UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

FARMERS UNION OIL COMPANY, Plaintiff, vs. STELLA GUGGOLZ, WILLIAM P. ZUGER, Tribal Court Judge of the Standing Rock Sioux Tribal Court of the Standing Rock Indian Reservation; and THE STANDING ROCK SIOUX TRIBAL COURT, Defendants.	CIV. 07-1004 MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

In this case, Farmer's Union Oil Company (hereafter "Company") seeks review of the Tribal Court's decision on subject matter jurisdiction without exhausting its remedies in the Standing Rock Sioux Tribal Court. This is paradoxical because for years the Company has regularly appeared in the Standing Rock Sioux Tribal Courts as a plaintiff to obtain judgments against Standing Rock Sioux Tribal members and other reservation resident members of federally recognized Indian tribes who have engaged in commercial dealings with the Company but failed to timely pay their accounts. See Exhibit C, Certified Orders of the Standing Rock Sioux Tribal Court, attached hereto and incorporated herein by reference as if fully set forth below. Through its commercial dealings, the Company has regularly engaged in commerce with Tribal members and other reservation residents who are members of federally recognized Indian tribes.

STANDARD OF REVIEW

When a party moves to dismiss pursuant to Rule 12(b)(1) in addition to other grounds, such as Rule 12(b)(6), "the court should consider the Rule 12(b)(1) challenge first since if

it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined." *Rhulen Agency, Inc. v. Alabama Ins. Guaranty Ass'n,* 896 F.2d 674, 678 (2d Cir.1990). A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the court lacks the statutory or constitutional power to adjudicate the case. In contrast, a dismissal under Rule 12(b)(6) is a dismissal on the merits of the action-a determination that the facts alleged in the complaint fail to state a claim upon which relief can be granted. *Nowak v. Ironworkers Local 6 Pension Fund,* 81 F.3d 1182, 1187-88 (2d Cir.1996).

In deciding a motion to dismiss under 12(b)(1) and 12(b)(6), the issue is not whether a Plaintiff will ultimately prevail, but whether the Plaintiff is entitled to offer evidence to support the claims. *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1973). A court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Sheppard v. Beerman,* 18 F.3d 147, 150 (2d Cir.1994) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)); *see also Kaluczky v. City of White Plains,* 57 F.3d 202, 206 (2d Cir.1995). However, **conclusory allegations that merely state the general legal conclusions necessary to prevail on the merits and are unsupported by factual averments will not be accepted as true**. *See, e.g., Albert v. Carovano,* 851 F.2d 561, 572 (2d Cir.1988); *Clapp v. Greene,* 743 F.Supp. 273, 276 (S.D.N.Y.1990) emphasis added.

ARGUMENT I.

THE COURT LACKS JURISDICTION OVER THE TRIBAL COURT AND THE PERSON OF TRIBAL COURT JUDGE WILLIAM ZUGER BECAUSE HE IS CLOAKED IN QUALIFIED IMMUNITY, I.E., AT ALL RELEVANT TIMES HE WAS ACTING WITHIN HIS OFFICIAL CAPACITY AND WITHIN THE SCOPE OF HIS OFFICIAL DUTIES.

Federally recognized Indian Tribes are immune from suit unless Congress or the Tribe has specifically waived that immunity. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 1702, 140 L.Ed.2d 981 (1998); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). Here, there is neither Tribal consent or Congressional waiver alleged by the plaintiff.

The-federal courts have long recognized the individual immunity defenses of tribal officials in state and federal courts. See e.g. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985) (Ninth Circuit affirming dismissal of individually named tribal members in Title VII and § 1983 action, holding that "tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority"), *Miller v. Coyhis*, 877 F. Supp. 1262 (E.D. Wis. 1995), *Suarez v. Newquist*, 855 P.2d 1200, 1203 (Wash. App. 1993), *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), *Cameron v. Bay Mills Indian Community*, 843 F. Supp. 334, 336 (W.D. Mich. 1994). On this topic, see generally, Timothy W. Joranko, Tribal Self-Determination Unfettered: Toward a Rule of Absolute Tribal Official Immunity from Damages in Federal Court, 26 Ariz. St. L. J. 987, 1009-1017 (1994).

By failing to allege that Judge Zuger acted outside his representative capacity and by failing to allege specific facts that demonstrate that Judge Zuger acted beyond the scope

of his official authority, plaintiff demonstrates that the Court lacks subject matter jurisdiction over this cause of action.

In *Vencel v. Bug-O-Nay-Ge-Shig, et al.*, 262 F.Supp.2d 1001, 1003-1004 (D. MN 2003), the Court opined:

> It is axiomatic that federal courts lack plenary jurisdiction. *See Godfrey v. Pulitzer Publ'g Co.*, 161 F.3d 1137, 1141 (8th Cir.1998). "The inferior federal courts may only exercise jurisdiction where Congress sees fit to allow it." *See Southwestern Bell*, 225 F.3d at 945. The burden of establishing jurisdiction rests with the party asserting jurisdiction. *See Kokkonen v. Guardian Life Ins. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). No presumptive truthfulness attaches to the plaintiff's allegations, and a district court can evaluate for itself the jurisdictional claim. *See Trimble v. Asarco, Inc.*, 232 F.3d 946, 959 (8th Cir.2000).

Similarly, here the Court should stay its hand because plaintiff has failed to establish that the Court has subject matter jurisdiction over the case at bar. The *Vencel* Court found in the record that because the Bug O Nay Ge Shig School was operated by the Band under direction of the Bug O Nay Ge Shig School Board, the School was not operated by or under direction of the BIA. Therefore, the *Vencel* Court reasoned, federal law precludes the exercise of subject matter jurisdiction by this Court in this matter, because such an exercise of jurisdiction would infringe on tribal sovereignty. *Vencel, supra*, 262 F.Supp.2d at 1004, *citing Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). The *Vencel* Court's rationale was:

> the case arises out of events occurring entirely in Indian Country, and Congress has not expressly limited the jurisdiction of the Tribal Court. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987). Thus, jurisdiction over the matter presumptively lies in the Tribal Court. *See id.* at 18, 107 S.Ct. 971.

Similarly, in the case at bar the Court should dismiss this action because jurisdiction over a cause of action alleged to have occurred within the reservation presumptively lies in the

Tribal Court because all events alleged by defendant Guggolz in her complaint against the plaintiff, pending in Tribal Court, occurred in Indian Country and because Congress has not expressly limited the civil jurisdiction of the Standing Rock Sioux Tribal Court, the Tribal Court has presumptive jurisdiction and this Court should stay its hand. Therefore, this Court should dismiss this action or in the alternative, stay the action pending exhaustion of Tribal remedies.

Argument: II.

THE FACTS SET FORTH IN THE PLEADINGS ESTABLISH AN OFFICIAL IMMUNITY DEFENSE. HENCE, THE PLAINTIFF HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

C.J.S. Federal Civil Procedure § 792, XI (B)(2)(e) entitled Dismissal, Grounds for Dismissal, Affirmative Defenses, provides in relevant part that"when an official immunity defense is established by facts stated in the claim, the defense can be determined at the pleading stage on a motion to dismiss for failure to state a claim." Here, the pleadings provide at ¶ 7 that"The Honorable William Zuger ('Judge Zuger') is the Associate Tribal Judge presiding over the civil matter." The plaintiff avers in ¶ 19 of the pleadings that"The Standing Rock Sioux Tribe and Judge Zuger lack any authority or jurisdiction to hear or decide the civil case filed against the plaintiff, a non-Indian, and further proceedings in the Standing Rock Sioux Tribal Court would be contrary to law."

Federally recognized **Indian Tribes** are immune from suit unless Congress or the **Tribe** has specifically waived that immunity. *See Kiowa **Tribe** of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 754, 118 S.Ct. 1700, 1702, 140 L.Ed.2d 981 (1998); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978).

Though plaintiff alleges that Judge Zuger lacks authority and jurisdiction, plaintiff has failed to allege that Judge Zuger acted outside his representative capacity.[1] Thus, according to the plaintiffs pleadings, the Judge is entitled to the same immunity as the Standing Rock Sioux Tribal Court, a political subdivision of the Standing Rock Sioux Tribe which cannot be joined as a party to this action because the Tribe has not unequivocally expressed its waiver to suit in the federal Court and Congress has not abrogated the Tribe's sovereign immunity. See discussion of Fed. R. Civ. P. 19(a)(2)(i), *infra*.

Because the plaintiff has failed to allege that Judge Zuger acted outside his representative capacity, the plaintiff has failed to state a claim upon which relief can be granted and this Court should dismiss this action or, in the alternative, stay the action pending exhaustion of Tribal remedies.

Argument:

III.

THE COURT CANNOT GRANT RELIEF IN THIS ACTION BECAUSE THE TRIBE AND THE TRIBAL COURTS ARE INDISPENSABLE PARTIES WHICH CANNOT BE JOINED IN THE ABSENCE OF THEIR CONSENT.

"Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories. As an aspect of this sovereign immunity, suits against tribes are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress." *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1304 (10th Cir.2001), (quoting *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir.1997)). Therefore, this suit against the Tribal Court, a political subdivision of the Standing Rock Sioux Tribe, is barred because the Tribe has not unequivocally expressed

[1] To avoid the general bar against federal citizen suits naming states as defendants, the Supreme Court developed a doctrine to permit suit against state officials when the officials allegedly act in violation of federal law. This branch of decision is well-known as the *Ex Parte Young* doctrine, after the decision in *Ex Parte Young*, 209 U.S. 123 (1908).

its waiver to suit in the federal Court and Congress has not abrogated the Tribe's sovereign immunity.

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978) (citing, *inter alia, Puyallup Tribe, Inc. v. Department of Game of Washington,* 433 U.S. 165, 172-73, 97 S.Ct. 2616, 2621, 53 L.Ed.2d 667 (1977)). This immunity from suit derives from the position of the Indian tribes as once-independent nations with "inherent powers of a limited sovereignty which has never been extinguished." See *United States v. Wheeler*, 435 U.S. 313, 322, 98 S.Ct. 1079, 1085, 55 L.Ed.2d 303 (1978) (quoting F. Cohen, Handbook of Federal Indian Law 122 (1948)).

"Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government," *Santa Clara Pueblo*, 436 U.S. at 55, 98 S.Ct. at 1675, although Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which tribes otherwise possess. Id. The Supreme Court has repeatedly recognized that tribal courts have inherent power to exercise civil jurisdiction over non-Indians in disputes affecting the interests of Indians which are based upon events occurring on a reservation. See, e.g., *Montana v. United States*, 450 U.S. 544, 566, 101 S.Ct. 1245, 1258, 67 L.Ed.2d 493 (1981) (citations omitted).

Pursuant to Rule 19, the Standing Rock Sioux Tribe is an indispensable party to this litigation, which cannot be joined as a party in the absence of its consent. Thus, in an unpublished decision of the U.S. Eighth Circuit court of Appeals, *U.S. ex rel Hall, v. Allied Gaming, et al.*, 27 F.3d 572 (8th Cir. 1994) the Court held that

> The tribes cannot be joined involuntarily because they are entitled to sovereign immunity, and there is no indication that the immunity would be waived. We agree with the District Court that the tribes are necessary parties within the meaning of Fed. R. Civ. P. 19(a)(2)(i). They are parties to the challenged contracts, and their interest in the validity of the contracts would be directly affected by a judgment declaring the contracts void and unlawful, which is the relief sought by the plaintiffs. Under Fed. R. Civ. P. 19(b), the question then becomes "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." For the reasons given in the able opinion of the District Court, we agree with that Court that the Indian tribes are indispensable in the sense that word is used in Rule 19. It is simply inconceivable to us that a suit claiming that a contract is invalid should be allowed to proceed in the absence of all parties to the contract.
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> This ground-failure to join indispensable parties is adequate to dispose of the entire case, and we affirm on that basis. It is thus not necessary for us to reach the issues of standing and of the merits that the parties have briefed. The judgment is affirmed, substantially for the reasons given in that portion of the District Court's opinion that deals with Rule 19. See 8th Cir. R. 47(B).

Similarly, in the case at bar, Rule 19[2] is clearly applicable. 19(b) provides:

> If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.
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> Clearly, under Rule 19, because the SRST is an indispensable party–hiring of a Contracting Officer is and should remain exclusively under Tribal control. Application of the factors cited above make patent why the Court should dismiss this action without prejudice: the tribal Court should and must be allowed to determine the scope of its subject matter jurisdiction in the first instance. In

[2] The relevant part of Rule 19 cited by the 8th Circuit provides: "[a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

> addition, a judgment rendered in the absence of the Tribe will be inadequate as parties not within the Court's personal and subject matter jurisdiction will proceed to perform their lawful duties under Tribal law.
> It defies logic to allow an unhappy Company facing potential liability to erase its lengthy history of commercial dealings and participation in the Tribal Court by challenging the Court's subject matter jurisdiction without exhausting its Tribal remedies first. Non-Indian Entities Engaging in Commercial Dealings With the Tribe and Its Members Within the Reservation Have a Consensual Relationship With the Tribe and Its Members. Therefore, Those Entities Are Subject to Tribal Jurisdiction.

"Tribal sovereignty over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut. Ins. Co. v. LaPlante*, 1987, 107 S.Ct. 971, 977, 480 U.S. 9, 18, 94 L.Ed.2d 10. The general rule concerning tribal authority is that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. *Smith v. Salish Kootenai College,* 434 F.3d 1127, 1131 (9th Cir.2006) (quoting *Montana v. United States,* 450 U.S. 544, 565 (1981)).

There are two major exceptions to this general rule. As explained by the Supreme Court in *Montana*, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands:

> (1) [a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements; and (2) [a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct 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 565-66, cited in *Weeks v. Oglala Sioux Housing Authority*, 797 F.2d 668, 670-671.

This case falls squarely within both parts of the *Montana* test. First, the power to exercise tribal civil authority over non-Indians derives from the tribe's inherent powers necessary to self-government and territorial management. *Salish,* 434 F.3d at 1139

(quoting *Babbitt Ford, Inc. v. Navajo Indian Tribe,* 710 F.2d 587, 592 (9th Cir.1983)). Hence, Tribal civil jurisdiction over non-Indians who enter into consensual relations with the Tribe and its members is a direct consequence of their calculated decision to engage in commerce with the Indians. *Id.*

Everyone who engages in commercial dealings or "commerce with Indians" by operating businesses which offer goods or services to reservation resident Tribal members and other members of federally recognized Indian tribes within the Standing Rock Indian Reservation are subject to the jurisdiction of the Tribal Court. This is because their activities have a direct effect on the political integrity, economic security and health and welfare of the Tribe and its members. *Montana, supra* at pp. 565-66. The purpose of the exercise of this jurisdiction is to ensure that there is a civil forum for the adjudication of all disputes arising out of the said commercial dealings.

The Company now takes the position that the Standing Rock Tribal Court lacks subject matter jurisdiction to hear an action against it which arose within the reservation boundaries. For years, the Company has repeatedly sought and obtained relief in the form of civil judgments against reservation resident Tribal members and other members of federally recognized Indian tribes from the Tribal Court. Now, when the Company's insurance company is potentially liable for a claim filed against the Company, the argument is made before this Court that the Tribal Court lacks subject matter jurisdiction over the claim of a reservation resident Tribal member which is alleged to have arisen in Indian Country on the Standing Rock Indian Reservation. Treaty between United States and the Great Sioux Nation, April 29, 1868, 15 Stat. 635, II Kappler Indian Affairs, Laws and Treaties p. 998 (2d ed.); Act Feb. 28, 1877, 19 Stat. 254; Act March 2, 1889, 25 Stat.

888; Act Feb. 14, 1913, § 10, 37 Stat. 675, 678; 18 U.S.C. § 1151(defining "Indian Country[3]").

The City of McLaughlin, Corson County, South Dakota is within the exterior reservation boundaries of the Standing Rock Indian Reservation by the South Dakota Supreme Court. ***State v. Molash***, 86 SD 558 (SD 1972). In ***Molash***, *supra, at* 560-561, the South Dakota Supreme Court noted that its analysis "require[d] a brief review of the history of the Standing Rock Reservation." The ***Molash*** Court, *supra,* 86 SD at 560, wrote:

> By the Treaty between United States and the Great Sioux Nation, April 29, 1868, 15 Stat. 635, II Kappler, Indian Affairs, Laws and Treaties (2d ed.), p. 998, the land west of the Missouri River in South Dakota and a small part of North Dakota was set aside as the Great Sioux Reservation for the Sioux Nation. In 1877 the United States acquired a portion thereof and established the acquired land as a part of the public domain. Act of February 28, 1877, Ch. 72, 19 Stat. 254. Six reservations were then created from the remaining Great Sioux Nation, one of which was the Standing Rock Reservation wherein the alleged offense in this action occurred. Act of March 2, 1889, § 3, 25 Stat. 888. During the years 1904 through 1913 Congress enacted a series of statutes relating to the tribal lands in five of the six reservations. The Act of February 14, 1913, Ch. 54, 37 Stat. 675 (Act of 1913), dealt with that part of the reservation embracing McLaughlin, South Dakota, the situs of the alleged offense in this case.
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> Congress in the Act of 1913 in summary provided: (1) For allotments to each Indian who had not been previously allotted, (2) For withholding lands for agency Indian schools and various religious institutions, (3) For the grant of sections 16

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[3] 18 U.S.C. § 1151. Indian country defined:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) ***all land within the limits of any Indian reservation under the jurisdiction of the United States Government***, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

CREDIT(S) (June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, § 25, 63 Stat. 94.) Emphasis added.

> and 36 in each township to the state for school purposes or providing lieu lands in the event these sections had been previously allotted, and (4) For the remaining 'surplus' lands to be sold under the Homestead and Townsite laws for not less than the price fixed in the Act.
>
> The Act further provided the sale price was to be held in trust by the United States and the proceeds credited to the trust account of the tribe. Section 10 of the Act spelled out that the United States was not bound to purchase any land or to find purchasers therefor (except school lands heretofore referred to), and also stated: 'Provided, That nothing in this Act shall be construed to deprive the said Indians of the Standing Rock Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act.'

The ***Molash*** Court properly recognized: "[o]nce Congress has established a reservation it remains so until separated therefrom by Congress." 86 SD at 561, citing ***United States v. Celestine***, 215 U.S. 278 (1909). As the South Dakota Supreme Court has interpreted federal law, from March 2, 1889 to date, the boundaries of the Standing Rock Sioux Reservation are intact.

This is precisely the type of case the Supreme Court had in mind when it decided the *Montana* case. *Montana,* 450 U.S. at 565-66. Here, the Tribe seeks to regulate, through the Tribal Court, the activities of the Company which is comprised of non-Indians who have entered into consensual relationships with the tribe and its members through commercial dealing[4], etc. In addition, it is clear that the Tribe also retains the inherent power to exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Here, the allegation is that a Tribal member was injured when attempting to enter the Company's place of

[4] The fifth edition of Black's Law Dictionary, at p. 244, defines "Commerce with Indian tribes" as meaning: "Commerce with individuals belonging to such tribes, in the nature of buying, selling, and exchanging commodities, without reference to the locality where carried on, though it be within the limits of a state. *U.S. v. Holliday*, 3 Wall. 407, 18 L.Ed. 182.

business. The exercise of Tribal jurisdiction here is no more than is necessary to protect the economic security, health and welfare interests of the Tribe and its members. Therefore, the Court should dismiss this action without prejudice or, in the alternative, stay this matter pending the exhaustion of Tribal remedies as required by federal law. When a court finds that tribal exhaustion is required, the court can stay or dismiss the action. *Spirit Mountain Gaming v. Sharber,* 343 F.3d 974, 976 (9th Cir. 2003). In *Sharber,* the Ninth Circuit Court of Appeals affirmed the district court's conclusion that the tribal exhaustion requirement also applies to issues of tribal sovereign immunity. Determining whether the tribe has waived immunity, or whether Congress has abrogated its immunity, requires "a careful study of the application of tribal laws, and tribal court decisions." *Stock West Corp. v. Taylor,* 964 F.2d 912, 920 (9th Cir.1992); *see also Nat'l Farmers,* 471 U.S. at 855-56, 105 S.Ct. 2447. Hence, the district court properly "stayed its hand until after the ... Tribal Courts have the opportunity to resolve the question." *Stock West Corp.,* 964 F.2d at 920. *Sharber,* 343 F.3d at 976. If dismissal may result in the running of the applicable statute of limitations, the court should stay the action instead of dismissing it. To ensure that the Company does not encounter any problems with the statute of limitations, the Court may stay the action instead of dismissing it. *Id.* Consequently, the Court should dismiss this action without prejudice, or, in the alternative, stay the action pending exhaustion of Tribal remedies and grant the defendants such other and further relief as the Court may find just and proper in the circumstances.

Dated: Standing Rock Indian Reservation, this 9th day of April, 2007.

By: Steven C. Emery

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF MOTION was mailed, via first class mail, postage prepaid to:

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