IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

ATTORNEY'S PROCESS AND INVESTIGATION SERVICES, INC.,	)	
	)	No. 1:05-CV-00168-LRR
Plaintiff,	)	
	)	**BRIEF IN SUPPORT OF API'S**
v.	)	**MOTION FOR PARTIAL SUMMARY**
	)	**JUDGMENT ON JURISDICTIONAL**
SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA,	)	**GROUNDS**
	)	
Defendants.	)	

TABLE OF CONTENTS

INTRODUCTION

Attorney's Process and Investigative Services, Inc. moves for summary judgment as to Count I of its Complaint, which seeks a declaratory judgment pursuant to 28 USC §2201, the Federal Declaratory Judgment Act, that the Tribal Court is without jurisdiction over API. As this Court recognized in its Order dated January 7, 2009[1], API exhausted all tribal court remedies by virtue of the Tribal Court of Appeals' determination of the jurisdictional issue in the Tribal Court's favor. *See Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 16-17 (1987) (holding that tribal appellate review of jurisdictional issue constitutes exhaustion of tribal remedies and that federal courts should not intervene until tribal appellate review is complete). The issue is now one for this Court to determine as a matter of federal law. *National Farmers Union Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985).

[1] Document 41.

Because of the procedural posture of this case – following the exhaustion of remedies in tribal court – the factual record now before this Court, which forms the basis of API's motion, was developed and determined by the tribal courts.[2] As discussed below, there is no dispute as to the *material* factual findings of the Tribal Court, only their legal effect. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (A fact is material only when it is a fact that "might affect the outcome of the suit under the governing law.") Based on those factual findings, this Court should find as a matter of law that the tribal courts lack jurisdiction over API and grant summary judgment in API's favor. F.R. Civ. P. 56(c) (summary judgment is appropriate if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."); *Agristor Leasing v. Farrow,* 826 F.2d 732, 734 (8th Cir. 1987) (holding that summary judgment is appropriate when there is no genuine issue of material fact, "so that the dispute may be decided on purely legal grounds.")

FACTUAL BACKGROUND AND PROCEDURAL OVERVIEW[3]

A. Material Undisputed Facts

As this Court has stated, this case arises out of a tribal leadership dispute between the tribal council elected by tribal members (the Elected Council or Walker Council) and a council appointed by the hereditary chief as the result of dissatisfied tribal members seeking a "self help remedy" (the Appointed Council or Bear Council). 401 F. Supp. at 955-56.

---

[2] *Iowa Mut. Ins. Co.*, 480 U.S. at 21 (one purpose of exhaustion is to develop a record upon which the federal courts can make a determination consistent with federal law concerning tribal court jurisdiction over a nonmember.)

[3] To the extent that the Tribal Court of Appeals has made a factual finding on the facts recited in the statement of material facts and in this brief, API will cite to the Tribal Court's *Memorandum and Order.*

The Tribe is a federally recognized Indian Tribe, which owns and operates the Meskwaki Bingo-Casino-Hotel (the Casino). App. 9 (Tribal Court Complaint ¶ 1). API is a Wisconsin corporation in the business of investigative, security and law enforcement consulting. App. 10 (Tribal Court Complaint, ¶ 2); App. 1 (June 2003 Agreement, p. 1).

On June 16, 2003, API entered into an Agreement for consulting services with the Tribe. App.1-8 (June 2003 Agreement). The Agreement was executed on behalf of the Tribe by Alex Walker, who at the time was the Chairman of the Elected Tribal Council. App. 79 (*Memorandum and Order,* p. 1). The scope of services that API agreed to provide included "[d]eveloping a security plan for the re-opening of the Tribe's Gaming Facility" and "investigat[ion] [of] allegations of unlawful acts and tribal policy violations of the dissident group involving Tribal funds, and gaming operations." App. 1-2 (June 2003 Agreement, §I.2.B and E).

With regard to the resolution of any disputes between the Tribe and API, the June 16, 2003 Agreement provided:

> i The parties shall make efforts to settle through dialogue and negotiation any disputes that may arise out of this Agreement. However, should such efforts fail after thirty (30)days, the dispute shall be submitted to arbitration, which **shall** be conducted in Des Moines, Iowa, in accordance with the Commercial Arbitration Rules of the American Arbitration Association.
>
> ii. The arbitrator shall apply the applicable laws of the Tribe (as enacted or amended), the United States and the State of Iowa. The arbitrator shall not have the power to alter, modify, amend, add to or subtract from any term or provision of this Agreement, nor to rule upon or grant any extension, renewal or continuance of this Agreement. Judgment on the award of the arbitrator may be entered by the Federal District Court for the Northern District of Iowa under the Federal Arbitration Act or Iowa state court pursuant to Iowa law. For this purpose, the Tribe and API hereby irrevocably consent to the jurisdiction over their persons of such courts for such purpose, including to enter judgment on an arbitration award, and

waive any defense based on improper venue, inconvenient venue, or lack of personal jurisdiction.

iii. The failure of any party to submit voluntarily to arbitration shall be deemed to be a breach of this Agreement. Provided, that if either party has a good faith position that a dispute does not arise under this Agreement, that party may file an action in the Federal District Court for the Northern District of Iowa, or the Iowa state courts, to determine whether the dispute is the proper subject of arbitration under this Agreement.

App.4-5 (June 2003 Agreement § III.2) (emphasis added).

At the time that Alex Walker signed the Agreement in June of 2003 on behalf of the Tribe, the Walker Council was recognized by the Bureau of Indian Affairs as the governing tribal council. App. 82-83, *Memorandum and Order,* p. 4-5; App. 60 ¶1 (NIGC "Notice of Violation" (NOV) dated April 30, 2003, Exhibit D).[4] The National Indian Gaming Commission (NIGC) specifically stated in the NOV that it deferred to the Bureau of Indian Affairs in defining the "tribe" for purposes of receiving federal services and determining eligibility of the government's "special programs." App. 60 ¶ 3 (NOV, Exhibit D). On several occasions following his appointment by the Hereditary Chief, Homer Bear or others on his behalf contacted either the Department of the Interior or its Bureau of Indian Affairs seeking recognition for his Council from the Bureau of Indian Affairs. App. 82 (*Memorandum and Order,* pp. 5-6).

On each occasion, the Bureau of Indian Affairs rejected Homer Bear's request and reiterated that it continued to recognize the Walker Council as the Elected Council of the Tribe. App. 63 (March 17, 2003 letter from Midwest Regional Director of the Bureau of Indian Affairs refusing to recognize Bear Council, Exhibit F); App. 64 (April 1, 2003 letter from the Assistant Secretary for Indian Affairs, Exhibit R-1); App. 65 (May 9, 2003

[4] All references to "Exhibits" are to exhibits made part of the tribal trial court record.

letter from Deputy Commissioner of Indian Affairs, Exhibit R-2); App. 66 (May 23, 2003 letter from Secretary of the Interior in response to request to certify special election stating that it "was not called and held in accordance with tribal law and, therefore, we will not recognize the results of it." Exhibit R-3).

The Bureau of Indian Affairs did not recognize the Bear Council until the fall of 2003. App. 83, *Memorandum and Order,* p. 4-5 and fn.4.)

B. Procedural Background

1. Tribal Court

In August 2005, the Tribe filed its complaint in Tribal Trial Court alleging tort claims against API, including for conversion of Tribal funds, trespass and misappropriation of trade secrets. App. 9-17 (Tribal Court Complaint). In September of 2005, API moved to dismiss the Tribe's complaint on the ground that the Tribal Court lacked jurisdiction over it. App. 18-23 (API's Motion to Dismiss). Following discovery on the jurisdictional issue, on July 27, 2006, the Tribal Trial Court held a hearing on API's motion. App. 83 (*Memorandum and Order,* p. 5); App. 24-59 (Transcript of Hearing).

On March 26, 2008, the Tribal Court denied API's motion. App. 67-78 (Tribal Trial Court's Findings of Fact, Conclusions of Law and Order (Order)). Pursuant to API's appeal of the Tribal Trial Court's Order, the Court of Appeals filed its *Memorandum and Order* affirming the Tribal Trial Court on December 23, 2008. App. 79-86.

2. Federal Court

API filed its Complaint in this Court on October 21, 2005. (Document 2)[5]. API moved for preliminary injunction on November 7, 2005. (Document 12) On November 15, 2005, following a hearing on the motion, this Court denied API's motion and stayed the proceedings pending exhaustion. (Document 24). On January 2, 2009, API moved to reopen the case, which had been administratively closed, and to lift the stay. (Document 37). The Court granted API's unresisted motion on January 7, 2009. (Document 41).

ARGUMENT[6]

Tribal courts have exceptionally limited jurisdiction over nonmembers. Not only must they show that civil jurisdiction over a particular nonmember satisfies one of the two narrow exceptions to the general rule that tribes have *no* jurisdiction over nonmembers, tribal courts' civil adjudicative jurisdiction is even more circumscribed than tribes' civil legislative jurisdiction. *See Plains Commerce Bank v. Long*, 128 S. Ct. 2709, 2720 (2008) ("[E]fforts by a tribe to regulate nonmembers . . . are 'presumptively invalid.'"); *ibid.* ("A tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."); *see also Strate v. A-1 Contractors,* 520 U.S. 438, 453 (1997) (same).

Applying the relevant legal principles to the undisputed facts of this case, API is entitled to judgment as a matter of law on Count I of its Complaint because the Tribal Court of Appeals exceeded its jurisdiction in holding it has the authority to determine the Tribe's tort claims against API on two, alternative grounds. First, the Tribal Court lacked

[5] References are to this Court's docket.

[6] Because the Tribe's motion to dismiss cannot be resolved without deciding the exact questions posed by API's federal question claim of no tribal court jurisdiction, the arguments presented below largely duplicate, although in a different order, the arguments in API's resistance to that motion.

jurisdiction because the conduct of API does not fall within one of the two narrow *Montana* exceptions to the general federal rule that tribal courts presumptively lack jurisdiction over nonmembers. Second, alternatively, even if the Tribal Court had jurisdiction over API in the first instance, it was deprived of that jurisdiction as a matter of federal law because recognition by the Bureau of Indian Affairs vested the Alex Walker Council with authority to sign the June 2003 Agreement and the authority to waive the Tribe's sovereign immunity by agreeing to arbitration *and* because the Federal Arbitration Act mandated that any disputes arising out of the 2003 Agreement or about its validity be resolved by an arbitrator, not the tribal courts.

I. API Is Entitled To Summary Judgment On Its Claim That The Tribal Court Exceeded Its Jurisdiction In Holding It Has The Authority To Determine The Tribe's Tort Claims Against API Because This Case Does Not Fall Within Either Of The Narrowly Drawn Montana Exceptions To The General Rule Of No Tribal Court Jurisdiction Over Nonmembers.

The Tribe and its courts had no jurisdiction over API, a nonmember. *Montana v. United States,* 450 U.S. 544, 565 (1981) ("The inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."); *Plains Commerce Bank*, 128 S. Ct., at 2719 ("[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders."). As the Supreme Court's recent decision in *Plains Commerce Bank* makes very clear, the general rule — the "default rule" — is that Indian tribes cannot regulate nonmembers and therefore cannot exercise civil jurisdiction, legislative or adjudicative, over them.

The Supreme Court in *Montana* delineated two, *narrow* exceptions to the default rule, both of which serve the same end, permitting jurisdiction only "to the extent necessary 'to protect tribal self-government [and] to control internal relations.'" *Plains*

Commerce Bank, 128 S. Ct., at 2721 (quoting *Montana*, 450 U.S., at 564); *see also id.*, at 2726 ("The second Montana exception stems from the same sovereign interests that give rise to the first . . . ."). Under the first *Montana* exception, often called the "consensual prong," a tribe may regulate or otherwise exercise civil jurisdiction over nonmember activities that reflect the nonmember's consent to subject himself to tribal authority; under the second, the "protective prong," it may regulate nonmember conduct that threatens the political integrity, economic security, or welfare of the tribe. *See Plains Commerce Bank,* 128 S. Ct., at 2720 (citing *Montana*, 450 U.S., at 565-566); *see also id.*, at 2724. As explained below, neither exception to the rule against tribal jurisdiction over nonmembers applies here.

A. The Tribal Court Of Appeals Employed A Presumption Of Tribal Jurisdiction Flatly Contrary To Federal Law.

The Tribal Court of Appeals erroneously held that it was not required to satisfy either of the *Montana* exceptions. App. 94 (*Memorandum and Order,* p. 16.) The Tribal Court incorrectly started its jurisdictional analysis with the premise that "[t]he Tribe retains *presumptive* civil jurisdiction over nonmembers committing torts on tribal trust land." *Id.* (emphasis in the original). The Tribal Court of Appeals' holding in this regard is contrary to federal law, specifically as most recently explained by the United States Supreme Court in *Plains Commerce Bank.* In *Plains Commerce Bank*, the Supreme Court made it clear that tribal courts are presumptively *without* jurisdiction over non-members *even when their activities occur on tribal land. See Plains Commerce Bank,* 128 S. Ct. at 2719 ("This general rule restricts tribal authority over nonmember activities *taking place on the reservation,* and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians . . . ." (emphasis added)); *id.* at 2720

("[E]fforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'"). *Plains Commerce Bank* makes it clear that the status of the land is relevant to the jurisdictional inquiry *only* insofar as it bears on the application of the two exceptions, *i.e.*, the stronger a tribe's claim to the land, the more likely it can demonstrate a sufficiently strong tribal interest supporting application of an exception. *See* 128 S. Ct. at 2720. Thus, contrary to the Tribal Court of Appeals' decision, the general presumption against civil jurisdiction applies to the Tribe's tort claims against API unless one of the two *Montana* exceptions applies.

B. Nonmembers' Conduct That Forms The Basis Of The Tribal-Court Claims, Not Issues That May Arise In Tribal-Court Proceedings, Must Be The Focus Of The Jurisdictional Inquiry.

The Tribal Court of Appeals, after erroneously holding that it had jurisdiction over API without ever having to reach the issue of whether a *Montana* exception applied, nonetheless proceeded to determine as an alternative ground whether one of those exceptions conferred tribal court jurisdiction over API. App. 94-95 (*Memorandum and Order,* pp. 16-17). Although the Tribal Court of Appeals correctly concluded that the first *Montana* exception, the consensual prong, did not cover the Tribe's tort claims, App. 92 (*Memorandum and Order,* p. 14), it incorrectly concluded that the second exception, the protective prong, did.

The *Montana* exceptions focus on the "activities" and "conduct" of the nonmember over whom a tribe seeks to exercise civil jurisdiction. *See Plains Commerce Bank*, 128 S. Ct., at 2720. Thus, a tribe must show that more than the issue of the existence of a tribal leadership dispute is involved. Instead it must show that the nonmember's conduct that forms the basis of the claims it seeks to adjudicate imperils

one of the tribe's limited interests. As a matter of federal law, the Tribe cannot make such a showing. In its complaint against API, the Tribe alleged that API took tribal funds without authority (¶¶ 4-5), entered its casino without authority (¶ 7), improperly took information about the operation of the Tribe's casino(¶¶11-12), and improperly used and reviewed that information (¶¶ 44-46). App. 10-11, 15.

None of these acts, inherently or in fact, "intrude[d] on the internal relations of the tribe or threaten[ed] tribal self-rule." 128 S. Ct. at 2723. To be sure, one issue in the Tribe's tort claims is whether the Walker Council had authority to enter the June 2003 Agreement, since if the Agreement is valid, the conduct challenged by the Tribe's tort claims would be licensed and therefore not tortious. But that *issue* — *i.e.*, whether the Walker council had authority to waive sovereign immunity — is not *conduct* of API that could sustain the first *Montana* exception. If a tribe and its courts could exercise civil jurisdiction over a nonmember because of the mere fact that one issue in a dispute implicated a tribal political interest, the default rule against tribal jurisdiction over nonmembers would be sharply curtailed, if not largely overtaken. *See Plains Commerce Bank*, 128 S. Ct., at 2720 (emphasizing that both *Montana* exceptions "cannot be construed in a way that would swallow the rule [of no jurisdiction over nonmembers] or severely shrink it." (internal quotation marks and citations omitted)). Any claim brought under tribal law in a tribal court could involve a challenge to the legitimacy of some of the tribal members' own conduct — the validity or scope of applicable tribal laws, the authority of an Indian tribunal, and, as in this case, whether the Tribe entered the Agreement legitimizing the defendant's conduct, waiving sovereign immunity, and agreeing to arbitrate all disputes arising out of the Agreement. Resolving those

challenges very well may implicate "internal relations of the tribe" in some sense, but that ever-present possibility cannot vest a tribal court with jurisdiction over the nonmember's conduct without totally changing the federal default rule of no jurisdiction.

C. There Is No Jurisdiction Under The First *Montana* Exception.

In its jurisdictional analysis, the Tribal Court of Appeals correctly identified and examined API's conduct. App. 92 (*Memorandum and Order,* p. 14). Thus, it correctly concluded that the first *Montana* exception did not apply. The Court of Appeals recognized that the Tribe's tort claims are not premised on a consensual relationship between a tribe and a nonmember; rather, it held that the first exception "does not apply to the Tribe's tort claims – as API correctly points out, these are premised on *lack* of consent and turn on the tribe's claim that there was no valid Agreement." App. 92 (*Memorandum and Order*, p.14 (emphasis in original)). In other words, a necessary component of the Tribe's tort claims is that API took funds, entered the casino, and obtained casino records without any consensual arrangement permitting such conduct. Those claims by their nature are a poor fit with *Montana*'s first exception for claims involving *consensual* arrangements.

The Tribe nonetheless argued in its Motion to Dismiss – and it is anticipated that it will do so here – that the consensual exception applies. *See Tribe's Memorandum of Authority,* pp. 17-19. The Tribe contends that API entered into a consensual relationship with Alex Walker, which sustains jurisdiction. *Id.* Though API did enter into a consensual relationship with Walker, that relationship is not the *nonmember conduct* targeted by the Tribe's tort claims. Rather, the claims challenge the allegedly nonconsensual aspects of API's relationship with the Tribe — *e.g.*, the taking of its funds

and entry into its casino. Further, the Tribe cannot rely on tribal gaming licensing procedures and other tribal regulations related to gaming in support of its argument that the first prong of *Montana* applies to API's conduct. *See Tribe's Memorandum of Authority*, p.18. That contention fails for many reasons. First, as with the Tribe's first contention, API's conformance with tribal gaming laws is not the nonmember conduct targeted by the Tribe's tort claims. Second, there is no evidence that API actually submitted to the licensing procedures, a fact necessary to show consent. Third, saying that API was subject to tribal gaming laws assumes the very conclusion that the Tribe must prove: tribal gaming laws are civil regulations that apply only if API, as a nonmember, consented. Fourth, whether API was required to comply with tribal gaming laws before contracting with the Walker Council does raise, as the Tribe suggests, "a matter of law," but it is a matter of *tribal* law that this Court cannot decide.[7] In fact, implicit in the Tribal Court of Appeals's conclusion that the Tribe did not satisfy the first *Montana* exception is a rejection of all of the tribal law aspects of the Tribe's contention. There is no reason for this Court to reach a different conclusion about tribal law.

Plains Commerce Bank sheds further light on the application of the first *Montana* exception to this case, because it explains that the mere existence of an agreement or other ostensibly consensual relationship between a tribe member and a nonmember is not sufficient to satisfy the first *Montana* exception. In *Plains Commerce Bank*, the Supreme Court acknowledged that Indian "laws and regulations may be fairly imposed on

[7] In fact at the time, there was no gaming activity being conducted, precisely because there was a federal finding that the Bear Council did not have the authority to operate the casino. As stated in the Notice of Violation dated April 30, 2003 "[t]he tribal government recognized by the Secretary of the Interior is not in control of the Tribe's gaming operation and remains excluded from the premises by the occupying group." App. 60, § 4(G). There is, therefore, an open question of *tribal* law regarding whether compliance with gaming laws was required.

nonmembers only if the nonmember has consented, either expressly or by his actions." *Plains Commerce Bank*, 128 S. Ct. at 2724. All the evidence here indicates that API never consented to tribal jurisdiction over its conduct underlying the Tribe's claims. In its Agreement with the Tribe, API sought and expressly obtained the Tribe's consent to arbitrate all disputes arising out of the Agreement. *See* App. 4-5 (API Agreement § III.2.b.i). API and the Tribe agreed that the arbitrator's decision would be binding and enforceable only in state and federal courts. *See* App. 5 (API Agreement § III.2.b.ii). They also agreed that motions relating to the arbitration could be brought only in state and federal courts. *See* App. 5 (API Agreement § III.2.b.iii.) Indeed, even the *Plains Commerce Bank* dissent acknowledged that forum-selection clauses and arbitration clauses are proper ways for nonmembers to escape tribal jurisdiction. *See Plains Commerce Bank*, 128 S. Ct. at 2729 (Ginsburg, J., dissenting). Even if the June 2003 Agreement is somehow unauthorized, its provisions nevertheless plainly manifest API's strenuous withholding of consent to tribal civil jurisdiction. As a matter of law, the first *Montana* exception is inapplicable.

D. There Is No Jurisdiction Under The Second *Montana* Exception.

The Tribal Court of Appeals, in sustaining jurisdiction under the second *Montana* exception, wrongly concluded it had jurisdiction because it measured API's alleged conduct by a relaxed standard that is inconsistent with federal law. App. 94 (*Memorandum and Order*, p. 16) ("Any tortious activity in which a nonmember engages, directly aimed at the Tribe's gaming operations, while on trust land, is more than sufficient grounds to justify the Tribal Court exercising civil adjudicatory jurisdiction over the nonmember.") Federal law, instead, requires that a tribe aiming to preserve self-

government may only exercise civil jurisdiction over a nonmember to protect the tribe from *catastrophe*. See *Plains Commerce Bank,* 128 S. Ct. at 2726-2727 (rejecting application of the second *Montana* exception because the challenged conduct — sale of land — could not "fairly be called 'catastrophic' for tribal self-government"). API's alleged conduct, though it may have injured the Tribe, presented no catastrophic risk for tribal self-government. Moreover, the mere fact that API's conduct took place at a time when the Walker and Bear Councils were disputing each other's authority does not render API's conduct catastrophic. If the background issue of who is the "true" governing body could satisfy the second *Montana* exception, tribal courts would have civil jurisdiction over *every* nonmember who interacted with the Tribe during an intra-tribal dispute. Again, just because a case might implicate a sensitive question of tribal politics does not give tribal courts jurisdiction over nonmembers; the challenged nonmember conduct itself must pose catastrophic risk to tribal self-government. *See Plains Commerce Bank,* 128 S. Ct. at 2720 (stating that the *Montana* exceptions cannot be applied in such a way as to "swallow" the general rule of no-jurisdiction.). As a matter of law, the undisputed facts preclude any such finding in this case.

In short, the recent application of principles concerning tribal jurisdiction over nonmembers in *Plains Commerce Bank* controls this case. And it more than shows why, as a matter of law, the tribal courts had no jurisdiction over API for the tort claims the Tribe has alleged. This Court therefore must find that the tribal courts lacked jurisdiction, and it should enter judgment for API accordingly.

II. Even Assuming The Tribal Courts Had Jurisdiction Over API In The First Instance, Their Determinations Exceeded The Limitations Imposed On Tribal Court Jurisdiction By Federal Law And Thus Must Be Voided.

Regardless of the extent of a tribe's legislative jurisdiction over nonmembers, a tribal court's adjudicative jurisdiction is limited even further. First, tribal courts, like state and federal courts, are bound to apply controlling federal law. They have no power to disregard applicable federal law, which is why questions of federal law decided by tribal courts are reviewed *de novo* by federal courts. *See Duncan Energy Co. v. Three Affiliated Tribes,* 27 F.3d 1294, 1300 (8th Cir. 1994). Second, federal laws that provide for exclusive forums, which is precisely what the Federal Arbitration Act does here, may remove certain claims from tribal court jurisdiction that would otherwise fall within that jurisdiction. In deciding that API's June 2003 Agreement with the Tribe was invalid, the Tribal Court of Appeals went beyond the bounds of both of those federal-law limitations on its adjudicative jurisdiction. Its conclusions on the Agreement's validity, therefore, should therefore be declared void.

A. As A Matter Of Federal Law, The Alex Walker Council Had The Authority To Bind The Tribe To The June 2003 Agreement With API And To Waive The Tribe's Sovereign Immunity By Agreeing To Arbitrate Any Claim That Arises Under The Agreement.

The issue of who had the authority to bind the Tribe to the Agreement, which waived the Tribe's immunity and selected arbitration as the method for resolving disputes, is a matter of federal, not tribal law. In so arguing, API recognizes this Court has on several occasions declined to determine who was the governing tribal council of the Tribe, holding that this issue was an intra-tribal dispute to be determined based on tribal law. For example, in *Sac and Fox Tribe of the Mississippi v. Bear,* 258 F. Supp. 2d 938 (N.D. Iowa), a suit in which the Walker Council sued the Bear Council seeking a

declaratory judgment "settling [the] tribal dispute by declaring which Tribal Council is in control of the Tribe and the casino revenue," *id.* at 940, this Court declined to do so on the ground that "the Tribe's leadership dispute raises intra-tribal issues" and "[t]his Court is without jurisdiction to resolve intra-tribal disputes," *id.* at 943. As the Eighth Circuit Court of Appeals noted in *Runs After v. United States,* 766 F.2d 347, 352 (8th Cir. 1985), relied on by this Court in the dispute between the Walker and Bear Councils, 258 F. Supp. at 943, "resolution of . . . disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court."

Here, however, API is not urging this Court to interpret or apply tribal constitutional law or other tribal law.[8] The scope of the Tribe's federal sovereign immunity, and the question of which governing council had the authority to waive that federal immunity, select litigation forums, and perform actions related to the Tribe's federally granted sovereign powers, are matters of *federal* law. See *Kiowa Tribe*, 523 U.S., at 759 ("Like foreign sovereign immunity, tribal immunity is a matter of federal law.").

Who is the "true" governing council of a tribe *for tribal issues* is simply irrelevant to the *federal issue* of who can waive the tribe's sovereign immunity and agree to resolve disputes in a non-tribal forum. Thus, irrespective of its powers under tribal law, the Walker Council had *federal* powers — including the power to waive the Tribe's sovereign immunity in arbitration clauses and to conduct business with third parties, including governmental entities, particularly business inextricably linked to federally

[8] While API did argue issues of tribal law in support of its motion to dismiss in tribal court, The Tribal Court of Appeals rejected API's position, and API does not seek to relitigate the tribal-law aspects of the tribal court's ruling in this Court.

regulated activities such as gaming — because its recognition by the BIA vested it with those federal powers.

Federal law makes it clear that recognition of a particular tribal entity by the BIA confers on that entity certain authority in dealing with non-member third parties. Specifically, federal regulations provide, with regard to recognition by the Bureau of Indian Affairs of the Department of the Interior:

> The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes. Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. *Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes.*

25 C.F.R. § 83.2 (emphasis added). As stated in the third sentence of this provision, acknowledgment of tribal existence by the BIA confers upon a tribal government entitlement to the "immunities and privileges available to other federally acknowledged Indian tribes" as a result of their "government-to-government relationship with the United States." One such immunity and privilege is sovereign immunity. *See Kiowa Tribe,* 523 US 751, 754, 759 (1998) (the federal government has plenary control over an Indian tribe's sovereign immunity). And immunity can be waived in arbitration clauses that divest tribal courts of their jurisdiction. See *C&L Enters., Inc. v. Citizen Band Pottawami Indian Tribe of Okla,* 532 U.S. 411, 423 (2001).

In this case, as reflected in the Tribal Court of Appeals decision, there is no dispute that, at the time API and the Walker Council entered into the June 2003 Agreement, the Walker Council was recognized by the BIA as the Tribe's governing

council. App. 82-83 (*Memorandum and Order,* pp. 4-5). Recognition of the Walker Council by the Bureau of Indian Affairs therefore vested the Walker Council with power over the Tribe's federal sovereign immunity. Regardless of whether the Walker Council or the Bear Council was the "true" governing council as a matter of *tribal law*, only the Walker Council could waive the Tribe's federal sovereign immunity until BIA officially recognized the Bear Council. The Tribe's view that, at the time of the API Agreement, only the Bear Council could have waived the Tribe's sovereign immunity is manifestly contrary to the BIA's authoritative, contemporaneous determination to the contrary. If power over an Indian tribe's sovereign immunity depended on the tribal-law question of who is the tribe's "true" governing council, BIA recognition would be meaningless. Thus, it does not matter with respect to this case whether the Bear Council had authority on behalf of the Tribe over matters relating to *tribal* law. As a matter of *federal* law, only the federally recognized Walker Council could waive the Tribe's federal sovereign immunity, and it did precisely that through the arbitration provisions in API's Agreement.

In any event, even if the sovereign-immunity waiver in API's Agreement could be valid only if the entire Agreement was valid, API's Agreement with the Walker Council is valid *in toto* because it is inextricably intertwined with the Walker Council's *federal power* to operate the Tribe's casino. BIA recognition confers authority on a tribal entity to carry on government-to-government relations with the federal government. *See* 25 C.F.R. § 83.2. This general authority also extends authority to enter into relationships with third parties in order to carry out federally regulated activities. As the Eighth Circuit Court of Appeals stated in *Goodface v. Grassrope,* 708 F.2d 335 (8th Cir. 1983), it is the BIA exclusively that makes the determination which tribal government is recognized for

purposes of conducting business relating to the Tribe's federally regulated activities:

> [T]he district court correctly found that the BIA acted arbitrarily and capriciously by effectively creating a hiatus in tribal government which jeopardized the continuation of necessary day-to-day services on the reservation. The BIA, in its responsibility for carrying on government relations with the Tribe, is obligated to recognize and deal with some tribal governing body in the interim before resolution of the election dispute.

708 F.2d at 338-339.

The "government relations with the Tribe" in this case undisputedly included the gambling operations at the Tribe's Casino. *In re Sac & Fox Tribe and Mississippi in Iowa/Meskwaki,* 340 F.3d 749, 751 (8th Cir. 2003) (explaining that the Tribe is a federally recognized Indian Tribe which operates the Meskwaki Casino-Bingo-Hotel under a state-tribal compact with the State of Iowa). On April 30, 2003, the National Indian Gaming Commission (NIGC) issued a Notice of Violation closing the Casino then occupied by the Bear Council. *See* 340 F.3d at 753; App. 60-61(NOV, Exhibit D.) The NIGC concluded that closing was mandated because the entity recognized by the BIA — the Walker Council — was not operating the Casino, and NIGC required the Walker Council to reassume control of the Casino by May 2, 2003. App.60-61 (NOV, Exhibit D); App. 82-83 (*Memorandum and Order,* pp 4-5). *See also In re Sac & Fox Tribe and Mississippi in Iowa/Meskwaki,* 340 F.3d at 754. In other words, at the time API and the Walker Council entered into their Agreement, the Walker Council was the only entity of the Tribe that could run the Tribe's Casino.

The Walker Council, therefore, on June 13, 2003, was the only entity of the Tribe that could enter into agreements with third parties relating to the operation of the Casino. The June 2003 Agreement between API and the Walker Council is just such an agreement. Its subject matter is inextricably related to the Tribe's gambling operations

regulated by the federal government and administered by the BIA and NIGC. The Agreement specifically provided in Section I.2. B and E that the services API was to render included "[d]eveloping a security plan for the reopening of the Tribe's gambling facility" and the investigation of "allegations of unlawful acts and tribal policy violations of the dissident group involving Tribal funds, and gaming operations." App. 1-2. If the Walker Council could not enter into agreements relating to the Casino's operation, such as the June 2003 Agreement with API, it would eviscerate the federal determination that only the Walker Council, *and not the Bear Council*, could run the Casino. To operate a casino is to run a business, which *necessarily entails* entering into agreements, such as gambling agreements with patrons, agreements with suppliers of the casino, and security agreements like the one with API. In light of its subject matter, API's Agreement therefore cannot be found invalid simply because the Walker Council, but not the Bear Council, signed it.

This is not to say that the Walker Council had power from the federal government to commit the Tribe to *any type of agreement*. Rather, the Walker Council had specific authority from the federal government to enter into agreements in order to carry out its federally regulated activities, and it also had specific authority from the federal government to waive the Tribe's sovereign *immunity*. For all other types of agreements and for all of the Tribe's non-federal privileges and immunities, API submits, in accordance with the tribal courts' rulings, that only the Bear Council had authority to bind the Tribe.

Holding that BIA recognition can confer on an otherwise "unofficial" council (like the Alex Walker Council) the authority to waive a tribe's sovereign immunity in

arbitration clauses and to conduct business with third parties relating to the federally regulated activity of gambling is sound federal policy. The Tribal Court of Appeals, in fact, candidly recognized the destabilizing effect of its contrary holding that, regardless of the contemporaneous federal determinations, the "true" Bear Council alone had power to waive the Tribe's immunity and enter into casino-related Agreements in June 2003:

> [B]usinesses that choose to work with an affirmatively *ousted* tribal council are taking a substantial risk. They ought not to be heard to complain when the gamble fails.

App. 88 (*Memorandum and Order,* p.10). *See also, id.,* App. 87. This "gamble" would certainly extend further than the facts of this case. Any private business doing business with a tribe during an intra-tribal leadership dispute would run the risk of its Agreement being voided by subsequent events beyond its control when a new tribal council came into power. Applying the rationale of the Tribal Court of Appeals, as long as a challenger was found to be appointed consistent with tribal law, it could disaffirm the predecessor council's valid agreements. Such uncertainty would chill the willingness of nonmembers to conduct business with the Tribe, with serious economic consequences for the Tribe. Nonmembers, moreover, ought to be able to rely on the authoritative determinations of federal agencies whose sole job is to manage the relationship of tribes and their members with the federal government and its citizens.

B. The Federal Arbitration Act Precludes Any Exercise Of Jurisdiction By The Tribe In This Case.

Even though API believes that the tribal courts had no *civil* jurisdiction over API and the Tribe's tort claims (see above), assuming for the sake of argument that they did, the tribal courts had no *adjudicative* jurisdiction to render judgment on those claims and the issues relevant to them. As already shown, the waiver of sovereign immunity

contained in API's Agreement is valid as a matter of federal law. The valid waiver was effected by the Agreement's arbitration provision. *See C&L Enters., Inc.*, 532 U.S. at 418. Therefore, the arbitration provision is valid as well. That provision requires that any court — tribal, state, and even federal — stay its hand when asked to resolve disputes arising out of the June 2003 Agreement, even if that court otherwise would have subject-matter jurisdiction to resolve the dispute. It also means that federal arbitration law, which compels courts to follow parties' arbitration preference, is applicable in the tribal-court proceedings.

In *National Farmers Union*, the Supreme Court explained that federal law, either through a statute or treaty or as a necessary implication of the tribe's dependent status, could divest a tribe of regulatory or adjudicatory authority over certain matters, especially when nonmembers are involved. The Federal Arbitration Act is such a law. As the Supreme Court recently reaffirmed in *Preston v. Ferrer*, 128 S. Ct. 978 (2008), the Federal Arbitration Act "establishes a national policy favoring arbitration when the parties Agreement for that mode of dispute resolution. The Act, which rests on Congress' authority under the Commerce Clause, supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration." 128 S. Ct. at 982. Thus, as a matter of federal law, "when parties agree to arbitrate all disputes arising under their contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court." *Id.* Nothing in the Federal Arbitration Act carves out Indian tribes from its reach, just as nothing in the Act carves out state courts, and by its terms it applies to *all* "contract[s] evidencing a transaction

involving commerce." 9 U.S.C. § 2.[9]

Moreover, the Supreme Court in *National Farmers Union* required tribal exhaustion in civil cases because, "[i]n the civil field, . . . Congress has never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country," whereas Congress had done so in criminal cases. 471 U.S. at 855 n.17. The Federal Arbitration Act is precisely such a federal forum provision. It mandates that when parties to an agreement evidencing a transaction involving commerce agree to arbitrate disputes arising out of the agreement, the arbitrator is the exclusive forum for resolving such disputes as a matter of federal law. Accordingly, federal substantive law regarding arbitration was no less binding on the tribal court as it would have been on a state court, and the Tribal Court of Appeals had no authority to disregard binding federal law. It therefore exceeded the scope of its authority by deciding the issue.[10]

Also contravening federal arbitration law, the Tribal Court of Appeals incorrectly held that the tribal courts had authority to consider the validity of the Agreement despite the arbitration clause. The Federal Arbitration Act requires that challenges to the validity of an agreement with an arbitration clause be submitted to an arbitrator. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U. S. 440, 446 (2006) (discussing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967)). That federal statutory rule

[9] There should be no dispute that the June 2003 Agreement between API —a Wisconsin corporation — and the Tribe for the provision of investigative and security services related to the Tribe's casino operations involves "commerce" within the meaning of the FAA.

[10] Indeed, although API has exhausted its tribal remedies as this Court ordered it was required to do, the Supreme Court's decision in *Preston* demonstrates that the Federal Arbitration Act supersedes other laws that might require exhaustion before an entity other than the arbitrator. Just as the Act overrides state laws requiring exhaustion of administrative remedies, it overrides the federal policy of tribal exhaustion. As this case amply demonstrates, the delay and expenses associated with tribal court exhaustion are fundamentally inconsistent with the federal goals embodied in the Act.

supersedes *all* contrary laws that lodge primary jurisdiction of such challenges in other forums. *See Preston v. Ferrer*, 128 S. Ct. 978 (2008). Because, as a matter of federal law, the tribal courts could not address the Agreement's validity, the tribal-court rulings to the contrary are null and void.

It would have been no defense for the Tribe to argue that its tort claims are not encompassed by the Agreement's arbitration clause. The Tribe's tort claims clearly arise out of the Agreement. All of them challenge the propriety of API's conduct performing the Agreement, from accepting payment to providing security services to the Tribe. *See Hudson v. ConAgra Poultry Co.*, 484 F.3d 496, 499-500 (8th Cir. 2007) ("Under the Federal Arbitration Act, we generally construe broad language in a contractual arbitration provision to include tort claims arising from the contractual relationship, and we compel arbitration of such claims."); *CD Partners v. Grizzle*, 424 F.3d 795, 800-01 (8th Cir. 2005) ("Broadly worded arbitration clauses . . . are generally construed to cover tort suits arising from the same set of operative facts covered by a contract between the parties to the agreement."). Indeed, fairly read, the Tribal Court of Appeals' opinion agrees with this characterization of the Tribe's claims: if that court did not agree that the Tribe's claims arise out of the Agreement, App. 92 (*Memorandum and Order,* p. 14), it would have had no reason to rule further that the Agreement was invalid, but simply could have distinguished the arbitration provision as irrelevant instead.

Therefore, the Tribal Court of Appeals, even if it had subject-matter jurisdiction over the Tribe's tort claims (it did not), should have dismissed the Tribe's claims upon finding that they came within the Agreement's arbitration provision because that

provision validly limited the courts' adjudicative jurisdiction in the Tribe's case against API. Had the Tribal Court of Appeals followed that proper course, it would not have rendered any judgment or ruling about the Agreement's validity. Thus, any such judgments or rulings it did render were ones it had no power to render, and they accordingly are null and void as a matter of law.

CONCLUSION

The tribal courts' determination that it could proceed to the merits of the Tribe's tort claims is clearly wrong: the courts had no power to do so. They had no civil jurisdiction over API, as *Plains Commerce Bank* proves. They also had to abide the arbitration-preference in the June 2003 Agreement. Federal law compelled the tribal courts to permit an arbitrator to resolve the Tribe's tort claims and its attacks on the Walker Council's authority to commit the Tribe to the Agreement. Even if the tribal courts could assess the Walker Council's authority, they misapplied controlling federal law in concluding that the Walker Council lacked authority with respect to the Agreement and its arbitration clause.

Since these arguments present only legal issues, this Court should award summary judgment to API and hold as a matter of law that the tribal court lacked jurisdiction over API.

Respectfully submitted,

RICHARD S. FRY
rsf@shuttleworthlaw.com
MARK L. ZAIGER
mlz@shuttleworthlaw.com
DIANE KUTZKO
dhk@shuttleworthlaw.com
for
SHUTTLEWORTH & INGERSOLL, P.L.C.
500 US Bank Bldg., P.O. Box 2107
Cedar Rapids, IA 52406-2107
PHONE: (319) 365-9461
FAX: (319) 365-8564

DAVID B. SALMONS (Pro Hac Vice)
david.salmons@bingham.com
BRYAN M. KILLIAN (Pro Hac Vice)
bryan.killian@bingham.com
for
BINGHAM MCCUTCHEN, LLP
2020 K Street, NW
Washington, DC 20006
PHONE: (202) 373-6000
FAX: (212) 373-6001

ATTORNEYS FOR PLAINTIFF

Copy to:
Steven F. Olson, Esq.
Jeffrey S. Rasmussen, Esq.
Olson, Allen & Rasmussen, LLC
8200 Humboldt Avenue S.
Bloomington, Minnesota 55431
and
Wilford H. Stone, Esq.
Lynch Dallas PC
526 Second Avenue SE
P. O. Box 2457
Cedar Rapids, Iowa 52406-2457

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this document was served upon counsel of record for each party to the action in compliance with FRCP 5 on the 1st day of March, 2009 by:

[X] Electronically via ECF for ECF registrants
[ ] U.S. Mail _____
[ ] Fax _____
[ ] Fed Ex _____
[ ] Hand Delivered _____

By K. Frieden