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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

STIMSON LUMBER COMPANY,

Plaintiff,

v.

COEUR D'ALENE TRIBE,

Defendant.

Case No. 2:22-cv-00367-DCN

COEUR D'ALENE TRIBE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR STAY

Defendant Coeur d'Alene Tribe ("Tribe") respectfully submits this memorandum in support of its motion to dismiss plaintiff Stimson Lumber Company's ("Stimson") Complaint (Dkt. 1) pursuant to Federal Rules of Civil Procedure 12(b)(1) and/or 12(b)(6) or, in the alternative, to stay this case pending the exhaustion of tribal remedies.

BACKGROUND

As alleged in the Complaint, the "Tribe is a federally recognized Indian tribe possess[ing] the full legal power of a sovereign domestic government." Dkt. 1 ¶ 4. "Stimson is an Oregon corporation with its principal place of business in Oregon." *Id.* ¶ 3. Stimson operates a sawmill located on the Tribe's land. *See id.* ¶ 1. On May 31, 2000, the Tribe entered into a "Lease and Option Agreement" ("Agreement") with TOBD, Inc. *Id.* ¶ 9. TOBD, Inc.'s rights under the Agreement were subsequently assigned to Stimson in 2006, and Stimson has operated the mill on tribal land since that time. *Id.* ¶¶ 1, 11. That is despite the Tribe's effort to remove Stimson from the land, including through initiating proceedings in the Coeur d'Alene Tribal Court ("Tribal Court"). *Id.* ¶ 1, 18.

On August 22, 2022, this Court dismissed a previous lawsuit filed by Stimson against the Tribe concerning the Agreement for lack of subject matter jurisdiction. *Id.* ¶ 17. The Court found "there was no diversity of citizenship between Stimson and the Tribe." *Id.* Stimson subsequently filed the Complaint underlying this case, again making claims related to the Agreement. *Id.* at 5-6. Specifically, Stimson asserts that "Section 19.3.2 [of the Agreement] is enforceable against the Tribe; therefore, the Tribe's court does not have jurisdiction to resolve disputes regarding the Parties' rights and duties under the Agreement." *Id.* ¶ 21. Stimson requests declarations that the Agreement's dispute resolution provision is "binding against the Tribe" and that the Tribe

contractually "waived its right to sue Stimson in tribal court" under the Agreement, and it seeks "[a]n order enjoining the Tribe from asserting jurisdiction in tribal court." *Id.* at 5-6. This time, Stimson's Complaint invokes this Court's federal question jurisdiction. *Id.* ¶ 5. Stimson asserts: "This Court has original jurisdiction pursuant to 28 U.S.C. § 1331 because the question of whether an Indian tribe retains the power to compel a non-Indian 'to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331.'" *Id.* (quoting *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985)).

LEGAL STANDARD

"Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." *Drake v. Obama*, 664 F.3d 774, 779 (9th Cir. 2011). "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citation omitted). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* While the court "accept[s] all of the *factual* allegations in the complaint as true," *Lacano Investments, LLC v. Balash*, 765 F.3d 1068, 1071 (9th Cir. 2014), it does not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations," nor is it "required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint," *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (quotations omitted).

ARGUMENT

Federal courts "are courts of limited jurisdiction" that "possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Stimson, as the party asserting federal jurisdiction, bears the burden of

establishing it. *See id.* Further, a "federal court must always show respect for the jurisdiction of other tribunals." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 21 (1987) (Stevens, J., concurring). In the context of a challenge to a tribal court's jurisdiction, this means that even when a federal district court has jurisdiction, it "should not entertain [the] challenge" until the tribal court has "the first opportunity to evaluate the factual and legal bases for the challenge," and the plaintiff fully exhausts tribal remedies. *Id.* Stimson cannot meet its burden of establishing federal subject matter jurisdiction because the Complaint does not on its face raise a federal question. Even if Stimson could meet its burden, though, the Court should nevertheless dismiss or stay this case until tribal remedies are exhausted.[1]

I. The Court Lacks Subject Matter Jurisdiction Because Stimson's Complaint Does Not on its Face Present a Federal Question.

The allegations in Stimson's complaint fail to raise a federal question and thus Stimson cannot meet its burden of establishing this Court's subject matter jurisdiction. Stimson alleges the Court has jurisdiction pursuant to 28 U.S.C. § 1331 because "the question of whether an Indian tribe retains the power to compel a non-Indian 'to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a "federal question" under § 1331.'" Dkt. 1 ¶ 5 (quoting *Nat'l Farmers*, 471 U.S. at 853).[2] Nowhere does Stimson contend, however, that any federal law restricts the Tribal Court's jurisdiction over the Tribe's lawsuit against

[1] The Tribe has raised these same defenses in opposing Stimson's motions for temporary restraining order and preliminary injunction that are pending in this case. However, the Tribe is required by the federal rules to answer or otherwise respond to the Complaint within 60 days of a waiver of service being sent. *See* Fed. R. Civ. P. 12(a)(1)(A)(ii). Accordingly, the Tribe now brings this motion to raise these same defenses.

[2] As Stimson concedes, this Court has already found in a previous case dismissed earlier this year that it lacks diversity jurisdiction over a dispute between Stimson and the Tribe. Dkt. 1 ¶ 17. Accordingly, Stimson does not invoke diversity jurisdiction in this case, and the Tribe will not address it here. The Tribe maintains, however, that the Court lacks diversity jurisdiction in this case, as well, for the same reasons previously determined by the Court.

Stimson. To the contrary, Stimson's claim for relief requests declarations concerning the enforceability of the Agreement and an injunction preventing *the Tribe* from asserting jurisdiction in Tribal Court during the pendency of this federal case. *Id.* at 5-6. At its core, Stimson's claim is an ordinary contract claim. It does not present a federal question.[3]

A claim presents a federal question if it "aris[es] under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, meaning either that "federal law creates the cause of action" or that "the vindication of a right under state law necessarily turns on some construction of federal law," *United Here Local 30 v. Sycuan Band of Kumeyaay Nation*, 35 F.4th 695, 702 (9th Cir. 2022) (quotation omitted). "Federal common law as articulated in rules that are fashioned by court decisions are 'laws' as that term is used in § 1331." *Nat'l Farmers*, 471 U.S. at 850. Accordingly, when a plaintiff invokes federal question jurisdiction in a challenge to a tribal court's jurisdiction, it must contend that federal law—whether Constitutional, statutory, or common law—divests the tribal court of power and forms the basis for the relief it seeks. *Id.* at 852-53.

In *National Farmers*, the plaintiffs, a Montana state school district and its insurer, "contend[ed] that the right which they assert[ed]—a right to be protected against an unlawful exercise of Tribal Court judicial power—has its source in federal law because federal law defines the outer boundaries of an Indian tribe's power over non-Indians," and the case in tribal court was of a kind that fell beyond those outer boundaries. *Id.* at 851. In particular, the plaintiffs in *National*

[3] The Tribe's sovereign immunity provides an additional limitation on this Court's subject matter jurisdiction to enforce any dispute resolution provision in the Agreement. *See Ramey Constr. Co. v. Apache Tribe of the Mescalero Rsrv.*, 673 F.2d 315, 320 (10th Cir. 1982) ("When consent to be sued is given, the terms of the consent establish the bounds of a court's jurisdiction."). With respect to any potential claim to enforce section 19.3.3 of the Agreement, the Tribe agreed to arbitration only for a "Proceeding," only before the "Center for Public Resources," Dkt. 1 at 50 (§ 19.3), and those terms "must be strictly and narrowly construed," *Tongol v. Donovan*, 762 F.2d 727, 730 (9th Cir. 1985).

Farmers asserted that the Crow Tribal Court's exercise of jurisdiction over them was unlawful because it had "been divested of this aspect of sovereignty" by federal law. *Id.* at 852. The plaintiffs contended that the Crow Tribal Court's jurisdiction was foreclosed by the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), which had held that a tribal court lacked criminal jurisdiction to punish non-Indians for offenses committed on an Indian reservation. 471 U.S. at 853-4. The Court in *National Farmers* found that federal law provided the "governing rule of decision" for a question regarding a tribal court's exercise of jurisdiction over a non-Indian. *Id.* at 851. The Supreme Court found the plaintiffs had, therefore, filed an action arising under federal law. *Id.* at 853. The same is not the case here.

Stimson does not assert that federal law restricts the Tribal Court from exercising civil jurisdiction over Stimson, nor does the Complaint contain any factual allegations to support such an assertion. To the contrary, Stimson's claim for relief requests a declaration that the Agreement's dispute resolution provision "is enforceable against the Tribe," thereby depriving the Tribal Court of jurisdiction in a particular instance. *Id.* ¶ 21. Specifically, Stimson requests declarations that the dispute resolution provision is "binding against the Tribe" and that the Tribe contractually "waived its right to sue Stimson in tribal court" under the Agreement, and it seeks an order "enjoining the Tribe from asserting jurisdiction in tribal court." *Id.* at 5-6. Federal law, therefore, does not create the cause of action here, nor does the right Stimson seeks to vindicate turn whatsoever on the construction of federal law.

Simply put, whether the Agreement is enforceable or prevents the Tribal Court from hearing a dispute between the Tribe and Stimson in a particular instance does not implicate federal law. *See Newtok Vill. v. Patrick*, 21 F.4th 608, 617 (9th Cir. 2021) ("[F]ederal common law does not cover all contracts entered into by Indian tribes because that might open the doors to the federal

courts becoming a 'small claims court for all such disputes.'") (citation omitted). Stimson thus fails to sufficiently allege a basis for federal question jurisdiction. *See Snowbird Constr. Co. v. United States*, 666 F. Supp. 1437, 1441 (D. Idaho 1987) (finding federal question jurisdiction lacking where the federal court "action . . . [was] based primarily upon the alleged breach of [a] contract," and "the parties expressly agreed that interpretation of the contract would be governed by state law."); *see also Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 33 (1st Cir. 2000) ([U]nder *National Farmers*, the determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to . . . provisions that may be contained within the four corners of an underlying contract.").

Moreover, Stimson makes the conclusory legal assertion that the Agreement is "enforceable against the Tribe; therefore, the Tribe's court does not have jurisdiction to resolve disputes regarding the Parties' rights and duties under the Agreement," Dkt. 1 ¶ 21, but it does not actually ask the Court to make a declaration as to the Tribal Court's jurisdiction, *see id.* at 5-6. Rather, the Complaint requests only that "the Tribe" be enjoined "from asserting jurisdiction in tribal court throughout the pendency of this [federal] action." *Id.* at 6. Other courts have dismissed similar claims for lack of subject matter jurisdiction. *See, e.g.*, *Memphis Biofuels LLC v. Chickasaw Nation Indus., Inc.*, No. 08-2253 Ma/P, 2008 WL 11318298 (W.D. Tenn. Aug. 13, 2008), *aff'd*, 585 F.3d 917 (6th Cir. 2009). In *Memphis Biofuels*, the plaintiff sought to have the court compel arbitration under a contract, *id.* at *1, and requested in its complaint that the court enjoin the defendant tribal corporation "from proceeding with its case . . . in the Chickasaw Nation District Court," *id.* at *12. The *Memphis Biofuels* court noted that plaintiff did not actually seek a declaration that the tribal court lacked jurisdiction, *id.* at *12 n.16, and therefore found there was "no federal question jurisdiction" and dismissed the case, *id.* at *13. Stimson's Complaint has the

same jurisdictional defect and must be dismissed for the same reason the *Memphis Biofuels* court articulated.

Accordingly, because the Complaint does not on its face present a federal question, the Court lacks subject matter jurisdiction and must dismiss this case.

II. The Court Should Dismiss or Stay the Case Because Stimson Has Not Exhausted Tribal Remedies.

Even if the Court were to find it has jurisdiction, it should nevertheless dismiss or stay this case as a matter of comity until tribal remedies are exhausted. The Supreme Court has long recognized that "the question whether a tribal court has the power to exercise . . . jurisdiction over . . . a case" is one that should be addressed "in the first instance in the Tribal Court itself." *Nat'l Farmers*, 471 U.S. at 855-56. A federal court therefore must "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction." *Id.* 857. A full opportunity includes, at a minimum, tribal appellate review of the matter. *Iowa Mut.*, 480 U.S. at 16-17. This Court has also held that the enforcement of dispute resolution provisions in a contract must be resolved "initially . . . by the . . . tribal court." *Snowbird*, 666 F. Supp. at 1444.

This tribal exhaustion requirement is based in the federal government's commitment to supporting tribal self-government and self-determination, as well as notions of judicial economy. *Nat'l Farmers*, 471 U.S. at 856. And although it is a prudential, not jurisdictional, rule, *see Iowa Mut.*, 480 U.S. at 16 n.8, it is mandatory, *Burlington N.R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991).

Indeed, there are only four narrow exceptions to the tribal exhaustion doctrine:

(1) Where the "assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith," *Nat'l Farmers*, 471 U.S. at 856 n.21 (citation omitted);

(2) Where the "action is patently violative of express jurisdictional prohibitions," *id.*;

(3) Where "exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction," *id.*; and

(4) Where tribal court jurisdiction over the action is plainly lacking and "would serve no purpose other than delay," *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997).

Stimson does not claim in its Complaint to have exhausted tribal remedies, nor does it allege facts sufficient to support that any of the four exceptions to the exhaustion requirement apply. As discussed below, none do. Accordingly, the Court should dismiss or stay this case until tribal remedies are exhausted.

A. Exhaustion is Required Because Tribal Court Jurisdiction is Colorable, if Not Likely, and Therefore Would Not Serve Only to Delay.

Tribal exhaustion is not required when "it is plain" a case lies beyond the bounds of tribal jurisdiction permitted under federal law. *Strate*, 520 U.S. at 459 n.14. In that narrow instance, exhaustion "would serve no purpose other than delay." *Id.* "If [tribal] jurisdiction is colorable or plausible, then the exception does not apply and exhaustion of tribal court remedies is required." *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 848 (9th Cir. 2009) (quotations omitted). When presented with the question of whether this exception applies, a federal district court "need not"—and should not—"make a definitive determination of whether tribal court jurisdiction exists; [it] must decide only whether jurisdiction is plausible." *Id.* at 849 (citation omitted).

Stimson fails to identify in its Complaint any reason why the Tribal Court's exercise of jurisdiction over Stimson is beyond the bounds of tribal jurisdiction permitted under federal law and thus is plainly lacking. Stimson's claims instead revolve around the enforceability of the Agreement. The resolution of its claims would, as discussed above, require the Court to engage in the interpretation of that Agreement, which this Court does not have the subject matter

jurisdiction in this case to do. Stimson's claim to enforce a contractual forum-selection clause also provides no basis to strip the Tribal Court of jurisdiction that exists independently of the Agreement. *Cf. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (finding no "serious[] conten[tion]" that a forum selection clause "oust[s]" a court of jurisdiction); *Kamm v. ITEX Corp.*, 568 F.3d 752, 754 (9th Cir. 2009) ("a forum selection clause does not deprive a federal court of subject matter jurisdiction").

Moreover, the Tribal Court's jurisdiction is at least colorable or plausible, if not likely, under federal law. "Tribal jurisdiction is colorable, for example, when the events that form the bases for [the tribal court] claims occurred or were commenced on tribal territory." *Wilson v. Horton*, 906 F.3d 773, 779 (9th Cir. 2018) (quotation omitted). And under firmly established Ninth Circuit precedent, tribal courts have jurisdiction over actions to evict nonmembers from tribal land. *See Water Wheel Camp Recreation Area, Inc. v. LaRance*, 642 F.3d 802, 819-20 (9th Cir. 2011). In *Water Wheel*, plaintiff, a non-Indian, controlled and operated a resort on tribal land pursuant to a lease agreement with the tribe. *Id.* at 805. The lease provided for renegotiation of the rental payment amount after twenty-five years to reflect more accurately the property's market value at that point. *Id.* When that time came, however, plaintiff and the tribe failed to reach an agreement. *Id.* Plaintiff stopped paying rent to the tribe but continued to operate the resort on tribal land. *Id.* When the lease expired, plaintiff failed to vacate the property. *Id.* The tribe filed an unlawful detainer action in tribal court. *Id.* at 804, 805-07. While that case was pending, the non-Indian resort operator filed the federal action challenging the tribal court's jurisdiction and seeking to halt the tribal court proceedings. *Id.* at 807. On review, the Ninth Circuit found the tribal court had jurisdiction. *Id.* at 820.

The *Water Wheel* court began by recognizing that "Indian tribes possess inherent sovereign powers, including the authority to exclude." *Id.* 808. It reasoned that "[f]rom a tribe's inherent sovereign power[]" to exclude "flow lesser powers, including the power to regulate non-Indians on tribal land." *Id.* at 808-09. The Ninth Circuit distinguished the circumstances in *Water Wheel* from *Montana v. United States*, 450 U.S. 544 (1981), which "concerned the tribe's exercise of regulatory jurisdiction over non-Indians on *non-Indian* land within the reservation." *Water Wheel*, 642 F.3d at 809 (emphasis in original). The *Water Wheel* court found that *Montana*—which held that "the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations . . . cannot survive without express congressional delegation'" except in two specified exceptions, *Water Wheel* 642 F.3d at 809 (quoting *Montana*, 450 U.S. at 564)—applies "exclusively to questions of jurisdiction arising on non-Indian land or its equivalent, *id.* at 809. Therefore, "where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*." *Id.* at 814. Heeding precedent indicating that, where "regulatory jurisdiction exists and neither Congress nor the Supreme Court ha[s] said otherwise, [a] tribal court may also exercise adjudicative jurisdiction," the Ninth Circuit held that the tribal court had jurisdiction over the tribe's unlawful detainer action against the non-Indian resort operator stemming from the operator's trespass onto tribal land. *Id.* at 810, 816.

Thus, the Ninth Circuit consistently applies "two distinct frameworks for determining whether a tribe has jurisdiction over a case involving a non-tribal-member defendant: (1) the right to exclude, which generally applies to nonmember conduct on tribal land; and (2) the [two] exceptions articulated in *Montana* . . . , which generally apply to nonmember conduct on non-tribal

land." *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 898 (9th Cir. 2017). For example, in *Window Rock*, the Ninth Circuit evaluated the plausibility of tribal jurisdiction over a dispute between employees of two Arizona public school districts and the districts related to employment decisions and practices occurring on the Navajo Reservation. *Id.* at 896-97. It concluded that, "[b]ecause the claims ar[o]se from conduct on tribal land and implicate[d] no state criminal law enforcement interests, . . . tribal jurisdiction [was] colorable or plausible" under the right-to-exclude framework announced in *Water Wheel*. *Id.* at 896, 903. Exhaustion of tribal remedies was therefore "required." *Id.* at 906.

Similarly, in *Grand Canyon Skywalk Development LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196 (9th Cir. 2013), the Ninth Circuit required the exhaustion of tribal remedies in a dispute between a tribal corporation and a non-Indian corporation over property rights stemming from a management and revenue-sharing contract pertaining to the Skywalk tourist attraction at the Grand Canyon, located on Hualapai tribal land. *Id.* at 1206. In doing so, it reiterated that, "'where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough," on its own, "to support regulatory jurisdiction . . . , and unless a limitation applies, adjudicatory jurisdiction, as well." *Id.* at 1204 (quoting *Water Wheel*, 642 F.3d at 814-17) (internal citation omitted).

Likewise, here, Stimson continues to occupy and operate a sawmill located on tribal land. Dkt. 1 ¶¶ 1, 11. This is despite the Tribe's effort to "eject Stimson" from the land. *Id.* ¶ 1. Stimson is an Oregon corporation. *Id.* ¶ 3. And, as Stimson acknowledges, the Tribe is a "federally recognized Indian tribe," possessing "the full legal power of a sovereign domestic government." *Id.* ¶ 4. From the Tribe's sovereign status derives its "authority to exclude" and, in turn, "the lesser

power[] . . . to regulate non-Indians on tribal land." *Water Wheel*, 642 F.3d at 808-09. Stimson's continued occupation of tribal land interferes directly with that power. Under the Tribe's right-to-exclude, the Tribe's "status as landowner is enough," in and of itself, to support tribal regulatory and adjudicatory jurisdiction. *See Grand Canyon Skywalk*, 715 F.3d at 1204.[4] Tribal Court jurisdiction is thus at least colorable or plausible, if not likely. Without tribal jurisdiction plainly lacking, *see Strate*, 520 U.S. at 459 n.14, exhaustion of tribal remedies would not serve merely to delay and is therefore required in this case. *See Elliott*, 566 F.3d at 847-48.

B. Exhaustion is Required Because the Assertion of Tribal Jurisdiction is Not Motivated by a Desire to Harass or Conducted in Bad Faith.

The bad faith exception only applies when a tribal court itself acts in bad faith. *Grand Canyon Skywalk*, 715 F.3d at 1201 ("[W]here . . . a tribal court has asserted jurisdiction and is entertaining a suit, the tribal court must have acted in bad faith for exhaustion to be excused. Bad faith by a litigant instituting the tribal court action will not suffice."). As the Ninth Circuit has explained, any "broader interpretation [of this exception] would unnecessarily deprive tribal courts of jurisdiction and violate the principles of comity that underlie the exhaustion requirement" because a "party would need only allege bad faith by the opposing party, or a third party, to remove the case to federal court." *Id.* Stimson's Complaint contains no such allegation that the Tribal Court has acted with any motivation to harass or in bad faith. Accordingly, the exception does not apply, and tribal exhaustion is required.

C. Exhaustion is Required Because Tribal Jurisdiction is Not Patently Violative of Express Jurisdictional Prohibitions.

[4] In *Water Wheel*, the Ninth Circuit nonetheless found that the tribal court's jurisdiction was proper under the two *Montana* exceptions. 642 F.3d at 816-19. The Ninth Circuit found both *Montana* exceptions would apply simply because "the commercial dealings between the tribe and [the nonmember lessee] involved the use of tribal land, one of the tribe's most valuable assets." *Id.* at 818. The same would be true here if *Montana* applied.

Tribal exhaustion is not required where tribal jurisdiction over a matter is expressly prohibited by federal law. This may arise where, for example, a federal statute preempts the jurisdiction of nonfederal courts. *See, e.g. El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 477, 484-45 (1999) (finding Price–Anderson Act preemption provision, which grants federal "district courts original and removal jurisdiction over all 'public liability actions'" and allows for the removal of such actions from nonfederal courts as of right, obviates application of the tribal exhaustion doctrine in such cases); *see also Basil Cook Enterps. Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 67 (2d Cir. 1997) ([T]he only relevant 'jurisdictional prohibitions' in this context are those arising under federal law. . . . Thus, exhaustion will be excused under the 'patently violative of express jurisdictional prohibitions' exception only in those rare cases when a tribal court's civil jurisdiction is . . . in patent violation of express federal law.") (citations omitted). The exception may also arise in the case of a tribal court action against a party which is foreclosed by that party's sovereign immunity, as established in federal law. *See United States v. Yakima Tribal Ct.*, 806 F.2d 853, 861 (9th Cir. 1986) (finding "exhaustion was pointless" in tribal court case against the United States "because tribal court jurisdiction clearly was foreclosed by the sovereign immunity of the United States") (citing *United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 n.10 (9th Cir. 1986)).

None of those circumstances is present here. Stimson's Complaint does not allege that the Tribal Court's jurisdiction is expressly preempted by federal law, nor can it. The Complaint lacks on its face any allegation which would support that the Tribal Court's jurisdiction is patently violative of express jurisdictional prohibitions and, therefore, exhaustion of tribal remedies is required.

D. Exhaustion is Required Because Stimson Has an Adequate Opportunity to Challenge the Tribal Court's Jurisdiction in that Forum and Therefore Exhaustion is Not Futile.

A party may be excused from exhausting tribal remedies where exhaustion would be "futile because of the lack of adequate opportunity to challenge the [tribal] court's jurisdiction" in that forum. *Grand Canyon Skywalk*, 715 F.3d at 1203. This exception "applies narrowly to only the most extreme cases," such as where there is no functioning tribal court system or there has been a lengthy delay in the tribal court proceedings, calling into question the very possibility of an eventual resolution in that forum. *Id.* (citing *Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032, 1036 (9th Cir. 1999); *Krempel v. Prairie Island Indian Cmty.*, 125 F.3d 621, 622 (8th Cir. 1997)). Stimson does not—and cannot—allege any facts to support that such an institutional or procedural defect exists with the Tribal Court, thereby depriving Stimson of an adequate opportunity to challenge the Tribal Court's jurisdiction in that forum. This exception does not apply, and exhaustion is required.

Ultimately, because Stimson does not even assert in its Complaint that it has exhausted tribal remedies, and because the allegations in the Complaint fail to show that any of the four exceptions to the exhaustion requirement apply, even if the Court were to find it has subject matter jurisdiction, it should dismiss or stay this case and require tribal remedies to be exhausted.

CONCLUSION

For the reasons discussed above, the Tribe respectfully requests the Court dismiss Stimson's Complaint (Dkt. 1) for lack of subject matter jurisdiction or, in the alternative, dismiss or stay this case pending exhaustion of tribal remedies.

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Respectfully submitted this 14th day of November, 2022.

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