STANDING ROCK SIOUX TRIBAL COURT
STANDING ROCK SIOUX INDIAN RESERVATION

Lorrie Miner,	)	
plaintiff	)	**File #COMP 08-014**
	)	
vs.	)	**MEMORANDUM**
	)	**OPINION AND**
Standing Rock Sioux Tribe,	)	**ORDER AND JUDGMENT**
defendant	)	**OF DISMISSAL**

The Tribe has, first of all, moved for recusal of the undersigned. This presents a threshold issue, which we cover first.

Recusal

The essential basis for the motion is Mr. Emery's contention that the Court has expressed a negative bias toward him, for which recusal is appropriate.

Judge Miner counters, properly so, that the basis for recusal is bias against a party, not its attorney. This is reflected in our ordinance, contained at § 1-308, which directly addresses bias in terms of party, not counsel. This Court is not aware of precedent to the contrary.

Indeed, this Court has no bias against Mr. Emery. He is not only an exceptionally qualified lawyer, but has an uncommon dedication to the profession and the clients he serves.

The motion is denied.

We turn now to the substance of the Tribe's motions to dismiss.

The Tribe's Motions

The Tribe, in its Answer of February 11, 2008, has raised, as separate, but identical, affirmative defenses to each of Judge Miner's four counts against the Tribe:

- Failure to state a claim upon which relief may be granted,
- Lack of subject matter jurisdiction of this Court, and
- *Res judicata*, by virtue of dismissal of her prior suit against nine of the Tribal Council members.

For the reasons articulated below, it is the opinion of this Court that Counts 2 and 3 do not state claims within the subject matter jurisdiction of this Court, because of tribal

sovereign immunity, and that Counts 1 and 4 do state claims upon which relief could be granted, but because of the dismissal of her prior action against the Council members, with prejudice, she is precluded from litigating them in this action by *res judicata.*

Although the Tribe both titles and grounds its Motion as one for summary judgment, only, it is apparent from its brief that this is true only as to the issue of *res judicata*, which depends for its resolution upon matters outside the four corners of Judge Miner's pleading, *i.e.*, her prior action against the Chairman and eight other Council members in file #COMP 06-584 and the Standing Rock Supreme Court's Memorandum Opinion and Order in file #APL-06-011.

As to its briefing of the adequacy of the specific counts to state a cause of action within the subject matter jurisdiction of this Court, the Tribe grounds its arguments upon Rule 12 of the Federal Rules of Civil Procedure, only, and does not argue matters outside the instant pleadings.

Thus, the matter of subject matter jurisdiction is considered and determined under Rule 12, and the matter of preclusion by *res judicata* under Rule 56.

The Federal Rules of Civil Procedure govern civil actions in this Court, pursuant to Rule 1 of the Rules of Court, with stated exceptions not pertinent to this decision.

We consider first the matter of sovereign immunity and, then, the issue of *res judicata.*

Sovereign Immunity

Judge Miner states four causes of action, seeking money damages as her primary claim:

1. Wrongful Discharge
2. Breach of Contract
3. Gender Discrimination
4. Indian Civil Rights Act – Denial of Due Process

The Standing Rock Sioux Tribe Code of Justice, § 1-108, provides:

> The Tribe shall be immune from suit, except to permit garnishment of Tribal employee wages in accordance with Title II, Section 2-211 of this Code.

This provision is clear. The Code does not permit these claims.

The issue, then, becomes the extent to which the Tribe is immune, as a sovereign entity, under prevailing federal law or the Standing Rock Sioux Tribe Constitution.

1. Federal Law

Perhaps the clearest exposition of the impact of federal law upon Indian tribal sovereign immunity is in the case of Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 US 751 (1998).

The Supreme Court observed that "...as tribes were not at the Constitutional Convention," their sovereign immunity "is a matter of federal law and is not subject to diminution by the States." Kiowa, *Id.*, at 756. The Court drew an analogy to the sovereign immunity of foreign states, which immunity is extended by the United States according to its law, as a sovereign, and concluded:

> Like foreign sovereign immunity, tribal immunity is a matter of federal law.

Kiowa, *Id.*, at 759.

Thus, the Court stated, succinctly, the immunity of Indian nations, as follows:

> As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.

Kiowa, *Id.*, at 754.

As to Counts 1 and 2, there is no allegation of any abrogation of the otherwise complete Standing Rock immunity by federal act. Indeed, as to Count 2, Breach of Contract, the Supreme Court specifically addressed it, as follows:

> Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.

Kiowa, *Id.*, at 760.

Judge Miner contends, at pages 5 and 6 of her brief of March 4, 2008, that entry by the Tribe into a contract with Judge Miner may constitute both a waiver of sovereign immunity and the foundation for a cause of action under the Indian Civil Rights Act. However, neither count 1 or 2 is pled either as an ICRA claim or any other federal cause of action, so neither is federal claim.

As to Count 3, the only allegation of federal abrogation of tribal sovereign immunity is Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, *et seq.* As the Court noted at the time of the hearing of February 12, 2008, 42 USC § 2000e specifically exempts Indian tribes from the reach of the statute, and Judge Miner has conceded the point in her brief of March 4, 2008, at page 8.

This brings us to Count 4. Judge Miner grounds her claim on the "due process rights under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-3." Section 1302 provides:

> No Indian tribe in exercising powers of self-government shall –
>
> ...
>
> (8) deny any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law....

Judge Miner, in her pleading, implicitly recognizes that the basis of any due process or other constitutional limitation upon tribal sovereignty arises only from Congressional enactment or tribal law, not from the United States Constitution. This is recognized, explicitly, by the United States Supreme Court, in the case of Martinez v. Santa Clara Pueblo, 436 US 49 (1978), at page 56:

> Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local government. [citing Worcester v. Georgia]
>
> ...
>
> As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.
>
> ...
>
> As the Court in *Talton* recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.

We turn, then, to the reach of the tribal courts under ICRA.

Santa Clara Pueblo remains the landmark federal case defining the impact of ICRA upon tribal sovereignty. It clearly confirmed the limited authority of the federal courts to review ICRA violations by tribal governments, only by writ of *habeas corpus*, under 25 USC § 1303.

However, the question here is its impact upon **tribal** court review of alleged violations of ICRA. In this regard, the *holding* of the case does not extend to determination of tribal court jurisdiction, but its *dictum*, and, therefore, the anticipated direction of the Court, does.

The issue before the Supreme Court in Santa Clara Pueblo was "whether a federal court may pass on the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members." Santa Clara Pueblo, *Id.*, at p. 51. The answer to that question, then, addressed *federal* jurisdiction, concluding at page 59 ("...we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit."), the Court engaged itself in further consideration of the purposes for which ICRA was enacted, including the following illustrative comments:

> We note at the outset that a central purpose of the ICRA and in particular of Title I was to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans. [*Id.*, at 60-61]
>
> Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of the individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-government." [*Id.*, at 62]
>
> The cost of civil litigation in federal district courts, in many instances located far from the reservations, doubtless exceeds that in most tribal forums. [*Id.*, at 65]

Thus, it appears that, to the extent that Congress has exercised its plenary power, there are at least three objectives recognized by the Supreme Court.

The first objective is to secure enumerated civil rights (ICRA, by its explicit language extends these as limitations on tribal power, thus available to all within the jurisdiction of its courts, not just Indians). This is best achieved by allowing the tribal courts to be the ultimate arbiters of compliance.

The second objective is to strengthen tribal self-government. Tribal court review of council actions under ICRA does not weaken tribal sovereignty, for the Tribal Court is an independent constitutional branch of Tribal government. Judicial review ultimately strengthens tribal sovereignty by providing safeguards for civil rights acceptable to the Congress and the Supreme Court, in keeping with Sioux traditions of respect and fair treatment of all people.

The third objective is to provide judicial review in a forum accessible and affordable to the Tribe and the parties. This is also achieved by allowing tribal court review of alleged ICRA violations.

This is precisely the Supreme Court's conclusion:

> Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are **obligated** [this Court's emphasis] to apply. Tribal courts have repeatedly been

> recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

Santa Clara Pueblo. *Id.*, at 65.

As noted, ICRA extends as a limit on tribal power and, therefore, protects Indians and non-Indians alike, granting property and personal protection to "any person within its jurisdiction."

Even though the Supreme Court was very clear, in Santa Clara Pueblo, the Tribe argues precisely the opposite, citing it as authority. In its Answer, at page 11, ¶ 7, the Tribe alleges:

> To the extent that the plaintiff brings claims under the Indian Civil Rights Act, the plaintiff is not incarcerated and therefore cannot claim the only relief available thereunder, i.e., a federal writ of *Habeas Corpus* under 25 U.S.C. § 1303.

In its Responsive Memorandum of Law, dated March 25, 2008, at page 8, the Tribe sets forth the following passage from Santa Clara Pueblo, clearly demonstrating its misunderstanding of the case, as demonstrated as it overlooks the critical qualification, herein emphasized:

> ...unless and until Congress makes clear its intention to permit additional intrusion on tribal sovereignty that adjudication of such actions **in a federal forum** would represent, we are constrained to find that § 1302 does not impliedly authorize for declaratory or injunctive relief against either the tribe or its officers.

Santa Clara Pueblo, *Id.*, at 72.

The Tribe also misses the clear import of the preceding sentence of the Supreme Court's opinion:

> Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, **in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions.**

Santa Clara Pueblo, *Id.*, at 72, emphasis added by this Court.

This Court has not been able to identify any subsequent federal case directly addressing the issue of whether the tribal courts are obligated to enforce the Indian Civil Rights Act. The issue has met with mixed response at the tribal level. The American Indian Law

Deskbook, 3rd Ed., *Conference of Western Attorneys General*, ed., Clay Smith, 2004, addressed the tribal treatment, as follows (pp. 256-57):

> In earlier cases most tribal courts rejected claims that tribal procedures did not satisfy ICRA's due process requirements. ...Tribal courts more recently have found due process and equal protection violations. In one case, as an example, a tribal court ordered the tribe's business committee to reinstate the chief judge of the tribal court, without back pay, pending a hearing complying with ICRA and tribal law [citing McKinney v. Business Council, 20 Indian L. Rep. 6020 (Duck Val. Tr. Ct. Feb. 12, 1993)].

Nor has this Court been able to identify, nor has either party, any Standing Rock Supreme Court case addressing the issue of enforceability of ICRA in the Standing Rock Sioux Tribal Court.

Indeed, the Tribe's contention that its own Court does not have the authority to interpret and apply ICRA is further inconsistent with its continuing argument to the contrary at page 8 of its Responsive Memorandum:

> Here the Tribal Court made clear in its October 2006 Judgment, i.e., the plaintiff received equal protection of the law and due process within the meaning of both 25 U.S.C.A. § 1302(8) and the Standing Rock Bill of Rights.

This is, of course, a misstatement of the Court's Administrative Order for Dismissal of October 3, 2006, which did not reach the issue. Nonetheless, it is inconsistent for the Tribe to argue that this Court lacks the subject matter jurisdiction to address ICRA claims [which would render any prior judgment of the Court void, as a matter of law], but that the plaintiff is, nonetheless, bound and estopped by that very judgment.

Parenthetically, the Tribe also misstates the Standing Rock Supreme Court's opinion in Judge Miner's case, in its Responsive Memorandum, at page 3, stating:

> Here, we know from the Tribal Supreme Court's decision that no Tribal official has "acted unconstitutionally or beyond his statutory powers." APL-06-011/012, April 16, 2007....

Neither such language, nor its substance, appear anywhere in Standing Rock Supreme Court's Memorandum Opinion and Order of April 16, 2007.

The Tribe's inconsistency is, finally, compounded by its admission, contrary to its previous argument, at page 14 of its Responsive Memorandum, that (emphasis by this Court):

> Indian tribes have the right to regulate their internal and social relations, to make their own substantive law in internal matters, and **to enforce that law in their own forum.**

The issue of enforcement of ICRA in the tribal court is not an issue of first impression in this Court. Judge Miner cites a Standing Rock Sioux Tribal Court decision, rendered by the Hon. B.J. Jones, Duane Twinn v. Pamela Tischmak, et al., CV 01-619, in support of her ICRA claim.

While Judge Jones' opinion supports Judge Miner's position that the Tribal Court may hear cases against the Tribe for equitable relief under ICRA, however, it also mandates dismissal of her claims, on all counts, including ICRA, for money damages.

That case joined Sitting Bull College, an entity of the Tribe, on due process claims, apparently including ICRA based claims, and claims under the Americans with Disabilities Act. Judge Jones raised the issue of sovereign immunity, *sua sponte*:

> Even though it is not raised by the Defendants' motion for summary judgment, the Court would be remiss were it to resolve the instant case without examining whether the Defendant College is entitled to the defense of sovereign immunity.

Order Granting Summary Judgment in Part and Denying Summary Judgment in Part, Judge B.J. Jones, Nov. 18, 2002, p. 3.

Judge Jones drew a distinction between injunctive and declaratory remedies, which are equitable remedies (and, therefore, available only in the demonstrated absence of an adequate remedy at law) and monetary relief:

> Even if it is demonstrated that tribal officials exceeded their authority, the Tribe itself cannot be sued for money damages.

Opinion of Judge Jones, at p. 6.

> This Court has held in numerous recent decisions that the Tribe and its entities should not be immune from suits asserting violations of the Indian Civil Rights Act. See Bird Horse v. Standing Rock Sioux Tribe and Standing Rock Landowners and Mad Bear Descendants asserting claims alleging taking of property rights under the ICRA); Mentz v. Murphy (asserting claims of equal protection violations for the implementation of the Tribe's drug testing policies.)
>
> Similarly, the Court has held that the Tribe and its entities should not be immune from suits for equitable and injunctive relief alleging violations of the Tribe's own Constitution.

> The Court therefore feels that if the Plaintiff can demonstrate a claim under the ICRA, his complaint, insofar as it can be construed to request claims for equitable or injunctive relief, should not be dismissed.

Opinion of Judge Jones, at p. 10.

Judge Jones ruled that the plaintiff's claims against the tribal College, including due process claims, must proceed to trial.

This Court hastens to note that the motion before Judge Jones in the Twinn case was before him on summary judgment, combining legal with foundational factual issues. This Memorandum Opinion addresses only sufficiency of the pleadings, under Rule 12.

This Court finds Judge Jones' well reasoned opinion to be persuasive and, therefore, accepts it as stating the prevailing law of the Tribe.

This conclusion is also buttressed by two other considerations.

First, the Standing Rock Sioux Tribe Constitution, Article XI, § 8 guarantees all persons within the jurisdiction of the Tribe due process of law. ICRA, § 1302 (8) says that:

> No Indian tribe in exercising powers of self-government shall—
>
> ...
>
> (8) deny to any person within its jurisdiction ... due process of law.

It does not say "may;" it says "shall." The essence of due process is to follow the law, as written. The Tribe's public policy supporting this Court's conclusion is found in its decision to adopt ICRA's provisions, verbatim, in its own Constitution.

Second, this Court is required to follow and enforce federal law, even giving it primacy over Tribal law, by the Standing Rock Sioux Tribe Code of Justice, § 2-401, Applicable Laws, in **any case** over which it has jurisdiction:

> In determining any case over which it has jurisdiction the Standing Rock Sioux Tribal Court shall give binding effect to:
>
> (a) any applicable constitutional provision, treaty, law, or any valid regulation of the United States;
>
> (b) any applicable provision of the tribal Constitution or any law of the Tribe not in conflict with federal law....

Thus, this Court is compelled to agree with Judge Jones.

Judge Miner's prayer for relief, ¶¶ 1 through 7 seeks monetary damages. She cites Judge Jones' decision as controlling precedent. Her claims for money damages, therefore, are

barred by the Tribe's sovereign immunity. However, this Court may entertain claims for equitable relief, to the limited extent dictated by ICRA.

The Tribe, in its brief of March 17, 2008, at pages 14, 16, 18 and 21, states that "the plaintiff has failed to plead a claim for equitable relief."

However, ¶ 8 of the Complaint seeks "such other relief as the court deems just and equitable." This is sufficient under federal notice pleading practice to state a claim for equitable or injunctive relief, therefore stating a cause of action within the jurisdiction of this Court, in the absence of an adequate remedy at law.

2. Tribal Law

Judge Miner grounds her Count 1, Relief for Wrongful Discharge upon Article XII of the Standing Rock Sioux Tribe Constitution and §§ 1-304, 1-307 and 18-103 of the Standing Rock Sioux Tribe Code of Justice.

Article XII provides:

> No Judge shall be removed from office except upon written charge of specific misconduct in office, or medical inability to carry out the duties of office, adopted by a two-thirds majority vote of the Tribal Council after a hearing with reasonable prior notice to the Judge.

As noted, *supra*, Judge Jones has ruled, in the Twinn case, that "the Tribe and its entities should not be immune from suits for equitable and injunctive relief alleging violations of the Tribe's own Constitution." In addition, in the case of Billingsley v. Murphy, decided June 8, 1990, the Standing Rock Supreme Court held that:

> Judicial review of an administrative proceeding must involve an inquiry into the constitutionality of the administrations hearings under review, and the Trial Court, after scrutiny found that the appellee's constitutional rights to due process were violated. The record contains no limitation on the scope of review assigned to the Trial Court and we agree with the Trial Court that any law purporting to divest the judiciary of its power of Constitutional inquiry is void.

Thus, the Complaint, Count 1, states a constitutional cause of action, constitutionally subject to this Court's subject matter jurisdiction.

We turn next to the Code sections referenced by Judge Miner in her Complaint.

Code § 1-304 pertains to referendum, the retention election of judges, which is not in issue here. There is no dispute as to the manner in which the referendum as to Judge Miner's retention was conducted, or the results.

Code § 18-103, likewise, has no pertinence to this action. Title XVIII pertains to Tribal employees, which, pursuant to § 18-103 (f), specifically excludes Tribal judges.

Thus, the only Code section pertinent to Count 1 is 1-304, to the extent consistent with Article XII of the Constitution.

Judge Miner, in her Reply Memorandum of April 14, 2008, argues, at page 3, that she is entitled to money damages, stating "...the Tribe has waived its sovereign immunity by entering into an employment agreement with Ms. Miner."

However, this contention overlooks direct and controlling precedent in the 8th Circuit. The case of American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe, et al., 780 F2d 1374 (8th Cir. 1985) was a suit against the Standing Rock Sioux Tribe, alleging breach of contract.

The facts were more compelling, as regards the contract theory of waiver than the instant case. The Tribe had entered into a promissory note with the plaintiff and did so in full compliance with a Council Resolution. The agreement contractually obligated the Tribe to repayment, including interest, "in addition to such other and further rights and remedies provided by law." It provided that the Tribe would be liable for attorneys fees incurred in collecting and that it was subject to the law of the District of Columbia.

Judge Bruce Van Sickle, for the United States District Court for the District of North Dakota, construed these provisions as an implied waiver of sovereign immunity. The Court of Appeals summarized his rationale as follows:

> The district court reasoned that a rule permitting implied waiver of Indian nation sovereign immunity in contract cases, as distinguished from statutory actions, would neither create a widespread threat to nor substantially impinge on tribal autonomy.

American Indian Agricultural Credit Consortium, *Id.*, at 1378.

The implication of a remedy was clear, for in the absence of a right of action, there could obviously be no "remedies provided by law," as promised by the Tribe in its contract, but the contract did not contain an *express* waiver.

It was also clear that the Circuit Court, while reversing the District Court, did not approve of the Tribe's actions. Noting that the District Court had concluded that the Tribe's conduct would ultimately inure to its own detriment by discouraging outsiders from contracting with the Tribe, the Court observed that "There is much appeal to the district court's desire to make Standing Rock face up to its promise." *Id.*, at 1377.

The Court's obvious approbation of the Tribe underscores the fundamental strength of its decision as to sovereign immunity:

> If injustice has been worked in this case, it is not the rigid express waiver standard that bears the blame, but the doctrine of sovereign immunity itself. But it is too late in the day, and certainly beyond the competence of the court, to take issue with a doctrine so well-established.

Id., at 1379.

The Court concluded, holding:

> Here, Standing Rock did not explicitly consent to submit any dispute over repayment on the note to a particular forum, or to be bound by its judgment. To derive an express waiver of sovereign immunity from a promissory note that merely alludes to "rights and remedies provided by law," that provides for attorney fees in the event of a collection action, and that contains a choice of law provision, simply asks too much.

Id., at 1380-81.

Judge Miner makes a less compelling case and this Court cannot conclude that the Tribe has effected a waiver of its sovereign immunity, on a contract theory.

Count 2 of Judge Miner's Complaint does not allege any tribal law basis for abrogation of the Tribe's sovereign immunity. Therefore, as noted above, there is complete sovereign immunity under Kiowa, *supra*, at page 760.

Count 3 alleges, as its foundation in Tribal law, Title XVIII of the Standing Rock Sioux Tribe Code of Justice. As previously noted, § 18-103(f) specifically excludes tribal judges from the purview of the Title.

Finally, we turn again to Count 4. Judge Miner alleges that the Council violated the provisions of Article XII of the Standing Rock Constitution. This Court, as noted, has subject matter jurisdiction to review Tribal compliance with the Constitution. Count 4, therefore, states a cause of action for which this Court has subject matter jurisdiction.

Subject Matter Jurisdiction

Thus, for the reasons herein stated, Judge Miner has alleged causes of action in Counts 1 and 4, for which this Court has subject matter jurisdiction. Counts 2 and 3 do not and must be dismissed.

As noted at the outset of this opinion, the Court does not reach the question of whether there is sufficient factual basis for the allegations to proceed to trial. It is a Rule 12 motion, for the reasons stated.

Res Judicata

The Tribe has also pled *res judicata*, and raises it in its motion. We turn next to the issue of whether Judge Miner's Complaint is barred by *res judicata.*

The Tribe cites, and quotes from, at pages 8 and 9 of its brief of March 17, 2008, the case of Canaday v. Allstate Ins. Co., 282 F3d 1005, at 1014, regarding the criteria it contends should determine the applicability of *res judicata*:

> In applying the Eighth Circuit test for whether the doctrine of res judicata bars litigation of a claim, we examine whether (1) a court of competent jurisdiction rendered the prior judgment, (2) the prior judgment was a final judgment on the merits, and (3) both cases involved the same cause of action and the same parties.

As this Court reads Judge Miner's brief, it does not appear that the parties diverge as to these principles, but rather the application of the principles to the facts of this case. Thus, we turn to the matter of application.

1. That a court of competent jurisdiction rendered the prior judgment.

The satisfaction of this element appears to be inherently conceded, for Judge Miner chose the tribal court as the forum for both actions.

2. That the prior judgment was a final judgment on the merits.

This point is disputed by Judge Miner. She quotes from the opinion of the undersigned in her prior suit, at page 9 of her brief:

> The undersigned had also deemed himself, and other sitting judges, to be disqualified from hearing the case on the merits, and recused himself from any adjudication on the merits..

By this Court's reading of the Tribe's brief, its only counter appears at page 9:

> The prior judgments were final judgments on the merits. Id. [citing back to the Canady case]

This obviously begs the question: what is a decision "on the merits?."

Though not noted by the Tribe, the Court in Canaday briefly addressed the question of definition of merits, at page 1015:

> The relitigation exception is narrowly construed and allows a district court to enjoin litigation of only those claims and issues that the district court has decided.
>
> [citations omitted] However, the relitigation exception may apply even if the merits of the case were never reached, provided that a critical issue concerning the case has been adjudicated properly.

The generally accepted legal definition of "adjudication" does not require any findings of fact. Black's Law Dictionary, 8th ed. defines "adjudication," thusly:

> **1.** The legal process of resolving a dispute; the process of judicially deciding a case. **2.** JUDGMENT.

The issue appears to be simplified by reference to the Federal Rules of Civil Procedure. Rule 41 addresses dismissal of actions and the effect thereof. Rule 41(b) states:

> Unless the dismissal order states otherwise, a dismissal under this subdivision (b) **and any dismissal not under this rule - except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 - operates as an adjudication upon the merits.** [emphasis added]

The prior case was not dismissed for lack of jurisdiction, improper venue or failure to join a Rule 19 party and, therefore, would not appear to be an adjudication on the merits under the Federal Rules of Civil Procedure.

However, as with most issues with which the courts have been forced to grapple involving troubling situations under which the law does not afford a fair result, this issue, too, has caused great difficulty in the federal courts. This is noted by Judge Miner, in her citation to Wright, Miller and Cooper, at pages 6 and 7 of her Reply Memorandum of April 14, 2008. She quotes from Ch. 13, § 4436, at pp. 152-53, which states (emphasis by this Court):

> The most direct reason is that jurisdictional dismissals ordinarily **preclude** any decision on the substance of the claims presented, and often occur before any substantial effort must be invested in litigating the first action.

In addressing the issue of incurrence of substantial effort, Professor Cooper, in the preceding section, § 4435, at p. 145, notes:

> This method of interpreting Rule 41(b) is directly objectionable because it involves so slippery a method of manipulating the concept of jurisdiction.

The Court has carefully read and re-read the extended treatment of the federal precedent in the section cited, § 4436, as well as the preceding section, § 4435, and at Ch. 7, § 2373, and neither the treatise, nor the cases in the annotations, appear to have dealt with an issue similar to this case.

There appears to be little continuity amongst the cases and this is noted and criticized by Professor Cooper, and he notes that the authorities appear to be fact specific and result oriented (§ 4436, p. 171):

> Beyond these clearly jurisdictional matters, the structure of Civil Rule 41(b) has led to decisions that characterize various other grounds of dismissal as jurisdictional in order to secure a proper preclusion result. This approach has been explored in the preceding section and need not be restated.

As it was stated in the preceding section, § 4435, at p. 134:

> Thus, it is clear that an entire claim may be precluded by a judgment that does not rest on any examination whatever of the substantive rights asserted.

This conclusion was also footnoted, with the observation that involuntary dismissals that did not reach the merits, but were based upon conduct such as failure to prosecute constituted adjudication on the merits. This is consistent with the argument of Judge Miner, above noted, that the reason for the treatment of a dismissal as being analogous to a jurisdictional dismissal is that the *law* has **precluded** the hearing of the claim.

In this case, Judge Miner's claim was not legally precluded. Rather, she objected any judges invested as allowed by Tribal law. The order to dismiss was necessitated by her motion to Judge Hodny requesting his recusal, as stated in this Court's Administrative Order For Dismissal, at pp. 1-2:

> The matter has been re-filed, but the plaintiffs now question Judge Hodny's impartiality:
>
> > Since Judge Hodny was appointed by defendant Ron His Horse Is Thunder, it is reasonable to question Judge Hodny's personal bias and prejudice in favor of defendant Ron His Horse is Thunder. Judge Hodny presiding over this matter generates the very appearance of impropriety sought to be averted by Section 1-308.
>
> Although there is certainly question of the timeliness of the plaintiffs' motions, as Judge Hodny had already acted without challenge, Judge Hodny agreed to recuse himself. Any subsequent appointment would be after notice of the plaintiffs' objection.

> He noted that he had no acquaintance with the Chairman and has never met or even spoken to him. Indeed, Judge Hodny questioned whether the plaintiffs may be "judge shopping," in an effort to find a judge more favorably inclined toward their suits. Judge Hodny also noted that the plaintiffs' tactic to disqualify him might also preclude the seating of any judge in these cases:
>
> > Since the basis for the request is my appointment by the tribal chairman to a case in which he is a litigant it can be assumed my replacement will face the same problem unless there is some provision of law, of which I am not aware, under which someone else can make the appointment. ...Hopefully you will be able to find a way around this problem.

Thus, Judge Miner's first suit was not precluded by law. Rather, after first accepting Judge Hodny, she objected to him because he had entered a procedural ruling adverse to her.

Judge Miner was not precluded from suing in the Standing Rock Sioux Tribal Court. Therefore, there is no sound analogy to jurisdiction. Judge Miner's argument that "The dismissal was similar to a dismissal based on jurisdictional grounds because the court essentially determined that it did not have authority to hear the case," is not apt.

It was Judge Hodny's impression that the plaintiffs were "judge shopping," and the Standing Rock Supreme Court concluded that "The Plaintiffs/Appellants are in a quagmire of their own making." This Court has no reason to take issue with either conclusion, particularly that of the Supreme Court.

The requirement of a decision "on the merits," is to guarantee "the right once to be heard on the substance of [the party's] claim." Saylor v. Lindsley, 391 F2d 965 (2d Cir. 1968), at 968. That right was afforded, so that it is the opinion of this Court that this matter was previously determined on the merits.

3. That both cases involved the same cause of action and the same parties.

Judge Miner, in her brief at page 10, argues:

> A government official sued in his or her individual capacity is not in privity with the government. See *Pittman v. Michigan Corrs. Organization*, 2005 WL 65516 (6th Cir. 2005). Since the parties are different and there is not privity the claim is not precluded.

However, as the Tribe notes in its brief, at page 1, the Standing Rock Supreme Court ruled that, despite the caption of the lawsuit, the first suit against the Council members was in their **official** capacity. The Supreme Court said, at page 3 of the slip opinion:

> Although the Plaintiffs/Appellants do not characterize the Defendants/Appellees as the Chairman, Secretary and Tribal Council members, the defendants below were sued for actions taken in the performance of their official duties and are in fact being sued in their official capacities.

This Court is obviously bound by the decisions of the Standing Rock Supreme Court, as a matter of law.

Further, Pittman, on closer reading, does not say that "since the parties are different," that there is no privity. On the contrary, Pittman says, at page 2:

> The individual defendants, however, who were sued both in their official capacities and as individuals, were not parties in the previous action. "A government official sued in his or her official capacity is considered to be in privity with the government." [citation omitted]

Pittman dictates the conclusion exactly opposite that urged by Judge Miner. It holds that the suit, which our Supreme Court has ruled to be against the Tribe's officials for acts in their official capacities, puts them in privity with the Tribe, as a matter of law.

Pittman draws for authority upon the United States Supreme Court case of Sunshine Anthracite Coal Co. v. Adkins, 310 US 381 (1940), which said, at pages 402 and 403:

> Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different and parties nominally different may be, in legal effect, the same.
>
> The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy.
>
> Measured against these standards, there appears to be a privity of interests between the former and present suits.

Although Sunshine preceded the adoption of the Federal Rules of Civil Procedure and involved common law pleading and practice, it does reflect the fundamental principles of the doctrine of *res judicata.*

Both the former and present cases have been defended at Tribal expense and direction by the Tribe's General Counsel, Steven Emery, and there is nearly 100% co-incidence of the issues. Both cases have alleged causes of action for wrongful discharge, breach of contract and gender discrimination, seeking money damages and "such other relief as the court deems just and equitable."

While the present suit contains a further count denominated "Indian Civil Rights Act – Denial of Due Process," the wrongful discharge claim of the first suit was also based in part on the Article XII constitutional claim which forms one of the two foundational elements of her present Count 4 for denial of due process and ICRA was the law then and now, extending due process in terms identical to the Standing Rock Constitution.

Thus, it appears that the instant case is barred by *res judicata*.

As Judge Miner notes, at page 9 of her brief, "The doctrine of merger serves to prevent splitting of causes of action." As the Tribe notes, at page 9 of its brief, "An action is the same, for purposes of res judicata, if it turns on the same nucleus of operative facts as the prior claim."

The former and latter complaints are almost identical in their essential foundational factual allegations and, as noted, the present causes of action are nearly 100% subsumed in the original. The foundational facts are the same.

As with the prior case, this crucial and determinative issue is one which may be reviewed *de novo* by the Standing Rock Supreme Court. Pittman, *supra*, at page 2 states: "A district court's dismissal based upon claim preclusion is reviewed *de novo* by this Court."

As well, the issues of sovereign immunity turn, as Rule 12 issues, and issues of law, again reviewable *de novo*.

Rule 11 Sanctions

The Tribe, in its brief, page 4, requests Rule 11 sanctions against Judge Miner's lawyer, alleging that there was no good faith basis for Judge Miner's suit. This is denied.

The Court has determined that she has stated a cause of action and the determinative issue, claim preclusion, presents an issue upon which there is no direct precedent. This Court cannot conclude that Judge Miner's counsel acted in bad faith.

It is, on the contrary, this Court's opinion that the research and analysis by Judge Miner's counsel, while rejected in its ultimate conclusion by this Court, was of very high quality, well exceeding the standard of practice witnessed by this judge in 35 years of practice in the State and Federal courts of North Dakota.

Costs

The Tribe also asks for costs. These are subject to Code § 2-209 and, in this case, the only cost allowable in this case is the filing fee, which was paid by Judge Miner.

FOR THE FOREGOING REASONS, IT IS ORDERED, AND JUDGMENT IS ENTERED, IN ACCORDANCE WITH § 2-201 OF THE STANDING ROCK SIOUX TRIBE CODE OF JUSTICE AND RULE 1 OF THE RULES OF COURT, AS FOLLOWS:

1. DENYING THE TRIBE'S MOTION TO RECUSE,

2. DISMISSING THE VERIFIED COMPLAINT WITH PREJUDICE, AND

3. DENYING THE TRIBE'S MOTION FOR SANCTIONS.

Dated this 21st day of April, 2008,

William P. Zuger
Chief Judge

Attest: Clerk of Court