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

ATTORNEY'S PROCESS AND INVESTIGATION SERVICES, INC.,	)	
Plaintiff,	)	No. 1:05-CV-00168-LRR
v.	)	MEMORANDUM OF AUTHORITY IN SUPPORT OF API'S RESISTANCE TO THE TRIBE'S MOTION TO DISMISS
SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA,	)	
Defendants.	)	

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INTRODUCTION

In this case, Attorney's Process and Investigation Services, Inc. ("API") has brought three claims against the Sac and Fox Tribe of the Mississippi in Iowa ("the Tribe"): a federal-question claim seeking a declaration that the Tribe lacks jurisdiction over API, a non-Indian; a claim that the Tribe breached API's June 2003 Agreement; and a claim to compel arbitration over all disputes between API and the Tribe arising out of the June 2003 Agreement.

In 2005, this Court ordered that the case be stayed pending exhaustion of tribal-court proceedings related to tort claims brought against API by the Tribe and challenging actions taken by API in performing the June 2003 Agreement. *See* 401 F.Supp. 2d 952 (N.D. Iowa 2005). Although the Tribe does not now dispute that API has properly exhausted tribal remedies consistent with this Court's 2005 order — thereby permitting this Court to proceed — it contends this Court must dismiss the case for two alternative reasons.

First, the Tribe believes that this Court must determine as a threshold matter — before it could determine whether the Tribal Court exceeded its jurisdiction — that its sovereign immunity deprives this Court of jurisdiction of *all* of API's claims, such that dismissal is

appropriate pursuant to Federal Rule of Civil Procedure 12(b)(1). In support of that position, the Tribe contends that the legal issues relevant to its sovereign immunity are matters of tribal, not federal law,[1] and that, therefore, this Court must accept the tribal courts' determination that the Tribe has not waived its immunity from API's suit.[2]

Second, the Tribe argues API has failed to state claims upon which relief can be granted, such that dismissal of *all* of API's claims is appropriate pursuant to Federal Rule of Civil Procedure 12(b)(6). In support of that position, the Tribe contends that the Tribal Court had jurisdiction over API and did not exceed its limited scope (thus defeating API's federal question claim) and that, therefore, this Court must accept the Tribal Court's determination that API's June 2003 Agreement with the Tribe is unauthorized and, hence, invalid (thus defeating API's breach-of-Agreement and arbitration claims).[3]

The Tribe's arguments are wholly without merit and legal support. With respect to the Tribe's sovereign immunity defense, an Indian tribe cannot use its sovereign immunity to preclude a federal court from deciding whether the tribal courts have exceeded the scope of their limited civil, adjudicative jurisdiction over non-Indians.[4] That is a threshold question of *federal* law that this Court must resolve regardless of the Tribe's sovereign interests.

In this case, moreover, the Tribe's sovereign immunity defense should be rejected on the merits because the Tribe has validly waived its sovereign immunity, as this Court should

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[1] *Tribe's Memorandum of Authority*, pp. 4-7.
[2] *Tribe's Memorandum of Authority*, pp. 11-12.
[3] *Tribe's Memorandum of Authority*, pp. 12-20.
[4] The issue of tribal court jurisdiction is framed in terms of whether the tribal court may exercise "civil adjudicatory jurisdiction" over a member. *Nevada v. Hicks,* 533 US 353, 380 (2000). As one treatise on Indian law puts it, civil adjudicative jurisdiction "concerns the power of a court to decide a case or impose an order," in contrast with a tribe's civil legislative jurisdiction, which "concerns a government's general power to regulate or tax persons or property." Cohen's Handbook of Federal Indian Law § 7.01, p. 597 (2005).

conclude for two reasons. First, regardless of the amount of deference due to the Tribal Court of Appeals' findings and conclusions, the issue of whether the Walker Council, as a result of its recognition by BIA as the only entity authorized to exercise the federally conferred powers of the Tribe, had authority to waive the Tribe's federally-conferred sovereign immunity in the June 2003 Agreement with API is a question of federal law this Court must consider *de novo*. And as a matter of federal law, API's Agreement with the Tribe, executed by the Walker Council as part of its operation of the Tribe's casino, is valid and contains a valid arbitration clause waiving the Tribe's immunity. Whether the Walker Council was, at the time, the governing council *for tribal law purposes* has no bearing on its authority to commit the Tribe to the June 2003 Agreement and its arbitration clause. Second, even assuming the Tribal Court of Appeals' contrary findings and conclusions could have some bearing on this Court's assessment of the Tribe's sovereign-immunity defense, the tribal courts had no jurisdiction to render those findings and conclusions, which therefore are void as a matter of law.

Similarly, from the conclusion that the Tribal Courts' judgments are void, it follows that the Tribe's 12(b)(6) motion fails as a matter of law. Because the Tribal Court of Appeals exceeded its limited jurisdiction over nonmembers, not only should this Court reject the Tribe's 12(b)(6) motion as it pertains to API's federal-question claim, it should enter judgment for API on that claim. This Court also should reject the Tribe's 12(b)(6) motion as it pertains to API's breach-of-contract and arbitration claims because this Court cannot defer to that Tribal Court of Appeals' void determination that API's Agreement is unauthorized and invalid.

STATEMENT OF FACTS

As they pertain to the Tribe's motion to dismiss, the facts are not a point of serious dispute,[5] and API agrees with the Tribe that the Tribal Court's findings of fact, although not binding on this Court, are reviewed under a "deferential, clearly erroneous standard." *Tribe's Memorandum of Authority*, p. 7 (quoting *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994)). Rather, API and the Tribe primarily disagree over the implication of facts that are mostly undisputed for the federal-law questions presented by the Tribe's motion to dismiss.

Although not recited by the Tribe in its motion to dismiss, of great importance here are the following factual findings made by the Tribal Court of Appeals:

> Before and after the Bear Council was installed in the spring of 2003, Hereditary Chief Old Bear and others communicated with various federal agencies regarding the new Bear Council. *See, e.g.,* Tribal Court Order at 8 ¶¶13-14, 9 ¶¶14, 16-17. But these agencies refused to recognize the Bear Council for purposes of gaming activities and other federal government matters until the fall 2003 elections. *Id.* at 8 ¶13 (noting on April 30, 2003 that the National Indian Gaming Commission ("NIGC") sent notice of violation based on continued recognition of Walker Council on [sic]; 9 ¶14 (March 14, 2003 letter from Midwest Regional Director of the BIA refusing to recognize Bear Council); 9 ¶16 (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"); 9 ¶ 17 (August 28, 2003 letter from BI A stating it continued to recognize Walker Council). While the record does not expressly state this, the Secretary of the Interior (and, correspondingly, all other federal agencies) continued to recognize the Walker Council, and apparently refused to recognize the Bear Council, for at least six months after the Hereditary Chief took action.

[5] API however does not agree with the Tribe's statement of facts insofar as it impermissibly includes the allegations contained in its Tribal Court complaint. Even if it was at one time entitled to rely on these so called "facts" — which API believes it was not — the Tribal Court of Appeals has reversed the Tribal Court's Order of Default dated October 13, 2008 and therefore none of these allegations are deemed admitted. See Court of Appeals' Memorandum and Order filed February 19, 2009, attached to API's resistance.

Court of Appeals decision, p. 4-5. Thus, although the Tribe (and Tribal Court) have disputed the effect and general significance of recognition of the Walker Council by the Bureau of Indian Affairs (BIA), the *fact* of BIA recognition is not in dispute.

ARGUMENT

I. The Tribe's Assertions Of Sovereign Immunity Over API's Claims Fail As A Matter Of Law

A. The Tribe Cannot Assert Sovereign Immunity as a Defense to API's Claim That The Tribe Exceeded The Scope Of Its Limited Jurisdiction Over API, a Nonmember.

API and the Tribe agree that Indian tribes recognized by the federal government have sovereign immunity and that such immunity is potentially a defense to a *common-law contract claim*. *See Tribe's Memorandum of Authority*, p. 9 (quoting *Kiowa Tribe of Okla. v. Manuf. Tech., Inc.*, 523 U.S. 751, 754 (1998)). But it does not follow that, if the Tribe has not validly waived its sovereign immunity, this Court must dismiss the *entirety of API's action*. In its motion to dismiss, the Tribe completely ignores the fact that, in this case, API has asserted more than just a contract claim against the Tribe. API's complaint asserts a claim seeking a declaration that the Tribe has no civil jurisdiction over API and that the tribal courts exceeded their limited jurisdiction in considering the Tribe's tort claims. As the Supreme Court has held, that sort of claim is a federal-question claim. *See Nat'l Farmers Union Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985) ("The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331."). None of the cases cited by the Tribe involved an Indian tribe's

sovereign-immunity defense to such a claim; all, rather, appear to involve state-law, monetary, and property claims brought against a tribe.

Moreover, the Tribe's assertion of sovereign immunity as a defense against federal equitable and declaratory claims challenging the power of a tribe over nonmembers and non-Indians would render those federal claims meaningless. It is also entirely inconsistent with the Supreme Court's decisions recognizing those claims and providing for the need to exhaust tribal remedies in asserting them. In *National Farmers Union Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), for example, the Supreme Court explained that when a nonmember brings an action in federal court challenging a tribe's assertion of regulatory or adjudicatory authority over it, it is necessarily arguing that, as a result of treaty, statute, or its dependent status, "the Tribe has to some extent been divested of this aspect of sovereignty" — *i.e.*, the power to regulate nonmembers — by federal law. *Id.* at 852. Indeed, the Court explained, "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." *Id.* at 853 (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668 (1974)). Accordingly, when nonmembers such as API "contend that federal law has divested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference." *Id.* at 853. It simply makes no sense to contend that a Tribe may assert sovereign immunity in response to a claim that federal law has divested it of its sovereign powers to regulate nonmembers. There is no logical reason, and the Tribe has cited no support, for extending a tribe's sovereign immunity over an area for which federal law has divested the Tribe of sovereignty. To put it differently, both the merits of a nonmember's federal-question claim that a tribe has no power over him and the ability of

a tribe to claim immunity from that claim, turn on whether federal law allows the tribe to retain its sovereignty *vis-à-vis* the nonmember. The two issues are inextricable, and to accept a tribe's sovereign immunity defense assumes the very conclusion that the nonmember seeks to litigate on the merits.

In addition, the fact that the Supreme Court has required that federal claims challenging a tribe's authority over nonmembers first be exhausted in tribal court further proves false any assertion of sovereign immunity over such claims. The exhaustion requirement itself presupposes that the federal court will in fact be able to exercise its jurisdiction after exhaustion. *See, e.g., Nat'l Farmers Union*, 471 U.S. at 856-57 (explaining reasons for exhaustion, including that tribal court clarification of the grounds for its purported jurisdiction will aid further federal court review). If tribes could eliminate all federal judicial review of their unlawful exercise of regulatory and adjudicatory authority over nonmembers merely by asserting sovereign immunity, then the United States Supreme Court's exhaustion cases are truly meaningless and tribes are free to impose unlawful authority over nonmembers with impunity. There is no support for that remarkable proposition, and this Court should reject it.

B. This Court Should Reject The Tribe's Immunity Defense On The Merits Because The Tribe Has Validly Waived Any Sovereign Immunity It Had

API and the Tribe agree the question whether the Tribe has immunity from API's claims in this suit depends on whether it has already waived that immunity. API agrees, moreover, that the only potential waiver of the Tribe's federal sovereign immunity is the waiver effected by the arbitration clause in the June 2003 Agreement API signed with the Walker Council on the Tribe's behalf. See *C&L Enters., Inc. v. Citizen Band Pottawami*

Indian Tribe of Okla, 532 U.S. 411, 418 (2001). API also agrees that the Tribal Court of Appeals concluded that the Agreement did not waive the Tribe's federal sovereign immunity. Where API and the Tribe disagree, however, is over the question whether that conclusion binds this Court. It does not.

This Court should not accept the Tribal Court's determination for two reasons.. First, as API and the Tribe agree, this Court must decide all federal law questions *de novo.* As explained below, whether the Walker Council had authority to waive the Tribe's federal sovereign immunity by entering into the June 2003 Agreement and the arbitration clause is a federal-law question, contrary to the Tribe's view that the question of authority to commit the Tribe to the Agreement and arbitration clause is a tribal-law question. Second, even if this Court were inclined to accept some of the tribal courts' findings and conclusions as they pertain to the immunity defense at issue, this Court could not defer because the tribal court lacked jurisdiction to render those findings and conclusions. Preclusive effect cannot be given to the judgment or rulings of a court lacking jurisdiction. *See Montana v. United States*, 440 U.S. 147, 153 (1979) (binding effect can be given only to determinations "by a court of competent jurisdiction"). And whether the tribal courts had jurisdiction over API (a nonmember) "is a question of federal law that must be reviewed *de novo*." *Duncan Energy Co,* 27 F.3d at 1300. Because the availability of the Tribe's sovereign immunity defense raises identical issues as API's federal-question claim, API will proceed to address that issue.[6]

[6] The questions of the Tribe's authority over API and the tribal courts' jurisdiction over the Tribe's claims against API implicate both the Tribe's 12(b)(1) motion and its 12(b)(6) motion, for if the authority and jurisdiction are lacking, both motions fail. API addresses the questions in both contexts, and begins with the 12(b)(1) context because the Tribe's 12(b)(1) motion directly challenges the jurisdiction of this Court to dispose of API's claims.

II. API Has Stated A Claim For Declaratory Relief That The Tribal Court Exceeded Its Jurisdiction In Holding It Has The Authority To Determine The Tribe's Tort Claims Against API

A. Whether The Tribe Validly Waived Its Sovereign Immunity In API's Agreement Is An Issue That Must Be Determined By Federal, Not Tribal, Law.

In responding to the Tribe's motion to dismiss, API does not contest that a deferential standard generally applies to a tribal court's interpretation of tribal law. During the Tribal Court proceedings in this case, API did in fact argue that, as a matter of tribal law, the Alex Walker Council was authorized to enter into the June 16, 2003 Agreement with API for reasons that included its status as Elected Council consistent with the Tribe's Constitution. 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.[7]

API further recognizes that 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

[7] Therefore, the factual findings of the Tribal Court that the Tribe recites on page 6 of its Memorandum have no bearing on the issues raised by API in federal court. These include the fact that Alex Walker, Jr. violated the Tribe's Constitution by not setting recall petitions for a vote prior to March 4, 2003; that the Tribe removed from the Walker Council all powers of Tribal office; and that the Bear Council, not the Walker Council, had the power to bind the Tribe under tribal law.

347, 352, 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. The scope of the Tribe's federal sovereign immunity, and the question of which governing council had the authority to waive that *federal* immunity 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."). And as the parties agree, this Court reviews federal-law issues *de novo*. Moreover, contrary to the Tribe's assertion (*Tribe's Memorandum of Authority*, pp. 13-14), this Court's prior statement (in the context of considering the need for tribal court exhaustion) that the validity of the Agreement implicated issues of tribal law does not preclude this Court from now recognizing the limitations *federal* law imposed on the tribal court's proceedings. The Court's prior statements were made in the context of a motion for preliminary injunction, with a truncated record, and where the arguments were focused on whether API was required to exhaust tribal remedies. *See* 401 F. Supp. 2d at 961. Although the Tribe would give those prior statements preclusive effect, *res judicata* applies only where there is a final judgment on the merits of an action. *See Goings v. Chickasaw County*, 2007 WL 2473384, 7 (N.D. Iowa 2007). (*citing Allen v. McCurry,* 449 U.S 90 (1980)); *Lovett v. General Motors Corp.,* 975 F.2d 518, 522 (8th Cir. 1992) (explaining that district court may change rulings any time prior to final judgment). No such final judgment has been entered in this case, and the Court clearly contemplated that the case would return to it once exhaustion was concluded. *See* 401 F. Supp. 2d at 963. As all parties agree, that time has now come, and

this Court is free to recognize the ways in which the tribal court exceeded its authority, including by disregarding and incorrectly applying binding federal law.

The Tribe's 12(b)(1) defense boils down to a single legal issue that this Court must decide *de novo*: regardless of a tribal entity's status as the "true" governing council under tribal law, can it waive the tribe's federal sovereign immunity if it is the only tribal counsel recognized by the BIA as having authority under federal law? The Tribe, like the Tribal Court of Appeals, erroneously believes that such an entity cannot waive the tribe's sovereign immunity; in their view, because the Bear Council was the Tribe's "true" governing council for tribal purposes, only it could waive the Tribe's immunity. See *Memorandum and Order,*[8] p. 8; *Tribe's Memorandum of Authority,* pp. 13-14. But when the BIA recognizes an entity that is not the "true" governing council, that entity must be able to waive the tribe's sovereign immunity, or else BIA recognition is meaningless. 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 federal sovereign immunity from suit in federal court. Thus, irrespective of its powers under tribal law, the Walker Council had *federal* powers — including the power to waive the Tribe's sovereign immunity and to conduct business with third parties, including governmental entities, particularly business inextricably linked to federally 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 nonmember third parties. Specifically,

[8] Unless otherwise indicated, this refers to the Tribal Court of Appeals' December 23, 2008 order concerning jurisdiction.

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).

In this case, 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. 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 the 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 for 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 all events, even if the sovereign-immunity waiver in API's Agreement could be authorized and valid only if the entire agreement was authorized valid, API's Agreement with the Walker Council is authorized and 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. 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. *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 1.2 that the services API was to render included "[d]eveloping a security plan for the reopening of the Tribe's gambling facility." *See* Complaint, Document 2, Exhibit A. If the Walker Council could not enter into agreements relating to the Casino's operation, like 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. API's Agreement therefore cannot be found unauthorized 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 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.

Memorandum and Order, p.10. *See also id.,* p. 9. 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.

The Tribe's reliance on *Prescott v. Little Six,* 387 F.3d 753 (8th Cir. 2004) is misplaced.[9] While it, like this case, ostensibly involved tribal authority to enter into an agreement, the cases have little else in common. The Eighth Circuit in *Prescott* did not consider an Indian tribe's claim that its own courts' resolution of the validity of an agreement controlled the federal courts' considering of their own jurisdiction. Instead, *Prescott* involved a tribal court claim by the trustees of a tribal benefits plan who sought a determination concerning the legal status of the draft plans (which had not been enacted because of a change in tribal leadership). 387 F.3d at 754. The tribal court of appeals ultimately determined that the draft plans were not binding. *Id.* at 755. The claimants under the plans then brought a federal court action under ERISA, asking the federal court to award benefits under the draft agreements. *Id.* The Eighth Circuit ordered dismissal *on the merits of the claimants' ERISA claims,* finding that the district court should have deferred to the tribal court's decision that the plans were not binding, because they were never approved consistent with tribal statutes. *Id.* at 756. The Eighth Circuit expressly stated that "[b]ecause we agree with [defendant] that the District Court erred in not deferring to the tribal appeals court's determination that no

[9] *Tribe's Memorandum of Authority*, pp. 5-6.

benefit plans were created, *we need not address [defendant's] assertion that [defendant] is immune from suit . . . .*" *Id.* (emphasis added). Thus, *Prescott* merely reaffirms the established rule that federal courts should defer to tribal courts in their resolution of tribal law. And the benefits agreement at issue in *Prescott* is the type of agreement amenable to adjudication in tribal court because, unlike the agreement at issue here, the *Prescott* agreement was entirely unrelated to the tribe's federally regulated activities.

Accordingly, this Court must deny the Tribe's motion to dismiss on 12(b)(1) grounds. Because the Tribe's immunity is a federal – not tribal law -- question, the Tribal Court of Appeals' opinion on the effectiveness of the Walker Council's sovereign immunity waiver is not binding on this Court. Considering it *de novo*, the Court should conclude that the waiver is effective and, if necessary, that the Agreement containing the waiver is valid.

B. This Court Cannot Defer To The Tribal Court's Determinations Because The Tribal Court Exceeded The Scope Of Its Limited Jurisdiction.

Before a federal court can defer to the holdings of another court, it must satisfy itself that the other court had jurisdiction to render those holdings. *See Montana v. United States*, 440 U.S. 147, 153 (1979). Tribal courts have exceptionally limited jurisdiction over nonmembers: not only must they show that civil jurisdiction over a particular nonmember satisfies one of the 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). The Tribal Court of

Appeals' opinion is null and void under either route. In rendering its opinion that the June 2003 Agreement is invalid, it exceeded its adjudicative jurisdiction in two significant ways. Furthermore, the Tribe and its courts have not shown, and cannot show, that one of the exceptions to the general rule gives them civil jurisdiction over API in the first place; thus, all decisions they have entered against API's interest are null and void and not binding against API in this federal proceedings.

1. The Tribal Courts' Determinations Are Void Because They Exceeded The Scope Of The Courts' Limited Adjudicative Jurisdiction.

Regardless of the extent of a tribe's legislative jurisdiction over nonmembers, a tribal court's adjudicative jurisdiction is limited even further. In deciding that API's June 2003 Agreement with the Tribe was invalid, the Tribal Court of Appeals went beyond the bounds of the limitations on its adjudicative jurisdiction. Its conclusions on the Agreement's validity, therefore, should be declared void.

Even though API believes that the tribal courts had no *civil* jurisdiction over API and the Tribe's tort claims (see below), 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. v. Citizen Band Pottawami Indian Tribe of Okla,* 532 U.S. 411, 418 (2001). 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. 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."). 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, *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. 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 make, and they accordingly are null and void.

It is the view of the Tribe and the Tribal Court of Appeals, however, that the tribal courts had authority to consider the validity of the Agreement despite the arbitration clause. Because that view is wrong as a matter of federal law, the tribal-court rulings to the contrary are null and void. (Tribal courts must follow federal law; that is why, for instance, federal

courts review tribal-court determinations of federal law *de novo*.) 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 supersedes *all* contrary laws that lodge primary jurisdiction of such challenges in other forums. *See Preston v. Ferrer*, 128 S. Ct. 978 (2008).

The Supreme Court, in *National Farmers Union*, 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*, the Federal Arbitration Act "establishes a national policy favoring arbitration when the parties contract 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* "Agreement[s] evidencing a transaction involving commerce." 9 U.S.C. § 2.

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]

The federal-court cases the Tribe cites in support of its view that the tribal courts could consider the validity of the June 2003 Agreement are inapposite. *See Tribe's Memorandum of Authority* p.14 & n.19. None involved agreements with arbitration clauses, which exempt such agreements from the general rule that tribal courts can adjudicate their validity. None, furthermore, involved agreements entered into by a displaced tribal council that nonetheless retained federal power to bind the tribe to agreements related to the federally regulated activities the displaced council continues to manage. *In re Sac & Fox*, 340 F.3d 749 (8th Cir. 2003), cited on page 14 of the Tribe's memorandum, is totally irrelevant: involving a federal-court suit essentially between the Walker and Bear Councils, that decision not only had nothing to do with arbitration clauses and casino operation, it also had nothing to do with a

[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.

tribal court's consideration of the validity of an agreement between the Tribe and a nonmember.

2. The Tribal Courts' Determinations Are Void Because The Courts Had No Jurisdiction Over API.

In addition to exceeding the bounds of their adjudicatory jurisdiction in passing (erroneously) on the validity of the June 2003 Agreement because this issue was for the arbitrator, the Tribe and its courts had no civil jurisdiction over API in the first place, as the Supreme Court's recent decision in *Plains Commerce Bank* makes very clear. The Tribe advances the opposite conclusion, in large part because it begins its analysis of tribal jurisdiction with a discussion of *Worcester v. State of Georgia,* 6 Pet. 515 (1832) (*see Tribe's Memorandum of Authority*, pp. 14-15), whose expansive view of tribal jurisdiction over nonmembers is thoroughly outdated. *See United States v. Wheeler,* 435 U.S. 3131, 326 (1978) ("The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."); *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.").

The general rule — the "default rule" — is that Indian tribes cannot regulate nonmembers and therefore cannot exercise civil jurisdiction over them. The Supreme Court in *Montana* delineated two, *narrow* exceptions to the general 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.

The Tribal Court of Appeals erroneously held that it did not even have to satisfy one of the *Montana* exceptions. It incorrectly began with the premise that "[t]he Tribe retains *presumptive* civil jurisdiction over nonmembers committing torts on tribal trust land." *Memorandum and Order,* p. 16 (emphasis in the original). The Tribal Court of Appeals' holding in this regard is contrary to federal law, specifically as most recently explained in *Plains Commerce Bank.* In *Plains Commerce Bank*, the Supreme Court made it clear that tribal courts are presumptively without jurisdiction over nonmembers *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.

The Tribal Court of Appeals, after 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. Although the court correctly concluded that the first *Montana* exception, the consensual prong, did not cover the Tribe's tort claims, 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* imperils one of the tribe's limited interests. As a matter of federal law, the Tribe cannot make such a showing. In its claims against API, the Tribe alleged that API took tribal funds, entered its casino, took information about the operation of the Tribe's casino, and used and reviewed that information. None of these acts, inherently or in fact, "intrude[d] on the internal relations of the tribe or threaten[ed] tribal self-rule." *Id.* at 2723. To be sure, one issue in the Tribe's tort claims is whether the Walker Council's Agreement is valid, for if it is, the conduct challenged by the Tribe's tort claims would be licensed and hence not tortious. But that *issue* 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 overtaken altogether. *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 Indians' own conduct — the validity or scope of applicable tribal laws, the authority of an Indian tribunal, and, as in this case, whether the Tribe validly entered an agreement privileging 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," 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.

In its jurisdictional analysis, the Tribal Court of Appeals correctly examined API's conduct. Thus, it correctly concluded that the first *Montana* exception did not apply. The tribal court 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." *Memorandum and Order,* p.14 (emphasis in original).

The Tribe nonetheless urges this Court to find 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. 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 unconsented taking of its funds and unauthorized entry into its casino. Invoking its gaming licensing laws as another basis for the first *Montana* exception, the Tribe contends that API consensually submitted to the Tribe's authority because, "[a]s a matter of law, API was subject to tribal gaming licensing procedures and other tribal regulations related to gaming." *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 record 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 had to comply with tribal gaming laws before contracting with the Walker Council is, as the Tribe suggests, "a matter of law"; but it is a matter of *tribal* law that this Court cannot decide.[11] In fact, implicit in the Tribal Court of Appeals' 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, to which this Court should defer.

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 an Indian and a nonmember is not sufficient to satisfy the first *Montana* exception. In *Plains Commerce Bank*, the Supreme Court

[11] 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. See *Memorandum and Order*, p.5, fn. 4 ("The NIGC ultimately ordered the Tribal Casino closed because it did not view the Bear Council as authorized to operate it.").

acknowledged that Indian "laws and regulations may be fairly imposed on 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 expressly obtained the Tribe's consent to arbitrate all disputes arising out of the Agreement. *See* API Agreement § III.2.b.i. Document 2, Exhibit A. API and the Tribe agreed that the arbitrator's decision would be binding and enforceable only in state or federal court. *See id.* § III.2.b.ii. They also agreed that motions relating to the arbitration could be brought only in state and federal courts. *See id.* § III.2.b.iii. Document 2, Exhibit A. 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 invalid, its provisions nevertheless plainly manifest API's strenuous withholding of consent to tribal civil jurisdiction.

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. See *Memorandum and Order* at 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 (the *sine qua non* of the second *Montana* exception) may only exercise civil jurisdiction over a nonmember to protect the tribe from *catastrophe*. See 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 (allegedly) injured the Tribe, presented no catastrophic risk for tribal self-government. Moreover, the mere fact that API's conduct took place 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 valid 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. *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.)

III. This Court Should Reject The Tribe's 12(b)(6) Motion.

Beyond urging that its sovereign immunity justifies dismissal of all of API's claims pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the Tribe argues that API's case must be dismissed pursuant to Rule 12(b)(6) because API has failed to state claims upon which relief can be granted.[12] As with its 12(b)(1) motion, the focus of the Tribe's 12(b)(6) motion is the decision of the Tribal Court of Appeals, and from that the Tribe draws two conclusions. First, in the Tribe's view, API's federal-question claim fails as a matter of law because this Court should concur with that court's determination that it had civil, adjudicatory

[12] In moving under Rule 12(b)(6), the Tribe has accepted a heavy burden. As this Court noted in *Rakes v. Life Investors Ins. Co. of America*, 2007 WL 2122195, at 2 (N.D. Iowa 2007), "in assessing a motion to dismiss, the court must view the allegations in the complaint in the light most favorable to the non-moving party. The court must accept all the factual allegations in the complaint as true." As the Court further explained, dismissal under Rule 12(b)(6) is likely to be granted "only in the unusual case in which a plaintiff includes allegations that show, on the face of the [complaint], that there is some insuperable bar to relief." (Citations and internal quotation marks omitted.)

jurisdiction over the Tribe's tort claims against API. Second, the Tribe further reasons that, because the tribal court had jurisdiction, its rejection of the June 2003 Agreement is preclusive and conclusive in this case and, therefore, fatal for API's breach-of-contract and arbitration claims.

Although API's argument that sovereign immunity is no defense to a federal-question claim challenging tribal civil power is an argument limited to the Tribe's 12(b)(1) motion, the rest of the arguments that API has made in response to the Tribe's 12(b)(1) motion apply to its 12(b)(6) motion as well. API's reasons why this Court should not defer to the Tribal Court's determinations on sovereign immunity and the Agreement's validity are, in fact, reasons why the Tribal Court lacked jurisdiction over nonmember API or did not stay within its limited bounds — the essence of API's federal-question claim, i.e., its challenge to the Tribal Court's jurisdiction over API. Furthermore, if the Court concludes that the tribal courts erred as a matter of federal law in invalidating the Agreement, those courts' determinations cannot be conclusive with respect to API's contract and arbitration claims.

In other words, the Tribe's 12(b)(6) motion inescapably raises the question of the tribal courts' authority and jurisdiction. API's responses to that question remain the same regardless of the context in which it is presented. Namely, the tribal courts exceeded the scope of their limited adjudicatory jurisdiction by ruling that the Tribe had not validly waived its immunity and that the June 2003 Agreement is invalid on account of a defect in the Walker Council's authority. Binding federal law (the Federal Arbitration Act) precluded the tribal courts from answering that question, and binding federal law (regarding federally bestowed tribal powers) demands that the Agreement and its sovereign-immunity waiver be found binding on the Tribe. The tribal courts also had no civil jurisdiction over API to begin with.

As the Supreme Court's recent decision in *Plains Commerce Bank* makes clear, the presumption of no jurisdiction over nonmembers applies to the Tribe's case against API, and neither of the two *Montana* exceptions confers tribal jurisdiction.

For those reasons, this Court must reject the Tribe's 12(b)(6) motion to dismiss all of API's claims. The Tribe cannot show, as a matter of law, that API's challenge to the tribal courts' civil, adjudicatory jurisdiction fails, and the Tribe cannot rely on the claimed preclusive effect of the Tribal Court's rulings to defeat API's contract and arbitration claims. In rejecting the Tribe's 12(b)(6) arguments, the Court should also rule in favor of API on the merits of its claim that the Tribal Court lacked jurisdiction over API, leaving API's breach-of-contract and motion-to-arbitrate claims to be resolved by this Court in due course. For this reason, API has filed along with its response to the Tribe's motion to dismiss a motion for summary judgment asking the Court to award API judgment as a matter of law on the same grounds it should reject the Tribe's motion to dismiss.

CONCLUSION

For the reasons stated above, the Tribe's motion to dismiss must be denied.

Respectfully submitted,

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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:

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By K. Frieden