

FILED

APR 24 2015

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

Clerk, U.S. District Court
District Of Montana
Great Falls

GLACIER ELECTRIC
COOPERATIVE, INC., BRIAN
ELLIOTT, WILLARD
HJARTARSON, JIM NEWMAN,
DARROL BERKRAM, ZITA
BREMNER, MILES LEWIS, DAVE
LOSING, and JAMES TAYLOR, in
their official capacities as directors of
Glacier Electric Cooperative, Inc., and
DAN BREWER, in his official
capacity as Interim General Manager of
Glacier Electric Cooperative, Inc.

Plaintiffs,

vs.

FLOYD "BOB" GERVAIS et al,

Defendants.

CV 14-75-GF-BMM

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS**

I. SYNOPSIS

The defendant individual members of Glacier Electric Cooperative, Inc. (collectively "Cooperative Members") have moved this Court to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1), for failure to exhaust tribal court remedies. (Doc. 3). Plaintiff Glacier Electric Cooperative, Inc., the individual

directors of Glacier Electric Cooperative, Inc., and the interim general manager of Glacier Electric Cooperative, Inc. (collectively “Glacier Electric”) oppose the motion. (Doc. 6).

This case stems from a lawsuit rooted in the same legal issues as the one currently before the Blackfeet Tribal Court. (Doc. 1). Glacier Electric has moved to dismiss the Cooperative Members’ complaint in the underlying Blackfeet Tribal Court case. (Doc. 1-2). Glacier Electric’s motion to dismiss remains pending in Blackfeet Tribal Court. (Doc. 3).

II. JURISDICTION and VENUE

The Court possesses jurisdiction under 28 U.S.C. § 1331. Blackfeet Tribal Court jurisdiction over Glacier Electric presents a federal question. *Plains Commerce Bank v. Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008).

Venue is proper under 28 U.S.C. § 1391(b). The corresponding tribal court suit currently remains venued in Blackfeet Tribal Court. The Blackfeet Tribal Court is located in Glacier County, Montana. Glacier County is within the Great Falls Division of the District of Montana.

III. FACTUAL and PROCEDURAL BACKGROUND

Glacier Electric Cooperative, Inc. is a rural electric cooperative headquartered in Cut Bank, Montana. *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1139 (9th Cir. 2001). Glacier Electric is a non-profit corporation organized

under Montana's Rural Electric and Telephone Cooperative Act, MCA § 35-18-101. (Doc. 1 at 3). Glacier Electric is the sole provider of electricity to the Blackfeet Reservation. (Doc. 3 at 2). The individual plaintiffs serve on Glacier Electric's Board of Trustees. (Doc. 1 at 4-6). Glacier Electric Cooperative, Inc. and the individual Glacier Electric Cooperative Board Members are the defendants in the underlying Blackfeet Tribal Court suit. *Id.* at 2.

The Cooperative Members are members and qualified voters of Glacier Electric Cooperative, Inc. *Id.* The Cooperative Members reside on trust land and are enrolled members of the Blackfeet Tribe. *Id.* at 6. The Cooperative Members are the plaintiffs in the underlying Blackfeet Tribal Court suit. *Id.* at 2.

The Cooperative Members filed a complaint against Glacier Electric in the Blackfeet Tribal Court on August 6, 2014. (Doc. 1-2). Glacier Electric moved on October 1, 2014, to dismiss the complaint in Blackfeet Tribal Court. (Doc. 3). The Cooperative Members filed a response brief on October 15, 2014. *Id.* Glacier Electric's motion to dismiss remains pending in Blackfeet Tribal Court. *Id.* Glacier Electric filed a complaint for declaratory and injunctive relief with this Court on October 17, 2014, based on the litigation in Blackfeet Tribal Court. (Doc. 1).

IV. DISCUSSION

Non-Indians may bring a cause of action under 28 U.S.C. § 1331 to challenge tribal court jurisdiction. *Elliott v. White Mountain Apache Tribal Ct.*, 566

F.3d 842, 846 (9th Cir. 2009). Subject to limited exceptions, a non-Indian is subject to a mandatory requirement to first exhaust remedies in tribal court before bringing suit in federal court. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850-53 (1985); *see also Marceau v. Blackfeet Hous. Auth.* 540 F.3d 916, 920 (9th Cir. 2008).

The tribal court exhaustion requirement does not serve as a jurisdictional bar. *Grand Canyon Skywalk Dev., LLC v. 'SA' NYU WA Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013). The exhaustion requirement instead represents a prerequisite to a federal court's exercise of its own jurisdiction. *Grand Canyon Skywalk*, 715 F.3d at 1200. A federal court may intervene only after the tribal appellate court has ruled on the jurisdictional issue. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 20 (1987).

Principles of comity obligate the Court to dismiss or abstain from adjudicating claims over which tribal court jurisdiction is "colorable." *Atwood v. Fort Peck Tribal Ct. Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008). The Court may relieve a non-Indian from the duty to exhaust, however, where it determines that tribal court jurisdiction is "plainly" lacking. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n. 14 (1997); *see also Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 854. Accordingly, the Court must determine whether the Blackfeet Tribal Court "plainly" lacks jurisdiction over Glacier Electric.

A. Tribal Court Jurisdiction Based on Glacier Electric's Member Status

The Cooperative Members first allege that Glacier Electric qualifies as an “Indian-owned” entity based on Glacier Electric’s majority Blackfoot tribal membership. (Doc. 3). The Cooperative Members argue that Glacier Electric’s status as an “Indian-owned” entity provides for tribal court jurisdiction without consideration of the decision in *Montana v. United States*, 450 U.S. 544 (1981), and its progeny. *Id.* Glacier Electric counters that it is a non-member corporation irrespective of its alleged majority tribal membership. (Doc. 6). Glacier Electric cites *Airvator v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596, 602 (N.D. 1983), for the proposition that a state-chartered corporation should be treated as a non-Indian independent of its percentage of Indian shareholders. *Id.*

Tribal courts are not courts of general jurisdiction. *Phillip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 939 (9th Cir. 2009). The Cooperative Members are Blackfoot tribal members subject to the Blackfoot Tribal Court’s jurisdiction. BLACKFEET LAW AND ORDER CODE, Chapter 1, Section 1. A tribally-owned entity may be treated as a tribal member for the purposes of tribal court jurisdiction. *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1135 (9th Cir. 2006) (en banc). Individual members of a federally recognized tribe that operate a business entity, however, generally stand distinct from tribally-owned entities. *Puyallup Tribe, Inc. v. Dept. of Game of State of Wash.*, 433 U.S. 165, 172-73 (1977).

Glacier Electric does not qualify as a tribally-owned entity. *See White v. Univ. of Cal.*, 765 F.3d 1010, 1025-26 (9th Cir. 2014). The Blackfeet Tribe did not create Glacier Electric pursuant to tribal law. *See White*, 765 F.3d at 1025-26. The Blackfeet Tribe does not own or operate Glacier Electric. *Id.* It appears that Glacier Electric would not qualify as a tribally-owned entity within the jurisdiction of the Blackfeet Tribal Court even if Blackfeet tribal members constituted all of Glacier Electric's cooperative members.

District courts within the District of Montana previously have characterized Glacier Electric as a non-tribal corporation and a non-member of the Blackfeet Tribe for the purposes of tribal court jurisdiction. *E.g., Glacier Elec. Coop., Inc. v. Williams*, 96 F. Supp. 2d 1089, 1090 (D. Mont. 1999). The Ninth Circuit also has cast doubt on the Cooperative Member's argument that Glacier Electric is an Indian-owned entity based on its majority tribal customer membership. *See, e.g., Big Horn Cnty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 949 n.1 (9th Cir. 2000). It does not appear that the Cooperative Members possess a colorable claim of tribal court jurisdiction based on the membership status of the parties.

B. Tribal Court Jurisdiction Based on the Inherent Right to Exclude

The Cooperative Members next rely on *Evans v. Shoshoni-Bannock*, 736 F.3d 1298 (9th Cir. 2013), for the proposition that tribal jurisdiction can be established in cases involving non-Indians where the tribe controls the land on

which the dispute arose. (Doc. 3). The Cooperative Members cite *Strate* and *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002), to support the claim that tribes retain inherent authority over the conduct of non-members on Indian fee or trust land. *Id.* Following this line of reasoning, the Cooperative Members argue that Glacier Electric's actions impact Indians who reside on trust land, and given the tribe's inherent authority over this trust land, the tribal court possesses jurisdiction. *Id.* Glacier Electric fails to address this argument. (Doc. 6).

The inherent sovereign powers of an Indian tribe generally do not extend to the activities of nonmembers on non-Indian fee land within its borders. *Plains Commerce Bank*, 554 U.S. at 328. An Indian tribe possesses authority, however, to regulate activities that take place on tribal land based on the tribe's inherent power to exclude. *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993); *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983). A tribe's adjudicatory authority remains coextensive with its regulatory authority. *Strate*, 520 U.S. at 453. The Ninth Circuit has determined that a tribe's inherent authority over tribal land may provide for regulatory authority over non-Indians on tribal land based on the inherent right to exclude. *Grand Canyon Skywalk*, 715 F.3d at 1204; *see also Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 804-05 (9th Cir. 2011).

This Court's analysis begins with *Grand Canyon Skywalk*. In *Grand Canyon Skywalk*, a non-Indian corporation and a tribal corporation entered into a contract to construct and manage a tourist attraction on tribal land. 715 F.3d at 1199. The tribe invoked its eminent domain authority when it commenced proceedings in tribal court to acquire the non-Indian corporation's interest. *Id.* The non-Indian corporation petitioned for a temporary restraining order in federal court. *Id.* The district court denied the petition and required the non-Indian corporation first to exhaust tribal court remedies. *Id.* The Ninth Circuit affirmed. *Id.*

The Ninth Circuit recognized that the tribe retained the power to limit access to the tourist attraction given the attraction sat on tribal land. *Id.* at 1204. The contract between the non-Indian corporation and the tribal corporation interfered with the tribe's right to exclude the non-member corporation from the reservation. *Id.* Tribal court jurisdiction was not "plainly" lacking based on the tribe's power to exclude, which provides for the lesser powers to regulate and adjudicate. *Id.* at 1205 (citing *Water Wheel*, 642 F.3d 802, and *Bourland*, 508 U.S. 679).

Glacier Electric agreed to provide utility services on the Blackfeet Reservation in exchange for a fee similar to the non-Indian corporation in *Grand Canyon Skywalk*. *Id.* at 1204. Glacier Electric's access to a customer base and tribal land likewise serves as the basis for the agreement. *Id.* The Blackfeet Tribe, like the tribe in *Grand Canyon Skywalk*, retains the right to exclude non-members

from its land. *Id.* The conduct of Glacier Electric in this instance potentially interferes with the Tribe's right to exclude. *Id.*

Whether the land underlying the dispute is Indian or non-Indian remains unclear from the record at this point. The record indicates that relevant conduct may have taken place on both Indian and non-Indian lands. Significantly, nothing in the record establishes that Glacier Electric's actions took place exclusively on a congressionally-granted right-of-way within the Blackfeet reservation. *See, e.g., Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1064 (9th Cir. 1999) (stating that a railroad's congressionally-granted right-of-way is the equivalent of non-Indian fee land).

The Court at this juncture simply must determine whether jurisdiction is "plainly" lacking. The standard set forth in *Grand Canyon Skywalk* applies to this case irrespective of the ambiguous nature of the land ownership. Glacier Electric's actions, at the minimum, amount to an intrusion on the Blackfeet Tribe's right to exclude. Glacier Electric's actions could be subject to the Blackfeet Tribe's right to regulate and adjudicate non-members based on interference with its right to exclude.

D. Colorable Jurisdiction Under the *Montana* Exceptions

The limitation on tribal court jurisdiction established by *Montana* and its progeny apply generally to questions of jurisdiction arising on non-Indian land or

its equivalent. *Water Wheel*, 642 F.3d at 809. The general rule established by *Montana* is not invoked automatically given the ambiguous nature of the land status underlying this dispute. *Id.* If further development of the record indicates that Glacier Electric's actions took place exclusively on non-Indian fee land and *Montana* is applied, the Cooperative Members still potentially possess a colorable claim of jurisdiction under the exceptions to *Montana's* general rule.

The Cooperative Members contend that its claims meet both *Montana* exceptions based on Glacier Electric's consensual relationship with the Blackfeet Tribe and the effect that Glacier Electric's winter shut-offs have on the economic security, health, and welfare of the tribe. (Doc. 3). Indian tribes retain inherent sovereign power pursuant to the first *Montana* exception to exercise some forms of civil jurisdiction over non-Indians on their reservations where non-members enter into consensual relationships with the tribe or its members. *Montana*, 450 U.S. at 565. The consensual relationship involves commercial dealings, contracts, leases, or other arrangements. *Id.*

The first *Montana* exception applies equally whether the relationship is with the tribe itself or its members. *Grand Canyon Skywalk*, 715 F.3d at 1206; *see also Montana*, 450 U.S. at 565. Glacier Electric has entered into a consensual relationship with Blackfeet tribal members under *Montana's* first exception. *Big Horn Cnty. Elec. Coop., Inc.*, 219 F.3d at 951. The court in *Big Horn County*

determined that an electric cooperative that voluntarily provides electrical services on a reservation creates a consensual relationship as contemplated by *Montana's* first exception. *Id.*

The second *Montana* exception provides for tribal civil jurisdiction over non-Indians where the non-Indian activity threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Montana*, 450 U.S. at 565. The Cooperative Member's allegation that Glacier Electric conducts winter shut-offs undoubtedly has a direct effect on the health or welfare of the Blackfeet Tribe. The Cooperative Members possess a colorable claim of jurisdiction over Glacier Electric based on the *Montana* exceptions given the consensual nature of the relationship between the parties and the potential impact of the relationship on the health and welfare of the Blackfeet tribal members.

V. CONCLUSION

The proper question before the Court is whether "it is plain" that the Blackfeet Tribal Court lacks jurisdiction. *Strate*, 520 U.S. at 459. The Blackfeet Tribal Court stands in the best position to develop the factual record. The Blackfeet Tribe's inherent regulatory authority over tribal land serves as a colorable basis to support civil tribal court jurisdiction. It is not apparent to the Court at this stage of the litigation that the Blackfeet Tribal Court "plainly" lacks jurisdiction over this

matter as to excuse Glacier Electric from exhausting tribal court remedies. *Grand Canyon Skywalk*, 715 F.3d at 1205.

IT IS HEREBY ORDERED the defendant Cooperative Member's motion to dismiss (Doc. 3) is GRANTED.

IT IS FURTHER ORDERED that the plaintiff Glacier Electric's Complaint (Doc. 1) is DISMISSED WITHOUT PREJUDICE for failure to exhaust tribal court remedies.

DATED this 24th day of April, 2015.

A handwritten signature in cursive script that reads "Brian Morris". The signature is written in black ink and is positioned above a horizontal line.

Brian Morris
United States District Court Judge