UNITED STATES DISTRICT COURT
SOUTHWESTERN DISTRICT OF NORTH DAKOTA

STANDING ROCK HOUSING AUTHORITY,

Plaintiff,

v. No. 1:08 CV-052-DLH-CSM

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendant.

PLAINTIFF'S RESPONSE TO EEOC'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Plaintiff, Standing Rock Housing Authority (hereafter "SRHA"), through its counsel of record, Ripley B. Harwood (Ripley B. Harwood, P.C.), responds as follows to the Defendant's Motion and Memorandum seeking dismissal of its Declaratory Judgment Complaint:

I. THE CASE IS JUSTICIABLE AND RIPE FOR REVIEW

Defendant first contends that this matter is not ripe for review. Ripeness is a component of the broader notion of justiciability, a doctrine our Supreme Court has characterized as "one of uncertain and shifting contours." *Flast v. Cohen*, 392 U.S. 83, 97, 88 S. Ct. 1942, 1951, 20 L.Ed.2d 947 (1968). The EEOC's Memorandum correctly identifies the ripeness factors and the seminal cases that underscore them, but then urges the wrong conclusion by application of those factors to the facts of this case. EEOC Mem. at p. 3.

A. This case is fit for review

Fitness for review is established if the court is presented "with a controversy that [is] 'definite and concrete, not hypothetical or abstract'." *Assiniboine and*

Sioux Tribes v. Board of Oil and Gas Conservation, 792 F.2d 782, 788 (9th Cir.1986), citing *Babbitt v. United Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979)(quoting *Railway Mail Ass'n. v. Corsi*, 326 U.S. 88, 93, 65 S.Ct. 1483, 1487, 89 L.Ed. 2072 (1945)).

SRHA asks this Court to review the straightforward legal question of whether sovereign immunity and the corresponding express exclusion of Indian Tribes from the definition of 'employer' under Title VII of the Civil Rights Act of 1964 preclude the EEOC from exercising jurisdiction over SRHA, foreclosing enforcement of its subpoena. *See* Declaratory Judgment Complaint at ¶ 1. This is not an abstract or hypothetical determination, nor is it a coverage question to be left to the agency's determination.

In *Equal Employment Opportunity Commission v. Karuk Tribe Housing Authority,* 260 F.3d 1071 (9th Cir. 2002), the Ninth Circuit highlighted the key distinction between the jurisdictional question the EEOC's administrative subpoena raises here, and garden variety coverage questions that are not subject to judicial review at the subpoena enforcement stage. It pointed out that the terms "coverage" and "jurisdiction" have often been used interchangeably and imprecisely, when it is important to distinguish these concepts because they frequently lead to opposite outcomes. *Karuk, supra,* 260 F.3d at 1077. The Court emphasized that:

> [t]his distinction is not merely semantic. There is a difference, particularly in the case of an Indian tribe, between the determination whether an agency has regulatory jurisdiction to enforce a subpoena in the first instance, and the very different question whether a subpoena recipient has a defense to liability under the applicable statute.

Id.

Albeit under a different federal statute, the *Karuk* tribe mounted precisely

the same jurisdictional challenge to an EEOC administrative subpoena that SRHA raises in its Declaratory Judgment Complaint. The *Karuk* court properly characterized this as a purely legal question, "the resolution of which does not depend on a factual inquiry, and which would not undermine the role of subpoena enforcement actions as 'summary procedure[s]' designed to allow 'speedy investigation of EEOC charges.'" Id. at 1078 (citations to supporting authority omitted).

The court held that such questions fall into the narrow category that are ripe for judicial determination ***at the subpoena enforcement stage***. *Id.* The court pointed out that the result of subjecting a tribe to a subpoena when basic jurisdiction is lacking is irreparable injury to tribal sovereignty. *Id.* The court also noted the absence of any compelling reason to defer to the EEOC for any initial determination of this issue, since it is possessed of no particular expertise in interpreting whether federal statutes apply to Indian tribes. *Id.*

B. Demands for compliance with a subpoena for which there is no jurisdiction is final enough for immediate judicial review.

Case law that the EEOC relies upon makes clear that judicial review of agency action is not premature where agency action is final and the questions presented are purely legal. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. at 1515 (1967). There is no point in delaying judicial review if further factual development would not render the issue any more concrete. *Assiniboine, supra,* 792 F.2d at 789.

Furthermore, "[f]inality is a pragmatic, flexible concept." *Id.* Courts consider the following factors in ascertaining finality: 1) whether the agency action has "direct and immediate effects on the plaintiff's day to day business."

Id. (citations to supporting authority omitted). *Karuk, supra,* supplies the answer to this factor. Demands for compliance (such as the EEOC has made in the Determination at issue in this case),[1] are a direct affront to tribal sovereignty. The harm is irreparable, and the prejudice is real and immediate. *Karuk, supra,* 260 F.3d at 1078; *see also*, *Aroostook Band of Micmacs v. Ryan,* 403 F. Supp.2d 114, 131 (D. Me. 2005).

The other finality factors include whether the agency action "has the status of law, whether immediate compliance with its terms is expected, and whether court review will interfere with the proper functioning of an agency." *Assiniboine, supra,* 792 F.2d at 789 (citations to supporting authority omitted).

Certainly in this case the EEOC's subpoena has the status of law. SRHA does not challenge the agency's authority (when jurisdiction is present), to issue administrative subpoenas. As to immediate compliance, the EEOC's Determination not only demanded immediate compliance, it set a deadline for SRHA's compliance. *See* fn. 1. While the EEOC now concedes that it has no administrative authority to enforce its subpoena, it is noteworthy that it never bothered to point this out to SRHA in the imperious Determination it handed down to the Tribe.[2]

The *Karuk* case also supplies the answer to the last finality factor: it seems axiomatic that immediate court review will not interfere with the proper functioning of the EEOC if the EEOC lacks jurisdiction over this matter in the first place. To the contrary, immediate court review, and a speedy determination

---

[1] *See* Exhibit E to SRHA's Declaratory Judgment Complaint.
[2] *See* Doc. 11 at p. 2-3; *compare* Exhibit E to SRHA's Declaratory Judgment Complaint.

that the EEOC lacks jurisdiction in this case, would enhance the proper functioning of this agency by freeing up its resources from this case for redirection to those over which it does have jurisdiction.

This case and others like it illustrate that the finality factors discussed above, though satisfied in this case for the reasons set forth above, are an imperfect fit where, as here, federal administrative law and the federal administrative subpoena power, collide head-on with concepts of Indian tribal sovereignty. Indian tribal sovereignty enjoys especially sacrosanct ground in the hierarchy of federal jurisprudence precisely because it is aboriginal. It derives from recognition of the fact that Indian tribes once existed as independent nations, whose rights to independence (though violated most appallingly in the interim), have never been extinguished. *Weeks Const., Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668, 670 (8th Cir. 1986). For these reasons, the federal courts should be especially receptive to the use of the Rule 57 procedural tool, when it best effectuates the right of a sovereign nation to assert and promptly protect its sovereignty against unlawful incursions. This case is the narrow exception discussed so thoroughly in *Karuk, supra*. It is ripe for review now. Declaratory judgment is appropriate because the harm has already occurred, and is ongoing.

C. The EEOC subpoena imposes multiple hardships and is also a recurring problem.

SRHA's complaint also meets the second ripeness prong, because withholding judicial review would perpetuate existing hardships. None of the cases the EEOC cites in the section of its Memorandum discussing this hardship criteria (p. 6-8), have to do with Indian tribes or sovereignty issues. In the cases

the EEOC cites, judicial relief was denied because of the absence of a showing of immediate injury. *See e.g., General Fin. Corp. v. F.T.C.,* 700 F.2d 366 (7th Cir. 1983).

The EEOC likens that case unto this one, but they are, in fact, distinctly different in this critical respect: as the *Karuk* court noted, when federal agencies seek to burden Indian tribes over which they have no jurisdiction with administrative subpoenas, the harm is not only immediate, but irreparable. It is an affront to the tribe's very sovereignty. *Karuk, supra*, 260 F.3d at 1077; *see Aroostook, supra,* 403 F. Supp.2d at 131.

As the *Karuk* court correctly noted, this unique fact compels immediate review within this narrow category of cases. By ignoring the key sovereignty issue that distinguishes this case from the garden variety scenarios relied upon in Defendant's Memorandum, the EEOC under-analyzes the hardship issue, thereby missing the critical point. As an arm of the federally recognized Standing Rock Sioux Tribe, SRHA has *already* been harmed by the EEOC's issuance of a subpoena that is in derogation of its sovereign rights, and it is entitled to relief now.

Fifteen months ago, and two months before the EEOC even issued its subpoena, SRHA filed its motion for summary judgment before the EEOC. By reference to sworn affidavits and documentary evidence, SRHA outlined its arguments for why the EEOC lacked jurisdiction over the underlying complaints. The EEOC ignored that motion. More than a year later, it instead issued its Determination commanding compliance with the subpoena. That determination sidestepped the issues raised in SRHA's summary judgment

motion. Despite the fact that SRHA's motion directed the EEOC to the *Karuk* case and its distinction between coverage and jurisdictional questions, the EEOC's Determination contended that the agency has the right to determine its jurisdiction. It does not. Accordingly, the EEOC's suggestion in its briefing that SRHA must simply await the further whimsy of this gargantuan oppressor, to see if it some day elects to ask this Court to enforce its subpoena, is both fundamentally flawed and avoidably oppressive.

As set forth below, there are other, subtler but at least equally important harms the EEOC's briefing fails to address. This is not the first time the Standing Rock Sioux have been forced to defend their sovereignty against EEOC encroachment. As such, the subpoena at issue in this controversy may fairly be regarded as emblematic of a situation that is likely to recur, unless and until the EEOC develops policy guidelines that respect Indian sovereignty. For these reasons, as well as for the EEOC's now well documented history of lengthy delay in this matter, declaratory judgment is the sharpest and most appropriate tool in the shed for addressing these important issues before more harm results.

1. SRHA is harmed because the underlying cases languish

In its haste to preempt the field of investigating discrimination complaints, the EEOC's briefing ignores another key type of harm that recurs when jurisdictional disputes effectively suspend the merits of a case. The harm discussed in *Karuk* of infringing upon the sovereignty of an Indian tribe pierces deeper than mere diplomatic insult. The effect of the jurisdictional limbo these disputes create is to delay and prejudice resolution of the underlying discrimination claims in their proper forum: the Standing Rock Sioux Tribal Court.

As the court in *Aroostook* said (in notable understatement), "the loss of the right to litigate in the forum of one's choice is cognizable…" *Aroostook, supra*, 403 F.Supp.2d at 131.

The merits of SRHA's defenses to the underlying claims lie bobbing in the wake of the EEOC's sloth. As with any case, the luster fades with time. Witnesses lose their memories, move away, or die. Persons in key positions when events occurred change jobs and go missing. Documents get lost or archived.

Thus, the inability to move forward on the merits in the proper forum is a tangible harm that deepens over time. Yet the EEOC asks this Court to deny immediate relief from this harm, and to wait while it dithers over its administrative subpoena, and over whether to ask this Court to enforce it. The ongoing harm of delayed resolution of the underlying merits is perhaps the most compelling reason for the Court to decide this matter now, so the real case now trapped in the jurisdictional thicket is not left to languish any longer in the improper forum, to the distinct disadvantage of all parties.

2. SRHA is harmed because this is a recurrent situation

Finally, as the facts of *Karuk* demonstrate, and as shown below, this is a recurrent situation plaguing Indian tribes in general, and the Standing Rock Sioux in particular. Declaratory judgment is a particularly appropriate mechanism where the situation presented is likely to recur. *See generally, Fisher v. Dillard Univ.*, 499 F.Supp. 525, 536 (E.D. La. 1980).

As SRHA pointed out to the EEOC in its summary judgment motion filed in January, 2007, the EEOC's Denver District Office in 2005 dismissed Title VII race-based discrimination charges made against the Standing Rock Sioux Community

School in a different case, on jurisdictional grounds. *See Dismissal and Notice of Rights*, attached as Exhibit 1. In that case, the EEOC apparently agreed with Standing Rock's summary judgment contention that sovereign immunity barred EEOC consideration of the Complainant's charges. *See* Standing Rock Community School's Motion and Memorandum for Summary Judgment, attached as Exhibit 2.

SRHA's tribal status and the Community School's tribal status in this predecessor case are indistinguishable. For jurisdictional purposes, both entities are arms of the Standing Rock Sioux. Given the EEOC's actual notice of its own previous ruling, its failure to address SRHA's summary judgment motion in this case and its insistence instead on issuing a subpoena and then demanding the Tribe's compliance should fairly be viewed as arbitrary and capricious, as well as irreconcilably inconsistent with its own precedent involving this very Tribe.

Indeed, the EEOC has previously acknowledged and even argued that the Sioux are an Indian tribe exempt from the Title VII definition of employer, and the South Dakota district court agreed with them. *See Giedosh v. Little Wound School Board, Inc*., 995 F.Supp. 1052, 1058 (W.D. S.D. 1997) (EEOC's decision more relevant and given more weight than decisions cited by the plaintiffs). Though *Giedosh* does not make mention of it, the same district office involved in this case would likely have been the one to have made this inconsistent jurisdictional determination in *Giedosh*.

The case law on the Title VII 'employer' exemption for Indian tribes is so clear and pervasive that at least one court recently surveying this landscape characterized the repeated filing of such obviously non-viable federal charges

as "arguably frivolous." *Aroostook, supra,* 403 F. Supp.2d at 131. It noted that tribal entities suffer real harm when such charges are filed. The tribe incurs legal costs, and is forced against its will to defend against "obviously futile" charges in a forum from which it is exempt in the first place. *Id.* The Court properly characterized the situation as a diplomatic affront to the basic dignitary interests of a sovereign with its own legal system, customs, and means of redress. *Id.*

SRHA has been harmed in this way as well. This Court should address the merits of its declaratory judgment action because the Standing Rock Sioux, the Sioux nation, and Indian tribes in general, have been recurrently plagued with inconsistent and arbitrary EEOC enforcement initiatives, despite the fact that Title VII, as read in this Circuit and elsewhere, clearly exempts them. The Court should take this opportunity to direct the EEOC to develop nationwide policies to prevent this recurrent, systemic abuse; also wasteful of finite federal resources.

II. THIS COURT HAS SUBJECT MATTER JURISDICTION

Defendant's motion devotes several pages to the argument that the Court lacks jurisdiction over SRHA's complaint. Deft's. Mem. at p. 8-12. Defendant's argument however, overlooks a number of federal statutes that clearly confer jurisdiction.

A. 28 U.S.C. § 1362 vests jurisdiction

28 U.S.C. § 1362 vests the federal district courts with original jurisdiction over all civil actions:

> … brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The Standing Rock Sioux Tribe is a federally recognized Indian Tribe. *See Federally Recognized Indian Tribes*, 67 Fed. Reg. 46327-46333 (July 12, 2002). SRHA is a tribally chartered and designated housing entity and an arm and instrumentality of the Standing Rock Sioux Tribe. *See* affidavit of Ken Alkire at ¶'s 5, 6, & 9, attached as Exhibit 3.

Defendant's jurisdictional argument does not even challenge SRHA's status as an instrumentality of the Standing Rock Sioux Tribe. Accordingly, the Court should rule that this is a civil action brought by an Indian tribe wherein the matter in controversy arises under the laws of the United States, namely under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 2000e, *et seq*. As such, this Court clearly has jurisdiction under 28 U.S.C. §1362 and 28 U.S.C. §1331, discussed below. *See* F. Cohen, *Handbook of Federal Indian Law*, § 7.01, fns. 2 & 3 at p. 597 & § 7.04[1][a] at p. 610-14 & fn. 120(2005).

B. *28 U.S.C. § 1331 vests jurisdiction over this federal question*

This Court also has jurisdiction over this matter pursuant to the basic federal question statute, 28 U.S.C. §1331, because the matter at issue arises under the laws of the United States. The Eighth Circuit has stated this most succinctly in *Gaming World Intern., Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 847 (8th Cir. 2003)("If a declaratory judgment action requires resolution of an issue of federal law or precludes the assertion of a federal right by a responding party, there is jurisdiction over it."). Federal question jurisdiction is nowhere clearer than when the matter at issue is a federal statute. *See* F. Cohen, *Handbook of Federal*

Indian Law, § 7.04[1][a] at p. 610-12 (2005); *see also, Assiniboine, supra*, 792 F.2d at 792-93 (extensively discussing this issue).

C. The Administrative Procedures Act entitles SRHA to review

Last, but certainly not least, 5 U.S.C. § 702 of the Administrative Procedure Act provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." There is a strong presumption under the APA that agency action is reviewable. *Woodsmall v. Lyng*, 816 F.2d 1241, 1243 (8th Cir.1987); *see State of N.D. ex rel. Bd. of Univ. & Sch. Lands v. Yuetter*, 914 F.2d 1031, 1033 (8th Cir. 1990). While the APA does not provide an independent basis for judicial review of administrative decisions, it does provide a basis in conjunction with 28 U.S.C. § 1331 and 28 U.S.C. § 1362. *See Assiniboine, supra*, 792 F.2d at 792-93.

For reasons already discussed, the interrelated questions of whether SRHA is a Title VII employer or an exempt sovereign, are presently justiciable issues over which this Court has jurisdiction. This is not a mere impermissible challenge to the EEOC's investigation. It is instead a proper and timely challenge to the more fundamental and plaguing question of whether there is a jurisdictional basis for any investigation <u>at all</u>.

III. SOVEREIGN IMMUNITY HAS NO APPLICATION

The Administrative Procedure Act provides in relevant part:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or

> employee thereof acted or failed to act in any official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702.

The Administrative Procedure Act constitutes a "specific waiver of the United States' sovereign immunity for actions for non-monetary relief brought under 28 U.S.C. § 1331." *Western Shoshone Nat. Council v. U.S.*, 408 F.Supp.2d 1040, 1048 (D. Nev. 2005); *see also*, 4 K. Davis *Administrative Law Treatise* § 23:19 at 195 (2d ed. 1983)("[A]bolition of sovereign immunity in § 702 is not limited to suits 'under the Administrative Procedure Act'; the abolition applies to every 'action in a court of the United States seeking relief other than money damages ...).

In *Assiniboine, supra*, 792 F.2d at 793, the court also noted that there was every reason to extend the same rationale applicable to 28 U.S.C. § 1331, to suits expressly authorized to be brought under 28 U.S.C. § 1362. Taken together, these statutes are interpreted as unequivocal waivers of sovereign immunity as to non-monetary claims against the United States. Defendant's sovereign immunity argument is without merit.

CONCLUSION

For all the foregoing reasons, SRHA respectfully requests that the Court deny Defendant's motion, and that it instead grant SRHA's request for an expedited resolution of the merits of its Declaratory Judgment Complaint. SRHA

requests such other and further relief as the Court deems proper under the circumstances.

Respectfully Submitted:

RIPLEY B. HARWOOD, P.C.

By: s/ _____

RIPLEY B. HARWOOD
11200 Lomas Blvd., N.E., Suite 210
Albuquerque, NM 87112
505-299-6314
505-298-0742 fax
Attorney for Plaintiff