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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

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| GLACIER COUNTY REGIONAL PORT AUTHORITY,<br><br>Plaintiff,<br><br>vs.<br><br>LAURIE ESAU, MONTANA HUMAN RIGHTS BUREAU,<br><br>Defendant. | Case No. CV-22-81-GF-BMM-JTJ<br><br>Judge: Hon. Brian Morris<br><br>DEFENDANTS' BRIEF IN RESPONSE TO PLAINTIFF'S RENEWED RULE 65 MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER [Doc. 19] |

Defendants Laurie Esau, in her official capacity as Commissioner of the Montana Department of Labor and Industry (Department) and the Montana Human Rights Bureau (MHRB) file this response to *Plaintiff's Renewed Rule 65 Motion for Preliminary Injunction and Temporary Restraining Order* (Doc. 19).

## I. PROCEDURAL HISTORY

1. On August 30, 2022, Plaintiff filed *Plaintiff's Verified Complaint for (1) Declaratory Judgment; (2) Preliminary and Permanent Injunctive Relief*. (Doc. 1).

2. On September 6, 2022, Plaintiff filed its *Amended Complaint for Declaratory Judgment*. (Doc. 3).

3. On September 9, 2022, Plaintiff filed *Plaintiff's Rule 65 Motion for Preliminary Injunction and Temporary Restraining Order* with supporting documents. (Doc. 7).

4. On September 29, 2022, the Montana Office of the Attorney General was served with copies of the summons, Amended Complaint, and motion for preliminary injunction (with supporting documents). (Docs. 12 & 13).

5. On October 19, 2022, Plaintiff filed its *Plaintiff's Second Amended Complaint for Declaratory Judgment* (Doc. 16) and *Plaintiff's Renewed Rule 65 Motion for Preliminary Injunction and Temporary Restraining Order* (Doc. 19) prior to any appearance by Defendants.

6. Plaintiff did not seek or obtain leave from the Court to file a second amended complaint, and Defendants did not consent to the filing of the *Second Amended Complaint*.

7. The following day, Plaintiff filed a *Notice of Appearance* prior to Defendants' appearance. (Doc. 22).

8. On that same day, October 20, 2022, Defendants appeared via the filings of *Defendants' Motion to Dismiss Amended Complaint* (Doc. 23) and *Defendants' Brief in Response to Plaintiff's Rule 65 Motion for Preliminary Injunction and Temporary Restraining Order* (Doc. 25).

9. The Montana Attorney General's Office was not served with Plaintiff's second amended complaint or the renewed motion for pre-judgment injunctive relief until October 21, 2022. Plaintiff failed to serve the *Notice of Appearance* (Doc. 22) on the Attorney General's Office. The Certificates of Service on Docs. 16, 19, and 20 stated that Commissioner Esau was served via the ECF system, but that is not an appropriate form of service for a non-attorney party who had not yet appeared in the action.

10. On October 31, 2022, Plaintiff filed its *Reply in Support of Rule 65 Motion for Preliminary Injunction and Tempory* [sic] *Restraining Order* (Doc. 29) and *Plaintiff's Response in Opposition to Defendants' Motion to Dismiss Amended Complaint* (Doc. 30).

11. On November 2, 2022, the Blackfeet Nation filed a *Rule 24 Motion to Intervene* in this case. (Doc. 32).

Plaintiff has filed a second amended complaint, and while ordinarily an amended complaint supersedes the original complaint and renders any motions to dismiss moot, *e.g.*, *Ramirez v. County of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015); *Braun v. Bank of Am., N.A.*, No. CV 18-70-BU-BMM-JCL, 2019 U.S. Dist. LEXIS 475, *1 (D. Mont. Jan. 2, 2019), here Plaintiff did not seek leave of Court to file a second amended complaint as required by Fed. R. Civ. P. 15(a). *See Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Dev. Co.*, 758 F.2d 203, 206 n.1 (7th Cir. 1985) (leave to amend cannot be granted without a request for leave).

Thus, Defendants consider the *Second Amended Complaint* (Doc. 16) to be inoperative and their motion to dismiss (Doc. 23) to remain in good effect. Based on the filing of *Plaintiff's Response in Opposition to Defendants' Motion to Dismiss Amended Complaint* (Doc. 30), it appears that Plaintiff also considers the motion to dismiss to be operative. Defendants await direction from the Court in the event that its understanding regarding the status of the *Second Amended Complaint* and *Defendants' Motion to Dismiss Amended Complaint* is incorrect.

## II. INTRODUCTION

In this case, the Defendants have been accused of encroaching on the Blackfeet Nation's tribal sovereignty by initiating a fact-finding proceeding between two non-tribal entities to determine whether the Montana Human Rights Act (MRHA) was violated.

It is not and never has been the Department's intention to adversely affect the rights of Blackfeet Nation or its members. The Department intends to ensure that non-Indians are not immune from unlawful discrimination against other non-Indians merely because they step foot onto tribal land within Indian Country. The Department is fulfilling its interest in preventing unlawful discrimination by presiding over an administrative contested case hearing that will elicit the facts needed for its Office of Administrative Hearings (OAH) and Human Rights Commission (HRC) to make a determination on the matter.

Plaintiff wants to deprive the Department of the ability to gather the facts necessary to determine whether there even *is* a jurisdictional issue in this case, and the Department strenuously objects to losing the ability to decide for itself how the facts of this case affect the State of Montana's regulatory authority. This case is not nearly as factually clear as the Plaintiff presents it to be because it is not clear whether the Blackfeet Nation passed any laws or took any actions that conflict with the application of § 49-2-312 to Plaintiff.

In the context of federal Indian law, this case boils down to an issue of concurrent state and tribal jurisdiction over the conduct of non-Indians within Indian Country. The Department does not dispute that the Blackfeet Nation possesses the sovereign right to exclude and that this right would include the right to impose COVID vaccination requirements on outsiders wishing to enter the Blackfeet Reservation. The Blackfeet Nation's authority to regulate non-Indians and non-members is not in question here. What is in question is: (1) whether the Blackfeet Nation ever actually *exercised* its right to exclude, (2) whether the Blackfeet Nation's exercise of its right to exclude, under the facts of this case, grants it exclusive jurisdiction over the conduct of non-Indians on tribal land within the Blackfeet Reservation, i.e., whether tribal law preempts state law, and (3) whether the Blackfeet Nation's rights may be vested in a third, non-party.

The Plaintiff cannot demonstrate a likelihood of success on the merits of this case when this case is viewed under either substantive Indian law or the notions of ripeness, exhaustion, and *Younger* abstention. For these reasons, the request for pre-judgment injunctive relief must be denied.

## III. INCORPORATION FROM PRIOR BRIEF

Plaintiff's renewed motion does not substantially differ from its initial motion, and in the interests of avoiding unnecessary repetition, Defendants restate and incorporate here the relevant facts, standard of review, and arguments set forth

in *Defendant's Brief in Response to Plaintiff's Rule 65 Motion for Preliminary Injunction and Temporary Restraining Order* (Doc. 25). Defendants also provide additional argument on the issue of Plaintiff's likelihood of success on the merits in light of the production of the Sixth Amended Tribal Ordinance 121.

## IV. ADDITIONAL ARGUMENT

In responding to Plaintiff's renewed motion for pre-judgment injunctive relief, Defendants now have the benefit of additional briefing from Plaintiff that clarifies that basis of the challenge against Mont. Code Ann. § 49-2-213.

Plaintiff initially sought injunctive relief preventing Defendants from "improperly exercising authority over the Port Authority and other non-Indian members' activities occurring on tribal lands," which is an overbroad and non-specific request. (Doc. 19). Plaintiff's recent briefing, however, is focused entirely on Mont. Code Ann. § 49-2-213—no other provision of the MHRA act is discussed—and the argument is based on the assertion that § 49-2-213 conflicts with tribal law:

> 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.

(Doc. 29, at 2).

Thus, Plaintiff has essentially conceded that its issue with § 49-2-312 stems from the existence of an alleged conflict between state law and tribal law. Plaintiff has not articulated a challenge to the Department's application of § 49-2-312 to non-Indians on reservation tribal land in the absence of a conflicting tribal law.

The fact is, however, that Plaintiff has not shown that the Sixth Amended Tribal Ordinance 121 actually imposed a COVID vaccine mandate for non-Indians entering and gathering on the Blackfeet Reservation.[1] The question of whether other grounds to pre-empt § 49-2-213 exist (such as the argument asserted by the Blackfeet Nation) is irrelevant at this point because Plaintiff has made no showing that it—a non-tribal third party—should be entitled to assert rights vested in the Blackfeet Nation that have not been exercised through acts of tribal regulation.

## A. Tribal Regulation Does Not Pre-Empt State Regulation Unless There Is a Conflict Between the Exercise of Concurrent Jurisdiction

States have regulatory authority over conduct within Indian Country so long as the regulation is not pre-empted by federal law or does not unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43 (1980) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). Tribes also have civil regulatory

[1] The fact that the Blackfeet Nation does not assert the Sixth Amended Tribal Ordinance 121 as a basis for pre-emption of State regulation in this case casts further doubt on the Plaintiff's interpretation of the ordinance.

authority over non-Indians within Indian Country who enter into consensual relationship with the tribe or its members or when the non-Indians' conduct threatens or has some direct effect on the political integrity, economic security, or the health and welfare of the tribe. *Montana v. United States*, 450 U.S. 544, 565–56 (1981).[2] Tribes also have the "power to exclude persons whom they deem to be undesirable from tribal lands." *Duro v. Reina*, 495 U.S. 676, 696–97 (1990); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144–45 (1982).

State and tribal regulatory authority can exist concurrently, and thus the fact that a tribe has exercised its ability to regulate non-members in Indian Country does not mean that the state automatically loses regulatory authority. In *Washington v. Confederated Tribes of Colville Indian Reservation*, the United States Supreme Court held that non-Indians could be subjected to both state *and* tribal tax regimes within Indian Country. 447 U.S. 134 (1980). The Court stated that "[w]e do not believe that principles of federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155. The Court also rejected the argument that the two tax regimes conflicted and thus the state regulation must give way, stating:

[2] It should be noted, however, that the *Montana* holding concerned tribal regulation of non-Indian on fee land with the reservation owned by non-Indians, and this case concerns tribal land within the reservation.

"There is no direct conflict between the state and the tribal schemes, since each government is free to impose its taxes without ousting the other." *Id.* at 158.

The Supreme Court upheld a concurrent state/tribal tax system again in *Cotton Petroleum Corp. v. New Mexico* and noted that "[t]here is simply no evidence in the record that the [state] tax has had an adverse effect on the Tribe's ability to attract oil and gas leases." 490 U.S. 163, 191 (1989). When discussing the concurrent jurisdiction issue, the Court stated:

> as our discussion of Cotton's "multiple taxation" argument demonstrates, the fact that States and tribes have concurrent jurisdiction over the same territory makes it inappropriate to apply Commerce Clause doctrine developed in the context of commerce "along" states with mutually exclusive territorial jurisdiction to trade "with" Indian tribes.

*Id.* at 192.

When the Supreme Court has ruled *against* concurrent state and tribal jurisdiction, it has been because the application of two regulatory systems creates a conflict. In *New Mexico v. Mescalero Apache Tribe*, the Court struck down the application of state hunting and fishing laws to non-Indians on tribal land because "[t]he Tribe and the Federal Government jointly conduct[ed] a comprehensive fish and game management program" on the reservation. 462 U.S. 324, 328 (1983). For example, the state required non-Indians to have a state license while hunting on tribal lands while the tribe did not. *Id.* 329. The Court held that concurrent jurisdiction would allow the state to supplant tribal regulations and "disturb and

disarrange" the Tribe's comprehensive regulatory scheme. *Id.* at 338; *see also Segundo v. Rancho Mirage*, 813 F.2d 1387, 1393 (9tih Cir. 1987) ("[T]he cities' rent control ordinances would necessarily preclude enforcement of a *conflicting* ordinance enacted by the Tribe, and would 'effectively nullify' the Tribe's authority to regulate the use of its lands." (emphasis added)).

Thus, Supreme Court case law makes it clear that states may exercise concurrent jurisdiction over non-Indians on tribal lands so long as there is no conflict with the Tribe's regulations or system of self-government.

**B. The Blackfeet Nation's Sixth Amended Tribal Ordinance 121 Does Not Create a Conflict with Mont. Code Ann. § 49-2-213 That Destroys Concurrent Jurisdiction**

Plaintiff provided a copy of the version of Sixth Amended Tribal Ordinance 121 that it asserts is in effect as an exhibit to its response to Defendants' motion to dismiss. (Doc. 30-1). This document was not provided to Defendants or the Court with either the initial or renewed motions for pre-judgment injunctive relief. Notably, nothing in this document states that the Blackfeet Nation adopted a general vaccine mandate that applied to non-Indians entering the Blackfeet Reservation and gathering on tribal land.

Plaintiff appears to rely on the following language in Chapter 7, section 6:

> **Section 6. COVID-19 Vaccination.** The Blackfeet Tribal Business Council designates the Public Health Officer through South Piegan Health Center to administer vaccinations for COVID-19, on the

> Blackfeet Reservation in cooperation with the Indian Health Services. Vaccination policies shall include a minimum of the following:
>
> A. Vaccination Staff shall be trained in the policies & procedures for vaccinating for COVID-19.
>
> B. Mandatory vaccination with exception
>
> C. Vaccination procedures and protocols including decontamination procedures during and after vaccination.
>
> D. PPE protocols for both vaccinator and patient.
>
> E. Anaphylaxis procedures in the event of a serious adverse event.
>
> F. Back up vaccination team in the event the current team is unable to perform vaccinations.
>
> G. Establishing vaccination prioritization according to State and CDC guidance.
>
> H. Coordination and communication with other vaccine providers.
>
> I. Community and patient education regarding how to receive the vaccine, vaccine safety, and other relevant medical considerations.

*Id.* at 15.

The context of the ordinance indicates that the reference to "[m]andatory vaccination with exception" concerns the tribal health staff members who are carrying out the vaccine administrations, not to the public at large. *Id.* at 2 ("[T]he Blackfeet Tribal Business Council desires to protect and promote the safety of the Tribal workforce while they carry out the duties of the Blackfeet Tribe, which requires invocation of additional procedures until the danger from the COVID-19 state of emergency has passed[.]"); *id.* at 3 ("[T]he COVID-19 vaccine distribution

through Southern Piegan Health Clinic shall begin and requires the development of basic policies to ensure the quality and safety of vaccine distribution.").

Other factors outside of the text of the ordinance also indicate that there was no general vaccine mandate in effect on the Blackfeet Reservation. The Blackfeet Reservation experiences heavy outsider tourist traffic due to being the access route for the Saint Mary, Many Glacier, and Two Medicine entrances of Glacier National Park. It defies logic that the Blackfeet Nation would impose a vaccine mandate applicable to all outsiders without making any effort to publicize this decision. Yet Defendants are unable to find any announcement from the Blackfeet Nation or the National Park Service alerting visitors that such a vaccine mandate existed during the 2021 season, despite the existence of national news stories concerning the reopening of the Blackfeet Reservation to tourists and vaccination efforts among tribal members.[3]

Plaintiff's own publicly available meeting minutes refer to a mask requirement by businesses on the Blackfeet Reservation, but they say nothing about a vaccine mandate.[4] All of this raises a significant question as to whether

[3] Blackfeet Nation Welcomes Back Tourists After Risky Shutdown Pays Off, www.npr.com (June 22, 2021), https://www.npr.org/2021/06/22/1007133543/blackfeet-nation-welcomes-back-tourists-after-risky-shutdown-pays-off.

[4] Glacier County Regional Port Authority, October 2021 Board Meeting Minutes, *available at* https://www.glacierportauthority.org/_files/ugd/9ca7d2_1a1e4b7c32ce44fb89a688fcb2fc7fcc.pdf.

there was in fact a vaccine mandate from the Blackfeet Nation that applied to outsiders who entered the Blackfeet Reservation in November 2021 when the Plaintiff held its meeting in Browning.

### C. Plaintiff Has Not Demonstrated that a General Vaccine Mandate from the Blackfeet Nation, if It Did Exist, Would Create a Conflict with the Application of Mont. Code Ann. § 49-2-213 as Against Plaintiff

Plaintiff asserts that a conflict exists in this case between Mont. Code Ann. § 49-2-312 and the Sixth Amended Tribal Ordinance 121 without demonstrating that this is true. If there was not a general vaccine mandate in place on the Blackfeet Reservation in November 2021, then there is no basis to assert that § 49-2-312 creates a conflict with tribal regulation. Again, Defendants do not contest that the Blackfeet Nation had the authority to regulate non-members in this manner—they merely contest whether this authority was actually exercised through legislation or other conduct.

An exercise of tribal regulatory authority is necessary in order to preempt the application of Mont. Code Ann. § 49-2-213 in this case because, without it, there is no way for the State of Montana or the public at large to determine what portions of the MRHA apply within Indian Country and what portions do not. Plaintiffs purport to challenge solely § 49-2-213, but that statute is part of the MHRA, and the jurisdictional basis for Human Rights enforcement between provisions of the MHRA are not distinct. If general, unexercised notions of tribal

sovereignty were sufficient to pre-empt state jurisdiction, it would be difficult to draw a distinction permitting a lack of jurisdiction over this case while exerting jurisdiction over, for example, an employer walking to tribal land to exclude from a hiring pool a member of a protected class.

Defendants have not interfered with the Blackfeet Nation's right to make their own laws and be ruled by them because there is no compelling evidence that the Blackfeet Nation passed any laws that conflict with the enforcement of Mont. Code Ann. § 49-2-213 against non-Indians. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 158. There is no basis to deny the Defendants concurrent jurisdiction that would allow them hold fact-finding proceedings regarding the alleged discrimination in this case.

**D. State Regulation in This Instance Does Not Disrupt Federal or Tribal Regulatory Schemes**

Even if there were a conflict between the application of § 49-2-213 and an exercise of tribal sovereignty, that would not automatically mean that the state law must give way. In *New Mexico v. Mescalero Apache Tribe*, the Supreme Court held that "[s]tate jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at state are sufficient to justify the assertion of state authority." 462 U.S. at 334. In that case, the Court found that New Mexico's interests were insufficient, but the same is not true in this case.

Plaintiff claims that enforcement of § 49-2-213 places it "in the impossible situation of being unable to comply with both laws at once," but there is no evidence that it was required to (1) hold its meeting in Indian Country or (2) enforce tribal law itself instead of leaving that responsibility to tribal officials and tribal members. If the Blackfeet Nation wished to exclude non-vaccinated outsiders from its tribal land within the Blackfeet Reservation, it could have done so, and there is no reason to believe that the MHRB would have applied § 49-2-213 to that factual scenario. However, that is not the facts we are presented with in this case. Defendants have not attempted to enforce § 49-2-213 against the Tribe, tribal officers, or tribal members. They have only sought to enforce this law against a non-tribal entity that routinely operates outside of Indian Country and yet entered Indian Country and engaged in conduct that potentially discriminates against other non-Indians.

The Defendants have made no attempt to disrupt or interfere with the Blackfeet Nation's right to regulate traffic on its tribal lands or exclude non-compliant outsiders. Concurrent jurisdiction should be permitted when the state regulation would not affect a tribe's ability to exercise its sovereign powers. *See Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1239–40 (9th Cir. 1996). Even if there has been a general vaccine mandate in place that conflicted with § 49-2-213, the facts of this case are not incompatible with the Blackfeet Nation's

sovereign right to exclude. Plaintiff has made no showing as to why the Blackfeet Nation's right to exclude inures to its benefit as a non-tribal entity.

Furthermore, the Department has a legitimate and compelling state interest in ensuring that non-Indians do not abuse an Indian tribe's permission for them to enter Indian Country by doing so for the purpose of engaging in unlawful discrimination, which supports the exercise of concurrent jurisdiction under the facts of this case.

## V. CONCLUSION

This Court must not impose the extraordinary remedy of federal preliminary injunctive relief to stop state discrimination proceedings based on Plaintiff's unproven assertion that the Sixth Amended Tribal Ordinance 121 conflicts with Mont. Code Ann. § 49-2-312. No conflict between state regulation and tribal regulation that would defeat concurrent jurisdiction has been shown in this case. Plaintiff does not have a likelihood of success, has no evidence of irreparable injury, has not prevailed in a balancing of the equities, and requests relief that is not narrowly tailored. The motion must be denied, and the administrative contested case hearing must be allowed to proceed.

DATED this 3rd day of November 2022.

*/s/ Lindsey R. Simon*
LINDSEY R. SIMON
Montana Department of Labor and Industry
Attorney for Defendant

## CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this *Defendants' Brief in Response to Plaintiff's Renewed Rule 65 Motion for Preliminary Injunction and Temporary Restraining Order (Doc. 19)* is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Word for Windows is 3,671 words long, excluding caption, certificates of service and compliance, and if required, any tables of contents and authorities, and exhibit index.

By: */s/ Lindsey R. Simon*
LINDSEY R. SIMON

## CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing document with the clerk of the court for the United States District Court for the District of Montana, using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

DATED this 3rd day of November 2022.

By: */s/ Lindsey R. Simon*
LINDSEY R. SIMON
Montana Department of Labor and Industry
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