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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF OREGON**

FIRST SPECIALTY INSURANCE  
CORPORATION,

Plaintiff,

v.

THE CONFEDERATED TRIBES OF THE  
GRAND RONDE COMMUNITY OF OREGON

Defendant.

**Case No.: 3:07-CV-05-KI**

**DEFENDANT'S MEMORANDUM  
IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

**(Oral Argument Requested)**

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## INTRODUCTION

In this action, Plaintiff First Specialty Insurance Corporation (“FSIC”) attacks the authority of the Tribal Court of the Confederated Tribes of the Grand Ronde Community of Oregon (“Tribal Court”) to vacate an arbitration award arising out of an on-reservation contract between Defendant, the Confederated Tribes of the Grand Ronde Community of Oregon (“Tribe”), and its former investment advisors. Because federal and Tribal law provide for Tribal Court jurisdiction over disputes arising out of a nonmember’s on-reservation activities and consensual dealings with the Tribe, FSIC’s claims should be denied.

Federal courts have long held that tribal courts may adjudicate disputes arising out of a nonmember’s on-reservation consensual dealings with the tribe – particularly when important tribal property and sovereignty interests are at stake. The Tribal Court’s adjudication of issues involved in the present dispute was consistent with this precedent. It was also consistent with Tribal law which provides for Tribal Court jurisdiction over disputes relating to contracts to which the Tribe is a party. The Tribal Court resolved the question of whether the Tribe waived its immunity against an arbitration award of attorney fees and costs. The arbitration arose out of an on-reservation contract between the Tribe and its nonmember investment advisors.

The Supreme Court has consistently recognized the vital role that tribal courts play in tribal self-government. On this basis, it has held that absent tribal court jurisdiction or a valid reason for denying comity, proper deference for tribal court systems precludes reconsideration of matters already resolved by the tribal court. The Grand Ronde Tribal Court has already decided the issues in this action. The Tribal Court’s judgment is entitled to comity.

## FACTUAL BACKGROUND

### A. The parties' relationship.

In January of 1992, the Tribe entered an Investment Advisory Agreement ("1992 Agreement") with Strategic Wealth Management, Inc. ("SWM").<sup>1</sup> Concise Statement ¶ 7.<sup>2</sup> The 1992 Agreement was a form agreement prepared by SWM. It was signed at the Tribe's governmental offices located on the Tribe's reservation in Grand Ronde, Oregon. Concise Statement ¶ 8. The 1992 Agreement does not contain a provision for attorney fees and costs.

Patrick Sizemore ("Sizemore"), the president and primary shareholder of SWM, had primary responsibility for the Tribe's account. Concise Statement ¶¶ 9-10. Over a period of nine years, Sizemore traveled to the Tribal governmental offices on the Tribe's reservation in Grand Ronde, Oregon, hundreds of times to perform investment advisory services. Concise Statement ¶¶ 10-11. In fact, the bulk of investment advisory services provided by Sizemore – through meetings, conferences, training sessions, financial reviews, and accounting reports – took place on the Tribe's reservation. *Id.*

Beginning in 1996, SWM and Sizemore encouraged the Tribe to invest an increasing amount of money in promissory notes secured by real property. From 1996 to 2000, SWM participated in selling the Tribe 37 notes with a face value of nearly \$50 million, representing 30 percent of the Tribe's total investment portfolio. The majority of the notes were brokered by Sizemore's brother Mark Sizemore. *Confederated Tribes of Grand Ronde v. Strategic Wealth Mgmt.*, Case No. C-04-08-003 at 2 (Grand Ronde Tribal Ct. Dec. 20, 2004) (order denying

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<sup>1</sup> First Specialty Insurance Corporation is SWM's insurer and has assumed SWM's and Pat Sizemore's interest in this action.

<sup>2</sup> References to "Concise Statement" are to Defendant's Concise Statement of Material Facts in Support of Motion for Summary Judgment.

motion to dismiss).<sup>3</sup> By 2001, all 37 notes were in default. In early 2001, the Tribe began investigating the reasons for the high number of defaults. Among other things, the Tribe discovered that the property securing the notes was worth far less than SWM and Sizemore had represented. The Tribe terminated its relationship with SWM in October 2001. *Id.*

On November 14, 2001, based on information obtained through its investigation, the Tribe initiated a lawsuit in Multnomah County Circuit Court against SWM and Sizemore<sup>4</sup> alleging violation of Oregon securities laws, breach of fiduciary duty, fraud, negligent misrepresentation, and breach of contract. SWM and Sizemore successfully compelled arbitration of the Tribe's claims pursuant to the 1992 Agreement.<sup>5</sup>

On January 23, 2003, the Tribe's attorneys filed a demand for arbitration of the Tribe's claims on behalf of the Tribe. Concise Statement ¶ 12. Over the Tribe's objections, SWM and Sizemore then successfully moved to have the arbitration conducted in Seattle, Washington. An arbitration proceeding was then conducted before a panel of the American Arbitration Association ("Panel"). Concise Statement ¶ 13. The Panel denied the Tribe's claims against SWM and Sizemore and also denied SWM and Sizemore's counterclaims against the Tribe. Concise Statement ¶ 13. SWM and Sizemore then filed petitions for their attorney fees and costs as a prevailing party under the Oregon Securities Act. The Tribe opposed the petitions on the basis that the Tribe had not waived its immunity to claims for attorney fees and costs. The Panel

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<sup>3</sup> Attached as Exhibit 10 to the Affidavit of Deneen Aubertin Keller in Support of Motion for Summary Judgment ("Keller Aff.").

<sup>4</sup> Mark Sizemore and his company Paradigm Financial Services were also named in the suit, but the Tribal Court determined it could not exercise jurisdiction over them, and they are not parties to this action.

<sup>5</sup> The Tribe opposed the motion and argued that a later agreement signed by the parties in 1995 controlled their relationship.

ruled that the award fell within the scope of the arbitration agreement and awarded SWM and Sizemore \$1,471,023.70 in attorney fees and costs. Concise Statement ¶ 13.

**B. The Tribal Court proceedings.**

On August 16, 2004, the Tribe filed a petition in Tribal Court seeking an order vacating that portion of the Panel's award granting SWM and Sizemore attorney fees and costs. Concise Statement ¶ 14. The Tribe alleged that sovereign immunity deprived the Panel of jurisdiction to grant SWM and Sizemore's claims for attorney fees and costs against the Tribe because the Tribe had not waived immunity to such claims in the 1992 Agreement. Keller Aff., Ex. 8 at 4.

SWM and Sizemore moved to dismiss the Tribe's petition claiming that the Tribal Court lacked jurisdiction to vacate the arbitration award. Concise Statement ¶ 15. After extensive briefing and oral argument before the Tribe's trial court ("Trial Court"), the Trial Court denied the motion to dismiss. Concise Statement ¶ 16. In denying the motion, the Trial Court held that the dispute arose out of and required examination of the parties' 1992 Agreement and that Tribal Court jurisdiction was consistent with the Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). *Strategic Wealth Mgmt.*, Case No. C-04-08-003 at 10-11 (order denying motion to dismiss).

Following a hearing on the respective merits of the parties' positions, the Chief Judge of the Tribal Court Suzanne Ojibway Townsend, revisited the issue of Tribal Court jurisdiction.<sup>6</sup> Concise Statement ¶ 17. Again, the court found that Tribal Court jurisdiction was consistent with federal and Tribal law. *Confederated Tribes of Grand Ronde v. Strategic Wealth Mgmt.*, Case No. C-04-08-003 at 13-17 (Grand Ronde Tribal Ct. Aug. 5, 2005).<sup>7</sup> The Trial Court ultimately concluded that the Panel did not have authority to award fees and costs against the

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<sup>6</sup> The Motion to Dismiss was heard by former Chief Judge Katherine English.

<sup>7</sup> Attached as Exhibit 11 to Keller Aff.

Tribe because the Tribe did not waive immunity with respect to SWM and Sizemore's claims for attorney fees and costs. *Strategic Wealth Mgmt.*, Case No. C-04-08-003 at 33.

SWM and Sizemore then appealed the Trial Court's decision to the Tribal Court of Appeals ("Court of Appeals"). Concise Statement ¶ 20. Plaintiff FSIC was substituted in the litigation for SWM and Sizemore. Concise Statement ¶ 21. Chief Judge Robert Miller and Associate Justices LeAnn Easton and Mark Johnson considered the jurisdictional arguments, along with FSIC's other arguments. The Court of Appeals rendered a written Opinion in which it determined that the Tribal Court had both personal jurisdiction over SWM and Sizemore and subject matter jurisdiction over the dispute. In concluding that it had jurisdiction over the dispute the Court of Appeals noted that:

"SWM and Patrick Sizemore voluntarily entered a contract with the Grand Ronde Tribe and the Tribe is exercising civil jurisdiction over them in relation to that very contract. This situation meets the first exception of *Montana* and the tribal court system has jurisdiction over those parties under the test."

*First Specialty Ins. Corp. v. Confederated Tribes of Grand Ronde*, Case No. A-05-09-001 at 19 n.6 (Grand Ronde Tribal Ct. App. Oct. 31, 2006).<sup>8</sup> The Court of Appeals also found that SWM and Sizemore engaged in more than nine years of financial advising and business dealings with the Tribe under the 1992 Agreement they signed with the Tribe and, as a result, concluded that the Tribal Court possessed personal jurisdiction over SWM and Sizemore and could "decide [their] rights under the 1992 Agreement and the arbitration award arising from that Agreement." Concise Statement ¶¶ 23-24

FSIC now seeks an order declaring the Court of Appeals Opinion void and without legal effect and asks this Court to reconsider the issues already addressed extensively by the Tribal Court. Complaint at 6-8.

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<sup>8</sup> Attached as Exhibit 14 to Keller Aff.



## ARGUMENT

### A. The Tribal Court had both personal and subject matter jurisdiction to resolve the dispute.

#### 1. Standard of review.

When reviewing a tribal court's finding of tribal jurisdiction, a federal court reviews the tribal court's findings of fact for clear error and gives deference to the tribal court's determinations of tribal law. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9<sup>th</sup> Cir. 1990). Only those conclusions of federal law which are relevant to the tribal court's decision regarding tribal jurisdiction are reviewed *de novo*. *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 904 (9<sup>th</sup> Cir. 2002). Upon determining that tribal court jurisdiction exists, the federal court's review must end. *Id.*

#### 2. The Tribal Court had subject matter jurisdiction.

##### a. Tribal law.

The Tribal Court had authority under Tribal law to address the Tribe's petition to vacate the arbitration award. The Grand Ronde Tribal Court Ordinance provides that the Tribal Court has subject matter jurisdiction over

... all civil actions where there are sufficient contacts with the Grand Ronde Reservation upon which to base jurisdiction consistent with the Constitution and laws of the Tribe and the United States. It is the intent of this paragraph to authorize the broadest exercise of jurisdiction consistent with these limitations. Without limiting the foregoing, the Court shall have jurisdiction over the following matters: proceedings involving ... contracts to which the Tribe is a party; ...

Tribal Code § 310 (d)(1)(A), *see* Keller Aff., Ex. 2. The Tribe's action to vacate the arbitration award of attorney fees and costs fell squarely within this provision. The Tribe's petition asked the Tribal Court to vacate an award which arose out of an arbitration conducted pursuant to a

contract between the Tribe and SWM. The “contract” was the 1992 Investment Agreement. At issue in the action was whether the Tribe waived its immunity against an award of attorney fees and costs in the 1992 Agreement. Thus, the action involved a “contract[ ] to which the Tribe is a party” and the Tribal Court appropriately held that it had subject matter jurisdiction under Tribal law. *See First Specialty Ins. Corp.*, Case No. A-05-09-001 at 16, *citing* Tribal Code § 310(d)(1)(A).

b. Federal law.

Tribal Court jurisdiction was also consistent with federal law. The Supreme Court has yet to expressly define the limits of tribal jurisdiction over actions arising from a nonmember’s on-reservation activities. However, it is clear that “where tribes possess authority to regulate the activities of nonmembers, ‘[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.’” *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997), *citing Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). The Court has generally recognized the existence of tribal regulatory authority over non-Indians who engage in business relations with tribes on their reservations. *See, e.g., Merriion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 142 (1982) (recognizing tribal authority to impose tax on production of oil and gas leases by non-Indians on reservation land); and *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 153 (1980) (acknowledging tribe’s authority to tax non-Indians entering the reservation to engage in economic activity). SWM and Sizemore had significant on-reservation business relations with the Tribe. The Court of Appeals found that SWM and Sizemore regularly performed services under the 1992 Agreement on the Tribe’s reservation. *First Specialty Ins. Corp.*, Case No. A-05-09-001 at 18. Sizemore himself admitted that he and other SWM employees participated in hundreds of meetings with the Tribal Council in Grand

Ronde, during which he provided financial updates and discussed parameters for acquiring promissory notes. Concise Statement ¶ 11. Based on the authorities cited above, civil jurisdiction over disputes arising out of those activities presumptively lies in the Tribal Court.

There can be no doubt that the present dispute arose out of the on-reservation activities of SWM and Sizemore. Indeed, the arbitration was conducted as a result of the parties' 1992 Investment Agreement and the services provided by SWM and Sizemore in connection therewith. The Tribe's claims – i.e., breach of contract, securities violations, and fiduciary duty – were specifically tied to the investment services provided by SWM and Sizemore. The arbitration itself was the result of an arbitration provision in the 1992 Agreement. Concise Statement ¶ 12. The Tribal Court's determination of jurisdiction was therefore proper.

FSIC will likely argue, as it did in the Tribal Court proceedings, that the Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981) governs the issue of tribal court jurisdiction over nonmembers. *Montana* sets forth a general rule that tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions. *Strate*, 520 U.S. at 446. However, *Montana* dealt with the narrow issue of a tribe's regulatory authority over hunting and fishing by non-Indians on *non-Indian fee land* within a reservation. *Montana*, 450 U.S. at 544. It left open the question of a tribe's regulatory authority over nonmembers on tribal land. *Id.* at 557. As explained above, this action arose out of a nonmember's *on-reservation* activities. *Montana* does not apply.<sup>9</sup>

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<sup>9</sup> The Supreme Court has not expressly applied *Montana* to the on-reservation activities of nonmembers generally. In *Nevada v. Hicks*, 533 U.S. 353 (2001), a majority of the Supreme Court justices opined that *Montana* applies whenever a party to a claim is a nonmember, but the holding in that case was limited to tribal court jurisdiction over state officers enforcing state law and the Court expressly left open the question of tribal court jurisdiction over nonmembers in general. *Hicks*, 533 U.S. at 358 n.2.

If, however, *Montana* was applicable, Tribal Court jurisdiction would still exist. This case falls squarely within both exceptions to *Montana*'s general proposition limiting tribal court jurisdiction over nonmembers. The exceptions provide that: (1) a tribe may exercise jurisdiction over the activities of nonmembers who enter consensual relationships with the tribe or its members; and (2) a tribe may exercise civil jurisdiction over nonmember conduct that threatens or directly affects the tribe's political integrity, economic security, health or welfare. *Montana*, 450 U.S. at 564-567.

*Montana*'s first exception "covers 'activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" *Strate*, 520 U.S. at 456-457, citing *Montana*, 450 U.S. at 565. The "consensual relationship" for purposes of Tribal Court jurisdiction was the parties' 1992 Agreement. The 1992 Agreement – a contract – is clearly among the illustrative examples listed in the exception.<sup>10</sup> Exercising jurisdiction over SWM and Sizemore in a matter arising from that contract was therefore appropriate. As the Court of Appeals explained, "SWM and Patrick Sizemore voluntarily entered into a contract with the [Tribe] and the Tribe is exercising civil jurisdiction over them in relation to that very contract." *First Specialty Ins. Corp.*, Case No. A-05-09-001 at 19 n.6.

Although it is not necessary to meet both *Montana* exceptions, Tribal Court jurisdiction existed under *Montana*'s second exception as well. The second exception applies when a nonmember's conduct threatens or has some direct effect on, among other things, the political integrity of a tribe. This litigation is about enforcement of an arbitration award against the Tribe that the Tribe contends violates its sovereign immunity. It involves a threat to the Tribe's self-

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<sup>10</sup> The list of "consensual relationships" is not exclusive. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1137 n.4 (9<sup>th</sup> Cir. 2006).

governance and political integrity – here, the Tribe’s inherent right to define the terms under which it will waive immunity and to decide when a waiver of immunity has been given. Issues of sovereign immunity affect the Tribe’s political integrity. *See, e.g., Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng’g.*, 476 U.S. 877, 890 (1986) (“The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance.”). Indeed, “[f]ew aspects of the Tribe’s political integrity and economic security are more important than its sovereign immunity from suit.” *Strategic Wealth Mgmt.*, Case No. C-04-08-003 at 17. The potential infringement of a Tribe’s sovereign immunity falls within *Montana*’s second exception.

3. The Tribal Court had personal jurisdiction over SWM and Sizemore.

Tribal law provides for jurisdiction over persons and entities “who [have] sufficient contacts with the Grand Ronde Reservation upon which to base jurisdiction consistent with the Constitution and laws of the Tribe and the United States.” Tribal Code § 310(d)(1)(B), *see* Keller Aff., Ex. 2. Federal constitutional law, in turn, requires a defendant to have “minimum” contacts with the forum state so that the exercise of jurisdiction with the forum state – in this case the Grand Ronde Reservation – does not “offend traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Thus, the test under federal law and Tribal law is the same.

SWM and Sizemore had sufficient “minimum contacts” with the Tribe’s Reservation to permit the Tribal Court’s exercise of jurisdiction over them. Pursuant to the 1992 Agreement, Sizemore and SWM performed services which caused them to have frequent and repeated contacts with the Tribe on the Grand Ronde Reservation. As the Court of Appeals found:

SWM and Patrick Sizemore engaged in more than nine years of financial advising and business dealings with the Grand Ronde Tribe . . . under the 1992 Agreement

they signed with the Tribe. SWM and Patrick Sizemore visited the Reservation many times to conduct trainings and to confer with tribal officials and employees. . . . There can be no question that we possess personal jurisdiction over SWM and Patrick Sizemore under tribal and federal law based on their voluntary and numerous contacts with the Grand Ronde Tribe and Reservation over this extensive period of time.

*First Specialty Ins. Corp.*, Case No. A-05-09-001 at 16-17.

Given their numerous contacts with the Tribe and the Grand Ronde Reservation, the Tribal Court's exercise of jurisdiction over them was consistent with "traditional notions of fair play and substantial justice." Therefore, the Tribal Court's determination of personal jurisdiction was appropriate.

**B. Establishment of Tribal Court's jurisdiction precludes review of FSIC's remaining claims.**

1. Tribal Court decision should be recognized and enforced under principals of comity.

Only tribal court jurisdictional determinations are subject to de novo review. Under principals of comity, once Tribal Court jurisdiction is established, "proper deference to the tribal court system precludes relitigation of issues raised by [plaintiff] and resolved in the Tribal Courts." *Iowa Mutual*, 480 U.S. at 19. Deference to tribal court decisions is founded in strong federal policy supporting the recognition and enforcement of tribal court judgments in federal court. As the Supreme Court explained, "tribal courts play a vital role in tribal self-government, and the federal government has consistently encouraged their development." *Id* at 9.

The federal rule for recognition and enforcement of tribal court decisions was clearly laid out by the Ninth Circuit in *AT&T Corp.* The Ninth Circuit held that "federal courts may not readjudicate questions – whether of federal, state or tribal law – already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason." *AT&T Corp.*, 295 F.3d at 904, *citing Iowa Mutual*, 480 U.S. at 19.

Other circuits agree with this rule. For example, the First Circuit found that “as long as the tribal court has properly defined its own jurisdiction, respect for the tribal court system will bar the relitigation of merits-related issues that were presented to and decided by that court.” *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 35 (1<sup>st</sup> Cir. 2000), citing *Iowa Mutual*, 480 U.S. at 19, and David H. Getches, et al., *Federal Indian Law* 528 (4<sup>th</sup> ed. 1998) (“The federal court should not be tempted beyond the jurisdictional question, even by a tribal court’s decision on the merits that it finds questionable.”). The Tenth Circuit has also held that “unless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason, it must enforce the tribal court judgment without reconsidering issues decided by the tribal court.” *Burrel v. Armijo*, 456 F.3d 1159 (10<sup>th</sup> Cir. 2006), citing *AT&T Corp.*, 295 F.3d at 905. As shown above, the Tribal Court had personal and subject matter jurisdiction over SWM and Sizemore to whom FSIC is a successor in interest.

Federal courts have, on limited occasion, found a basis to deny tribal court comity because a defendant was not afforded due process. *AT&T Corp.*, 295 F.3d at 904; see also *Wilson v. Marchington*, 127 F.3d 805, 810 (9<sup>th</sup> Cir. 1997). FSIC has not asserted, either before the Tribal Court or in its Complaint, that due process was denied by the Tribal Court. Were such a claim made, it would be completely without merit. The Tribe has a comprehensive Tribal court structure. The Tribe’s Constitution authorizes establishment of the Tribal Court. Concise Statement ¶ 3. The Tribal Court is made up of both a Trial Court and Court of Appeals as established by Tribal law. Concise Statement ¶ 4. Proceedings in Tribal Court are conducted pursuant to the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure, with certain specified exceptions. Concise Statement ¶ 5. Tribal law sets forth requirements for judges holding Tribal Court judicial positions. Specifically, Tribal law requires the Chief Judge

and Court of Appeals Judges to have a JD or LLB degree from an ABA accredited law school; be a member of the Oregon State Bar; have a minimum of ten years experience practicing law; and have demonstrable knowledge of Indian, federal and Oregon law. Concise Statement ¶ 6. The Tribal Court structure is one in which individuals with knowledge of state and federal court systems would be familiar.

SWM and Sizemore, and ultimately FSIC as their successor in interest, were afforded numerous opportunities to appear and be heard on their arguments before the Tribal Court. The Tribe petitioned the Trial Court for an order vacating the portion of the Final Award awarding attorney fees and costs to SWM and Sizemore. Concise Statement ¶ 14. SWM and Sizemore moved to dismiss the Tribe's petition for lack of subject-matter jurisdiction and lack of personal jurisdiction over them. Concise Statement ¶ 15. Following oral argument and briefing by the parties, the Trial Court issued an Order Denying Motion to Dismiss, which included findings of fact, conclusions of law and citations to legal authority. Concise Statement ¶ 16. The Trial Court held a hearing on the merits of the Tribe's petition to vacate and again addressed the issue of personal and subject matter jurisdiction in its Order Vacating Arbitration Award of Fees and Costs. Concise Statement ¶ 17. The Trial Court concluded that "taking jurisdiction over [SWM and Sizemore] is fully consistent with the provisions of the Tribal Court Ordinance." Concise Statement ¶ 18. The Trial Court also concluded that SWM and Sizemore had "significant and long term consensual relationships with the Tribe 'of the qualifying kind' to support Tribal Court jurisdiction" under federal law. Concise Statement ¶ 19.

SWM and Sizemore appealed the Trial Court's Order Vacating Arbitration Award of Attorney Fees and Costs to the Court of Appeals, and FSIC was substituted for SWM and Sizemore in the proceedings before the Court of Appeals. Concise Statement ¶¶ 20-21. After



briefing and oral argument, the Court of Appeals issued an Opinion, with findings of fact and conclusions of law, affirming the order of the Trial Court with respect to SWM and Sizemore, and thus to FSIC as their successor in interest. Concise Statement ¶ 22. There is no question that due process was provided.

Because the Tribal Court properly had jurisdiction and FSIC was afforded due process, the Tribal Court's decision must be given deference and the merits of the Tribal Court decision may not be relitigated here simply because FSIC is dissatisfied with the decision. There is no reason to deny the Tribal Court decision comity.

2. FSIC's claims are barred by res judicata.

In addition to comity, FSIC's claims are barred under the principles of res judicata. Res judicata precludes relitigation of claims where there is: "(1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties." *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9<sup>th</sup> Cir. 2002).

It is undisputed that the claims and parties in the Tribal Court and this action are the same and the Tribal Court's decision is a final judgment on the merits. Relitigation of the underlying merits of the Tribal Court decision is thus barred by res judicata. As the court in *Smith v. Salish Kootenai College*, 2003 WL 24868920 (D. Mont. 2003) stated, "[I]f tribal court jurisdiction exists then the tribal court's decision on the merits of the claims has *res judicata* effect in any subsequent proceeding."

3. There is no subject matter or supplemental jurisdiction for this Court to hear underlying merits of the Tribal Court decision.

This Court must have an independent basis for jurisdiction over the underlying claims of FSIC. The only federal question before this Court is whether the Tribal Court had jurisdiction.

Once that question is resolved, this Court is without jurisdiction to determine the merits of underlying claims.

Aside from the issue of tribal jurisdiction, FSIC's claims do not raise a federal question. The underlying action is a contract dispute. Contract disputes do not involve federal questions and the mere presence of a tribal sovereign immunity defense does not, by itself, convert the suit into one arising under federal law. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989).

In addition, there is no diversity jurisdiction because an Indian tribe is not a citizen of any state. *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8<sup>th</sup> Cir. 1974); *Gaines v. Ski Apache*, 8 F.3d 726, 730 (10<sup>th</sup> Cir. 1993). See also, *Ninigret Development Corp.*, 207 F.3d at 27.

A federal court may have supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). However, the court may decline to exercise supplemental jurisdiction when: the claim presents a novel or complex issue of state law; the claim substantially predominates over the original claim within the federal court's jurisdiction; the claims within the district court's original jurisdiction have been dismissed; or other compelling reasons. 28 U.S.C. § 1367(c).

Supplemental jurisdiction does not exist in this case because the underlying claims are contractual in nature and not "so related" to the original federal question (tribal court jurisdiction) as to form part of the same case or controversy. In this case, there is no common nucleus of operative fact to justify trying the claims together in one proceeding. Because the issue of Tribal Court jurisdiction may be resolved independently of the merits of the case,

supplemental jurisdiction over FSIC's claims on the merits is inappropriate. Even if supplemental jurisdiction did apply, the Court should decline to exercise it because the original claim within this Court's jurisdiction – whether the Tribal Court properly had jurisdiction – is resolved in favor of Tribal Court jurisdiction and should be dismissed.

Therefore, the underlying claims may not be considered by this Court due to the lack of subject matter and supplemental jurisdiction.

**C. FSIC is not entitled to injunctive relief and claims for attorney fees and costs incurred in the Tribal Court, Tribal Court of Appeals or these proceedings are barred by sovereign immunity.**

FSIC asks this Court for an injunction prohibiting the Tribe from enforcing the decision of the Tribal Court of Appeals dated October 31, 2006, and the Order Vacating Arbitration Award of Fees and Costs of the Tribal Court dated August 5, 2005. As shown above, the Tribal Court had jurisdiction to hear the matter before it and, as a result, its decision is binding. There is simply no basis for the requested injunction.

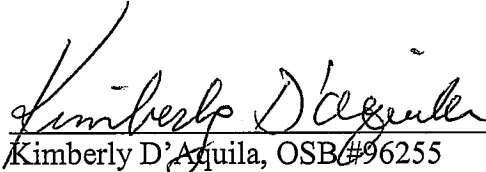
FSIC also asks this Court for an award of attorney fees and costs it has incurred in the Tribal Court, Tribal Court of Appeals and in this Court. However, FSIC has stated no basis upon which such fees and costs may be awarded.

The Tribe's sovereign immunity bars FSIC's request for injunctive relief and attorney fees and costs unless the Tribe or Congress has waived the Tribe's immunity. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Claims for attorney fees cannot be sustained against a tribe unless the tribe has expressly waived its immunity to such claims. *See O'Brien v. Moore*, 395 F.3d 499, 503 (4<sup>th</sup> Cir. 2005). No such waiver exists and FSIC's requests should be denied.

## CONCLUSION

For each of the above reasons, the Tribe respectfully requests this Court grant summary judgment in its favor and give recognition to the Tribal Court decision under principles of comity and res judicata.

Respectfully submitted this 2<sup>nd</sup> day of April, 2007.



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