

1 **James H. Jordan, Jr.**

Honorable Edward F. Shea

2 Washington State Bar No. 15796  
3 Miller Nash LLP  
4 4400 Two Union Square  
5 601 Union Street  
6 Seattle, Washington 98101-2352  
7 Telephone: (206) 622-8484  
8 Fax: (206) 777-7209  
9 james.jordan@millernash.com

6 Attorneys for Plaintiff  
7 Kalispel Tribe of Indians

8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF WASHINGTON  
AT SPOKANE

10 THE KALISPEL TRIBE OF  
11 INDIANS, a Native American tribe,

12 Plaintiff,

13 v.

14 SPOKANE RACEWAY PARK,  
15 INC., a Washington corporation;  
16 WASHINGTON MOTORSPORTS  
17 L.P., a Washington limited  
18 partnership; ORVILLE MOE and the  
marital community of ORVILLE and  
JANE DOE MOE,

Defendants.

Case No. CV-03-0423-EFS

PLAINTIFF KALISPEL TRIBE OF  
INDIANS' MOTION AND  
MEMORANDUM SUPPORTING  
MOTION FOR SUMMARY  
JUDGMENT AGAINST  
DEFENDANTS MOE

Hearing Date:  
January 22, 2008

19 **I. RELIEF REQUESTED**

20 Plaintiff The Kalispel Tribe of Indians ("the Tribe") seeks an order of  
21 summary judgment, ruling that all of defendant Orville Moe's Rule 13(b)  
22 permissive counterclaims are barred by the doctrine of tribal sovereign immunity.  
23 In the alternative, Mr. Moe has stated certain claims upon which relief cannot be  
24 granted and the other claims are untimely.

No relevant facts are in dispute and the statutes and the numerous cases supporting the Motion are clear. Therefore, the Court can rule as a matter of law under Fed. R. Civ. P. 56.

## **II. INTRODUCTORY CONTEXT FOR THE MOTION<sup>1</sup>**

### **A. The Joint Venture Between the Tribe and SRP.**

The Tribe entered into a written joint venture agreement (the “JVA”) with defendant Spokane Raceway Park, Inc. (“SRP”) on September 19, 1994. Under the JVA, the Tribe and SRP were to work together to develop certain real property in Airway Heights (the “Joint Venture”).

Contemporaneously with the JVA, SRP (as general managing partner of Washington Motorsports Limited Partnership (“WML”)) gift deeded 40 acres of real estate (“Property”) to the United States in trust for the Tribe. (Attachment A at Exhibit 1.) In 1996, the Bureau of Indian Affairs proclaimed the entire 40-acre Property to be part of the Kalispel Indian Reservation and now holds it in trust for the Tribe. SRP and/or WML own other property immediately to the north and west of the Property, on which they operate the SRP auto racing complex.

Under the JVA, a 20-acre portion of the Property’s 40 acres was to be developed by the Joint Venture (the Tribe and SRP) as a “Business Enterprise Zone.” The remaining 20 acres (the “Tribal Zone”) were to be used solely by the

---

<sup>1</sup> The facts in this Introductory section are for background purposes only and have been taken from the previous motions filed herein and their supporting declarations and exhibits. An LR 56.1(a) Statement of the undisputed facts germane to this Motion is filed herewith, with Attachments A (with Exhibits 1 through 3) and B (with Exhibit 4).

1 Tribe. (Attachment A at Exhibit 2.) Eventually, the Tribe opened the Northern  
2 Quest Casino on a portion of the Property.

3 **B. The Deterioration of the Joint Venture Relationship.**

4 In late October 2003, SRP's Orville Moe began threatening to damage  
5 the Casino property. On November 2, 2003, he directed an SRP employee to use a  
6 D8 Cat with a rear ripper attachment to drive back and forth across a section of the  
7 Casino parking lot, intentionally digging two parallel trenches across the asphalt  
8 and pulling up various electrical wires buried beneath the asphalt.

9 On November 13, 2003, the Tribe applied to this Court for a temporary  
10 restraining order (and then a preliminary injunction) against SRP, Mr. Moe, and  
11 certain SRP employees (the employees have been previously dismissed from this  
12 lawsuit). The Court issued the injunction and it remains in place today, against  
13 Mr. Moe. (*See* Docket 1 through 5, 14.)

14 **C. The Joint Venture Has Been Dissolved.**

15 In late 2004, the Tribe decided to dissolve the Joint Venture created  
16 by the JVA, as allowed by RCW 25.05.300(5). Therefore, the Tribe applied to the  
17 Spokane County Superior Court (Judge Austin presiding) for statutory dissolution.

18 In October 2004, Judge Austin dissolved the Joint Venture. All that  
19 was left was to wind up its affairs, under RCW 25.05.300. SRP appealed the  
20 dissolution all the way up to the Washington Supreme Court, but the courts all  
21 agreed that the dissolution was properly granted by Judge Austin. It remains  
22 dissolved today.

23 **D. A Receiver Was Appointed for WML.**

24 In an unrelated case, *Materne v. SRP*, Spokane County Cause  
25 No. 03-2-06856-4, also before Judge Austin, a group of WML unitholders sued SRP  
26 in the name of WML, to determine the amount and value of their units, since no profit



1 had ever been distributed to them from the operation of the SRP raceway. During that  
2 litigation, a court appointed receiver, Barry Davidson, took the reins of WML, and  
3 thereafter he intervened in *SRP v. Kalispel Tribe* pending before Judge Austin.

4 **E. The Spokane County Action Was Removed.**

5 On May 15, 2006, the Tribe removed the Spokane County action that  
6 was pending before Judge Austin, based on allegations against the Tribe by WML  
7 (as an intervener) that raised federal questions (among other grounds). (*See*  
8 Docket 74.) As a result, no further proceedings took place in that court.

9 Consequently, all the players and all of the claims, counterclaims, and  
10 cross-claims were thereafter pending before this Court.

11 **F. SRP Declared Bankruptcy.**

12 In late 2006, Moe caused SRP to declare bankruptcy (United States  
13 Bankruptcy Court for the Eastern District of Washington; Case No. 06-01966-  
14 PCW11 [Judge Williams]), in an effort to stave off further action in the *Materne*  
15 case. However, this tactic was rejected by Judge Williams and a U.S. Trustee  
16 (John Munding) was appointed over SRP. Moe was then removed from all  
17 authority positions in SRP.

18 **G. The Tribe, WML, and SRP Reached a Mediated Settlement.**

19 On January 31 and February 1, 2007, the Tribe, WML (through the  
20 Receiver), and SRP (through the U.S. Trustee) mediated a settlement of all claims  
21 between the Tribe on the one hand and WML and SRP on the other. The settlement  
22 has been approved by the Tribe, by Judge Austin in the WML receivership case, and  
23 by the Bankruptcy Court. Dismissals between those parties have now been entered  
24 in the *SRP v. Kalispel Tribe* case pending before Judge Austin and in this case.  
25 (*See* Docket 156 through 161.)

1 **H. Claims Against and By Moe Are Still Extant in This Court.**

2 Defendant Moe was not part of the mediation or settlement. Therefore,  
3 the Tribe's claims against him and his claims against the Tribe were unaffected.<sup>2</sup>

4 The counterclaims of Orville Moe are that (a) the Tribe allegedly  
5 somehow deprived him of compensation as a Joint Venture board member and  
6 (b) that when it barred him from the Casino, (1) it defamed him, and (2) it allegedly  
7 interfered with "economic relations with third parties" and (3) "injur[ed] his  
8 business reputation." (See Attachment A at Exhibit 3 [Counterclaim] at pp. 15-16.)  
9 All of these claims can be dismissed on summary judgment.

10 **III. STATEMENT OF MATERIAL FACTS**

11 Although the Tribe has followed LR 56.1(a) by filing herewith a  
12 formal "Statement," the same facts are listed here (in order) for the convenience of  
13 the Court, and pursuant to LR 7.1(f). All of the referenced Attachments and  
14 Exhibits 1 through 4 are attached to the Statement, per LR 56.1(a).

15 1. On September 19, 1994, WML, of which SRP was the general  
16 partner, conveyed by gift deed approximately 40 acres of land "to the United  
17 States of America in trust for the Kalispel Tribe of Indians." (See Attachment A  
18 [Declaration of James H. Jordan, Jr.] at Exhibit 1 [Statutory Warranty Deed].)<sup>3</sup>

19 <sup>2</sup> After the Court dismisses Moe's counterclaim, as discussed below, the Tribe  
20 anticipates that, in the interest of economic efficiency, it may voluntarily dismiss  
21 its claims against Moe and the action could be fully dismissed.

22 <sup>3</sup> Exhibits 1 through 3 referenced herein are exhibits to Attachment A, which is the  
23 Declaration of James H. Jordan, Jr., attached to the LR 56.1 Statement. Exhibit 4  
24 is attached to the Declaration of David C. Bonga, also attached to the LR 56.1  
25 Statement, as Attachment B.  
26

2. The land was not conveyed to the Tribe, and the Tribe has never held it in fee. (*Id.*) It is owned by the United States, in trust for the Tribe. (*Id.*)

3. Also on September 19, 1994, the Tribe and SRP executed the JVA. (Exhibit 2 [Joint Venture Agreement].)

4. Orville Moe is not a party to the JVA, and the Tribe did not waive its sovereign immunity as to him. (*Id.*)

5. No Joint Venture board member ever demanded or was paid by either the Tribe or the Joint Venture for their time on the board. (Attachment B [Declaration of David Bonga] at ¶ 3.) Mr. Moe was to be paid by SRP. (*Id.* at ¶ 4 and Exhibit 4 at p. 3, item D.)

#### IV. STATEMENT OF ISSUES

1. This Court should grant the Tribe's motion for summary judgment, holding that Orville Moe's counterclaims are barred by the doctrine of tribal sovereign immunity.

2. In the alternative, Moe has failed to state claims upon which relief can be granted.

3. Moe's claim for board compensation is time-barred and frivolous, and if owed at all it is owed by SRP and SRP is not a party.

#### V. EVIDENCE RELIED UPON

The Motion is based on the portions of the record attached to the LR 56.1 Statement – the Declarations of James H. Jordan, Jr. with Exhibits 1-3, which is attached to the Statement as Attachment A, and of David Bonga, Attachment B with Exhibit 4 – and the pleadings, papers, files, and records herein.



1 **VI. ARGUMENT**

2 **A. All of Moe's Counterclaims Are Barred by the Tribe's Sovereign**  
 3 **Immunity.**

4 The Court can rule, as a matter of law, that Orville Moe's  
 5 counterclaims are barred by the doctrine of tribal sovereign immunity.

6 Section 10 of the JVA reads as follows:

7 **SECTION TEN**  
**LIMITED WAIVER OF SOVEREIGN RIGHTS**

8 The Kalispel Tribe agrees to a limited waiver of their sovereign  
 9 rights. Said waiver shall be limited to such actions that arise  
 10 through this agreement or it's breach. Any collection on a judgement  
 11 against the Tribe is limited to the proceeds of such insurance  
 12 policies as are set forth in Section 7 herein or in the event that  
 there is no coverage or adequate coverage under the value of the  
 Venture or outside of coverage, then an amount equal to the policy  
 limits or an agreed amount by both parties based on an appraisal by  
 both business and land appraisers or an amount agreed to by both  
 parties. In no event will a decision against the Tribe subject Tribal  
 trust lands or proceeds from those lands to be a part of a judgement.

13 The very limited waiver in Section 10 does not open the door for  
 14 defendants Moe's permissive counterclaims.

15 1. Moe cannot assert any counterclaim against the Tribe.

16 First, the "Limited Waiver" is only between the Tribe and SRP, the  
 17 only parties to and signatories of the JVA. (See Exhibit 1 at pp. 1, 5.) This  
 18 eliminates all of Moe's counterclaims against the Tribe as a matter of law.

19 The U.S. Supreme Court considered this issue in *Oklahoma Tax*  
 20 *Commission v. Potawatomi Tribe*, 498 U.S. 505 (1991). In that case, the tribe filed  
 21 suit in federal court to enjoin assessment of a tax on cigarettes. Oklahoma  
 22 counterclaimed, asking for enforcement of a \$2.7 million claim against the tribe for  
 23 assessment of uncollected taxes and to enjoin the tribe from selling cigarettes in the  
 24 future without collecting and remitting state taxes on the sales. Relying on its  
 25 decision in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506,  
 26 511-12 (1940), the Court stated as follows:

1 A tribe does not waive its sovereign immunity from actions that could  
 2 not otherwise be brought against it merely because those actions were  
 3 pleaded in a counterclaim to an action filed by the tribe. Possessing  
 4 immunity from direct suit, we are of the opinion the Indian nations  
 possess a similar immunity from cross-suits. We uphold the Court of  
 Appeals' determination that the Tribe did not waive its sovereign  
 immunity merely by filing an action for declaratory relief.

5 *Oklahoma Tax Commission*, 498 U.S. at 509-10 (internal quotations and citations  
 6 omitted).

7 The Ninth Circuit, in *Squaxin Island Tribe v. Washington*, 781 F.2d  
 8 715, 723 (9th Cir. 1986), similarly held that when a tribe brought suit (for an  
 9 injunction, as here), any counterclaim for monetary relief was barred by the  
 10 doctrine of tribal sovereign immunity. *See also Pit River Home & Agr. Co-op*  
 11 *Ass'n v. United States*, 30 F.3d 1088, 1100-01 (9th Cir. 1994).

12 The Supreme Court has noted the "perceived inequity" of such a  
 13 policy, but has upheld it nonetheless. In *Three Affiliated Tribes of the Fort*  
 14 *Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 893 (1986), it held  
 15 as follows:

16 The perceived inequity of permitting the Tribe to recover from a non-  
 17 Indian for civil wrongs in instances where a non-Indian allegedly may  
 18 not recover against the Tribe simply must be accepted in view of the  
 19 overriding federal and tribal interests in these circumstances, much in  
 20 the same way that the perceived inequity of permitting the United  
 States or North Dakota to sue in cases where they could not be sued as  
 defendants because of their sovereign immunity also must be  
 accepted.

21 Accordingly, all counterclaims by Moe against the Tribe – either *qua*  
 22 Tribe, or as a partner of SRP in the now-dissolved Joint Venture – must be  
 23 dismissed, as a matter of well-established federal law, and he cannot recover any  
 24 monies or property directly from the Tribe.

25 Second, the "Limited Waiver" is narrowly tailored to apply only to  
 26 actions that are directly related to the JVA (to which Moe is not a party). By



1 contract, the Limited Waiver is “limited to such actions that arise through this  
2 agreement or it’s (sic) breach.” (Exhibit 3 at § 10.) Therefore, to the extent that  
3 Moe – a non-party to the JVA – is seeking relief against the Tribe for defamation  
4 or tortious interference – issues outside of the JVA – they are likewise barred by  
5 the doctrine of tribal sovereign immunity. *See* cases cited above.<sup>4</sup>

6 **B. The “Defamation” and “Tortious Interference” Claims Are Defective.**

7 1. There is no evidence of either defamation or damages.

8 Washington law defines defamation as follows:

9 In Washington, a defamation plaintiff must show four essential  
10 elements: falsity, an unprivileged communication, fault, and damages.”  
11 *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 133,  
12 839 P.2d 314 (1992). Liability for defamation requires that the  
13 defamation be communicated to someone other than the person  
defamed; in other words, there must be a “publication” of the  
defamation. *Pate v. Tyee Motor Inn, Inc.*, 77 Wn.2d 819, 821,  
467 P.2d 301 (1970).

14 *Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 701 (2001).<sup>5</sup> In this case, Moe’s  
15 counterclaim failed to allege any of the requisite elements: the communication (no  
16 specifics); to whom published (no person identified); the falsity (not explained); or  
17 any damages (not pled). (*See* Exhibit 3 at pp. 15-16.) Accordingly, he has failed  
18 to state a claim upon which relief can be granted.

---

21 <sup>4</sup> Due to the unique pleading style of Moe’s Answer, it is somewhat unclear what  
22 exactly is the factual and legal basis for each counterclaim (if, in fact, there are  
23 more than one). Nevertheless, this Motion is the first and final step necessary to  
24 clarify the ambiguities.

25 <sup>5</sup> Reversed on unrelated grounds: 536 U.S. 273 (2002).  
26

Further, without any proof of actual damages, there is no claim. Dismissal is proper.

2. There was no “tortious interference.”

Moe further alleges that as a result of the Tribe justifiably barring him from the Casino’s premises after he tore up the Casino parking lot, he was allegedly unable to “engage in economic relations with third parties.” (Exhibit 3 at pp. 15-16.) Not only does this allegation make no sense whatsoever, but it is akin to complaining in vain about a restaurant’s “No Shirt, No Shoes, No Service” rule: here, “No Civility, No Service.” A private establishment unquestionably has an absolute right to bar someone from its premises for any non-discriminatory reason.

Further, the five required elements of such a claim are “(1) the existence of a valid contractual relationship or business expectancy; (2) the defendant’s knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) the defendant’s interference for an improper purpose or by improper means; and (5) resulting damage.” *Koch v. Mut. of Enumclaw*, 108 Wn. App. 500, 506 (2001) (emphasis added). Here, being barred from the Tribe’s Casino did not interfere with his “business expectancy” *with other parties*, only with the Tribe’s own Casino.<sup>6</sup> Consequently, since all five required elements cannot be established, the claim should be dismissed.

---

<sup>6</sup> At the Northern Quest Casino, one generally plays against the House, except for certain card games. Regardless, recreational gaming in a casino cannot be seriously characterized as a “business expectancy.”

1 **C. The “Board Compensation” Claim is Both Frivolous and Time-Barred.**

2 Moe lastly alleges that he was somehow entitled to lifetime  
3 compensation from the Joint Venture for serving on the Joint Venture board.  
4 (Answer [Exhibit 3] at p. 15, ¶ 3.) However, there are numerous fatal defects in  
5 this claim.

6 First, there is no dispute that the Joint Venture was judicially  
7 dissolved in October 2004. That established an end point to the alleged “lifetime.”

8 Second, no board member – including Moe – ever demanded and the  
9 Joint Venture never paid any such compensation. (Attachment B at ¶ 3.) In fact,  
10 the Joint Venture never established any specific amount of compensation for board  
11 members. (*Id.* at ¶¶ 3-4.)

12 Third, any claim that Moe allegedly has for compensation must be  
13 asserted against SRP, not the Tribe, because SRP was to pay him. (*Id.* at ¶ 4 and  
14 Exhibit 4.) Therefore, he is out of luck in this action against the Tribe.

15 Consequently, Moe’s claim for compensation – assuming for  
16 argument purposes only that it was not barred by sovereign immunity – that was  
17 allegedly owed beginning in 1994 – is (a) time-barred under RCW 4.16.040(1)  
18 (contract actions must be brought within six years of breach), and (b) owed to him  
19 by a non-party. It should be dismissed.

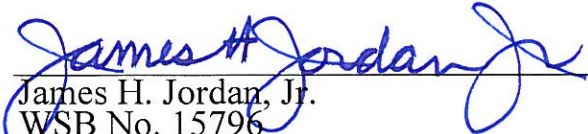
20 **VII. CONCLUSION**

21 For all of the reasons stated above, the Court should rule, as a matter  
22 of law, that Moe’s counterclaims are barred by the doctrine of tribal sovereign  
23 immunity and/or factually and legally defective.



1  
2 DATED this 19<sup>th</sup> day of December, 2007.


3 MILLER NASH LLP

4  
5   
6 James H. Jordan, Jr.  
7 WSB No. 15796  
8 james.jordan@millernash.com  
9 (206) 622-8484

10 Attorneys for Plaintiff  
11 The Kalispel Tribe of Indians

12 I hereby certify that on this 19<sup>th</sup> day of December, 2007, I electronically filed  
13 the PLAINTIFF KALISPEL TRIBE OF INDIANS' MOTION AND  
14 MEMORANDUM SUPPORTING MOTION FOR SUMMARY JUDGMENT  
15 AGAINST DEFENDANTS MOE with all Attachments and Exhibits with the  
16 Clerk of the Court using the CM/ECF system. I also caused the filing to be e-  
17 mailed to defendants' attorney (who has not formally appeared on the record,  
18 according to the docket) on the date set forth below.

19 Aaron L. Lowe  
20 430 West Indiana Avenue  
21 Spokane, WA 99205  
22 [aaronloweassociates@hotmail.com](mailto:aaronloweassociates@hotmail.com)

23   
24 James H. Jordan, Jr.  
25 Attorneys for Plaintiff  
26 The Kalispel Tribe of Indians