UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

MCKINSEY & COMPANY, INC. Plaintiff, *-against-* CHRISTOPHER BOYD, NATHAN GORDON, STEPHANIE DEFOE-HASKINS, LAURA GORDON, STEVEN BOYD, BRYAN BAINBRIDGE, VINCENT BRESETTE, NICHOLAS DEPERRY, and CHRISTOPHER HICKS, in their official capacities as Tribal Council of the Red Cliff Band of Lake Superior Chippewa Indians, and HENRY M. BUFFALO, in his official capacity as Chief Judge of the Red Cliff Tribal Court, Defendants.	:	Case No. 3:22-cv-00155

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF

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Defendants, CHRISTOPHER BOYD, NATHAN GORDON, STEPHANIE DEFOE-HASKINS, LAURA GORDON, STEVEN BOYD, BRYAN BAINBRIDGE, VINCENT BRESETTE, NICHOLAS DEPERRY, and, CHRISTOPHER HICKS, in their official capacities as Tribal Council of the Red Cliff Band of Lake Superior Chippewa Indians, and HENRY M. BUFFALO[1], in his official capacity as Chief Judge of the Red Cliff Tribal Court, respond to Plaintiff's Motion for Declaratory Judgement and Injunctive Relief.

PROCEDURAL HISTORY

On January 27, 2022, the Red Cliff Band of Lake Superior Chippewa ("Red Cliff" or the "Band") commenced a complaint ("Tribal Complaint" or "TC") in the Red Cliff Tribal Court against McKinsey & Company, Inc. ("McKinsey") for its role in orchestrating the opioid epidemic that has substantially harmed the health and welfare of the Band. On March 22, 2022, McKinsey filed an action in this Court seeking to enjoin the Band from proceeding in Tribal Court and demanding a declaratory judgment holding that the Tribal Court lacked personal and subject matter jurisdiction. Concurrently, the Tribal Court has set a hearing on McKinsey's motion to dismiss on June 2, 2022, at which point it is anticipated the parties will present jurisdictional arguments following a scheduled briefing of the same.

LEGAL STANDARD FOR ISSUING A PRELIMINARY INJUNCTION

A preliminary injunction is an extraordinary remedy never awarded as of right. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 376–77, 172 L. Ed. 2d 249 (2008); *Munaf v. Geren*, 553 U.S. 674, at 689 – 690, 128 S.Ct., at 2218–2219 (2008). Courts "must balance the competing claims of injury and must consider the effect on each party of the granting

[1] Out of an abundance of caution, counsel for Defendants include the Honorable Henry M. Buffalo *pro forma* and have had no *ex parte* communications with Judge Buffalo regarding this matter. Defendants also thank the Court for its deference in allowing the filing of this Memorandum.

or withholding of the requested relief." *Amoco Production Co. v. Village of Gambell,* 480 U.S. 531 (1987). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Romero–Barcelo*, 456 U.S., at 312, 102 S.Ct. 1798; *see also Railroad Comm'n of Tex. v. Pullman Co*., 312 U.S. 496, 500, 61 S.Ct. 643, 85 L.Ed. 971 (1941).[2]

To obtain a preliminary injunction, Plaintiff bears the burden of demonstrating that: (1) they have a reasonable likelihood of success on the merits of their underlying claim; (2) they have no adequate remedy at law; and (3) they will suffer irreparable harm without injunctive relief. *AM Gen. Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 803 (7th Cir. 2002). If Plaintiff meets this burden, Plaintiff must then show that the harm it will suffer outweighs any harm Defendants will suffer due to the entry of an injunction and that the preliminary injunction will not harm the public interest. *Id.* at 803-804; *Stifel v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 2014 WL 12489707, at *11 (W.D. Wis. May 16, 2014).

ARGUMENT

I. PLAINTIFF IS NOT SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS

Plaintiffs are not "substantially likely" to succeed on their claim that they can bypass the Tribal Court without first exhausting the remedies available in that forum. The law is well-settled

[2] This sentiment likewise applies to matters concerning Indian tribes: "Because it constitutes drastic relief to be provided with caution, a preliminaryinjunction should be granted only in cases where the necessity for it is clearly established." *U.S. ex rel. Citizen Band Potawatomi Indian Tribe of Okla. v. Enter. Mgmt. Consultants, Inc.,* 883 F.2d886, 888-889 (10th Cir. 1989) (internal citations omitted); *see also N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1246 (10th Cir. 2017) ("the right to relief must be clearand unequivocal").

that, as a matter of comity, Plaintiffs are required to exhaust jurisdictional defenses in the Tribal Court before this Court may rule on or enjoin the Tribal Court proceedings for lack of jurisdiction.

A. Any Challenge to Tribal Court Jurisdiction Must Be Decided First by the Tribal Court

"The tribal exhaustion rule provides that, absent exceptional circumstances, federal courts typically 'should abstain from hearing cases that challenge tribal court jurisdiction until tribal court remedies, including tribal appellate review, are exhausted.' " *Corp. of President of the Church of Jesus Christ of Latter-Day Saints v. RJ*, 221 F. Supp. 3d 1317, 1321 (D. Utah 2016); *National Farmers Union Insurance Co. v. Crow Tribe of Indians,* 471 U.S. 845, 855-56 (1985); *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987). Two Supreme Court cases firmly establish the rule that federal court challengers to tribal court jurisdiction must first exhaust their tribal court remedies on any jurisdictional issue. The Court said "the existence and extent of a tribal court's jurisdiction" require "a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested or diminished, as well as a detailed study of relevant statutes,Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *National Farmers*, 471 U.S. at 856. And "**that examination should be conducted in the first instance in the Tribal Court itself**." *Id.* (emphasis added). This is because "Congress is committed to a policy of supporting tribal self-government and self-determination." *Id*.:

> That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before eitherthe merits or any question concerning appropriate relief is addressed. The risks ofthe kind of "procedural nightmare" that has allegedly developed in this case will beminimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made.

Id. at 856-57 (emphasis added). Exhaustion of tribal court remedies "will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 857.

In extending the exhaustion requirement in *LaPlante*, the Supreme Court noted that "considerations of comity direct that tribal remedies be exhausted" before a challenge to tribal court jurisdiction "is addressed by the District Court." 480 U.S. at 15 (emphasis added). "Promotion of tribal self-government and self-determination require[] that the Tribal Court have 'the first opportunity to evaluate the factual and legal bases for the challenge' to its jurisdiction." *Id.* at 15-16 (quoting *Nat'l Farmers,* 471 U.S. at 856). The Seventh Circuit has likewise explained that the exhaustion doctrine is meant to implement Congress's policy of promoting tribal self-government and self-determination. *Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043, 1048 (E.D. Wis. 1999); *See also Altheimer & Gray v. Sioux Manufacturing Corporation,* 983 F.2d 803, 815 (7th Cir.), *cert. denied,* 510 U.S. 1019, 114 S.Ct. 621, 126 L.Ed.2d 585 (1993).

Thus, "the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'" *Id.* Although a tribal court's determination on jurisdiction is "ultimately subject to review" in federal court, this is only after all "available tribal remedies"—including tribal court appellate remedies—have been exhausted. *Id.* at 19.

Here, the Tribal Court has set this matter for hearing –following briefing by the parties. The Tribal Court has not yet heard, nor ruled on whether it retains jurisdiction over this matter or McKinsey. Tribal remedies have only been initiated, not exahausted. Therefore, the matter before

this Court should not proceed until the Tribal Court rules and, if necessary, further tribal remedies are exhausted.

B. The Narrow Exceptions to the Exhaustion Requirement Do Not Apply

Tribal exhaustion may be excused "…where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Nat'l Farmers*, 471 U.S. at 856 n. 21 (internal quotationsand citations omitted). There are two additional exceptions: "when it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by the main rule established in *Montana v. United States*, 450 U.S. 544 (1981); or . . . it is otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay." *Norton v. Ute Indian Tribe*, 2017 WL 2952256 at *3 (10th Cir. 2017) (quoting *Burrell v. Armijo*, 456 F.3d 1159, 1168 (2006). Further, other courts require the party invoking exceptions to the tribal court exhaustion rule to make a substantial showing and apply these exceptions restrictively.[3]

1. Plaintiffs do not establish the Tribal Court clearly lacks jurisdiction.

The Red Cliff Tribal Court has jurisdiction to adjudicate the claims against Plaintiff under

[3] At least one Circuit, the 10th Circuit, directs that the party invoking any exceptions to the tribal exhaustion rule bears a heavy burden of proof. *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226 (10th Cir. 2014). Further, the 10th Circuit recognizes tribal exhaustion where the claim of tribal court jurisdiction is even "colorable." *Norton v. Ute Idian Tribe*, 2017 WL 2952256 (10th Cir. 2017). The 8th Circuit directs that the exhaustion requirement only be waived if the assertion of tribal court jurisdiction is frivolous or obviously invalid. *Dish Network Serv., L.L.C. v. Laducer*, 725 F.3d 877,883 (8th Cir. 2013). Further, where relevant factual questions remain undeveloped, the prudential considerations outlined in *National Farmers* require exhaustion be enforced. *Id*.

the Band's inherent sovereign power and pursuant to the broad jurisdictional grant outlined in the Red Cliff Code of Laws.

a. The Red Cliff Band Tribal Court has jurisdiction over this matter under the Band's "inherent sovereign powers" and under the Red Cliff Code of Laws

Even absent a treaty or statute that provides jurisdiction, tribal courts possess adjudicatory jurisdiction as an incident of a tribe's "inherent sovereign power." *Montana*, 450 U.S. 544, 564 (1981); *see also MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1068 (10th Cir. 2007)("[i]n the absence of congressional legislation . . . tribal governments retain regulatory authority over all matters falling within their inherent sovereignty"). A tribe's inherent sovereign authorityover nonmembers on a reservation can be exercised under one of the two "*Montana* exceptions": tribes have jurisdiction, first, over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," *Montana*, 450 U.S. at 565, and second, over nonmember conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfareof the tribe," *id.* at 565-6. *See Thlopthlocco*, 762 F.3d at 1234 (summarizing *Montana*).

Indeed, the Band can assert such jurisdiction in this area when the conduct of those nonmembers threatens "the political integrity, the economic security, or the health or welfare" of the Band, or where the nonmembers enter into "consensual arrangements" with the Nation or its members. *Montana,* 450 U.S. at 565. Further Red Cliff Code of Laws §§ 4.1.1 provides the Tribal Court retains jurisdiction over "…all disputes arising under the laws of the Red Cliff Band of Lake Superior Chippewa Indians." *See* RCCL §§ 4.1.1.

Red Cliff clearly has the authority to determine this action as its own sovereign and should be allowed to do so, or at least be first afforded the opportunity to do so before this Court rules on this matter.

i. Plaintiffs' activities pose a direct threat to the health and welfare of the Band and its members, and thus the tribal courthas jurisdiction over this case under the Montana 2 analysis.

The *Montana* exceptions are "rooted" in the tribes' inherent power to regulate nonmember behavior that implicates these sovereign interests. *Attorney's Process and Invest. v. SAC & Fox Tribe*, 609 F.3d 927, 936 (8th Cir. 2010); (citing *Plains Commerce Bank*, 554 U.S. 316, 335 (2008)); *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 904 (9th Cir. 2019).

Under the second *Montana* exception, a tribe can regulate nonmember conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *Montana,* 450 U.S. at 566. Precedent showing that tribal jurisdiction under the second Montana exception is justified, and therefore necessarily "plausible," when nonmember conduct threatens the health of a tribe's members, *see Cheromiah v. United States*, 55 F. Supp. 2d 1295, 1305 (D.N.M. 1999) (medical malpractice claims), or threatens reservation resources like timber and water.

In *Norton*, a Tenth Circuit case, the Court found the Ute Tribal Court had "colorable" jurisdiction underthe second *Montana* exception over a trespass claim against nonmember police officers for their activities on tribal lands, and therefore exhaustion of tribal court remedies was required. *Norton*,2017 WL 2952256 at *6. Because the alleged activities all arose on tribal land, the Court confined its analysis to those facts, and largely based its holding on a tribe's well-recognized right, as landowner, to exclude others from its land. *Id.* at *4; *see also Plains Commerce*

Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 335 (regarding non-Indian activity on tribal lands,"'[r]egulatory authority goes hand in hand with the power to exclude.'") (citation omitted).

But the *Montana* test was formulated primarily to address tribal "civil authority over the conduct of non-Indians on fee lands," 450 U.S. at 566 and the Tenth Circuit in *Norton,* therefore correctly did not limit *Montana* to activities occurring only on tribal land. *Norton*, 2017 WL 2952256 at *3 ("tribes retain the right 'to exercise some forms of civil jurisdiction over non-Indians.

Here, the Band's Complaint alleges injuries to the health, welfare andeconomic security of the Band and its members that are direct, severe and compelling, indeed, "catastrophic." The injuries alleged here are that Red Cliff now faces a public crises that threatens to undermine the safety and well-bening of the entire community. There are now health, public safety, and law enforcement concerns that did not exist before McKinsey acted in concert with drug manufacturers to flood the Red Cliff community with opioids and impacted many Band members. If the second *Montana* exception is to have any meaning at all, it applies here.

II. PLAINTIFF WILL NOT SUFFER IRREPARABLE INJURY IF THE INJUNCTION IS DENIED.

"Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." Charles Alan Wright, et al., 11A *Fed. Prac. & Proc.: Civ.* § 2948.1 (3d ed. 2017 update). Irreparable injury for a preliminary injunction "must be both certain and great," not "merely serious or substantial." *Prairie Band of Potawatomi Indians v. Pierce,* 253 F.3d 1234, 1250 (10th Cir. 2001). A failure to show irreparable injury relieves the court from even examining the other three standards for the grant of a preliminary injunction. *See Franks v. Nimmo*, 683 F.2d 1290, 1293 (10th Cir. 1982); *Dish Network*, 725 F.3d at 882 ("[T]he

absence of irreparable injury is by itself sufficient to defeat a motion for a preliminary injunction. . . .").

Plaintiff asserts that the "irreparable" injury lies primarily in the inconvenience andexpense of having to litigate the jurisdictional challenge in the tribal forum first. But such litigation costs are not even economic injury, much less irreparable harm. The Supreme Court hasstated that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constituteirreparable injury." *Renegotiation Bd. v. Bannercroft Clothing Co.*, 415 U.S. 1, 24 (1974); *FTC v.Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980). Similarly, in the context of deciding whetherto enjoin a state court proceeding, this Circuit has noted that the costs of litigation are not "irreparable injury." *Briggs & Stratton Corp. v. Local 232, Int'l Union*, 36 F.3d 712, 714 (7th Cir. 1994); see also *Phelps v. Hamilton*, 59 F.3d 1058, 1065 (10th Cir. 1995) ("the cost, anxiety, and inconvenience" [of litigation] "is not enough to establish the 'great and immediate' threat of irreparable injury necessary to justify enjoining pending state proceedings."). Indeed, if the costs of litigating in tribal court constituted "irreparable harm" sufficient to enjoin a tribal court proceeding, there would be nothingleft to the *National Farmers* exhaustion doctrine.

Plaintiff also relies on *Crowe* to argue that the economic harm may be irreparable because sovereign immunity may prevent any future remedy available. *Crowe & Dunleavy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011). But that argument fails to acknowledge the fundamental differences between the harm recognized in *Crowe* and the very different harm alleged here. In *Crowe* the law firm was the subject of a collateral tribal court orderdirecting it (as a non-party) to immediately repay attorneys' fees it had already received for workit had already completed. *Crowe*, 640 F.3d at 1145-46. As the Tenth Circuit noted, the law firm would be left with no practical remedy to recover its fees, once repaid, if the opposing tribal faction wasultimately

recognized as the legitimate tribal government: it would be "highly unlikely" that the tribal government controlled by the hostile faction would "voluntarily return funds to Crowe," and the tribal government "would be immune from suit" in any litigation brought by Crowe to recover fees. *Id.* at 1157-58. Thus, "[i]n the unique circumstances of this case," the law firm faced a "significant risk of financial injury arising from irrecoverable attorneys' fees." *Id.* at 1158. But the Tenth Circuit's concern was about the attorneys' fees that would have to be repaid under the tribal court's collateral order, not the fees that would be incurred in exhausting the law firm's tribal court remedies. The Court never held that the law firm's "time, money, and effort in litigating before the tribal court" constituted irreparable harm. *Id.* at 1158 n.10.

Here, even if the Tribal Court finds that it has jurisdiction over Plaintiff, and if there were proceedings in Tribal Court following the same, such a ruling would then be fully reviewable in federal court before the Plaintiff would have to pay anything under a hypothetical judgment. Unlike *Crowe*, Plaintiff bears no risk of "the [i]mposition of money damages that cannot later be recovered for reasons such as sovereign immunity," *Id*. at 1157 (internal quotation omitted). Therefore, Plaintiff would not pay damages until the ultimate jurisdictional question was answered by review of federal Court.

III. RED CLIFF WOULD BE INJURED BY THE GRANT OF A PRELIMINARY INJUNCTION

Plaintiff asserts the time and expense they may incur in litigating in tribal court far outweighs "any inconvenience to the Tribe . . . .". The Band's injury is not "inconvenience;" instead, it precludes the Band from acting as a sovereign government by enforcing its own laws in its own courts.

"Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination." *Nat'l Farmers*, 471 U.S. at 856. "Tribal courts play

a vital role in tribal self-government, and the Federal government has consistently encouragedtheir development." *LaPlante*, 480 U.S. at 14-15 (citation omitted). "A federal court's exercise of jurisdiction over matters relating to reservation affairs can . . . impair the authority of tribal courts . . . ." *Id.*

Plaintiff argues that it will be especially injured because the Band can, alternatively, file claims in the pending multi-district litigation. However, the Band is not bringing claims under federal or state law—it is asserting common law claims under the purview of its tribal sovereignty.

Without claims arising under federal law, a federal forum is foreclosed. *See e.g. Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139, 1143 (10th Cir. 2004) (federal courts have no jurisdiction overdisputes regarding the meaning of tribal law). More importantly, even if another forum were available for the Band's claims, that would not eliminate the harm suffered as a sovereign in being precluded from enforcing its own laws in its own courts.[4]

IV. A PRELIMINARY INJUNCTION WOULD BE CONTRARY TO THE PUBLIC INTEREST

A preliminary injunction would disserve the public interest, which is best expressed by the longstanding congressional policy of supporting the exercise of tribal self-government through active tribal courts. *See Nat'l Farmers*, 471 U.S. at 856; *LaPlante*,480 U.S. at 14-15 & n.5 (citing federal statutes embodying this policy); *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991). The *National Farmers* exhaustion doctrine not only "further[s] the congressional policy of supporting tribal self-government" and "promote[s] the orderly administration of justice," but it also allows

[4] In *Crow Tribe II,* the Supreme Court went on to hold that, when federal and tribal courts appear to have concurrent jurisdiction, federal courts should normally allow Tribal Courts to first determine the scope and appropriateness of their own exercise of jurisdiction. *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 397 (E.D. Wis. 1995).

the federal courts "to obtain the benefits of tribal expertise." *See e.g. Texaco, Inc. v. Zah*, 5 F.3d 1374, 1377-78 (10th Cir. 1993). All of these policies squarely serve the public interest, and all will be impaired by the issuance of a preliminary injunction.

To the extent Plaintiff believes any of its rights are violated in tribal court, it will have the opportunity to seek review from a federal court after such remedies have been exhausted. *LaPlante*, 480 U.S. at 19. Plaintiff confuses its own interests with the "public interest," and fails to credit the weighty public interest inherent in the promotion of tribal sovereignty, including support for tribal courts, that has been repeatedly recognized by both Congress and the Supreme Court and that would be directly impaired by the grant of a preliminary injunction.

CONCLUSION

Plaintiff's motion for a preliminary injunction and declaratory relief should be denied.

DATED this 6th day of May, 2022.

Respectfully submitted,

RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS

By Its Attorneys,

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CERTIFICATE OF SERVICE

This is to certify that on May 6, 2022, a true and correct copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ T. Roe Frazer II
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