA, and now, a contested case hearing, see § 49-2-
8 504(7)(c), MCA. The Defendants' continued enforcement of § 49-2-312, MCA, at the
9 administrative level provides this Court with an adequate record to effectively review
10 the jurisdictional issue.
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12 Furthermore, it is nonsensical to require the Port Authority to exhaust the
13 Defendants' administrative process when the threshold jurisdictional question remains
14 as to whether the Defendants could initiate the contested proceedings over the Port
15 Authority's tribal activities. Exhaustion is not a prerequisite to this Court granting the
16 Port Authority's requested relief. See *Fort Bend Cnty., Tex., v. Davis*, 139 S. Ct. 1843, 1849
17 (2019) (the general rule is that exhaustion of administrative remedies is not a
18 jurisdictional prerequisite).
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21 **B. *Younger* Abstention does not apply to this case because Defendants cannot**
22 **meet all elements and, even if they could, exceptions exist precluding the**
23 **doctrine's application.**

“*Younger* abstention remains an extraordinary and narrow exception to the general rule that federal courts have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.” *Cook v. Harding*, 879 F.3d 1035, 1038 (9th Cir. 2018) (quotations omitted). A court may only abstain from deciding a case when the following factors are met:

- (1) A state-initiated proceeding is ongoing;
- (2) The state proceedings are quasi-criminal enforcement actions or involve a state’s interest in enforcing the orders and judgments of its courts;
- (3) Implicate an important state interest;
- (4) Allow litigants to raise federal challenges.

Cook, 879 F.3d at 1039 (quoting *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014)).

- 1. The third *Younger* factor is not met here because Defendants have failed to assert an important state interest that overrides the paramount and federal question of whether the state had jurisdiction to initiate the underlying state administrative proceedings for activities occurring on tribal land.**

Regarding the third *Younger* factor, the Port Authority agrees Defendants have an interest in enforcing Montana’s anti-discrimination laws within the State of Montana’s jurisdiction. However, Defendants’ interest in enforcing § 49-2-312, MCA, against the Port Authority on tribal land is defined strictly by federal law. *See Fort Belknap Indian Community v. Mazurek*, 43 F.3d 428, 432 (9th Cir. 1994). Federal law has determined that a state lacks an important state interest implicating *Younger* abstention

1 where a “paramount and federal” jurisdictional question must be resolved. *See Fort*
2 *Belknap*, 43 F.3d 428, 432, n. 3 (quoting *Seneca-Cayuga Tribe v. Oklahoma ex rel. Thompson*,
3 874 F.2d 709 (10th Cir. 1989)) (providing that when a state “is asked to decide issues of
4 federal law in an area in which federal interests predominate, the State’s interest in the
5 litigation is . . . not important enough to warrant *Younger* abstention.”). *See also Navajo*
6 *Nation v. Rael*, No. 1:16-cv-00888 WJ/LF (D.N.M. Apr. 11, 2017); *Pueblo of Santa Ana v.*
7 *Nash*, 854 F. Supp. 2d 1128 (D.N.M. 2012).

9 **2. The fourth *Younger* factor is not met here because Defendants**
10 **have continued enforcing § 49-2-312, MCA, against the Port**
11 **Authority despite the jurisdictional issues being raised,**
12 **effectively depriving the Port Authority from litigating the issue**
13 **at the administrative level.**

14 Defendants also fail to satisfy the fourth *Younger* factor. The Defendants have
15 continued investigating and prosecuting the Port Authority pursuant to § 49-2-312,
16 MCA, for its tribal activities despite federal and state law requiring Defendants assess
17 its jurisdiction at the outset of the case. *See Mont. Admin R. 24.8.220(b)* (authorizing a
18 charging party’s complaint to be dismissed based on a no cause finding for lack of
19 jurisdiction). *See also Fort Bend*, 139 S. Ct. at 1849 (tribunals must consider jurisdictional
20 issues sua sponte). The Port Authority has also raised the jurisdictional question in its
21 prehearing brief.

22 Even in light of these apparent jurisdictional issues, Defendants have continued
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to prosecute of the Port Authority and set the case for a two-day contested hearing. (Pl.'s 2d Am. Compl., ¶¶ 17-18). The Defendants have therefore deprived the Port Authority of the ability to effectively litigate the federal jurisdictional issue at the administrative level.

3. The “flagrant and patent” constitutional violation exception applies, precluding application of *Younger*.

Even if this Court were to determine Defendants have met all requisite *Younger* factors, exceptions to the doctrine exists precluding its application in this case.

“[A]bstention is inappropriate if bad faith prosecution or harassment is present, or where a statute is flagrantly and patently violative or constitutional prohibitions.”

Lebbos v. Judges, Super. Ct., Santa Clara Cty., 883 F.2d 810, 814 (9th Cir. 1989).

Applying *Younger* abstention to this case would violate the federal constitutional principles governing jurisdiction over Indian tribes providing that Congress, not the individual states, have plenary and exclusive authority over Indian tribes. *See* U.S. Const. Art. VI, cl. 2 (providing that the “Constitution, and the Laws of the United States . . . and all treaties made . . . under the authority of the United States, shall be the supreme law of the land”); Art. I, § 8, cl. 3 (providing Congress with the exclusive power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

The Montana Constitution echoes these federal jurisdictional principles, stating:

1 All provisions of the enabling act of Congress (approved February 22,
2 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the
3 Constitution of the state of Montana and approved February 22, 1889,
4 including the agreement and declaration that all lands owned or held by
5 any Indian or Indian tribes shall remain under the absolute jurisdiction
6 and control of the congress of the United States, continue in full force and
7 effect until revoked by the consent of the United States and the people of
8 Montana.

9 Mont. Const. art. I. Montana has not expressly amended its constitution as
10 authorized by 25 U.S.C. § 1324 to remove or amend its enabling act which limits its
11 authority over Indians tribes. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164,
12 177 (1973). *See also Castro-Huerta*, 142 S. Ct. at 21, 22-23 (confirming that the language in
13 statehood enabling acts is not an absolute bar to concurrent state and federal criminal
14 jurisdiction, subject to the limitations of federal law or principles of tribal self-
15 government.)

16 When conducting business on the Blackfeet Reservation, the Port Authority is
17 subject to the Tribe's inherent civil authority to regulate activities of non-Indians to
18 protect the health or welfare of the Tribe. The Port Authority is therefore likely to
19 succeed on the merits of its claim that Defendants lack jurisdiction to continue to
20 enforce § 49-2-312, MCA, against the Port Authority on tribal land.

21 **II. The Port Authority is likely to suffer irreparable harm if Defendants continue**
22 **administrative enforcement of § 49-2-312, MCA, against the Port Authority.**
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1 Defendants erroneously assert the Port Authority will not suffer irreparable
2 harm if the administrative contested case proceedings move forward.

3 "A plaintiff satisfies the irreparable harm requirement by showing "a significant
4 risk that he or she will experience harm that cannot be compensated after the fact by
5 monetary damages."" *Crowe Dunlevy v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011).
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7 "Irreparable harm may result if enforcement of an ordinance would yield fines
8 and criminal penalties." *Nat'l Solid Wastes Mgmt. Ass'n v. City of Dall.*, 903 F. Supp. 2d
9 446 (N.D. Tex. 2012). The Port Authority faces an improper trial where it risks being
10 subjected a wide range of penalties as a result of Defendants' continued enforcement of
11 § 49-2-312(1)(a), MCA, including possible criminal penalties and fines. *See* § 49-2-601,
12 MCA.
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14 Additionally, because it cannot follow § 49-2-312, MCA, and Blackfeet Tribal
15 Ordinance 121 at the same time, the Port Authority faces criminal penalties imposed by
16 Blackfeet tribal police. *See* Blackfeet Tribal Law and Order Code, ch. 6, § 3.

17 The Port Authority also faces irreparable harm to its company membership and
18 ongoing business relationship with the Blackfeet Tribe if it were to begin regularly
19 holding its meetings off the reservation. As Judge Molloy observed in preliminarily
20 enjoining enforcement of § 49-2-312, MCA, a decline in membership and harm to a
21 business's reputation constitute irreparable harm. *Mont. Med. Ass'n v. Knudsen*, CV 21-
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1 108-M-DWM, at *16 (D. Mont. Mar. 18, 2022) (citing *Am. Trucking Ass'ns, Inc. v. City of*
2 *L.A.*, 559 F.3d 1046, 1057 (9th Cir. 2009)). *See also McKinney v. Southern Bakeries, LLC*, 786
3 F.3d 1119 (8th Cir. 2015).

4 The Port Authority has made the requisite showing of irreparable harm to
5 support injunctive relief.
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7 **III. Equity and the public interest weigh in favor of enjoining enforcement of §**
8 **49-2-312, MCA, on tribal lands.**

9 Defendants argue that § 49-2-312, MCA, expresses the public interest as it was
10 passed by the legislature. However, as Judge Molloy noted in his order preliminarily
11 enjoining enforcement of § 49-2-312, MCA, it is not equitable or in the public interest “to
12 allow the state to violate the requirements of federal law, especially when there are no
13 adequate remedies available.” *See Mont. Med. Ass’n v. Knudsen*, CV 21-108-M-DWM, at
14 *21 (D. Mont. Mar. 18, 2022) (quoting *Ariz. Dream Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th
15 Cir. 2014)).
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17 Additionally, as the Port Authority notes above, Defendants’ interest in
18 enforcing Montana’s anti-discrimination laws on tribal lands is limited by federal law.
19 “Federal law, federal policy, and federal authority are paramount in the conduct of
20 Indian affairs in Indian Country.” *Seneca-Cayuga*, 874 F.2d at 713. Montana’s
21 Constitution agrees and further limits interest of the State of Montana in enforcing its
22 laws on tribal land. *See Mont. Const. art. I* (“[A]ll lands owned or held by any Indian or
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1 Indian tribes shall remain under the absolute jurisdiction and control of the congress of
2 the United States”).

3 Defendants ignore these federal principles and the Montana Constitution.

4 Defendants cannot claim an overriding interest in enforcing § 49-2-312, MCA, on tribal
5 land over the public health laws of the Tribe without first allowing the federal courts to
6 resolve the issues implicating federal jurisdiction and tribal sovereign immunity.
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8 The Port Authority further reiterates that other branches of state government,
9 namely the Montana Department of Public Health and Human Services (DPHHS), have
10 recognized that COVID-19 has had a disparate impact on Montana’s Indian tribes, *see*
11 *Leading Causes of Death among American Indian Residents of Montana, 2020 and 2015-2019*.
12

13 These public interest considerations weigh against the Defendants’ continued
14 enforcement of § 49-2-312, MCA, against the Port Authority on tribal land.

15 **IV. The Port Authority’s requested relief is narrowly tailored to its injury.**

16 "Crafting a preliminary injunction is an exercise of discretion and judgment, often
17 dependent as much on the equities of a given case as the substance of the legal issues it
18 presents. . . . A preliminary injunction should be crafted to meet the exigencies of the
19 particular case. *Mont. Med. Ass’n*, CV 21-108-M-DWM, at *23 (quoting *Trump v. Int’l*
20 *Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017)).
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1 In *Mont. Med. Ass'n*, Judge Molloy issued a limited preliminary injunction against
2 enforcement of § 49-2-312, MCA, to be in place only as long as the Centers for Medicare
3 and Medicaid Services' Interim Final Rule, which required certified providers and
4 suppliers require staff to be fully vaccinated against COVID-19, remained in effect.
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6 *Mont. Med. Ass'n*, CV 21-108-M-DWM, at *4.

7 Unlike in *Mont. Med. Ass'n*, Defendants' enforcement of § 49-2-312, MCA,
8 implicates federal jurisdictional and tribal sovereignty issues that impact the Port
9 Authority's ability to conduct business on the Blackfeet Reservation, as well as the
10 Blackfeet Nation's ability to enforce its own public health laws against non-tribal
11 entities. The exigencies of this particular case thus require preliminarily enjoining and
12 restraining Defendants from further enforcement of § 49-2-312, MCA, against the Port
13 Authority for its activities conducted on tribal lands until the merits of these issues can
14 be resolved by this Court.
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17 CONCLUSION

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19 For the foregoing reasons, the Port Authority respectfully requests this Court
20 grant the Port Authority's request for a preliminary injunction and temporary
21 restraining order enjoining Defendants' further enforcement of § 49-2-312, MCA,
22 against the Port Authority until the merits of the case can be resolved.
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1 DATED this 31st day of October, 2022

MATT LAW OFFICE, PLLC

2 By: /s/ Terryl T. Matt Law

3 Terryl T. Matt

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5 Attorneys for Plaintiff,
6 Glacier County Regional Port Authority
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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of October, 2022, a true copy of the foregoing
was served:

Via ECF to the following parties:

Lindsey R Simon
Agency Counsel
Montana Department of Labor and Industry
PO Box 1728
Helena, MT. 59624-1728
lindsey.simon2@mt.gov

By: /s/ Terryl T. Matt
Matt Law Office