UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

HALCÓN OPERATING CO., INC., Plaintiff, vs. REZ ROCK N WATER, LLC; FRANK WHITE CALFE; Honorable MARY SEAWORTH, in her official capacity as Associate Judge of the Fort Berthold District Court; and FORT BERTHOLD DISTRICT COURT of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, Defendants.	)	Civil No. 1:17-cv-00202-DLH-CSM

HALCÓN'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Plaintiff Halcón Operating Co., Inc. (Halcón) submits that the Motion to Dismiss by Defendants Honorable Mary Seaworth and the Fort Berthold District Court (collectively, the "Tribal Court") lacks merit and should be denied. The Tribal Court first questions this Court's subject matter jurisdiction, but Halcón has requested that this Court adjudicate the existence of tribal jurisdiction. The existence or lack of tribal jurisdiction is a matter of federal law and thus presents a federal question within this Court's subject matter jurisdiction. Next, the Tribal Court asserts that Halcón must exhaust tribal remedies before this Court may pass on the question of tribal jurisdiction. But the tribal exhaustion doctrine does not apply when the contracting parties have agreed to a non-tribal forum through forum selection clause or arbitration clause like those here. Finally, the Tribal Court attempts to invoke sovereign immunity as a bar to this action. The

Ex parte Young doctrine, however, applies to Indian tribes and allows suits for declaratory and injunctive relief against government officials (like the Tribal Court) who have exceeded federally imposed limits on their jurisdiction. Accordingly, the Motion to Dismiss should be denied.

BACKGROUND

As Rez Rock's own Complaint filed in Tribal Court makes quite clear, this dispute relates to payments claimed by Rez Rock for equipment rentals. In a nutshell, Rez Rock attempted to charge for overage hours and maintenance costs on equipment that it rented to Halcón, while Halcón disputed the charges based on a letter from Rez Rock's General Manager stating that Rez Rock "agrees to lease loaders at a rate of $260.00 per day per loader. No overage hours or maintenance fees will be charged for the loaders going forward until this agreement is terminated." (*Compare* Rez Rock Compl. ¶¶ 36-43, Dkt. No.7, *with* Dkt. No 6-3.) A Master Service Contract ("MSC") between the parties defined such equipment rentals as part of the "Work" governed by the MSC. (MSC ¶ 1, Dkt. No. 6-2.) It stated that Halcón may notify Rez Rock "either orally or in writing, of the Work desired," and provided that "this Contract shall control and govern all Work ordered by Halcón and accepted by Contractor during the term hereof." (*Id.* ¶ 2 (emphasis added).) Given these provisions, no party can colorably dispute that Rez Rock's equipment rentals to Halcón were within the scope of the MSC. The MSC also contained an "Arbitration" provision that extended to "any dispute, controversy, or claim (a 'Dispute') arising out of or in connection with this Contract." (*Id.* ¶ 21.) Under this arbitration clause, the parties agreed to submit any such disputes to mediation followed by binding arbitration: "If the parties are not able to resolve the dispute by means of mediation, the parties hereby agree the Dispute shall be referred to and determined by binding arbitration, as the sole and exclusive remedy of the parties as to the Dispute, conducted in accordance with the AAA arbitration rules for commercial disputes." (*Id.* ¶ 21

(emphasis added).) Accordingly, Halcón commenced proceedings to resolve the dispute by mediation or arbitration as required by the MSC.

Defendants Frank White Calfe and Rez Rock N Water, LLC (collectively, "Rez Rock") filed a competing lawsuit in the Tribal Court, claiming false representations, fraud, breach of contract (implied), *quatum valebant*, unjust enrichment, and tortious interference. (Rez Rock Summons and Compl., Dkt. Nos. 6-13 and 7.) All of the claims are asserted jointly by the company and White Calfe as its Chief Executive Officer, and all of the claims flow from Halcón's refusal to pay maintenance and overage charges on the rental equipment. (*See* Rez Rock Compl. ¶¶ 36-43, 49-81, Dkt. No. 7.) On September 11, 2017, the Tribal Court issued an order purporting to stay AAA arbitration proceedings pending in Texas. (Dkt. No. 8-13.)

In response, Defendant Halcón initiated this action on September 27, 2017, filing a Complaint and Motion for Preliminary Injunction. Halcón seeks an injunction prohibiting the Tribal Court from asserting jurisdiction in a civil action filed with the Tribal Court by Defendants Rez Rock N Water, LLC and Frank White Calfe (collectively, "Rez Rock"), and from interfering with the arbitration proceedings pending before the American Arbitration Association ("AAA") between Halcón and Rez Rock. Halcón likewise moved the Court to enjoin Rez Rock from further requesting the Tribal Court to take such action. After initiating this action, Halcón served all four Defendants. (Dkt. Nos. 10 to 13.) The Tribal Court appeared through counsel on October 25, 2017, and filed the present Motion to Dismiss on November 9, 2017. (Dkt. Nos. 16, 19.) To date, Rez Rock has failed to appear in this action. None of the Defendants have responded to the Motion for Preliminary Injunction. The Motion for Preliminary Injunction and supporting papers (Dkt. Nos. 4 to 8) further detail the relevant facts, which are incorporated by reference here and will be referred to as necessary in the argument below.

ARGUMENT

A. This action presents a federal question because it requests that the Court determine whether a tribal court has adjudicative authority over nonmembers.

It is a "settled principle" that "whether a tribal court has adjudicative authority over nonmembers is a federal question." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008). Halcón, indisputably a nonmember of the tribe here, has asked this Court to decide exactly that question – whether the Tribal Court has adjudicatory authority over Halcón in the tribal proceedings sought to be enjoined, and further whether the Tribal Court has adjudicatory authority to order a stay of AAA arbitration proceedings pending in Texas. (*See, e.g.*, Halcón's Compl. p. 9, Prayer for Relief ¶¶ 1-5, Dkt. No 1.) Halcón's Complaint properly invoked federal question jurisdiction under 28 U.S.C. § 1331, even citing two Supreme Court cases that adjudicated tribal court adjudicatory authority over nonmembers. (*Id.* ¶ 5).

Nevertheless, the Tribal Court casts this action as attempting to litigate "merits issues" rather than tribal jurisdiction. Halcón has made no such attempt. Indeed, Halcón has apprised the Court that it "does not seek to litigate contractual claims between Halcón and Rez Rock, nor does it request a declaration on the arbitrability of Rez Rock's claims, as that dispute is already the subject of ongoing arbitration in Texas and the parties' contract has delegated the issue of arbitrability to the arbitrators." (Br. in Support of Mot. for Prelim. Inj., p. 2, Dkt. No. 5 (emphasis added).) Rather, this lawsuit is "limited to federal issues of tribal jurisdiction and the Tribal Court's recent efforts to interfere with arbitration proceedings." (*Id.*) In other words, Halcón simply requests that the Court enjoin the Tribal Court's proceedings. Nevertheless, the existence of arbitration and forum selection clauses is significant to the tribal jurisdiction inquiry. This is so because the Eighth Circuit and this Court have recognized that parties may contract for a non-tribal

forum, and when they do so, it prevents the existence of tribal adjudicatory jurisdiction. *See, e.g.*, *Enerplus Res. (USA) Corp. v. Wilkinson*, 865 F.3d 1094, 1097 (8th Cir. 2017).

Here, Halcón and Rez Rock entered into a Master Service Contract that contains both an arbitration clause and, subject to the arbitration clause, a forum selection clause that mandates a forum different from the Tribal Court. (*See* MSC ¶¶ 15, 21, Dkt. No. 6-2.) Halcón has therefore argued that tribal jurisdiction is lacking in at least three independent respects: (1) the MSC requires arbitration and delegates questions of arbitrability to the AAA, and thus questions of arbitrability are beyond tribal jurisdiction (Br. in Support of Mot. for Prelim. Inj., Dkt. No. 5, pp. 10-13); (2) even assuming for the sake of argument that Rez Rock were entitled to attack its arbitration clause in court, the MSC contains a forum selection clause that limits jurisdiction and venue to federal and state courts located in Harris County, Texas (Dkt. No. 5, pp. 13-14); and (3) the Tribal Court lacks jurisdiction to stay AAA proceedings in Texas (Dkt. No. 5, pp. 14-15).

Because this lawsuit plainly raises questions of tribal adjudicatory authority over nonmembers of the tribe, federal question jurisdiction exists.

B. The tribal exhaustion doctrine does not apply, because Halcón and Rez Rock have contracted for a non-tribal forum.

1. Under controlling precedent, a party who has contracted for a non-tribal forum need not exhaust tribal remedies.

Next, the Tribal Court argues that Halcón must exhaust tribal remedies before seeking a federal ruling on tribal jurisdiction. The brief contains a lengthy recitation of case law on tribal exhaustion, but unfortunately omits the controlling Eighth Circuit precedent holding that a party who has contracted for a non-tribal forum need not exhaust tribal remedies. "The tribal exhaustion doctrine does not apply when the contracting parties have included a forum selection clause in their agreement." *Enerplus Res. (USA) Corp. v. Wilkinson*, 2016 WL 8737869, at *4 (D.N.D. 2016), *aff'd*, 865 F.3d 1094 (8th Cir. 2017) (quoting *M.B. Rests., Inc. v. CKE Rests., Inc.*, 183 F.3d

750, 752 (8th Cir. 1999)). Indeed, courts have recognized that even tribes themselves have an obligation "to settle their disagreements through the arbitration process if that is the forum they chose at the time of execution of their contract." *Alltel Commc'ns, LLC v. Oglala Sioux Tribe*, No. CIV.10-5011-JLV, 2010 WL 1999315, at *14 (D.S.D. May 18, 2010) (compelling arbitration where the tribe "agreed to use arbitration as the exclusive forum for resolution of any dispute which may arise during the life of the contract"); *see also Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 542 F.3d 224, 233 (8th Cir. 2008) (collecting "multiple lower court cases finding tribes subject to state court suits premised on arbitration agreements alone"). In such situations, when it comes to the application of tribal exhaustion, "the answer in the Eighth Circuit appears rather clear: when the negotiating parties have agreed to an appropriate forum, exhaustion of tribal remedies is not required." *Larson v. Martin*, 386 F. Supp. 2d 1083, 1087–88 (D.N.D. 2005) (relying on *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995)).

Nowhere is this principle more clear than *Larson v. Martin*, a North Dakota case with facts similar to the present situation. 386 F. Supp. 2d 1083, 1084 (D.N.D. 2005). In *Larson*, the Turtle Mountain Band of Chippewa Indians had contracted with Gerald Martin to build a road undertaken by the tribe and BIA. *Id.* In turn, Martin subcontracted with one Dennis Larson to furnish labor and equipment for the project. *Id.* Larson leased certain equipment to Martin under a contract containing the following terms:

> LAW. THIS AGREEMENT WILL BE DEEMED FULLY EXECUTED AND PERFORMED IN OUR OR ASSIGNEE'S PRINCIPAL PLACE OF BUSINESS AND WILL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH STATE LAW. YOU EXPRESSLY CONSENT TO JURISDICTION OF ANY STATE OR FEDERAL COURT IN THAT STATE OUR OR OUR ASSIGNEE'S PRINCIPAL PLACE OF BUSINESS OR ANY OTHER COURT SO CHOSEN BY US.

Id. at 1084–85.

Additionally, Martin was required to post bonds pursuant to his contract with the tribe. The bonding documents included the following provision:

> No suit or action shall be commenced hereunder by any claimants,
>
> ... [o]ther than in a state court of competent jurisdiction in and for the county or other political subdivision of the state in which the project, or any part thereof, is situated, or in the United States District Court for the district in which the project, or any part thereof, is situated, and not elsewhere.

Id. at 1085.

Later, when Martin failed to make payments to Larson, Larson brought suit in the United States District Court for the District of North Dakota. *Id.* Martin, who was a tribal member, moved to dismiss "based on lack of subject matter jurisdiction and the tribal exhaustion doctrine." *Id.* Despite Martin's arguments, however, this Court enforced the forum selection clause and rejected the tribal exhaustion arguments. The Court reasoned:

> . . . the Equipment Lease and the Subcontract Labor and Material Payment Bonds contained provisions which provided for jurisdiction in United States District Court for the District of North Dakota. The validity of those provisions is unquestioned. As a result, the Eighth Circuit's holding in *Carlow* is instructive. By signing the Equipment Lease and Subcontractor Labor and Material Payment Bonds, Martin agreed that disputes arising from those contracts can be litigated in federal district court. More important, Martin **agreed that disputes need not be litigated in tribal court, nor can they be**. Following *Carlow*, **the Court finds no legally justifiable reason to disrupt the parties' agreed-upon forum by way of the tribal exhaustion doctrine**. Under the facts presented, the Court finds that Larson need not exhaust tribal remedies prior to seeking relief in federal district court.

Id. at 1088 (emphasis added) (providing in footnote four that the claims cannot be litigated in tribal court because the forum selection clause only provided for jurisdiction in federal or state courts where the project was situated "and not elsewhere").

2. In Halcón's contract with Rez Rock, both the arbitration clause and the forum selection clause foreclose the need to exhaust tribal remedies.

The reasoning in cases like *Enerplus*, *Carlow*, and *Larson* dictates that tribal exhaustion is not required in this case. Here, the parties agreed to a mandatory arbitration clause requiring AAA

arbitration, and subject to that clause, a mandatory forum selection clause which provides for exclusive jurisdiction and venue within the courts of Harris County, Texas. (MSC ¶¶ 15 and 21, Dkt. No. 6-2.) There is no dispute that Rez Rock in fact agreed to the MSC and its provisions, because Mr. White Calfe executed it as "CEO / Owner" of Rez Rock and even authenticated it as an exhibit to an affidavit that he filed with the Tribal Court. (White Calfe Aff. ¶ 11 and Ex. 3 thereto, Dkt. No. 7.) Both parties to the MSC agreed that these provisions would govern any disputes between them, and they received the benefit of their bargain. Thus, each of the issues raised in Rez Rock's tribal Complaint ". . . need not be litigated in tribal court, nor can they be . . ." because Rez Rock previously submitted to exclusive jurisdiction in another forum. *Larson*, 386 F. Supp. 2d at 1088.

In light of the above, the Tribal Court's exhaustion argument rings hollow. Its brief lays out a list of factual contentions that supposedly "would far more than colorably support tribal court jurisdiction," but the factual contentions at bottom amount to questions about the arbitrability of Rez Rock's claims. Although Halcón believes that the arbitration clause clearly applies to Rez Rock's claims, all of which relate to equipment rented under the MSC, this Court need not decide that issue. If there are any questions regarding the arbitrability of Rez Rock's claims, those questions have been delegated to the arbitrator by virtue of incorporating AAA rules in the arbitration clause. *See, e.g., Fallo v. High–Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) ("[T]he arbitration provision's incorporation of the AAA Rules … constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator."); *see also Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 542 F.3d 224, 227 (8th Cir. 2008) (holding tribal government bound by arbitration clause and noting that the AAA Rules confer "upon the arbitrator the power to decide issues of jurisdiction and arbitrability"). This point was further detailed in the

Motion for Preliminary Injunction. (*See* Dkt. No. 5, pp. 9-11.) In short, the AAA rules provide unequivocally that the arbitrator shall have the power to determine questions of jurisdiction, "including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." AAA Commercial Arbitration Rules and Mediation Procedures, R-7, https://www.adr.org/sites/default/files/Commercial%20Rules.pdf (last visited November 18, 2017). Thus, the AAA panel may decide whether Rez Rock's various claims sounding in equity and tort amount to claims "arising out of or in connection with" the MSC. And it may decide "any objections with respect to the existence, scope, or validity of the arbitration agreement." *Id.* Finally, even assuming for the sake of argument that the arbitration clause was somehow suspect, the forum selection clause required that "any cause of action brought to enforce the terms of this Contract shall be brought in either a federal or state court located in Harris County, Texas." (MSC ¶ 15, Dkt. No. 6-2 (emphasis added)). Such causes of action would surely include claims arising from Halcón's refusal to pay amounts allegedly owned for equipment rentals, which were defined as "Work" under the MSC. (MSC ¶ 1, Dkt. No. 6-2.) In sum, tribal exhaustion is not necessary due to an arbitration clause that delegates issues of arbitrability to the AAA, and alternatively due to a forum selection clause, both of which mandate non-tribal forums.

3. In light of the arbitration clause and the forum selection clause in the MSC, there is no colorable claim to tribal jurisdiction under *Montana v. United States*.

The Tribal Court ignores on-point law from this circuit in favor of arguing from the general framework for tribal civil jurisdiction over nonmembers established by *Montana v. United States*, 450 U.S. 544, 565 (1981). The Tribal Court, however, misapplies *Montana*. The framework established by the United States Supreme Court is entirely consistent with Eighth Circuit precedent on civil claims involving arbitration or forum selection clauses, as explained below.

As a general rule, tribal courts do not have jurisdiction over the activities of non-Indians within their borders. *Montana v. United States*, 450 U.S. 544, 565 (1981); *Plains Commerce Bank*, 554 U.S. at 328. Tribal efforts to regulate non-tribal members and their interests are presumptively invalid. *Plains Commerce Bank*, 554 U.S. at 330.

There are only two limited exceptions whereby a tribe may exercise civil jurisdiction over non-Indian conduct. One exception is that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. The second exception is that "[a] tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (citing *Fisher v. District Court*, 424 U.S. 382 (1976)). These two exceptions, however, are limited and cannot be construed in a manner that would "swallow the rule," or "severely shrink it." *Plains Commerce Bank*, 554 U.S. at 330. The United States Supreme Court has repeatedly demonstrated its goal to preserve the general rule that tribal courts lack jurisdiction over non-Indians. *See id*.

One limitation on the first exception is that the claim must actually arise from the consensual relationship invoked for jurisdictional purposes, otherwise it has no bearing on the tribe's authority. *See, e.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438, 457-58 (1997). Agreements which do not affect the outcome of the case should be ignored. *Id.* In other words, the alleged wrongful conduct must be "closely related to [the] contractual relationships." *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 885 (8th Cir. 2013). In this vein, the Tribal Court's suggestions that Halcón's entered into "multiple consensual relationships" on the reservation is misguided. As

demonstrated not only by Halcón but by Rez Rock in its own pleadings, the only "consensual relationship" that gave rise to Rez Rock's claims was a contract by which the parties agreed to resolve any disputes in a non-tribal forum.

In addressing the limited nature of the *Montana* exceptions, the Supreme Court has also clarified that the second exception applies only when necessary "to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Strate*, 520 U.S. at 459. "But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or control internal relations." *Montana*, 450 U.S. at 564; *see also Strate*, 520 U.S. at 459. Stated another way, the exception applies only if the exercise of state or federal court jurisdiction would "menace" the tribe's ability to govern itself. *Strate*, 520 U.S. at 457-58.

Significantly, there are indications that the Supreme Court itself agrees with the Eighth Circuit's conclusion that parties may contractually agree to avoid tribal jurisdiction. Even in arguing for a broader interpretation of tribal jurisdiction under *Montana*, Justice Ginsburg has stated that if a party wants "to avoid responding in tribal court or the application of tribal law, the means [are] readily at hand:" the party can include a "forum selection, choice-of-law, or arbitration clauses in its agreements." *Plains Commerce Bank*, 554 U.S. at 346 (J. Ginsburg, concurring in part and dissenting in part). As such, there is no tension between Supreme Court case law and the Eighth Circuit's conclusion that parties need not exhaust tribal remedies if they have contracted for a non-tribal forum.

Here, Rez Rock cannot deny that its claims flow from work done under the MSC (which the claims obviously do), and thus acknowledge that the arbitration and forum-selection clauses in the MSC are triggered. Otherwise, its claims are not "closely related" to a contract sufficient to trigger *Montana's* consensual relationship exception. For the first *Montana* exception to apply,

the alleged wrongdoing must actually arise out of and be connected to the contractual relationship. *See Strate*, 520 U.S. at 457-58; *DISH*, 725 F.3d at 885. Torts that do not arise out of a given consensual relationship cannot be a basis for tribal jurisdiction over a non-Indian. *See Strate*, 520 U.S. at 457 ("Although A–1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a 'consensual relationship' with the Tribes, 'Gisela Fredericks was not a party to the subcontract, and the [T]ribes were strangers to the accident.'"). Again, either this is a dispute "arising out of or in connection with" the MSC, in which case the arbitration clause controls and directs the parties to binding arbitration (see MSC ¶ 21), or the consensual relationship exception is inapplicable, resulting in a lack of tribal jurisdiction. *See Strate*, 520 U.S. at 457-58; *DISH*, 725 F.3d at 885.

Likewise, the second *Montana* exception does not apply here because none of the allegations in Rez Rock's Complaint affect tribal self-governance or the Tribes' internal relations. *See Montana*, 450 U.S., at 564; *see also Strate*, 520 U.S. at 457-59. Even if the allegations in Rez Rock's Complaint were taken as true, the Complaint merely alleges the breach of a commercial contract between private parties and prays for payment of damages allegedly caused by Halcón's withholding of payment. (*See* Rez Rock Compl., ¶¶ 36-43, 49-81, Dkt. No. 7.) The Tribal Court suggests that the second *Montana* exception is satisfied by vague allegations that Halcón has violated the tribe's TERO[1] laws, though it does not bother to explain what laws were supposedly violated or how those laws relate to Rez Rock's actual claims against Halcón, and thereby fails to satisfy its burden to establish the high bar set by the second *Montana* exception. Simply put, there is nothing within Rez Rock's Complaint implicating the "political integrity, the economic security,

[1] The Tribal Employment Rights Commission.

or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. Therefore, there is no colorable claim to tribal jurisdiction under the *Montana* framework.

4. The Tribal Court's vague invocations of TERO laws cannot be used to conjure tribal jurisdiction.

At various points throughout its brief, the Tribal Court appeals to the MHA TERO laws as a basis for tribal jurisdiction, though without reference to any particular passage. In any event, federal courts have made it abundantly clear that similar principles apply to limit both regulatory and adjudicatory jurisdiction over nonmembers. *See, e.g.*, *Montana*, 450 U.S. at 565; *Strate*, 520 U.S. at 453; *Hicks*, 533 U.S. at 358-59. As stated above, the general rule regarding tribal civil jurisdiction is that tribes do not have authority over the activities of non-Indians within their borders. *See, e.g.*, *Montana*, 450 U.S. at 565; *Plains Commerce*, 554 U.S. at 330. Whether analyzing civil regulatory jurisdiction, or civil court jurisdiction, this analysis is the same. *Strate*, 520 U.S. at 453. A tribal agency's authority simply cannot exceed that of the tribe itself. *See id.* In sum, TERO could not regulate tribal jurisdiction into existence for this case even if it wanted to, any more than the Tribal Court could vest itself with jurisdiction simply by declaring it so.

Moreover, TERO's own ordinance and regulations do not bear on this dispute. TERO was created to increase employment of Indian workers and businesses, and to eradicate employment discrimination and its regulations perform the same purpose. *TERO Ordinances*, § 101; *TERO Regulations*, § 1.1. (Dkt. No. 19-2.) The TERO regulations specific to oil and gas companies concern employment preferences to "Qualified Indian Contractors." *TERO Regulations for Oil and Gas Exploration, Production, and Ancillary Services*, Part 3. It is not disputed that Rez Rock was a TERO-licensed contractor at the time Halcón retained them, but that fact has no bearing on this dispute. Although the Tribal Court's brief refers obliquely to TERO regulations governing arbitration provision, there are none to be found in the TERO regulations filed as an exhibit by the

Tribal Court, and certainly none were in place at the time the MSC arose. Likewise, Halcón never agreed to some TERO restriction on its right to arbitrate, nor does anything in the record suggest that it did. Because the present dispute does not involve matters of employment preference to tribal members, the TERO regulations simply have no nexus and are not relevant to the Tribal Court's claim of jurisdiction over the present payment dispute.

C. The *Ex parte Young* exception to tribal sovereign immunity applies, because this suit requests declaratory and injunctive relief against tribal officials who have exceeded their jurisdiction.

In a final gambit to avoid suit, the Tribal Court asserts a sovereign immunity defense. The Tribal Court cites to and discusses a slew of inapplicable cases, while ignoring controlling case law that holds that tribal sovereign immunity does not apply where tribal officials are accused of exceeding their jurisdiction in violation of federal law.

As a threshold matter, tribal sovereign immunity "is not of the same character as subject matter jurisdiction" though it is "jurisdictional in nature." *In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304 (8th Cir. 1994). First, "sovereign immunity may be waived in certain circumstances and is subject to the plenary power of Congress," while "[l]ack of subject matter jurisdiction, on the other hand, may not be waived." *Id.* Second, "sovereign immunity operates essentially as a party's possible defense to a cause of action" whereas "subject matter jurisdiction is primary and an absolute stricture on the court." *Id.* at 304-305 (emphasis added). As a result, "sovereign immunity is a jurisdictional consideration separate from subject matter jurisdiction." *Id.* For instance, *In re Prairie Island Dakota Sioux* affirmed a district court's remand to state court for lack of federal question jurisdiction, notwithstanding that the case posed an issue of tribal sovereign immunity. *Id.* at 305. The Tribal Court cites *Hagen v. Sissenton-Wappeton Community College* for the proposition that tribal sovereign immunity "is a matter of subject matter jurisdiction," while apparently missing the Eighth Circuit's more recent clarification to the

contrary: "*Hagen* does not state, as the tribe suggests, that sovereign immunity 'is a matter of subject matter jurisdiction.'" *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 487 F.3d 1129, 1131 n.4 (8th Cir. 2007) (emphasis added). Rather, *Hagen* simply "observes that we had previously stated that sovereign immunity is jurisdictional in nature but is not of the same character as subject matter jurisdiction." *Id.* In *C & W Enterprises*, the Eighth Circuit reaffirmed that tribal sovereign immunity was to be treated as a defense for purposes of the jurisdictional analysis, while also recognizing that "sovereign immunity is not an affirmative defense that is waived unless raised in an answer." *Id.* In sum, sovereign immunity is a "possible defense" to be considered separately from the question of whether federal question jurisdiction exists. *In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304-05. The Tribal Court is therefore wrong in attempting to frame sovereign immunity as a pleading standard. Moreover, even if lack of sovereign immunity were a pleading requirement, Halcón's Complaint adequately invokes an exception to sovereign immunity because it affirmatively pleads that the Tribal Court has exceeded its jurisdiction, in violation of federal law. (*See* Halcón's Compl. ¶¶ 5, 7, 33, 35-36, Dkt. No. 1.) These allegations trigger the *Ex parte Young* exception to sovereign immunity, discussed below.

"The protection of sovereign immunity is subject to the well established exception described in *Ex parte Young*, 209 U.S. 123, 159–60, (1908)." *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993). In *Ex parte Young*, the Supreme Court carved out an exception to the Eleventh Amendment immunity for suits against state officials seeking to enjoin alleged ongoing violations of federal law. 209 U.S. at 159-60. The *Ex parte Young* exception provides that an action seeking only prospective injunctive relief against action by state officials is not an action against the state, and is therefore not subject to the doctrine of sovereign immunity. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011)

(recognizing that *Ex parte Young* doctrine applied to tribal sovereign immunity permitted action for injunction against tribal court judge). Because tribal sovereign immunity is similar to that granted to the states, the Eighth Circuit has joined numerous other circuits in holding that "*Ex parte Young* applies to the sovereign immunity of Indian tribes, just as it does to state sovereign immunity." *N. States Power Co.*, 991 F.2d at 460 (relying on *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991)); *see also Crowe & Dunlevy, P.C.* 640 F.3d 1140; *Vann v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 38 (1st Cir. 2006).

Invoking the *Ex parte Young* doctrine is a simple matter where a plaintiff alleges that tribal officials should be enjoined from exceeding federal limits on their jurisdiction. "When the complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked." *Paradigm Energy Partners, LLC v. Fox*, No. 1:16-CV-304, 2016 WL 9496588, at *14 (D.N.D. Sept. 13, 2016) (granting preliminary injunction against Chairman of the Tribal Business Council and Chief of Police for the Mandan, Hidatsa & Arikara Nation). Indeed, the Eighth Circuit recently affirmed a preliminary injunction issued by this Court against the very same tribal court named as a defendant in this action, in circumstances strikingly similar to those here. *See Enerplus Res. (USA) Corp. v. Wilkinson*, No. 1:16-CV-103, 2016 WL 8737869 (D.N.D. Aug. 30, 2016), *aff'd*, 865 F.3d 1094 (8th Cir. 2017) . In the *Enerplus* case, this Court enjoined tribal proceedings where, like here, the dispute arose out of a contract that contained a forum selection clause mandating a non-tribal forum. *See id.* at *4. Though it did not specifically discuss *Ex parte Young*, this Court ruled, "The Fort Berthold District Court is prohibited from exercising jurisdiction over Enerplus Resources (USA) Corporation in the Tribal Court case entitled *Wilbur D. Wilkinson v.*

Enerplus Resources Corporation, Civil No. CV–2016–0079." For its part, the Tribal Court here argues that a "lawsuit against officials acting within their official capacity is nothing more than a claim against the entity," but it relies on inapplicable cases where the plaintiffs sought money damages or other affirmative relief.[2] Those cases are completely different from this situation.

Here, Halcón invokes the *Ex parte Young* doctrine consistent with prevailing Eighth Circuit precedent. The "Tribal Court" defendants consist of a tribal judge named in her official capacity and the Fort Berthold District Court. Halcón requests that the Court declare the Tribal Court lacks jurisdiction and enjoin the tribal judge or other officers of the Forth Berthold District Court (1) from asserting jurisdiction over the tribal action filed by Rez Rock against Halcón, and (2) from interfering with the ongoing arbitration proceedings filed by Halcón against Rez Rock before the AAA. Halcón does not seek money damages or the like. Because the action simply seeks "declaratory and injunctive relief against government officials in their official capacities" and alleges that the Tribal Court has "acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked." *Paradigm Energy Partners*, 2016 WL 9496588, at *14.

CONCLUSION

For the reasons set forth above, Halcón respectfully requests that the Court deny the Tribal Court's Motion to Dismiss.

[2] The Tribal Court cites the following cases in support of this argument, found at page 13 of its brief: *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985) (damages suit under civil rights act); *Epps v. Duke Univ., Inc.*, 447 S.E.2d 444 (claims seeking compensatory and punitive damages for wrongful autopsy); *Mullis v. Sechrest*, 495 S.E.2d 721 (1998) (damages action for personal injury); *Fletcher v. United States*, 116 F.3d 1315 (10th Cir. 1997) (voting rights action seeking affirmative injunctive relief); *Linneen v. Gila River Indian Community*, 276 F.3d 489 (9th Cir. 2002) (civil rights action for damages); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008) (action against tribal entity for breach of contract and civil conspiracy).

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