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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF UTAH
CENTRAL DIVISION

ANGELITA M. CHEGUP, TARA J. AMBOH, MARY CAROL JENKINS, LYNDA M. KOZLOWICZ, Plaintiffs, v. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a federally recognized Indian tribe; *et al.*, Defendants.	**No. 2:19-cv-00286-BSJ** **PLAINTIFFS' BRIEF RE: SECRETARIAL APPROVAL**

I. BACKGROUND

On March 27, 2013, Defendants passed Ordinance 13-022, which rescinded the jurisdiction of the Ute Indian Tribal Court to "review actions of the Tribal Business Committee" and "any claims against the Tribe or its officers and employees in their official capacities."[1] By 2018, Ordinance 13-022 was publicized, well-known, and oft-applied jurisprudence. In July of 2016, for instance, the Tribal Court dismissed an action against the Tribal Business Committee in their

[1] Declaration of Ryan D. Dreveskracht in Support of Plaintiffs' Brief Re: Secretarial Approval ("Dreveskracht Decl"), Exhibit C, at 7 (emphasis added).

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official capacities pertaining to the scope of their constitutional authority.[2] In September of 2016, to offer another example, Plaintiff Tara Amboh had an employment discrimination case thrown out of the Ute Tribal Court also because of Ordinance 13-022.[3]

On November 19, 2018, Defendants passed Resolution No. 18-472, scheduling "a hearing to consider the banishment of tribal members Mary Carol Jenkins, Lynda M. Kozlowicz, Tara J. Amboh, and Angelita Chegup . . . pursuant to Ordinance 14-002."[4] Upon receipt of notice that said hearing was going to occur, Plaintiff Tara Amboh, on behalf of all Plaintiffs, filed a Request for Information Form with the Tribe, seeking access to Ordinance 14-002 and "any Complaint, Resolution, Policy, Guideline, of Ordinance to be implemented" at the hearing.[5] This request was "completely ignored by the Business Committee and their secretaries"[6] who informed Ms. Amboh that she was "not entitled to any private" records of the Business Committee.[7] To this day, neither Plaintiffs nor their counsel have reviewed or had the opportunity to review Ordinance 14-002.[8]

At least an hour past when the Plaintiffs were given notice that the hearings would occur[9]—after Plaintiffs had all left the building—the Business Committee purportedly conducted a hearing "[p]ursuant to Ordinance 14-004."[10] At the purported November 27, 2018, hearing, "an audio recording of a court proceeding in the United States District Court for the District of Utah, Judge Jenkins presiding," was played and "**[a]t the conclusion of the hearing, the Business Committee passed a motion banishing the four Respondents.**"[11] Just like that, as of the late afternoon of

[2] Dreveskracht Decl., Exhibit D.
[3] Dreveskracht Decl., Exhibit E.
[4] Dreveskracht Decl., Exhibit A (emphasis added).
[5] ECF Nos. 52, 116-3.
[6] ECF No. 116.
[7] ECF No. 52.
[8] ECF No. 116.
[9] ECF No. 50.
[10] Dreveskracht Decl., Exhibit B (emphasis added).
[11] *Id.*

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November 27, 2018, Plaintiffs were banished from over 4.5 million acres of federal lands; the only lands they have ever known.[12]

Although Plaintiffs have never reviewed or had the opportunity to review Ordinance 14-002, through this litigation they have been able to access Ordinance 14-004.[13] Attached as an unauthenticated exhibit to their Supplemental Memorandum on Tribal Exhaustion, Defendants submit that to the extent "that any provisions of Ordinance No. 13-022 might have prevented Plaintiffs from appealing their banishment in Tribal Court, those provisions were repealed by Ordinance 14-004," which "granted the Tribal Court exclusive authority to hear appeals from orders of exclusion and/or removal after a hearing has been held thereon before the Ute Business Committee."[14]

II. LAW AND ARGUMENT

"[E]xhaustion of tribal remedies is not required where (1) 'an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith,' (2) 'the action is patently violative of express jurisdictional prohibitions,' or (3) 'exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.'" *Valenzuela v. Silversmith*, 699 F.3d 1199, 1207 (10th Cir. 2012) (quoting *Nevada v. Hicks*, 533 U.S. 353, 369 (2001)). In determining that the tribal court had no jurisdiction over certain causes of action, and that therefore there was no need to exhaust tribal remedies, the Supreme Court in *Hicks* explained: "a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction." *Hicks*, 533 U.S. at 368. Thus, here, if the Ute Tribal Court lacks jurisdiction to hear Plaintiffs' banishment appeal, "exhaustion would be futile and serve no purpose other than delay." *United*

[12] *See generally* ECF Nos. 22-25.
[13] ECF No. 115-1. Notably, while Defendants have filed a document that they identify as "Ordinance 14-004," they have "provided no declarations or affidavits authenticating" the exhibit such that it might be appropriately considered. *Zuniga v. Holder*, No. 12-2778, 2012 WL 4215859, at *2 (N.D. Cal. Sept. 14, 2012); *see also Cato v. Dir. of Corr. & Rehab.*, No. 12-1331, 2015 WL 3953338, at *3 (E.D. Cal. June 29, 2015) (same).
[14] ECF No. 115, at 7, 10 (quotation omitted).

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Keetoowah Band of Cherokee Indians in Oklahoma v. Barteaux, 527 F. Supp. 3d 1309, 1323 (N.D. Okla. 2020) (citing *Comstock Oil & Gas v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567, 572 (5th Cir. 2001); *Krempel v. Prairie Island Indian Cmty.*, 125 F.3d 621, 622 (8th Cir. 1997)).

As indicated above, Ordinance 13-022 clearly and unambiguously divested all jurisdiction from the Ute Tribal Court to entertain any appeal of Plaintiffs' banishment. *Ute Indian Tribe of Uintah v. Lawrence*, 312 F. Supp. 3d 1219, 1243 n.30 (D. Utah 2018), *rev'd on other grounds*, 22 F.4th 892 (10th Cir. 2022). While Defendants submit that Ordinance 13-022 "repealed by Ordinance 14-004,"[15] Ordinance 14-004 is invalid since it was not approved by the Secretary of the Interior as required by Article VI, Section 1(i), of the Tribe's Constitution[16]:

APPROVED: _____
Lelilah Duncan, Acting Superintendent
Uintah and Ouray Agency [17]

"Secretarial approval is required only of those tribes that have chosen to include such a requirement in their constitutions, bylaws or charters." *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 604 (9th Cir. 1984). Here, Article VI, Section 1(i), of the Tribe's Constitution limits the Ute Tribal Business Committee's authority to "exclude" to instances where it is done so pursuant to "ordinances which shall be subject to review by the Secretary of the Interior."[18] This language has been interpreted to mean what it says; to be valid, ordinances must be reviewed and approved by the Secretary of the Interior.[19] Ordinances that fall within this category which do not receive such approval are "absolutely null and void." *Bunch v. Cole*, 263 U.S. 250, 253 (1923); *see also Ward v. United States*, 139 F.2d 79, 83 (10th Cir. 1943) (same);

[15] ECF No. 115, at 10.
[16] Dreveskracht Decl., Exhibit F, at 6.
[17] ECF No. 115-1.
[18] Dreveskracht Decl., Exhibit F, at 6.
[19] Tribes are "free, with the backing of the Interior Department, to amend their constitutions to remove the requirement of Secretarial approval." *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 199 (1985). To Plaintiffs' knowledge, the Tribe has yet to amend its Constitution in this manner, however.

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Ute Indian Tribe of the Uintah and Ouray Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 21 IBIA 24, 32, 1991 WL 279697, at *6 (IBIA 1991) (assuming that where approval is required by tribal law and it is not given the proposed legislation is invalid); *Keweenaw Bay Indian Community v. Minneapolis Area Director*, 29 IBIA 72, 75, 1996 WL 69336, at *3 (IBIA 1996) (same).[20] In fact, Defendants themselves have argued before this vary Court that where the Tribe's Constitution requires secretarial approval and the document is "not approved by the Secretary of the Interior, [it] is 'absolutely null and void.'" *Lawrence*, 312 F. Supp. 3d at 1250 (quoting *Bunch*, 263 U.S. at 253).

Provisions of law requiring secretarial approval—and the invalid status of a document that does not have said approval—are commonplace. *See Feezor v. Babbitt*, 953 F. Supp. 1, 5 (D.D.C. 1996) (noting the Department of the Interior's "policy of including provisions for secretarial approval of subsequent ordinances in tribal constitutions"); *Conoco v. Shoshone & Arapahoe Tribes*, 569 F. Supp. 801, 804 (D. Wyo. 1983) (finding "as a matter of law that Secretarial approval is a precondition to ordinance validity"). The Indian Gaming Regulatory Act, for example, requires that "management contracts" be approved by the Secretary of the Interior; and contracts "that have not been approved by the Secretary of the Interior or the Chairman in accordance with the requirements of this part, are void." 25 C.F.R. § 533.7; *see, e.g., First Am. Kickapoo Operations v. Multimedia Games*, 412 F.3d 1166, 1176 (10th Cir. 2005). Likewise, 25 U.S.C. § 81(b) requires that any "agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years" is invalid "unless that agreement or contract bears the approval of the Secretary of the Interior." *See, e.g., Contour Spa at the Hard Rock v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1211-12 (11th Cir. 2012). It is well within the purview of the Court to interpret

[20] Dreveskracht Decl., Exhibits G-H.

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tribal law to determine that "as a matter of law that Secretarial approval is a precondition to ordinance validity." *Conoco*, 569 F. Supp. at 804; *see, e.g., Barteaux*, 527 F. Supp. 3d 1309.

III. CONCLUSION

Ordinance 14-004 was not approved by the Secretary of the Interior. As such, it is a "null and void" provision of tribal law. *Bunch*, 263 U.S. at 253. Ordinance 13-022, however, is valid, operative law—and it rescinded from the Ute Tribal Court the jurisdiction to hear this dispute.

A *habeas* "petitioner must exhaust **available** tribal remedies before instituting suit in federal court." *Iowa Mut. Ins. v. LaPlante*, 480 U.S. 9, 19 (1987) (emphasis added). A court without jurisdiction to hear a dispute does not present an "available" remedy. *Id.* Here, because there were no tribal remedies available to Plaintiffs—in addition to the reasons explained elsewhere in the record and at the evidentiary hearing[21]—exhaustion of tribal remedies is not required.

DATED this 18th day of July, 2022.

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[21] *See, e.g.*, ECF Nos. 110, 125.

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CERTIFICATE OF SERVICE

I, Ryan Dreveskracht, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue NE, Ste. L1, Seattle, WA 98115.

3. Today I served the foregoing document, via U.S. Mail and through this Court's ECF system, on the following parties:

Ute Indian Tribe of the Uintah and Ouray Reservation
6964 East 1000 South
Ft. Duchesne, UT 84026

The foregoing Statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, this 18th day of July, 2022.

s/Ryan Dreveskracht
Ryan Dreveskracht

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