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

REPLY IN SUPPORT OF MOTION TO DISMISS

Comes now, Defendant Honorable Mary Seaworth, in her official capacity as Associate Judge of the Fort Berthold District Court ("Judge Seaworth"); and Defendant Fort Berthold District Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation (the "Tribal Court"),[1] and hereby submit this Reply in Support of Motion to Dismiss.

The Tribe has an unassailable argument in support of its motion to dismiss. And because it has an unassailable argument and has attorneys who are highly experienced in this area of law, the Tribe submitted a thorough, scholarly, even-handed discussion of the applicable law showing the grounds for dismissal.

[1] Judge Seaworth and the Fort Berthold District Court will be collectively referred to as the Tribe.

In response, Halcon submits a brief which attempts to evade the issues in this case. It has no response to the multiple independent dispositive issues on which it must lose, and therefore attempts to argue other issues which are either not presented by the current facts or are insufficient to deprive the Tribal Court of pre-exhaustion review of the complaint filed in the Tribal Court.

Because Halcon has no substantial arguments on the issues presented, this reply will focus on why the Court must reject Halcon's attempt to evade the issues.

I. THERE IS NOT CURRENTLY A FEDERAL QUESTION PRESENTED.

The issue in this case is whether Tribal Judge Seaworth has exceeded a federally imposed limitation on Tribal Court jurisdiction. Because Halcon has not exhausted Tribal Court remedies, that legal issue is narrowed down to the specific question of whether there is a colorable claim, on the current Tribal Court record, that the Tribal Court has jurisdiction over the complaint filed in that Court. If there is a colorable claim stated in the Tribal Court complaint, then Halcon is required to exhaust Tribal Court remedies.

The Tribal Court complaint contains multiple allegations, including allegations which are without question within the Tribal Court's jurisdiction under the *Montana* test. The Tribal Court complaint includes claims which allegedly arose out of contractual and other relationships which are easily sufficient to establish Tribal Court jurisdiction under *Montana*.[2] It includes allegations that Halcon expressly agreed to allow the Tribe's TERO office to determine whether or not disputes between Halcon and Rez Rocks are arbitrable. It included claims which, if true, mean

[2] As the Tribe discussed in detail in Section III of its Memoradum in Support of Motion to Dismiss, application of the *Montana* test to the present case requires a developed factual record regarding issues such as: what contractual relationships existed between Halcon and the Tribe or tribal members; whether (as Rez Rocks alleges) Halcon agreed to a tribal forum for the claims in the complaint; the location of the alleged wrongful acts; and the impact on the Tribe if it were deprived of jurisdiction over Halcon.

that the arbitration and forum selection clauses upon which Halcon bases all of its arguments are void. And even if we assumed, arguendo, that the arbitration provisions and forum selection provisions were valid, the complaint includes claims that are outside the scope of the arbitration provision. The claims in the Tribal Court complaint are not even based upon the alleged Master Services Agreement.

Halcon's response is to assert, contrary to the allegations in the Tribal Court complaint, that Rez Rocks claims are on the Master Services Agreement and that the arbitration provision and choice of forum provisions in that contract are valid. Bootstrapping from these two assertions, Halcon then argues that the Tribe's Court lacks jurisdiction over the complaint filed in the Tribe's Court and that this Court has jurisdiction to enjoin the Tribal Court proceedings. There are multiple independent inadequacies from that argument.

First, Halcon's argument is simply not based upon the Tribal Court complaint or the current Tribal Court record. Rez Rocks pled claims that are not on the Master Services Agreement. Halcon is free to argue in the Tribal Court that the only cognizable claims would be "on the contract," but at this early stage in the proceedings the Tribal Court is required to assume the truth of the allegations in the Tribal Court complaint (just as in a typical federal court case, the federal court is required to assume the truth of the factual allegations in a federal court complaint), Tribe's Memorandum in Support of Motion to Dismiss §III.A; and this Court is required to let the Tribal Court develop the factual record regarding whether the claims are on or off of the contract, *id.* at III.B.

As the Tribe discussed in detail in its opening brief, once we have a developed factual record from the Tribal Court, this Court would have jurisdiction to determine whether the Tribal

Court has exceeded a federally imposed limitation on Tribal Court jurisdiction. But we are not at that point in the case yet. We do not yet have that record.

Halcon itself, unwittingly, illustrates this point. It does not even deny allegations in the Tribal Court complaint which, if true, would be sufficient to provide for Tribal Court jurisdiction. For example, Halcon does not dispute the allegation in the complaint that it expressly agreed to allow the tribal forum to determine arbitrability. Halcon's brief is also replete with allegations of "fact" that are not part of the Tribal Court record, and that are directly contrary to factual allegations in the Tribal Court complaint. Most notably, it alleges that Rez Rocks' claims are on the Master Services Agreement, when the Tribal Court Complaint alleges that some of the claims are off-contract claims and that one claim is based upon a separate oral contract not governed by the Master Services Agreement. Determining which party is correct will require development of the factual record, and as all federal appellate courts which have reached the issue have held, the development of that factual record must occur in the Tribal Court, not this Court. *Id.*

The mere fact that Halcon argues to this Court that Rez Rocks' claims are on the contract, when the Tribal Court complaint expressly alleges otherwise, is not sufficient to deprive the Tribal Court of jurisdiction of the Tribal Court complaint at this preliminary stage of the Tribal Court suit.

Second, the Tribal Court complaint alleges that Halcon expressly agreed to allow the tribal forum to determine arbitrability. At this early stage in the Tribal Court suit, that allegation of the Tribal Court complaint must be accepted as true; and while not currently material, the Tribe notes that it believes that Rez Rocks' assertion that Halcon has agreed to tribal jurisdiction to determine arbitrability is true. Halcon does not deny that allegation, but appears to be arguing that the alleged Master Services Agreement then trumps the grant of authority to the Tribe to determine

arbitrability.[3] That is a standard contract issue for the Tribal Court to determine as part of the case before it.

Third, while the claims in the Tribal Court are not on the alleged Master Services Agreement upon which Halcon premises all of its arguments to this Court, Rez Rocks and the Tribe have both taken the position in the Tribal Court that the arbitration and forum selection provisions are void and unenforceable on the Tribe's Reservation under the Tribe's laws. That presents a threshold legal issue which is squarely within the Tribal Court's jurisdiction to decide in the first instance, which must be decided before Halcon can base a claim on the allegedly void provision. *E.g.*, Memorandum in Support of Motion to Dismiss §II; *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 945 (8th Cir. 2010) (citing *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1417 (8th Cir. 1996));

Because it ignores the argument that the arbitration provision and forum selection clause are void under tribal law, Halcon wrongly analogizes the case to *Enerplus Resources (USA) Corp. v. Wilkinson*, 865 F.3d 1094 (8th Cir. 2017). In *Enerplus*, the parties had entered into a settlement agreement related to mineral royalties. That agreement specified that this Court would have jurisdiction over any disputes under the settlement agreement. Wilkinson then brought suit in the Tribal Court, alleging that Enerplus had violated the settlement contract. Wilkinson's claim was "on the contract," and the contract provided for jurisdiction in this Court. The only thing surprising about the case is that Wilkinson would appeal on a case in which his argument was so weak. It would be akin to Halcon appealing an adverse decision in the present matter.

[3] While not currently material, the Tribe notes that if, as Rez Rocks alleges, Halcon agreed that the Tribe, as a sovereign government, has authority, those tribal rights are simply not diminished, or impacted at all, by any alleged separate agreement between Halcon and a regulatory or adjudicatory third party. Rez Rocks does not have any authority to contract away the Tribe's governmental rights.

Predictably, the Eighth Circuit in *Enerplus* held that the District Court did not err in preliminarily enjoining Wilkinson's Tribal Court suit seeking remedies on the contract.

In contrast to Enerplus: 1) Rez Rocks claims are not on the contract; 2) the alleged Master Services Agreement does not provide this Court with jurisdiction, nor does the Federal Arbitration Act provide this Court with jurisdiction; and therefore neither provides an argument that tribal adjudication violates a federally imposed limitation on tribal court jurisdiction, Memorandum in Support of Motion to Dismiss ¶II;[4] 3) there are multiple colorable claims evidenced in the Tribal Court complaint that any alleged arbitration provision in the Master Services Agreement would not be enforceable under standard contract interpretation rules.

II. HALCON'S ARGUMENT THAT THIS MATTER FITS WITHIN *EX PARTE YOUNG* IS NOT SUPPORTED BY ITS OWN COMPLAINT AND IS FURTHER BASED UPON AN OBVIOUS MISSTATEMENT OF *EX PARTE YOUNG*.

In its opening brief, the Tribe provided a detailed discussion that this Court lacks jurisdiction unless Plaintiff has pled and proven an applicable waiver or exception to sovereign immunity. In response, Plaintiff asserts that its complaint against Judge Seaworth comes within an exception to tribal sovereign immunity based upon application of *Ex Parte Young* to tribal officers by analogy.

Halcon's argument is insufficient, because Halcon did not plead a waiver of sovereign immunity. For that reason alone, its complaint against Judge Seaworth must be dismissed. Plaintiff's arguments in a response brief are not pleadings.

[4] As the Tribe has noted repeatedly, it is not currently arguing that it has jurisdiction over the merits of Rez Rocks' claims. It may well be that based the alleged Master Services Agreement, comity, or other doctrines, any legal suit should be in a non-tribal forum. It is only noting that at this pre-exhaustion stage, one cannot yet make that determination and cannot determine whether the Tribal Court is violating a federally imposed limitation on tribal court jurisdiction. Comity and related doctrines are not federally imposed limitations on tribal court jurisdiction, and are instead matters for tribes and states, not federal courts, to work through.

While this Court need not currently consider whether a motion by Plaintiff to amend would be granted, the Tribe briefly notes that any attempt to amend would be futile because Plaintiff would not have any factual basis to plead, and would not be able to prove at this preliminary stage of the Tribal Court case, that the Tribal Court judge has exceeded a federally imposed limitation on Tribal Court jurisdiction.[5]

Halcon is not the first party to attempt to turn *Ex Parte Young* into a mere pleading requirement. The United States Supreme Court has repeatedly, unequivocally, rejected that exact argument. *Ex Parte Young* is not evaded by merely alleging that a government officer has exceeded his or her jurisdiction. *E.g.*, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949) (holding that on an action against a federal officer for specific relief, "it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies"). Plaintiff's conclusory allegation does not meet that requirement.

As "scope of authority" is used in *Ex Parte Young*, a "tribal official—even if sued in his 'individual capacity'—is only 'stripped' of tribal immunity when he acts 'manifestly or palpably beyond his authority.'" *Shenandoah v. Halbritter*, 275 F. Supp. 2d 279, 287 n.5 (N.D. N.Y. 2003) (citing *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 359 (2d Cir. 2000)). *See also Carey v. Espinosa*, Case no. A-011-1009 (Little Traverse Bay Band App. May 2, 2011) (applying *Ex Parte Young* by analogy to suits against tribal officers and holding that a court must look "to whether or not the type of action is within the employee's scope of duties or authority, not the alleged circumstances of a particular action" and that "since termination of employment is clearly a type of action within the scope of the Defendants' authority", the individually named defendants

[5] We cannot yet predict whether there will be any issues which come within the scope of *Ex Parte Young*.

had sovereign immunity for claims based upon alleged wrongful terminations); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985) (tribal officers are immune from suit if they are acting within the scope of authority which the Tribe delegated to them).

To overcome an official's sovereign immunity, "a claimant must allege and prove that the officer has acted outside of the scope of his authority." *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir. 1989) (citing *Larson*, 337 U.S. at 690). A mere claim of error in the exercise of an official's authority is not sufficient; the official's actions must be completely without authority. Larson, 337 U.S. at 690; Bassett, 221 F. Supp. 2d at 280 (holding that a claim against a tribal official "lies outside the scope of tribal immunity only where the complaint pleads—and it is shown—that a tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe"). Such allegations are not based upon a lack of delegated power where, for example, the official,

> was empowered by the sovereign to administer a general sales program encompassing the negotiation of contracts, the shipment of goods and the receipt of payment. A normal concomitant of such powers, as a matter of general agency law, is the power to refuse delivery when, in the agent's view, delivery is not called for under a contract and the power to sell goods which the agent believes are still his principal's to sell.

Larson, 337 U.S. 691-92.

If a tribal governmental agent's actions relate to the performance of his or her official duties, the actions are generally treated as being within the scope of his or her authority. *E.g.*, *Romanella v. Hayward*, 933 F. Supp. 163 (D. Conn. 1996) (holding that tribal employees responsible for the maintenance of a casino parking lot were entitled to assert the Tribe's immunity from suit in their individual capacities even if they may have been negligent, because the claims related directly to their performance of their official duties), *aff'd*, 114 F.3d 15 (2d Cir. 1997). *Compare Romanella* to *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 168 n.3, 171-72

(1977) (suit to enjoin tribal officers permissible where they were acting in individual capacities as fishermen, rather than tribal officers).

For example, in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 910 F. Supp. 2d 1188, 1198 (D.S.D. 2012), the District Court held that "because the Tribal Court has jurisdiction, in the first instance, to determine whether the Tribal Court judgment and thus the appellate bond has any validity in the wake of the Supreme Court's decision in *Plains Commerce Bank*, the Tribal Court is not acting beyond the scope of its authority in considering that issue and is entitled to tribal sovereign immunity at this juncture of the proceedings."

Here, a complaint was filed in the Tribe's Court, and Halcon believes the Tribal Court should dismiss the complaint. But it has not alleged and would have no basis for alleging that anything Judge Seaworth has done in the case exceeded any federally imposed limitation on Tribal Court jurisdiction. Tribal courts, like every other court, have jurisdiction to determine their own jurisdiction. *E.g.*, *United States v. Ruiz*, 536 U.S. 622 (2002) (holding "it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction"); 20 Am. Jur. 2d *Courts* §60 (citing cases from numerous jurisdictions for the proposition that a court has the inherent jurisdiction to determine its own jurisdiction). That is, a Tribal Court judge does not exceed her jurisdiction when she determines whether or not she has jurisdiction. A tribal appellate court does not exceed its jurisdiction when it reviews a tribal trial court decision.

CONCLUSION

Halcon is required to exhaust tribal court remedies. Until it has done so, it cannot state a federal question, nor can it state an applicable waiver of tribal sovereign immunity. It is premature to ask whether it will subsequently be able to state such claims. In fact, if, as Halcon asserts, it has a good argument that the Tribe's Court does not have jurisdiction, it has nothing to fear from a suit

in which it establishes the necessary facts in the Tribal Court and then obtains a decision from the Tribe's Court. Its present, premature, federal court suit must be dismissed.

Dated this 27th day of December, 2017.

/s/ Jeffrey S. Rasmussen
Jeffrey S. Rasmussen
FREDERICKS PEEBLES & MORGAN LLP
Specially Appearing for Honorable Mary Seaworth and Fort Berthold District Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation
1900 Plaza Drive
Louisville, CO 80027
Phone: (303) 673-9600
Fax: (303) 673-9155
Email: jrasmussen@ndnlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2017, a true and correct copy of the foregoing **RELY IN SUPPORT OF MOTION TO DISMISS** was filed with the Clerk of the Court via the ECF Filing System, which will serve all parties of record.

/s/ Ashley Klinglesmith
Ashley Klinglesmith, Legal Assistant