CASE NO. 04-35210

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN MARCEAU; et al.,
Plaintiff- Appellants,

vs.

BLACKFEET HOUSING AUTHORITY, and
its Board Members; et. al.
Defendants – Appellees.

On Appeal from the United States District Court
District of Montana, Great Falls Division
No. CV 02-00073-GF-SHE – Honorable Sam E. Haddon, Presiding

Response Brief of Tribal Defendants/Appellees

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ATTORNEYS FOR DEFENDANTS/APPELLEES

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CERTIFICATE OF INTEREST

Patrick L. Smith, counsel for Appellees Tribal Defendants, certifies the following:

1. The full name of every party or amicus represented by us are:

Blackfeet Housing, and Blackfeet Housing's prior board members Sandra Calfbossribs, Neva Running Wolf, Kelly Edwards, and Ursula Spotted Bear.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is:

None.

3. All parent corporations and publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by us are:

None.

4. The names of all law firms and partners or associates that appeared for the party or amicus now represented by us in the trial court or agency or are expected to appear in this court are:

Stephen A. Doherty, Esq. and Patrick L. Smith, Esq.

Dated: October 19, 2004 By: _____
Patrick L. Smith

TABLE OF CONTENTS

Page

CERTIFICATE OF INTEREST..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iv

I. JURISDICTIONAL STATEMENT..... 1

II. STATEMENT OF THE ISSUE PRESENT FOR REVIEW 2

III. STATEMENT OF THE CASE..... 3

IV. STATEMENT OF FACTS..... 6

V. SUMMARY OF THE ARGUMENT 8

VI. ARGUMENT 10

A. The District Court properly dismissed Tribal Defendants from the Lawsuit where Tribal Defendants enjoy sovereign immunity and where no waiver of Tribal sovereign immunity exists..... 10

B. Plaintiffs concede that Tribal Defendants enjoy Sovereign immunity..... 13

C. The Cases cited by Plaintiffs in Support of their position that the "Sue and Be Sued" provision contained in the Tribe's ordinances waives Tribal Defendants' Sovereign immunity are inapposite..... 14

D. The "Sue and Be Sued" clause does not apply..... 17

E. The "Sue and Be Sued" clause did not waive Tribal Defendants' Tribal Sovereign immunity..... 19

VII. CONCLUSION..... 23

CERTIFICATE OF COMPLIANCE..... 25

CERTIFICATE OF SERVICE..... 26

TABLE OF AUTHORITIES

CASE LAW

A.O. Smith Corp. v. Allstate Ins. Companies, 222 Wis.2d 475, 588 N.W.2d 285 (Wis App. 1988)..... 14

Acosta-Huerta v. Estelle, 7 F.3d 139 (9th Cir. 1992)..... 13

Buchanan v. Sokaogan Chippewa Cree Tribe, 40 F. Supp. 2d 1043 (E.D. Wis. 1999)..... 10, 22

C&L Enterprise, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 121 S.Ct. 1589 (2001)..... 8

Chance v. Coquille Indian Tribe, 963 P.2d 638, (Or. 1998)..... 10, 21

Dillon v. Yankton Sioux Tribe Housing Authority, 144 F.3d 581 (8th Cir. 1998).....9, 10, 17, 19, 20

Garcia v. Akwesasne Housing Authority, 268 F.3d 76, (2nd Cir. 2001)..... 10, 19, 21

Kevin Tall Whiteman, et al., v. Blackfeet Indian Housing Authority, Cause No. 97 CA 474, Blackfeet Tribal Court (Aug. 30, 1999) (Clarified Judgment and Order).....18, 20, 22

Kildare v. Saenz, 325 F.3d 1078 (9th Cir. 2003)..... 13

Kiowa Tribe of Oklahoma, 523 U.S. 751, 118 S.Ct. 1700 (1998)..... 8

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 114 S.Ct. 1673 (1994)..... 23

Linneen v. Gila River Indian Community, 276 F.3d 489 (9th Cir. 2002)..... 9, 17

Ninigret Development Corp. v. Narragansatt Indian Wetuomuck Housing Authority, 207 F.3d 21 (1st Cir. 2000).....10, 19, 20

Oklahoma Tax Commission v. Citizen Band Potawatami Tribe of Oklahoma, 498 U.S. 505, 111 S.Ct. 905 (1991)..... 8, 9

R.C. Hedreen Co. v. Crow Tribal Housing Authority, 521 F. Supp. 599 (D. Mont. 1981)..... 14, 15, 16

R.J. Williams Co. v. Fort Belknap Housing Authority, 509 F. Supp. 933 (D. Mont. 1981)..... 14, 15, 16

Ramey Constr. Co., Inc. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982)..... 10, 21

Santa Clara Pueblo v. Martinez 436 U.S. 49, 98 S.Ct at 1670 (1978) 8, 10, 20

Snowbird Construction Co., Inc., v. United States Department of Housing and Urban Development, 666 F. Supp. 1437 (D. Idaho 1987)..... 14, 16

Stock West Corp. v. Lujan, 982 F.2d 1389 (9th Cir. 1993)..... 10

State v. Day, 617 P.2d 142, 94 N.M. 753 (N.M. 1980)..... 14

United States v. Ballard, 779 F.2d 287 (5th Cir. 1986), *cert. denied*, 475 U.S. 1109 (1986)..... 13

STATUTES

25 U.S.C § 4101, *et seq*..... 7

REGULATIONS

24 C.F.R. § 950.126 (1998)..... 7, 13

24 C.F.R § 1000.10 (1998)..... 7

OTHER AUTHORITIES

Constitution and By-Laws of the Blackfeet Indian Reservation of Montana pursuant to Section 16 of the Act of June 15, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378)..... 6

Federal Rules of Civil Procedure 12(b) and 12(b)(2)..... 3

Ordinance No. 7.....6,7,8, 12

16 Wright, Miller, Cooper & Gressman, Federal Practice & Procedure § 3974, at 421 n. 1 (1985 & Supp. 1988)..... 14

I. JURISDICTIONAL STATEMENT

Tribal Defendants/Appellees steadfastly dispute federal court jurisdiction over Tribal Defendants in this case. The well-established doctrine of tribal sovereign immunity bars this action against Tribal Defendants, and consequently bars the exercise of subject matter jurisdiction by a federal court over the merits of Plaintiffs' claims as they relate to Tribal Defendants. Tribal sovereign immunity also deprives federal courts of personal jurisdiction over the individually named Tribal Defendants.

II. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the District Court properly dismiss Tribal Defendants from this lawsuit where Tribal Defendants enjoy tribal sovereign immunity and where no waiver of tribal sovereign immunity exists?

III. STATEMENT OF THE CASE

This case concerns public housing on the Blackfeet Indian Reservation. The Plaintiffs/Appellants contend that such public housing is defective, and in their first amended complaint allege that Defendants violated federal law and breached various common law duties in the design and construction of 153 houses on the Reservation. Named defendants include Blackfeet Housing, an arm of the Blackfeet Tribe; four out of the five then current members[1] of the board of directors of Blackfeet Housing; and the Secretary of the U.S. Department of Housing and Urban Development.

On December 10, 2002, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(2), Tribal Defendants moved the district court for an order dismissing Defendants Blackfeet Housing and Blackfeet Housing board members Sandra Calfbossribs, Neva Running Wolf, Kelly Edwards, and Ursula Spotted Bear from this lawsuit on the basis that the well-established doctrine of tribal sovereign immunity barred this action against the Tribal Defendants and consequently barred the court's exercise of subject matter jurisdiction over the merits of Plaintiffs' claims and that tribal

[1] Subsequent to the filing of this lawsuit, the Blackfeet Tribal Business Council dissolved the Board of Directors. The Council itself acted as the Board, but has now appointed new volunteer Board members.

sovereign immunity also deprived the court of personal jurisdiction over the individually named Tribal Defendants.[2] Several rounds of briefing followed.

On November 12, 2003, the U.S. District Court for the District of Montana, Great Falls Division, the Honorable Sam E. Haddon presiding, held oral arguments on the motions to dismiss filed by both Tribal Defendants and the U.S. Government. Additional briefing followed regarding select issues on which Judge Haddon invited supplemental briefing, including the immunity of the individual board members named in the suit and the question of whether anything in tribal ordinances or otherwise waived tribal sovereign immunity.

On January 14, 2004, Judge Haddon issued a written Memorandum and Order which, among other things, GRANTED Tribal Defendants' motion to dismiss the Amended Complaint. Judge Haddon held, among other things, that Blackfeet Housing, as a tribal agency, was entitled to sovereign immunity and that no waiver of Tribal Defendants' sovereign immunity existed. Specifically, Judge Haddon concluded that the provision in the Blackfeet Tribe's ordinance known as a "sue and be sued" clause did not operate to waive tribal sovereign immunity, but simply gave Tribal Defendants the authority to waive sovereign immunity, by contract, if they

[2] After Plaintiffs filed their first amended complaint, Tribal Defendants filed

so choose. Finding no evidence of any such waiver, Judge Haddon dismissed the Amended Complaint.

This appeal followed.

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a renewed motion to dismiss on the ground of tribal sovereign immunity.

IV. STATEMENT OF FACTS

The Blackfeet Tribe is a federally recognized Indian Tribe[3]. In 1977, pursuant to Tribal Ordinance No. 7, the Blackfeet Tribal Business Council established a public body known as the Blackfeet Indian Housing Authority, and further established the governmental purposes, powers, and duties of the Blackfeet Indian Housing Authority with respect to the provision of Federally funded low-income housing on the Blackfeet Indian Reservation.

Ordinance No. 7 contained a standard "sue and be sued" provision, which provides:

> The Council hereby gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim, or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it would otherwise have, but the Tribe shall not be liable for the debts or obligations of the Authority.

Defendants' Supplemental Excerpt of Record, at 9. Federal regulations had formerly required this provision to be included in all tribal ordinances that established tribal housing authorities before such tribal housing authorities could qualify for HUD assistance. As a result, the provision was included,

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[3] On December 13, 1935, the Secretary of the Interior approved the Constitution and By-Laws of the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana pursuant to Section 16 of the Act of June 15, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378). The

virtually word-for-word, in the charters of all or most tribal housing authorities. See 24 C.F.R. § 950.126 (1998).

In 1997, by way of a duly adopted tribal resolution, the Blackfeet Tribal Business Council created and designated Blackfeet Housing[4] as the "Tribal Designated Housing Entity" pursuant to provisions of the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101, et seq., ("NAHASDA"). The Housing Authority functions under regulations promulgated by the United States Department of Housing and Urban Development ("HUD"). See 24 C.F.R. § 1000.10 (1998) (governing the establishment and operation of Indian housing authorities).

As explained, Ordinance No. 7 was part of the charter of Blackfeet Housing's predecessor, Blackfeet Indian Housing Authority. The Blackfeet Tribe adopted the Ordinance in 1977, approximately ten years after the housing units at issue herein were constructed, according to Plaintiffs' complaint, and approximately twenty years before Blackfeet Housing was established to replace the Blackfeet Indian Housing Authority.

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governing body of the Blackfeet Tribe is the Blackfeet Tribal Business Council.

[4] Blackfeet Indian Housing Authority no longer exists. Rather, Blackfeet Housing is the new program arm of the Tribe set up to deal with housing on the Reservation. See Charter for Blackfeet Housing. Defendants' Supplemental Excerpts of Record, at 26.

A 1998 Blackfeet Tribal Attorney opinion clarified that the operative effect of Ordinance No. 7 was to delegate to the Blackfeet Housing Board the Blackfeet Tribal Business Council's authority to act in the area of housing affairs, and that the Blackfeet Tribal Business Council "retain[ed] the ultimate authority over all Tribal affairs, including all aspects of the Blackfeet Housing" program.

V. SUMMARY OF THE ARGUMENT

It is axiomatic that Native American tribes enjoy sovereign immunity from non-consensual lawsuits in state and federal court. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670 (1978); *C&L Enterprises, Inc., v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S.Ct. 1589 (2001). Tribal sovereign immunity is absolute and leaves no room for judicial discretion. An Indian tribe is subject to suit *only* where Congress has authorized the suit or the tribe has waived its immunity. *Kiowa Tribe of Oklahoma*, 523 U.S. 751, 754, 118 S.Ct. 1700, 1702 (1998).

But to abrogate tribal immunity, Congress must "unequivocally" express that purpose. *Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S.Ct. at 1677; *C&L Enterprises*, 532 U.S. at 418, 121 S.Ct. at 1594. Similarly, in order for a tribe to relinquish its tribal sovereign immunity, federal law requires that its waiver must be "clear." *C&L Enterprises*, 532 U.S. at 418,

121 S.Ct. at 1594, *quoting Oklahoma Tax Commission v. Citizen Band Potawatami Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905 (1991).

Plaintiffs' are mistaken in their assertion that a Blackfeet Tribal Council ordinance provision forming Blackfeet Housing's predecessor and containing a standard "sue and be sued" provision constitutes a waiver by the Blackfeet Tribe of its tribal sovereign immunity.

First, the "sue and be sued" provision does not even apply. Courts have held that the standard "sue and be sued" provision does not affect tribal immunity when a tribe acts in its constitutional, rather than corporate, capacity. *See, e.g., Linneen v. Gila River Indian Community*, 276 F.3d 489, 492-93 (9th Cir. 2002). Indian housing authorities like Blackfeet Housing act in a *constitutional* capacity, and are *governmental*, not corporate, entities. *See, e.g., Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583 (8th Cir. 1998).

In any event, federal courts that have squarely considered the issue have held that a bare "sue and be sued" clause – without more – does not waive tribal immunity. The clear weight of authority at present is that while "sue and be sued" language may give tribal housing authorities the *authority* to waive sovereign immunity, housing authorities would thereafter need to explicitly waive immunity through a written contract to *invoke* such

authority. *See, e.g., Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583-84 (8th Cir. 1998); *Ninigret Development Corp. v. Narragansatt Indian Wetuomuck Housing Authority*, 207 F.3d 21, 30 (1st Cir. 2000); *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 87 (2nd Cir. 2001); *Ramey Constr. Co., Inc., v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982); *Buchanan v. Sokaogan Chippewa Tribe*, 40 F. Supp. 2d 1043, 1047 (E.D. Wis. 1999); *Chance v. Coquille Indian Tribe*, 963 P.2d 638, 639 (Or. 1998). The case law relied upon by Plaintiffs is distinguishable on the facts because in those cases there was a *written contract.*

VI. ARGUMENT

A. THE DISTRICT COURT PROPERLY DISMISSED TRIBAL DEFENDANTS FROM THIS LAWSUIT WHERE TRIBAL DEFENDANTS ENJOY SOVEREIGN IMMUNITY AND WHERE NO WAIVER OF TRIBAL SOVEREIGN IMMUNITY EXISTS.

The district court correctly held that Tribal Defendants are immune from this lawsuit and that the "sue and be sued" clause did not waive such immunity.

Judge Haddon's written decision reflects that he relied on U.S. Supreme Court and Ninth Circuit precedent – including *Santa Clara Pueblo v. Martinez*, 436 49, 58 (1978); *Lineen v. Gila River Indian Comm.*, 276 F.3d 489, 492 (9th Cir. 2002); and *Stock West Corp. v. Lujan*, 982 F.2d 1389,

1398 (9th Cir. 1993) – which establishes that "Indian tribes, tribal agencies, and tribal officials acting within the scope of their official duties enjoy sovereign immunity." Plaintiffs' Excerpts of Record, at 9. As such, the trial court concluded that "Blackfeet Housing, as a tribal agency, is entitled to sovereign immunity." *Id.* While the trial court accurately acknowledged that sovereign immunity may be waived, it likewise recognized the exacting standard for a finding of waiver. *Id.*

Regarding the "sue and be sued" clause[5], and Plaintiffs' argument that such provision "operates to waive the Tribal Defendants' immunity for the claims asserted in this case", Judge Haddon directly held that "[n]o contractual waiver exists in the record." *Id.*

> Article V [the "sue and be sued" clause] is not a waiver of the Tribal Defendants sovereign immunity for the claims asserted in this case. That provision simply gives the Tribal Defendants

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[5] "The Council hereby gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be liable for debts or obligations of the Authority." Defendants' Supplemental Excerpts of Record, at 9.

By way of explanation, federal regulations had formerly required this provision to be included in all tribal ordinances establishing tribal housing authorities before such qualifying for HUD assistance. As a result, the provision was included, virtually word-for-word, in the charters of all or most tribal housing authorities. See 24 C.F.R. § 950.126 (1998).

> the authority to waive sovereign immunity, by contract, should they so choose.

Id.

Judge Haddon's ruling followed several rounds of briefing on the issue of tribal sovereign immunity and waiver. Moreover, during oral arguments on November 13, 2003, Judge Haddon specifically allowed the parties an additional opportunity to brief the effect of the "sue and be sued" clause on Tribal Defendants' sovereign immunity.

> And I want to invite the parties to brief, if they wish, this particular provision that has been referenced in the briefs already, and that's the consent that is contained in Tribal Ordinance Number 7, and whether that is a waiver of immunity or simply, as is suggested by the Housing Authority, the ability to, by contract, waive immunity. My initial conclusion is that it is the latter. And that it cannot be read on its face as a blanket waiver of immunity.

Plaintiffs' Excerpts of Record, at 28 (Transcript at 17-18).

Thus, Judge Haddon took extra care to thoroughly educate himself on this fundamental issue, and the parties had ample opportunity to support their respective positions. Judge Haddon's ultimate ruling on the immunity of Tribal Defendants reflects a correct interpretation and application of the law. The "sue and be sued" provision, without more, cannot – and did not – waive sovereign immunity, but only granted Blackfeet Housing the authority to waive its immunity by subsequent conduct. Since Blackfeet Housing

never exercised this authority, its immunity remains intact. Thus, the district court was absolutely correct in dismissing Tribal Defendants from Plaintiffs' lawsuit.

B. PLAINTIFFS CONCEDE THAT TRIBAL DEFENDANTS ENJOY SOVEREIGN IMMUNITY.

Plaintiffs have not challenged the district court's conclusion that Blackfeet Housing, as an arm of the Blackfeet Nation, and the individually named volunteer board members who at all times were acting within the scope of their authority, enjoy sovereign immunity from private lawsuits. Moreover, Plaintiffs have not briefed an argument they raised in the lower court, namely that Blackfeet Housing is an agent of the U.S. government[6].

Plaintiffs have therefore waived these arguments. *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992) (issues raised in a brief that are not supported by argument are deemed abandoned); *Kildare v. Saenz*, 325 F.3d 1078, 1085 n.3 (9th Cir. 2003) (issues referred to in an appellant's statement of the case but not discussed in the body of the opening brief are deemed waived for failure to adequately brief on appeal); *United States v. Ballard*, 779 F.2d 287, 295 (5th Cir. 1986), *cert. denied*, 475 U.S. 1109 (1986) (party

[6] Plaintiffs likewise suggest this theory in their Opening Brief: "HUD *and its implementing agency, Defendant-Appellee Blackfeet Housing*, point to the usual lack of funding, and HUD denies responsibility and liability." Plaintiffs'/Appellants' Opening Brief at 3 (emphasis supplied).

abandoned claims on appeal by failing to brief issues adequately); 16 Wright, Miller, Cooper & Gressman, Federal Practice & Procedure § 3974, at 421 n. 1 (1985 & Supp. 1988); *A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis.2d 475, 491, 588 N.W.2d 285, 292 (Wis. App. 1988) (in order for a party to have an issue considered by appellate court, it must be raised and argued within its brief); *State v. Day*, 617 P.2d 142, 144, 94 N.M. 753, 755 (N.M. 1980) (issues listed in the docketing statement, but not briefed, are deemed abandoned).

C. THE CASES CITED BY PLAINTIFFS IN SUPPORT OF THEIR POSITION THAT THE "SUE AND BE SUED" PROVISION CONTAINED IN THE TRIBE'S ORDINANCES WAIVES TRIBAL DEFENDANTS' SOVEREIGN IMMUNITY ARE INAPPOSITE.

Plaintiffs greatly exaggerate when they state that "[t]he Montana federal courts have uniformly concluded, until Judge Haddon's ruling at bar, that the 'sue and be sued' clause in the ordinance is itself sufficient to waive sovereign immunity of the Housing Authority." Plaintiffs'/Appellants' Opening Brief at 23. Plaintiffs cite to three cases in support of their position that a "sue and be sued" clause without more can waive tribal sovereign immunity – *R.C. Hedreen Co. v. Crow Tribal Housing Authority*, 521 F. Supp. 599 (D. Mont. 1981), *R.J. Williams Co. v. Fort Belknap Housing Authority*, 509 F. Supp. 933 (D. Mont. 1981), and *Snowbird Construction Co., Inc. v. United States Department of Housing and Urban Development*,

666 F. Supp. 1437 (D. Idaho 1987) – but none of these cases are availing and they certainly do not require upsetting Judge Haddon's sound ruling.

The cases upon which Plaintiffs rely are far and few between, factually distinguishable, and poorly reasoned. These cases have likewise largely been ignored by most courts, and thus may rightly be regarded as outliers not particularly helpful to, and certainly not dispositive of, the resolution of the tribal sovereignty issue raised by Tribal Defendants in their Motion to Dismiss.

Plaintiffs have greatly overstated the importance of both *R. C. Hedreen Co. v. Crow Tribal Housing Authority*, 521 F. Supp. 599 (D. Mont. 1981) and *R.J. Williams Co. v. Fort Belknap Housing Authority*, 509 F. Supp. 933 (D. Mont. 1981). Among other things, there is an absolutely critical factual distinction between the *R.C. Hedreen* and *R.J. Williams* cases and the one at bar: In both of these cases, the plaintiffs were private construction companies *who had entered into separate commercial contracts with the respective tribal housing authorities*. As will be discussed more below, this important factual distinction renders these cases virtually meaningless here.

In the *R. J. Williams* case, *there was a written contract*. Furthermore, the district court opinion contains no discussion concerning the "sue and be

sued" clause and how it relates to the contract at issue in the case. When the case reached the Ninth Circuit (which, by the way, contrary to Plaintiffs' representation, *reversed* the district court), a one-sentence statement that the "sue and be sued" clause waived the Tribe's immunity appears in a footnote, but constitutes mere dicta.

In the *R.C. Hedreen* case, *there was a written contract.* The analysis in *R.C. Hedreen,* a "red flagged" decision, is likewise not helpful on this issue. It is clear, though, that *a contract existed between the plaintiff and the tribal housing authority*: "On September 29, 1976, after competitive bidding, the Housing Authority entered into a construction contract with G. R. Associates [which company later assigned all of its rights under the contract to R.C. Hedreen]" *R.C. Hedreen*, 521 F. Supp. at 601.

The other case – *Snowbird Const. Co. v. United States*, 666 F. Supp. 1437, 1440-41 (D. Idaho 1987) – also involved a commercial construction contract. The case is thus distinguishable on its facts and thus does not provide support for Plaintiffs' position.

Counsel for Tribal Defendants have been unable to find any cases that have relied upon either the *R.C. Hedreen* case or the *R.J. Williams* case for the proposition that a bare "sue and be sued" clause, standing alone, without

more, constitutes a waiver of tribal sovereign immunity. Plaintiffs' reliance on these is unfounded at best.

D. THE "SUE AND BE SUED" CLAUSE DOES NOT APPLY.

Federal law indicates that the "sue and be sued" clause at issue in this case does not even apply for the reason that the provision only affects the immunity of a tribe when it acts in its corporate, not constitutional, capacity, and that tribal housing authorities by nature are governmental, not corporate in design and operation. *See, e.g., Linneen v. Gila River Indian Community*, 276 F.3d 489, 492-93 (9th Cir. 2002) ("The 'sue and be sued' clause in the [Tribe's] corporate charter in no way affects the sovereign immunity of the [Tribe] as a constitutional, or governmental, entity. We find no waiver here because the alleged actions that form the basis of this suit are clearly governmental rather than corporate in nature."); *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583 (8th Cir. 1998) (determining that the tribal housing authority was a tribal (governmental) agency, rather than a separate corporate entity created by the tribe).

Tribal Defendants submit that the "sue and be sued" provision does not apply because the public housing activities that form the basis of this suit are governmental (constitutional) in nature, not corporate, and the rule in the Ninth Circuit is that "sue and be sued" clauses standing alone, only waive

tribal immunity – if at all – when corporate, and not governmental, activities are implicated.

As in *Lineen v. Gila River Indian Community*, 276 F.3d 489 (9th Cir. 2002), the activities that form the basis of this lawsuit (i.e., the provision of low-income housing for tribal members) are clearly governmental in nature. In line with the Ninth Circuit's holding then, Blackfeet Housing, the Tribally Designated Housing Entity established to implement the Indian housing program on the Reservation, is not subject to suit because the "sue and be sued" clause in its charter does not apply.

When Indian housing authorities carry out low-income housing programs, they are engaging in *governmental*, as opposed to corporate, functions. Indeed, here we have a *tribal agency* acting in a *constitutional capacity* in the course of carrying out *governmental functions* (i.e., providing low-income housing to members of the Blackfeet Reservation). The Blackfeet Tribal Court has already determined that "...the [Blackfeet] Tribe, when it established the Housing Authority, acted in its Constitutional capacity and not in its corporate capacity." *Kevin Tall Whiteman, et al., v. Blackfeet Indian Housing Authority*, Cause No. 97 CA 474, Blackfeet Tribal Court (Aug. 30, 1999) (Clarified Judgment and Order) at 3. Copy attached at Defendants' Supplemental Excerpts of Record, at 34. Federal courts have

likewise concluded that Indian housing authorities are governmental, not corporate, entities. *See, e.g., Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583 (8th Cir. 1998) (determining that the tribal housing authority was a tribal (governmental) agency, rather than a separate corporate entity created by the tribe). As a result, the "sue and be sued" provision contained in Blackfeet Housing's charter does not apply, and does not waive Blackfeet Housing's sovereign immunity.

E. THE "SUE AND BE SUED" CLAUSE DID NOT WAIVE TRIBAL DEFENDANTS' TRIBAL SOVEREIGN IMMUNITY.

Federal courts that have squarely considered the issue have held that a bare "sue and be sued" clause – without more – does not waive tribal immunity. The clear weight of authority is that while "sue and be sued" language may give tribal housing authorities the *authority* to waive sovereign immunity, housing authorities must thereafter explicitly waive immunity through a written contract to *invoke* such authority.

Thus, *even if* the "sue and be sued" provision applies (which Tribal Defendants dispute), it did not waive tribal immunity here because Blackfeet Housing never *exercised* the authority to waive its immunity. *See, e.g., Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583-84 (8th Cir. 1998); *Ninigret Development Corp. v. Narragansatt Indian Wetuomuck Housing Authority*, 207 F.3d 21, 30 (1st Cir. 2000), *Garcia v. Akwesasne*

Housing Authority, 268 F.3d 76, 87 (2nd Cir. 2001); *Kevin Tall Whiteman, et al., v. Blackfeet Indian Housing Authority*, Cause No. 97 CA 474, Blackfeet Tribal Court (Aug. 30, 1999) (Clarified Judgment and Order), at 3-4.

The case law on the effect of a "sue and be sued" provision as it affects tribal sovereign immunity is not only consistent with, but arguably dictated by the clear rule that waivers of tribal sovereign immunity may not be implied. *See, e.g., Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 98 S.Ct. 1670 (1978).

In *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583-84 (8th Cir. 1998), the Eighth Circuit Court of Appeals explained that while the "sue and be sued" language gave the housing authority the *authority* to waive immunity, the housing authority would thereafter have to explicitly waive its immunity through a written contract to *invoke* such authority. In the *Dillon* case, the court concluded that because the housing authority did not have a written contract with the plaintiff, it could not have waived its sovereign immunity: "The Authority did not have a written contract with Dillon and could not have waived its sovereign immunity through an implied agreement." *Dillon*, 144 F.3d at 584.

Likewise, in *Ninigret Development Corp. v. Narragansatt Indian Wetuomuck Housing Authority*, 207 F.3d 21, 30 (1st Cir. 2000), the First

Circuit Court of Appeals held that an Indian Tribe's adoption of an ordinance authorizing a tribal housing authority to decree by contract to waive immunity from suit did not *in and of itself* waive tribal sovereign immunity. Drawing from well-established principles of statutory construction (i.e., that statutes and ordinances should be read to give effect to every word and phrase), the court noted: "After all, the ordinance, by its terms, authorizes the authority to shed its immunity 'by contract,' and these words would be utter surplusage if the enactment of the ordinance itself served to perfect the waiver." *Id.* at 30.

Similarly, the Second Circuit Court of Appeals in *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 87 (2nd Cir. 2001), affirmed a district court's decision holding that a "sue and be sued" provision in the Akwesasne Housing Authority's enabling ordinance, without more, did not waive tribal immunity. *Also see Ramey Constr. Co., Inc., v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982) (the presence of a "sue and be sued" clause in the tribal corporate charter cannot serve as a waiver of sovereign immunity); *Chance v. Coquille Indian Tribe*, 963 P.2d 638, 639 (Or. 1998) (standard "sue and be sued" language merely *authorizes* the waiving of tribal immunity and "*unless* [the tribal arm] takes some *further* action, such as offering its consent with respect to a particular

transaction, the usual rule of sovereign immunity will apply." (emphasis supplied); *Buchanan v. Sokaogan Chippewa Tribe*, 40 F. Supp. 2d 1043, 1047 (E.D. Wis. 1999) (tribal ordinance which authorized housing authority to agree by contract to waive any immunity from suit which it might otherwise have was not a waiver of sovereign immunity absent evidence that housing authority had subsequently waived its sovereign immunity through written contract).

Blackfeet Tribal Law also strongly supports Tribal Defendants' position. Consistent with the federal cases cites above, the Blackfeet Tribal Court has ruled that a bare "sue and be sued" provision – without more – is insufficient to waive sovereign immunity:

> For the Housing Authority to waive its immunity, they must specifically do so by written contract. Here there is no written contract that plaintiffs can produce to show that the housing authority specifically waived its sovereign immunity. As such the "sue and be sued" clause in Resolution 7 without more is ineffective to waive the sovereign immunity of Blackfeet Indian Housing Authority.

Kevin Tall Whiteman, et al., v. Blackfeet Indian Housing Authority, Cause No. 97 CA 474, Blackfeet Tribal Court (Aug. 30, 1999) (Clarified Judgment and Order) at 3-4.

The Plaintiffs claim that the tribal ordinance authorizing Blackfeet Housing to sue and be sued qualifies as such a waiver. *But the ordinance*

merely gave Blackfeet Housing the consent to waive immunity. Tribal Defendants have consistently maintained that a bare "sue and be sued" clause – without more – does not operate as a waiver *unless* Blackfeet Housing were to have subsequently *invoked* the authority to waive its immunity by, for example, executing a contract to that effect. This is exactly what the language cited above says. As a matter of law, Tribal Defendants did not waive their sovereign immunity pursuant to the tribal resolution that allowed Blackfeet Housing's predecessor to sue and be sued. Accordingly, while Blackfeet Housing's predecessor may have had the *power* to waive its immunity from suit, at no time did it *exercise* such power. Therefore, Tribal Defendants did not waive their sovereign immunity from this lawsuit, and should be dismissed.

VII. CONCLUSION

Plaintiffs bore the heavy burden of establishing by a preponderance of the evidence that jurisdiction existed in this case. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 1675 (1994). They have altogether failed to satisfy their burden, as the district court correctly held.

For all of the reasons explained above, Tribal Defendants respectfully request that the Court affirm the district court's dismissal of Tribal Defendants from this lawsuit.

DATED this 19 day of October, 2004

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Patrick L. Smith

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Cir. Rule 32, I hereby certify that the foregoing Response Brief of Tribal Defendants/Appellees is proportionally spaced, has a 14-point typeface, and as determined by the undersigned's work processing program, contains 4,287 words, not including the Table of Contents, Table of Cases, Table of Authorities, and Certificate of Service.

DATED this 19 day of October, 2004.

By: _____

CERTIFICATE OF SERVICE

This is to certify that on the 20 day of October, 2004, a true and accurate copy of the foregoing *Response Brief of Tribal Defendants/Appellees* was duly served by U.S. First Class Mail, postage prepaid, upon the following counsel of record:

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The original and 15 copies of the Response Brief of Tribal Defendants/Appellees were also Federal Expressed on the above date to:

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By: