UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 09-2605

ATTORNEY'S PROCESS AND INVESTIGATION SERVICES, INC.,

Plaintiff/Appellant,

v.

SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTHERN IOWA

BRIEF OF THE SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA

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ATTORNEYS FOR SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA

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JURISDICTION

Attorney's Process and Investigation Services, Inc. (API) correctly states the statutes under which it claims jurisdiction. A central issue in this case, discussed in depth below, is whether this case comes within the scope of federal court jurisdiction.

STATEMENT OF THE ISSUES

The sole issue in this case is whether, based upon federal law, the Court of the Sac & Fox Tribe of the Mississippi in Iowa (the Tribe) lacked jurisdiction to hear a claim which stems from API's actions as an agent of a tribal member, which include unlawfully attempting to forcibly overthrow the Tribal government, unlawfully taking control of the Tribe's government center and Casino, and all property in those tribal offices, and unlawfully taking $1,022,171.26 of the Tribe's funds as "payment" for its mercenary activities.

STATEMENT OF THE CASE

As a matter of definitively established tribal law, by no later than May 22, 2003, the constitutionally elected leadership of the Sac & Fox Tribe of the Mississippi in Iowa was a Council chaired by Homer Bear, Jr. (hereinafter the Bear Council or the constitutionally elected Council). API Appeal (App. 10-13).[1] After

[1] In this brief, the Tribe will refer to the Tribal Trial Court order denying API's motion to dismiss Sac & Fox Tribe of the Mississippi in Iowa v. Attorney's Process and Investigation, Inc., (App. 635) as "API Trial Court", and will refer to the Tribal Court of Appeals decision affirming that Trial Court (App. 647) as "API

the Bear Council's lawful and constitutional election, API alleges that API and Alex Walker, Jr. or a former Tribal Council on which Walker had been Chairman (Walker or the former Walker Council) agreed to a contract whereby API would take various actions related to "security" on tribal trust land. API's most dramatic action was an armed, military style assault and attempted forcible overthrow of the Tribe's governing body at the Tribe's government center and Casino in the very early hours of October 1, 2003.

Tribal Court Suit filed by the Tribe against API. On August 25, 2005, the Tribe filed suit against API in the Tribal Court, alleging that API unlawfully and intentionally took tribal funds and committed multiple intentional torts against the Tribe at the Tribe's government center and Casino, both of which are located on tribal trust lands. API filed a motion to dismiss for want of jurisdiction, in which API asserted that Walker met the requirements of tribal law and federal law and had authority under both laws to bind the Tribe to the contract. API asked the Tribal court to decide whether the Tribe was a party to a contract which API and Walker apparently entered into on June 16, 2003 (the June 16, 2003 contract), and API asked the Tribal Court to decide the equitable issue of whether Walker had

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Appeal." The Tribe will refer to the District Court's order staying Attorney's Process and Investigation Inc. v. Sac & Fox Tribe of the Mississippi in Iowa, (App. 29), reported at 401 F.Supp.2d at 954 (N.D. Iowa 2005) as "API District Court I" and the order dismissing the federal court suit, (App. 794), as "API District Court II."

apparent authority to contract on behalf of the Tribe. API also asked the Tribal Court to also decide whether the contract required arbitration of the claims which the Tribe had filed against API. API initially argued that if arbitration was required, the appropriate remedy was to dismiss, though on May 21, 2008 API filed counterclaims in which it asserted that the Tribal Court should compel arbitration, or alternatively should hear API counterclaims for breach of contract. API Appeal (App. 652 n. 6). Those counterclaims remain pending in the Tribal Court.

Contrary to its argument to this Court, API's challenge to Tribal Court jurisdiction was not on the pleadings. Prior to the hearing on its motion, API requested and was granted discovery, limited to the jurisdictional issues. API then argued on the facts, that it had a contract with the Tribe. In support of its motion API submitted deposition testimony, affidavits, and numerous documents.

The Tribal Court determined the issues which API raised in its motion to dismiss, holding that the Tribe had never entered into any agreement with API (and so had not agreed to arbitrate any claims with API), that the case fell squarely within the Tribal Court's jurisdiction, and that apparent authority did not apply because API clearly knew about the Tribe's leadership dispute when it entered into a contract with Alex Walker, Jr. API Trial Court (App. 663).[2]

API appealed to the Trial Court decision to the Tribe's Court of Appeals and, with one inconsequential exception, API did not challenge the Tribal Court's findings of fact. On December 23, 2008, the Tribal Court of Appeals affirmed the Trial Court's holding that the case came within the jurisdiction of the Sac & Fox Tribe of the Mississippi in Iowa Court and affirmed that apparent authority did not apply under the law or facts of this case.

Federal Court Suit filed by API against the Tribe. After API moved to dismiss the Tribal Court suit, API filed a federal court suit. Like the prior two suits by Walker and his agents, API asserted that the federal court should hold that Walker's "federal recognition" required the legal conclusion that Walker's authority to act on behalf of the Tribe was a federal law issue. On the Tribe's motion, the federal court suit was stayed pending exhaustion of Tribal Court remedies on the jurisdictional issues.

After the Tribe's Court of Appeals issued its decision affirming tribal court jurisdiction, API moved to reopen its federal court suit, and in support of that motion API expressly pled that it had completed its Tribal Court challenges to jurisdiction. Based upon API's attorneys' representation that it had completed its challenges to Tribal Court jurisdiction, the Tribe did not resist, and the Court granted, API's motion to reopen. (App. 50-57). The Tribe promptly moved to

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[2] Cf. API District Court I, 401 F.Supp.2d at 954 (taking judicial notice of the Tribe's leadership dispute).

dismiss the federal court suit and API then moved for summary judgment, which the Tribe opposed. The District Court, Judge Reade presiding, granted the Tribe's motion to dismiss, and API appealed.

STATEMENT OF FACTS[3]

In 2002, the Tribal Council chaired by Alex Walker, Jr. ("the Walker Council" or "former Walker Council") was presented with petitions for recall elections. API Appeal (App. 647). The Walker Council violated the Tribe's Constitution and their oaths of office by not setting those recall petitions for a vote prior to March 4, 2003. API Trial Court (App. 637-638); API Appeal (App. 647-648, 656).

In March 2003, the Tribe's Hereditary Chief and the Tribe's members lawfully responded to the Walker Council's violation of the Tribe's Constitution by removing that council from office. Id.

Beginning no later than May 22, 2003 the constitutionally elected and validly serving governing body of the Sac and Fox Tribe, based upon the definitively established (and therefore *per se* correct) interpretation of the Tribe's Constitution, was a Council chaired by Homer Bear, Jr. API Trial Court (App. 638); API Appeal (App. 648); API Br. at 3). API bases its appeal to this Court

[3] As discussed in section I.B, infra, the facts for purposes of this case are those alleged in the Tribe's Complaint in the Tribal Court unless the Tribal Court has issued a finding of fact which differs from the facts alleged in the complaint.

upon an allegation of "fact" that Bear was not the constitutionally elected Chairman. API Br. at 3 (falsely referring to the former Walker Council as "the constitutionally elected tribal counsel" [sic]).

The constitutionally elected governing body of the Tribe never entered into any contract with API, and API and the Tribe never agreed to arbitrate any claims between them. API bases its appeal on a contrary allegation of "fact" API Br., passim; e.g., API Br. at 3, 6).

On October 1, 2003, API perpetrated an illegal, forcible, Tribal Ct. Compl. ¶15 (App. 580), armed, Tribal Ct. Compl. ¶31 (App. 582), premeditated Tribal Ct. Compl. ¶32 (Id.), coordinated (Id.), trespass into the Tribe's government center and casino Tribal Ct. Compl. ¶7 (App. 579); Def Admis. 9, 11 (App. 492-493), in an attempted forcible takeover of the Tribe's property and government.

During that armed, military-style attack, API committed assaults, batteries, unlawful imprisonment and other criminal acts. Complaint ¶31; API Appeal (App. 650).

API facilitated entry to secured areas of the Tribe's Casino by persons who had previously been banned from the Casino due to their gross violations of tribal gaming laws. Complaint ¶24 (App. 581). API acted in conscious or intentional disregard of, or indifference to the rights or, safety of, or damages, to the Tribe. Complaint ¶34, 37, (App. 583).

Between June 16, 2003 and early November 2003 API took possession of $1,022,171.26 of the Tribe's money. API Trial Court (App. 640); API Appeal (App. 649). The Tribe did not authorize any payment of any tribal funds to API, and did not authorize API to perform any services for the Tribe, and neither the Tribal Chairman nor the Tribal Council Treasurer signed any documents permitting payment of tribal funds to API. API Appeal (App. 649-650).

As part of its armed assault, API worked in the Tribe's Casino, Tribal Ct. Compl, ¶7 (App. 579) and obtained and exercised control over all or nearly all tribal gaming information and tribal gaming commission information and over tribal gaming supplies and gaming machine components. Tribal Ct. Compl. ¶10, (App. 579), API Appeal (App. 650).

API did not submit an application for a gaming license to the Tribe's Gaming Commission, Tr. Ct. Compl. ¶34 (App. 583), was not granted a gaming license from the Tribe's Gaming Commission, (Id.), is morally unfit to hold a gaming license, (Id.) and therefore is unfit to work in gaming.

In the Tribal Court proceedings, API did not dispute the facts related to its conduct on October 1, 2003, but asserted that on June 16, 2003 it and the Tribe had entered into a contract which required arbitration of the Tribe's intentional tort claims. As noted above, the Tribe is not a party to the June 16, 2003 contract and has not entered into any contract with API. API Trial Court (App. 645).

> The June 16, 2003 contract stated that API had the responsibility for:
>
> B Developing a security plan for the re-opening of the Tribe's Gaming Facility.
> …
> D. Providing general community security services to Tribal Government and its operations as is feasible.
> E. Investigate allegation of unlawful acts and tribal policy violations of the dissident group involving Tribal funds, and gaming operations."

June 16, 2003 Contract §1(2)(A-F) (App. 570-571).

STATEMENT OF STANDARD OF REVIEW

Section I of this brief discusses, in detail, the standards of review which apply to components of this appeal.

SUMMARY OF THE ARGUMENT

The issue in this case is whether the Sac & Fox Tribe of the Mississippi in Iowa Court (the Tribal Court) had jurisdiction to hear a suit which the Tribe filed against Attorney's Process and Investigation, Inc. (API). This issue then comprises two subissues:

1) Did the Tribal Court have jurisdiction to decide whether the Tribe was a party to a contract which was apparently signed by API and Alex Walker, Jr. To decide whether the Tribe was a party to the contract, a court would have to determine an internal tribal leadership issue, which would require the court to decide complex

issues of Sac and Fox constitutional law. The Tribal Court therefore had exclusive jurisdiction to determine whether the Tribe was a party to the contract.

Additionally, API, not the Tribe, asked the Tribal Court to determine whether the Tribe was a party to the contract, and the Tribal Court could not have resolved API's jurisdictional motion without first resolving whether the Tribe was a party to the contract. The Tribal Court therefore had jurisdiction to decide contract validity as part of its exercise of jurisdiction to determine its own jurisdiction.

2) Did the Tribal Court have jurisdiction over claims for damages from a violent armed trespass at the Tribe's government center and Casino, and other intentional torts against the Tribe on tribal trust land, which were part of an attempted to forcibly overthrow the Tribe's constitutionally elected and validly serving government and who unlawfully took $1,022,171.26 of tribal funds in the process. As both the Tribal Court and the District Court held, API's conduct was a quintessential example of conduct which is within the jurisdiction of a tribal court. API previously had, and strongly presented, its one potential partial defense—that the people it was seeking to depose were not the Tribe's legitimate leaders. Litigation of that issue is done, and API lost.

API continues to press numerous lesser arguments, but these previously rejected arguments have only gotten weaker as API has had to add more premises

to those arguments, both to try to avoid the obvious consequence of the definitive determination that the people API was attempting to remove were the Tribe's legitimate, constitutionally elected governing body, and to try to avoid the consequences of strategy decisions which API has made in the four years since suit was filed.

API also presents a new and multiply flawed argument that, to decide whether it had jurisdiction under the second prong of the Montana test, the Tribal Court should have first struck all the allegations regarding harm caused by API and then dismissed this suit because the allegations of the complaint did not establish that API's conduct caused catastrophic harm. That argument must be rejected, because it is contrary to clearly established precedents of the Supreme Court and this Court, and because it was not presented to and in fact is contrary to API's argument to the Tribal Court.

This Court must affirm the District Court order of dismissal of API's suit.

DISCUSSION OF LAW

I. THE TRIBAL COURT HAS ESTABLISHED THE FACTS AND TRIBAL LAW APPLICABLE TO THIS POST-EXHAUSTION PROCEEDING.

The starting point for this Court's analysis is to determine the scope of the issues which it can or should decide in this case, a case which was filed after a tribal court suit was filed, and which returned to the federal court only after

Appellant determined and averred that it had completed all of its challenges to Tribal Court jurisdiction that court. This case is not unique, and the scope of this Court's review after exhaustion of tribal court remedies is well-defined by federal cases that, like the exhaustion doctrine itself, are based upon "the Federal Government's longstanding policy of encouraging tribal self-government." Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987); Id. at 19 ("tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development"); Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1299 (8th Cir. 1994). Like the exhaustion doctrine, the rules applicable to federal court review after exhaustion of tribal remedies require a federal court to tread lightly, both when it interacts with a tribal court and when a tribal court decision is involved.

The applicable rule, announced by the Supreme Court, is that the tribal forum is to develop the "full record" for further review and is to provide the federal courts with the "benefit of its expertise" regarding "the precise basis for accepting jurisdiction." Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985).

In articulating this rule the Supreme Court painted with broad strokes, and left it to the Circuit Courts to analyze the Supreme Court's decision and the underlying federal legislative and judicial policies, adding details to the rule. This

Court and the other circuit courts have already done the hard work of creating the detailed rules governing post-exhaustion proceedings and the Circuit Courts are in complete agreement about those rules. As discussed in detail below, they include: A) as it does when it reviews the law of any other sovereign, this Court looks to and is bound by the Tribe's legal interpretation of the Tribe's Constitution and laws; B) because Appellant has not challenged the facts below, it cannot challenge them in this appeal; C) "Unless a federal court determines that the Tribal Court lacked jurisdiction ... proper deference to the tribal court system precludes relitigation of issues ... resolved in the Tribal Courts." Iowa Mutual Ins. Co., 480 U.S. 9, 19.

A. THE TRIBAL COURT'S DETERMINATIONS OF TRIBAL LAW ARE BINDING ON THIS COURT.

Long before the United States Supreme Court articulated the exhaustion doctrine, it held that the final authority for interpretation and application of an Indian tribe's law is the tribe's court, and the tribal court's interpretation is binding on the federal courts, just as a state court's determination of state law is binding on the federal courts.

The United States Supreme Court first addressed this issue in Talton v. Mayes, 163 U.S. 376 (1896), holding that interpretation of tribal laws is "solely a matter within the jurisdiction of the Courts of that Nation." Id. at 385. The

exhaustion doctrine and the rationale for that doctrine have only strengthened the line of cases originating with Talton. Iowa Mutual Ins., 480 U.S. at 19 (holding that "Unless a federal court determines that the Tribal Court lacked jurisdiction ... proper deference to the tribal court system precludes relitigation of issues raised ... and resolved in the Tribal Courts"); Id. at 16 ("Adjudication of such matters by any nontribal court also infringes upon tribal law-making because tribal courts are best qualified to interpret and apply tribal law."); Prescott v. Little Six, Inc., 387 F.3d 753, 756 (8th Cir. 2004) (holding that "in this Circuit, we defer to the tribal courts' interpretation of tribal law.")[4].

The decision of the United States Court of Appeals for the Eighth Circuit in Prescott v. Little Six, Inc. is particularly instructive, both because it is this Circuit's most recent decision on this point of law and because of the remarkable similarity between the facts of that case and the facts of the present case. Like the present matter, Prescott turned on whether an alleged contract with an Indian tribe had been approved by the tribe. Little Six, Inc. ("LSI") (which for analytical purposes in that case had the same legal status as the Shakopee Mdewakanton Sioux

[4] Duncan Energy Co., 27 F.3d at 1300; City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d, 554, 559 (8th Cir. 1993); Prescott v. Little Six, Inc., 897 F. Supp. 1217, 1222 (D. Minn. 1995). See also Timothy W. Joranko, Exhaustion of Tribal Remedies in the Lower Federal Courts after National Farmers Union and Iowa Mutual, 78 Minn. L. Rev. 259, 298 (1993) ("it is a pure contradiction in terms for a federal court to declare that tribal law is not precisely what the tribe's high court announces.").

Community), brought a suit in the Community Court, asserting that LSI had not entered into certain alleged retirement benefits contracts which, had they been valid, would have been governed by ERISA. LSI also asserted that funds which Prescott had placed into trust accounts had to be returned to LSI. Prescott (who is Indian) and other plaintiffs (who were not Indian) then filed a federal court suit, asserting that, based upon federal cases interpreting ERISA, the alleged contracts were valid and the federal court had exclusive jurisdiction.

The District Court for the District of Minnesota dismissed the federal court action based upon the exhaustion doctrine, holding, inter alia, that "federal courts must defer to a tribal court's interpretation of its law." Prescott, 897 F. Supp. at 1222. The Shakopee Community Court reviewed the facts and Community law, and determined the contracts were invalid, therefore ERISA did not apply and the funds at issue belonged to LSI.

The Prescott plaintiffs returned to the federal courts, asserting they had exhausted tribal remedies, that because the federal courts have exclusive jurisdiction over ERISA contracts, contract validity presented an issue of federal law, and that the federal court therefore was required to provide a federal forum for litigating whether the contracts were valid as an question of federal law. On appeal, this Court held that the determination by the Shakopee Mdewakanton

Sioux Community Tribal Court of Appeals that the contracts were invalid was binding in the federal courts, and the federal courts therefore lacked jurisdiction.

Similarly, the Sac & Fox Tribal Court's determinations of tribal law are binding in the federal courts and all other courts. Specifically, the determination of the Appellate Court of the Sac & Fox Tribe of the Mississippi in Iowa that the alleged contract was invalid is binding on this Court, and admits but one conclusion; that this appeal must be denied and the district court affirmed.

Other holdings of the Sac & Fox Tribe of the Mississippi in Iowa Court on issues of tribal law both relevant to and binding on this Court, include, but are not limited to:

- The Walker Council violated the Tribe's Constitution by not setting recall petitions for a vote prior to March 4, 2003.
- In March 2003, by means of a legal, constitutional procedure for remedying the Walker Council's constitutional violations, tribal members and the Hereditary Chief, lawfully removed the Walker Council from office, thereby removing from that former Council all powers of tribal office.
- That in June 2003 the Bear Council was the lawfully, constitutionally elected governing body of the Tribe.
- That in June 2003, the Bear Council, and **not** the former Walker Council, had the power to bind the Tribe to contracts, expend Tribal funds, and exercise all other powers of tribal self-government.
- The doctrine of apparent authority does not apply against the Tribe.

B. THE FACTS APPLICABLE TO THE TRIBAL COURT'S FINAL DECISION REGARDING JURISDICTION ARE BINDING IN THIS COURT.

One of the primary purposes of exhaustion is to permit a tribal court to develop the factual record from which legal conclusions concerning jurisdiction can flow. Iowa Mutual Ins. Co., 480 U.S. at 19. Once a tribal court has created a factual record and issued a ruling based upon it, a party can seek federal review of the federal law issues related to jurisdiction, but is precluded from retrying the facts in the federal court. "[I] n making its analysis, the district court should review the Tribal Court's findings of fact under a deferential, clearly erroneous standard." Duncan Energy Co., 27 F.3d at 1300, citing FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313 (9th Cir. 1990).[5]

The first federal appellate court to reach the issue, the Ninth Circuit, explained that "clearly erroneous" standard is mandated by the federal policies underpinning the exhaustion doctrine.

> The Farmers Union Court contemplated that tribal courts would develop the factual record in order to serve the "orderly administration of justice in the federal court." Id. This indicates a deferential, clearly erroneous standard of review for factual questions. This

[5] The federal courts may only review facts for purposes of deciding the question whether the Tribal Court exceeded its jurisdiction. For all other purposes, the Tribal Court's findings of fact are binding and not subject to any federal court review. Cf. Am. Radio Ass'n, AFL-CIO v. Mobile S.S. Ass'n, Inc., 419 U.S. 215 (1974) ("The question of whether evidence is sufficient to make out a cause of action created by state law and tried in the state courts is a matter for decision by those courts.")

> standard accords with traditional judicial policy of respecting the factfinding ability of the court of first instance.

FMC, 905 F.2d at 1313. All federal courts which have reached the issue, including this Court, have adopted the Ninth Circuit's analysis on this issue of law. Duncan Energy Co., 27 F.3d at 1300 (citing FMC); Mustang Prod. Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996) (citing FMC).

The Tribe's Trial Court issued findings of facts in this matter, and, with one inconsequential exception, API did not challenge the findings of fact in its appeal to the Tribe's Appellate Court. API, therefore, has absolutely no basis for asserting here that those findings are clearly erroneous, and the Tribal Court's findings of fact must therefore inform this Court's analysis of the issues before it.

The facts that the Tribal Court found, and which this Court must accept, include, but are not limited to:

- All findings which served as the basis upon which the Tribal Court held that the former Walker Council had violated the Tribe's Constitution by not setting recall elections, that the Tribal Members and Hereditary Chief had lawfully removed the former Walker Council, and that the Tribe had lawfully elected the Bear Council prior to June 16, 2003.

- All findings which served as the basis upon which the Tribal Court held that the June 16, 2003 contract was not binding on the Tribe.

- All findings upon which the Tribal Court concluded that the doctrine of apparent authority did apply to Walker's actions.

- The finding that between June 30, 2003 and September 30, 2003, Appellant received $1,022,171.26 of tribal funds.

As it must, given the uniformity of federal circuit court decisions including prior precedent in this circuit, Appellant acknowledges that the Tribal Court's findings are dispositive, but Appellant attempts to escape the obvious result from its concession by arguing that allegations in the Tribe's complaint which API did not challenge in its jurisdictional motion "have not yet been proved to any court" and therefore must be ignored in this appeal. API Br. at 7.

In making this claim, Appellant is asking this Court to completely ignore the procedural posture of this case. Appellant challenged Tribal Court jurisdiction in the Tribal Court, and in that jurisdictional challenge it did not contest many of the allegations in the complaint. For purposes of the jurisdictional challenge, API is, as an issue of tribal procedural law, bound by the allegations which it did not contest. API Appeal (App. 662). For example, the Tribal Court Complaint alleges that Appellant was armed when it entered the Tribe's government center and Casino on October 1, 2003. API did not dispute that allegation when it contested tribal court jurisdiction, and it is therefore a fact, for purposes of this appeal, that API was armed when it attacked on October 1, 2003. Similarly, API did not contest any of the Tribe's other allegations regarding API's despicable and dangerous actions on October 1, 2003, other than to arguably (as a matter of tribal

procedural law) raise a claim that its actions on October 1, 2003 were undertaken as an agent of Alex Walker, Jr.[6]

Independently, because it was required to exhaust Tribal Court remedies related to jurisdiction, API had the legal duty to present any factual and legal challenge to jurisdiction in the Tribal Court, and API specifically averred to the federal District Court that it *had* done so. It cannot now be heard to say that the Court should ignore the jurisdictional facts which were alleged in the Tribe's complaint and which API did not seek to have resolved on the merits before it proceeded to this Court, for settled law in this Circuit requires otherwise.

[6] In the Tribal Court action, API asserted that Walker was the Tribe's Chairman, but it did not plead, and has otherwise been ambiguous about, whether its various intentional torts were taken in its capacity as Walker's agent or whether they were taken outside the scope of that agency relationship—i.e. did Walker direct API to enter the Tribe's government center and casino and did Walker instruct them to commit assaults and batteries, etc. or did API decide to do that on its own? For example API did not plead the affirmative defense of consent to the Tribe' s trespass claims. This is likely because of the dilemma which API faced in prior stages of this proceeding, during which API argued that the first Montana exception did not provide Tribal Court jurisdiction because there was not a sufficient nexus between its agreement with Walker and its intentional torts. That argument would have been ridiculous if API had affirmatively asserted that its intentional actions were undertaken as an agent of Walker and with Walker's approval. API does not face that dilemma in this appeal because the first Montana exception is not before the Court, and in this posture, API now appears to assert that its actions were based upon and within the scope of a consensual relationship between API and Walker. API Br. 36. While the application of the first Montana exception is not before this Court, it now appears to be clear that that exception does provide Tribal Court jurisdiction.

In this very appeal, API is seeking to take advantage of its own strategic decision to limit its factual contest to issues related to whether the Tribe agreed to any contract with API. API acknowledges, as it must given the clearly established precedents, that the inquiry here must focus on API's conduct, API Br. 12, but instead, in its brief to this Court, then meanders through federal court interpretation of federal statutes related to well pleaded federal court complaints and federal criminal sentencing, unsupported statements of what API would like the law to be, and other distractions, API Br. 12-20, to eventually end up concluding that though its argument started with an acknowledgement that its conduct is central to the case, the Tribal Court was not even permitted to look at API's conduct. API claims that because it did not contest the allegations regarding the violent, armed actions which API took, the assaults, batteries, false imprisonments, destructions of property, and expulsion of the Tribe's lawful, constitutionally elected governing body from the Tribe's seats of government, the Court is required to decide this case without considering that violent conduct against the Tribe and tribal officers and members.

API also uses the relatively cold recitation from notice pleading to its own maximum advantage. API broke into tribal buildings at 6 a.m. and assaulted and battered tribal officers and members, falsely imprisoned them, destroyed property and sought to expel and overthrow the Tribe's governing body. API wisely chose

not to contest or dwell on those issues in its Tribal Court challenge to jurisdiction, and if it had contested them it would only have created a more dramatic picture of what it looks like when a large, armed group of men come like thieves in the night to the Tribe's seat of government, and to the closed Casino, and break in, and assault, batter, and imprison those they find there in an attempt to overthrow the elected government, and what it looks like when a Tribe, through its membership, rushes in to support its constitutionally and validly elected government against such an attempted violent overthrow of that government. *Coup d'etat, riot, and crime* are the best legal descriptors of API's conduct, though in framing an intentional tort action, API's conduct is described by blander terms; trespass, intentional destruction of government property, and theft or conversion of government property. API appears to understand this, and it virtually concedes that what the Tribe alleged comes within the jurisdiction of the Sac & Fox Tribe of the Mississippi in Iowa Court under the "protective" prong of the Montana test. API Br. 17-19. But it cannot parlay its own decision not to contest the allegations of egregious activities into an avoidance of those allegations.

C. OTHER THAN THE FEDERAL LAW QUESTION OF WHETHER THE TRIBAL COURT EXCEEDED ITS JURISDICTION, API DOES NOT GET TO RELITIGATE QUESTIONS OF FEDERAL LAW IN THE FEDERAL COURTS.

As discussed in detail in section II. A, even if federal substantive law applies to a case before a tribal court, the tribal court is competent to decide those

questions of federal law, and then, "Unless a federal court determines that the Tribal Court lacked jurisdiction ... proper deference to the tribal court system precludes relitigation of issues ... resolved in the Tribal Courts." Iowa Mutual Ins. Co., 480 U.S. 9, 19.

II. THE TRIBAL COURT HAD JURISDICTION TO DETERMINE WHETHER THE TRIBE WAS A PARTY TO THE CONTRACT.

The Constitution and Bylaws of the Sac & Fox Tribe of the Mississippi in Iowa, which were approved by the United States on December 20, 1937, provides the Tribal Council with power and control over the Tribe's real property and over the Tribe's funds. Const. Art. X, §1 (c), (e) (providing the Council with the power and duty to protect and preserve the Tribe's property), (g) (providing the Council with the power to assign tribal land) and (j) (providing the Council with the power and duty "to receive, appropriate and expend for public purposes funds coming within the control of the Tribal Council."); Const. Art. XI, §5. ("The Tribal Council shall manage all unassigned tribal land for the benefit of the Tribe."); Bylaw Art. I, § 3. ("No money shall be disbursed without the consent of the Tribal Council and without the signature of the Chief and the Treasurer." As API concedes in this appeal, API Br. 36, 40, at all times relevant to this case, the Bear Council held these tribal constitutional powers. Homer Bear, Jr. was the Tribe's

Chairman, and Harvey Davenport was the Tribe's Treasurer. In exercising its constitutionally defined sovereign powers of self-government, the Tribal Council never agreed to any contract with API, never authorized API to engage in any conduct on the Tribe's land, and never authorized API to take tribal funds or other tribal property. The Tribe's legitimate, constitutionally chosen Chairman and Treasurer, exercising their constitutionally derived authority to control tribal funds, never authorized payment of tribal funds to API.

In section II of its brief, API argues that alleged "federal recognition" of the former Walker Council superseded the Tribe's Constitution and gave Walker power to enter into contracts even though Walker's actions were unconstitutional. All direct authority is contrary to API's claim, and API therefore resorts to sheer sophistry to attempt to misdirect this Court into concluding that Walker's unconstitutional actions were valid. API extends its unsupported argument even further by asserting that the Tribal Court exceeded its jurisdiction when it held that Walker did not have lawful authority to enter into a contract on behalf of the Tribe on June 16, 2003. Federal law, involving this very Tribe, is expressly contrary to this conclusion.

API's argument on that issue has numerous, independent, serious flaws: API's argument is dependent upon this Court accepting API's misrepresentation of the actions of the BIA and the NIGC; API dramatically understates the Tribe's role

in the operation and regulation of the Tribe's gaming facility and dramatically overstates the federal role; and even if one ignored these fundamental flaws, API's argument relates solely to its work related to the Tribe's Casino. But a substantial part of API's work was its attack on the Tribe's governing body and its government center. These flaws will be addressed in turn, but before even getting to them, API's argument has a glaring threshold flaw, which wholly eliminates the need for this Court to even review API's claim that the contract is valid under federal law, even though invalid under tribal law.

A. REGARDLESS OF WHAT SUBSTANTIVE LAW APPLIES TO DETERMINE WHETHER API AND THE TRIBE ENTERED INTO A CONTRACT, THE TRIBAL COURT HAD JURISDICTION TO DETERMINE WHETHER THE TRIBE WAS A PARTY TO THE JUNE 16, 2003 CONTRACT.

As discussed above, "Unless a federal court determines that the Tribal Court lacked jurisdiction ... proper deference to the tribal court system precludes relitigation of issues ... resolved in the Tribal Courts." Iowa Mutual Ins. Co., 480 U.S. 9, 19. "Tribal forums are available to vindicate rights created by" federal law. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978). In Martinez the Court held that while the Indian Civil Rights Act creates the substantive civil rights law which a tribe must follow, a tribal court has jurisdiction (and under the facts presented in Martinez, exclusive jurisdiction) to determine whether the Tribe complied with that federal substantive law). See also AT & T Corp. v. Coeur

d'Alene Tribe, 295 F.3d 899 (9th Cir. 2002) ("federal courts may not readjudicate questions-whether of federal, state or tribal law-already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason."); Prescott 387 F.3d 753. API has already litigated, in the Tribal Court system, the issue of whether the Tribe was a party to the June 16, 2003 contract. In fact, as API repeatedly emphasized in the Tribal Court and federal District Court, the Tribe did not even mention the alleged contract in the Tribe's Tribal Court complaint. The alleged existence of that contract was raised by API, as part of its motion to dismiss for want of jurisdiction. See API Appeal (App. 647)(App. 588). In its motion to dismiss, API argued that the contract was valid as a matter of tribal law, and also argued, identical to its argument to this Court, that the contract was valid as a matter of federal law. API even asserted, as part of its motion to dismiss the Tribal Court suit, that due process of law dictated that the Tribal Court exercise jurisdiction over API's counterclaims for breach of contract and an order compelling arbitration. API Motion to Dismiss (App. 591 ¶12-13); API Appeal (App 652 n.6).[7] API was

[7] This footnote describes the unusual "logic" which caused API to assert, as part of a motion to dismiss for want of jurisdiction, that due process dictated the Tribal Court exercise jurisdiction. API argued that a conflict existed between due process of law (which required the Tribal Court to hear API's counterclaims) and a tribal statute (which API asserted should be interpreted to preclude counterclaims against the Tribe). If such conflict actually existed, due process would trump the statute, see, e.g., In re: Johnson, Sac & Fox App. case no Johnson-APP-CV-2005-01-22,

provided a full and fair opportunity to present its argument.[8] After determining the facts and applying the tribal law to the facts, the Tribal Court rejected API's argument that the contract was valid, and the threshold issue is therefore whether, even though API had raised the issue, the Tribal Court lacked jurisdiction to determine whether or not the contract was valid.

The Tribal Court **did** have jurisdiction to determine whether or not the contract was valid. The standard axiom is that a "court has jurisdiction to determine its own jurisdiction." See United States v. United Mine Workers of Am., 330 U.S. 258, 291 (1947)," United States v. Haskins, 479 F.3d 955 (8th Cir. 2007). In the present matter, API asserted that tribal court jurisdiction turned on whether or not the Tribe was a party to the June 16, 2003 contract. The Tribal Court therefore had jurisdiction, and the duty, to resolve the jurisdictional issue presented to it: it unquestionably had jurisdiction to determine whether the Tribe was a party to the contract. This is particularly true here, where it was API, not the

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(in ruling against the Tribe, the Tribe's Court of Appeals held that that a statutory evidentiary presumption was invalid because it conflicted with due process of law). But API attempted to parley the alleged conflict into grounds, based upon tribal law, for dismissal, asserting that, to avoid violating due process, the Tribal Court should dismiss the Tribe's intentional tort claims against API.

[8] Initially API pled, as one basis for its motion to dismiss in the Tribal Court, that it did not believe it would receive a full and fair opportunity to present its case before an impartial tribunal. After actually being in the Tribal Court and before the Tribe's experienced judges, API abandoned that issue, did not raise it in its Tribal Court appeal or in the District Court below, and has thereby conceded that it was provided a fair hearing.

Tribe, which asked the Tribal Court to decide contract validity as a component part of API's jurisdictional motion.

1. The forum selection clause in the contract is not applicable to the Tribe because there was no contract with the Tribe.

API attempts to get around this rule of law and its own prior actions by arguing that its contract with Walker vested the federal or state courts with exclusive jurisdiction to determine whether to compel arbitration and therefore that the contract divested the Tribal Court of jurisdiction. This is, with only a slightly more sophistic presentation, the same "cart before the horse" argument which API has tried, and had rejected, in every major decision in this case. E.g., API District Court I (API argued that because its apparent contract with Walker contained a provision for arbitration, the Tribe was required to arbitrate its intentional tort claims. The Court held that if Walker lacked authority to bind the Tribe API's argument was invalid); API Trial Court (API repeated the argument which it made in the District Court, and the Tribal Court held that because Walker lacked actual or apparent authority to bind the Tribe, API's argument was invalid.); API App. Ct. (same); API District Court II (API asserted that because its contract with Walker purported to waive the Tribe's sovereign immunity, the Tribe had, in fact waived its sovereign immunity. The Court held that the argument was invalid because Walker lacked authority to bind the Tribe.) Like the arbitration clause and the

waiver of immunity clause, the choice of forum clause is only applicable to parties who entered into the contract. It does not apply to the Tribe.

2. The forum selection clause does not preclude Tribal Court jurisdiction of claims to compel arbitration.

Independent of the discussion above, API's argument is wrong because it is contrary to the well-established rule for interpretation of the language in the choice of forum provision which API entered into with Walker. A forum selection clause is permissive, not mandatory, unless it contains language that clearly shows otherwise. Dunne v. Libbra, 330 F.3d 1062 (8th Cir. 2003) (applying Illinois law)[9].The forum selection clause in Dunne stated "the parties consent to jurisdiction to [sic] the state courts of the State of Illinois." 330 F.3d at 1064. This Court held that because " the forum selection clause does not use the words 'exclusive,' 'only,' 'must,' or any other terms that might suggest exclusivity the forum selection clause permitted suit in Illinois but did not exclude suit in any other Court which had sufficient contact to the cause of action." Id.

[9] John Boutari and Son, Wines and Spirits, S.A. v. Attiki Importers and Distributors, Inc. , 22 F.3d 51,53 (2d Cir. 1994) ("an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere unless it contains specific language of exclusion.") (emphasis in original; quoting New York v. Pullman, 477 F. Supp. 438 (S.D. N.Y. 1979); Sterling Forest Assoc., Ltd. v. Barnett-Range Corp., 840 F.2d 249, 251-52 (4th Cir.1988); Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir.1987) (a forum selection clause that says nothing about courts having exclusive jurisdiction was permissive rather than mandatory).

Applying this rule to the present context, the forum selection clause which API and Walker allegedly agreed to states:

> if either party has a good faith position that a dispute does not arise under this Agreement, that party may file an acting in the federal District Court for the Northern District of Iowa, or the Iowa state courts, to determine whether the dispute is the proper subject of arbitration under this agreement.

June 16, 2003 Contract §III.2.b.iii (emphasis added). This is clearly a permissive forum selection clause. SBKC Service Corp v. 1111 Prospect Partners, L.P., 105 F.3d 578, 581-82 (10th Cir. 1997) ("If we parse this clause[which provided that a suit "may be maintained in" a Kansas state Court], we begin with the word 'may,' which is a word universally recognized as connoting permissiveness. It is not a word of exclusion; in plain terms, it does not confine the commencement of litigation to" Kansas state courts.). Even if Walker and API agreed that suits seeking to compel arbitration could be brought in the Iowa state courts or the United States District Court for the Northern District of Iowa, they did not exclude jurisdiction in any other court. API's argument that the forum selection clause provides exclusive jurisdiction must fail.

The Tribal Court had jurisdiction to determine whether or not the contract was valid, and API has already litigated in the Tribal Court its claim that the contract is valid. It does not get to relitigate that issue in this Court. Iowa Mutual Ins. 480 U.S. 9.

B. THE TRIBAL COURT HAD JURISDICTION TO WHETHER WALKER HAD AUTHORITY UNDER THE TRIBE'S LAWS TO THE JUNE 16, 2003 CONTRACT.

The question whether Walker was the legitimate leader of the Tribe when he signed the purported contract plainly requires a determination of Tribal constitutional law, including determination of the constitutional remedy for the former Walker Council's violation of its duty to hold constitutionally mandated recall elections, Const. Art. XII, §1; the power of the Tribe to remove Council members who are not recognized as persons of honor, law abiding and of good character, Const. Art. IV, § 2; the power of the Tribe at a General Meeting of the Tribe, Bylaw Art. III, and the provisions providing the Tribal Council with authority to control and protect tribal property, Const. Art. X, § 1 (c), (e) (g) (j); Art. XI, §5; Bylaw Art. I, § 3. API Appeal (App. 656-657) (resolving these issues of tribal constitutional law and determining that Walker lacked authority to enter into a contract on behalf of the Tribe). See also API District Court I, 401 F. Supp.2d 952, 961 ("Clearly, the validity of the Agreement turns on whether Walker was authorized to enter into contracts on behalf of the Tribe. This Court is without jurisdiction to determine whether the Walker Council or the Bear Council was the governing body of the Tribe at the time the Agreement was signed on June 16, 2003, because such a matter is an intra-tribal dispute.")

The Tribal Court had jurisdiction to make determinations of tribal law, and as discussed in detail in section I.A, supra, the Tribal Court's determinations of tribal law are binding on this Court.

While the Tribe does not need to show that tribal court jurisdiction is exclusive, the Tribe notes that the intra-tribal leadership dispute is within the Tribal Court's exclusive jurisdiction, and a tribal court's resolution of that tribe's leadership disputes is binding on other courts. "It is well established that such an intratribal dispute is exclusively within the tribe's own purview to decide." API Appeal (App. 654); Nero v. Cherokee Nation, 892 F.2d 1457, 1463 (10th Cir. 1989) (no federal jurisdiction over tribal leadership dispute); Wheeler v. Swimmer, 835 F.2d 259, 262 (10th Cir. 1987) ("The right to conduct an election without federal interference is essential to the exercise of the right to self-government.").

More specifically, this Court has already held that this particular intra-tribal leadership dispute is within the Tribal Court's exclusive jurisdiction to determine. In re: Sac & Fox Tribe of the Mississippi in Iowa / Meskwaki Casino Litig., 340 F.3d 749 (8th Cir. 2003). The Meskwaki Casino Litigation was a consolidated appeal from several cases in which the former Walker Council asserted it was the Tribe's governing body and therefore had the authority, *inter alia*, to enter into contracts and exercise other constitutionally created powers of the Trial Council. The United States District Court for the District of Northern Iowa rejected that

argument, holding that the Tribe, not the federal courts, was the only entity which could resolve the competing claims to Tribal office. Sac & Fox Tribe of the Mississippi in Iowa v. Bear, 258 F.Supp.2d 938 (N.D. Iowa 2003)**.** This Court affirmed. In re: Sac & Fox Tribe of the Mississippi in Iowa / Meskwaki Casino Litig., 340 F.3d at 749. Governing precedent thus expressly rejects API's claim that the question of whether Walker had the authority to act on behalf of the Tribe is a matter of federal law: it is instead solely a matter of tribal law. Id. Contrary to API's specious claims, there is not any case with a contrary holding, which is why API cites no case in support of its outrageous proposition.

The District Court's holding that only the Meskwaki Tribal Court could determine whether Walker could bind the Tribe to a contract on June 16, 2003, is correct. The validity of the purported contract necessarily turns on the question of whether Alex Walker had the requisite authority to execute it on behalf of the Tribe. See API Br. 30. The Tribe's Trial and Appellate Court have both determined the question could not be answered without resolution of complex issues of Tribal law necessary to decide the Tribe's leadership dispute, all of which are exclusively within the jurisdiction of the Tribal Court.

The Tribal Court proceedings determined that, based upon tribal law, Walker did not have the authority to bind the Tribe when he entered into the June 16, 2003 contract. API Trial Court (App. 646). The former Walker Council was

lawfully removed from office in March, 2003, and the Bear Council was the official Tribal Council as of May 22, 2003, at the very latest. API Appeal (App. 656-657). By June 2003, both the Hereditary Chief and the Tribe's membership had unequivocally removed from the Walker Council, all authority to act on behalf of the Tribe. Thus, Walker conclusively lacked actual authority to bind the Tribe.

API does not dispute that Walker lacked authority to bind the Tribe under the Tribe's federally approved Constitution. API Br. at 36, 40. Instead, API argues that there is a separate question of whether the United States had authorized Walker to contract on behalf of the Tribe. API's argument on this issue is based upon a false dichotomy. For all alleged contracts, there are multiple requirements which must be met before a contracting party is bound by the contract. Under the Tribe's Constitution, an absolute requirement is that the contract has to be approved by the Tribe's governing body. As API has conceded in this appeal, its contract simply does not meet this requirement. An additional absolute requirement is that any expenditure of tribal funds must be approved by the Tribe's constitutionally authorized, elected governing body and signed off on by its lawful Chairman or Treasurer. As API has conceded in this appeal, it does not meet this requirement either. API argues that, for the Tribe to be bound by a contract, the Tribal Council which authorized the contract must be "federally recognized." The Tribe, as adamantly as is possible, disagrees, but this Court need not resolve that

issue, because the issue here is not whether the Tribe would be bound by a contract signed by the Tribe's constitutionally elected governing body when that governing body allegedly lacked federal recognition. Regardless whether "federal recognition" of a particular tribal officer is required for contract validity, approval by the tribally recognized, constitutionally elected governing body is required. Regardless of any claimed issue of "federal law", the Tribe was not bound by the contract API and Walker signed, because, as a matter of resolved tribal law, approval by the "tribally recognized", i.e. the constitutionally elected, Tribal Council was required, and API did not have the approval of the tribally recognized governing body.

C. THE DECISION OF FEDERAL AGENCIES TO ADHERE TO THE STATUS QUO PENDING TRIBAL RESOLUTION OF THE LEADERSHIP DISPUTE DID NOT CONFER AUTHORITY ON WALKER TO BIND THE TRIBE TO THE PURPORTED CONTRACT.

In its briefs to the District Court, API argued, based upon an obvious mis-citation of 25 C.F.R. § 83.2,[10] that BIA "recognition" of Walker gave Walker lawful authority to exercise all powers of tribal government. The District Court rejected API's argument. API District Court II (App. 791), and API has abandoned that argument on appeal. But now, without the main authority that it

[10] API wrongly claimed that 25 C.F.R. §83.2defined, for federal purposes, the consequences of BIA "recognition" of a particular person as a Tribe's governing body. The regulation establishes the consequences of federal recognition of a Tribe. It is the tribal law equivalent of the equal footing doctrine for states—when a Tribe is federally recognized, it is entitled to most of the privileges enjoyed by other federally recognized tribes.

relied upon in the District Court, API continues to claim that the federal courts must treat Walker's unconstitutional actions as valid because Walker was "recognized" by the BIA. API's argument is contrary to the BIA's own statements of the limited effect of BIA "recognition" of tribal officers during a tribal leadership dispute. While API claims that the BIA's "recognition" trumps the Tribe's own resolution of an intra-tribal leadership dispute, the Interior Board of Indian Appeals and the BIA itself state that the Tribe's determination is dispositive and trumps any contrary statement by the BIA. Wanatee v. Acting Minneapolis Area Director, 31 IBIA 93 (1997); Priscilla A. Wilfarht, Overview of Decisions of the Interior Board of Indian Appeals Regarding the Government-to-Government Relationship and Other Tribal Government Issues §4 (available at: http://www.oha.doi.gov/IBIA/IbiaDiscussions/IbiaTGForum.html (synopsizing federal court and IBIA precedents, BIA Field Solicitor Wilfahrt writes, "There may be instances when the BIA must recognize an interim government [solely for federal agency use] prior to the completion of tribal process, but it must allow the tribe the opportunity to resolve the dispute and subsequently adjust its recognition to reflect the outcome of any tribal process.").

When a Tribe has resolved a tribal leadership dispute in a valid tribal forum, the results are binding on the BIA and the IBIA. Bucktooth v. Acting Eastern Area Director 29 IBIA 144, 149 (1996) (citing Wheeler v Dept. of Interior, 811 F.2d 549

(10th Cir. 1987)). See also Smoke v. Acting Eastern Area Director, 30 IBIA 31 (1996), recons. denied, 30 IBIA 90 (1996); Drake v. Acting Minneapolis Area Director, 29 IBIA 178 (1996); Gonzales v. Acting Albuquerque Area Director, 28 IBIA 229 (1995); Smally v. Eastern Area Director, 18 IBIA 459 (1990).

The IBIA and the BIA defer to the Tribe's resolution for the same reasons that the federal courts defer to the Tribe's decision. "It is a well-established principle of Federal law that intra-tribal disputes should be resolved in tribal forums. This rule applies with particular force to intra-tribal disputes concerning the proper composition of a tribe's governing body." Wadena v. Acting Minneapolis Area Director, 30 IBIA 130 (1996). See also Bucktooth v. Acting Eastern Area Director 29 IBIA 144 (identical text). It is also "well established that a tribe has the primary authority to interpret its own constitution and that BIA must defer to a reasonable interpretation put forth by the Tribe." 30 IBIA 294.

There are cases where the Bureau may need to take some actions related to a tribe before the tribe resolve its leadership dispute. In those cases, this Court's holding in Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983), IBIA precedents and Bureau practice permit the Bureau to treat one group as the Tribe's governing body on an interim basis for limited federal agency purposes. Like the present case, Goodface was an intra-tribal election dispute. The Goodface court noted that the parties would have to seek a tribal remedy for the intra-tribal dispute, and held

that the district court lacked jurisdiction to address the merits of the dispute. Id. at 338-39 and n.4. It also held that the BIA should "deal with" one of the competing tribal councils on an interim basis pending tribal resolution of the election dispute." Id. at 338-39. Goodface provides absolutely no support for the proposition that the BIA's choice of which of two competing tribal councils it recognizes has authority, conferred by the federal government, to conduct business with third parties, whether that business is related to federally regulated activities or not. Goodface speaks only to the BIA's obligation to provide day-to-day services to tribes, and the practical necessity of the BIA needing to deal with some tribal body for that limited purpose. The BIA does not establish whether nonmembers can conduct business with the tribe, and it owes no duties to nonmembers. API Appeal (App. 655). Acknowledgment by the BIA is not an insurance policy, nor does it trump a tribe's determination of who its leaders are. Id.

In the present matter, some of the Bureau's statements suggest that the Bureau exercised its limited power to decide that it would deal with Walker in 2003. In 2003 the Bureau acknowledged the Tribe's leadership dispute and that it could not resolve the dispute, but continued to refer to Walker as the Tribe's Chairman. The NIGC also dealt with Walker as the Tribe's chairman after Walker had been lawfully removed from tribal office. API wrongly attempts to parley

these BIA statements and NIGC actions from 2003 into a legal holding that Walker's contract with API was a tribal contract.

The same precedents which establish the Bureau's authority to treat a group as the Tribe's governing body for limited federal agency purposes during a leadership dispute also establish strict limits on that power. Pivotal for the current matter is that "when the BIA must act prior to the resolution of disputes in a tribal forum, the BIA decision is necessarily interim in nature, subject to revision should the tribal forum reach a different result. Thus it is clear that the BIA decision is secondary to the decision of the tribal forum." Wanatee v. Acting Minneapolis Area Director, 31 BIA 93 (1997) (emphasis added).

Like the present matter, Wanatee raised questions related to removal of members of the Sac & Fox Tribe of the Mississippi in Iowa Council. Wanatee had been elected to one of the seven Council positions by vote of the tribal members. Under Meskwaki law, the seven council members then select their Chairman and other officers. The Council installed Wanatee as its Chairman, but in April 1996 the Council selected a new Chairman and demoted Wanatee to a regular (non-officer) position on the Council. In June 1996 tribal members voted to recall and remove Wanatee from the Council.

Wanatee filed an appeal with the IBIA, asserting that under the Tribe's Constitution and laws he remained Chairman of the Tribal Council and that the

Bureau had erred by recognizing his demotion and removal. The IBIA dismissed the appeal, effectively holding that Wanatee had to bring the claim that he was Tribal Chairman in the appropriate tribal forum and that once the tribal forum decided the leadership question, the Bureau would be required to accept the Tribe's resolution.

Applying Wanatee to the present matter, the appropriate tribal forum has now resolved the 2003 leadership question and determined that Walker was removed from office in March, 2003 and in a valid, constitutional election held on May 22, 2003, the Bear Council was elected. To the extent the Bureau made any interim determination to the contrary, its predictions are outdated and wrong, and certainly are not binding. Goodface and the IBIA precedents discussed above establish that the federal agency upon whose decision API attempts to rely defers to the Tribe's decision and acknowledges, directly contrary to API's position, the Tribal Court's final and dispositive determination controls, not the BIA's interim, and incorrect, prediction.

In this case, the BIA did not pretend that its acknowledgment of the Walker Council was conclusive, or that its "recognition" conferred any authority to enter into agreements with third parties on behalf of the Tribe. Instead, it consistently reiterated its position that it lacked the authority to intervene in the leadership

dispute. API should have heeded those BIA caveats, because, as discussed above, they are amply supported by law.

As the Tribal Court of Appeals properly noted, the "BIA is not entitled to determine which of rival councils is the official tribal council for purpose of *nonfederal*, day-to-day tribal affairs." (API Trial Court (App. 654). Otherwise stated, while the BIA may be entitled to determine the council with which it deals, it is not entitled to determine which council may deal with tribal affairs, or determine the nature of a tribe's relationships with non-federal parties seeking to overthrow a tribe's legitimate government.

Without acknowledging the numerous IBIA and federal court precedents and the BIA statements which establish that the Tribe's decision is dispositive and any interim statement by the BIA is not, API asserts that nonmembers should be entitled to rely on BIA acknowledgment of a tribal council. But this equitable argument is without any merit. The numerous holdings which create the rule that the Tribe's decision is dispositive and that the BIA statements are secondary existed at the time that API decided to interject itself into the Tribe's dispute; the BIA itself acknowledged that the Tribe was in a leadership dispute and that only the Tribe could resolve the dispute. (App . at 63, 65). API knew, or at least should have known, that any statement by the BIA did not provide legal grounds for reliance, and as the Tribal court of Appeals held, API was gambling on the Tribe

recognizing the Walker Council, and is now trying to avoid the consequences of that very risky gamble. API Appeal (App. 663). See also API District Court II (App. 792).

API also argues that because the NIGC, in 2003, cited the BIA's statements as justification for NIGC actions, API should be able to rely upon the BIA's statements or alternatively should be able to rely upon the NIGC because the NIGC has some regulatory authority over tribal gaming and some of API's activities related to tribal gaming. But the NIGC is a federal agency, and API is not, and the NIGC relied upon the BIA's statements based upon federal precedents which state that, as a federal agency, it should look to the BIA (which then looks to the Tribe). API does not follow the chain of command which a federal agency must follow, and instead, under applicable law, API should have looked directly to the primary source.

Additionally, API's argument about NIGC action is based upon the same false dichotomy discussed above. Regardless whether the entity which operates the Tribe's gaming operation must be "federally recognized", it is clearly true that under the Tribe's constitution and gaming laws, the entity conducting the Tribe's gaming must be constitutionally elected and validly exercising the Tribe's sovereign governmental powers. [11] It is the Tribe's sovereign powers, which permit

[11] API also did not contest the facts which show that it was subject to the Tribe's

tribal gaming, 25 U.S.C.§ 2702 and which provide the Tribe, not the United States, with primary authority to regulate tribal gaming. If federal "recognition" is required, this is a second (and secondary) requirement for operation of gaming, it is not the sole requirement, and it is undisputed that Walker and API did not meet the first, primary requirement, because Walker held no tribal power and had no tribal power to delegate to API.[12]

To hold as API wishes in this particular case would strip authority from the Hereditary Chief, the membership of the Tribe, and the Tribal Court system, to determine as who has the authority to take governmental actions on behalf of the Tribe. API would vest all the power to make that determination in the BIA. This could not be more contrary to well-established, long-held, federal principles of self-governance, self-determination, and respect for Indian tribes. The right to determine its own leaders is one of the rights most basic and essential to any

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gaming regulatory jurisdiction, because it was "working in gaming, and had access to gaming access to cash, tokens or chips, machine components or other gaming supplies" or because it had "security . . . responsibilities." Tribal Code. 11-3101,

[12] In its brief to this Court, API speculates that the NIGC would have allowed the Casino to reopen if API and Walker had been able to successfully seize control of the Casino. As discussed above, regardless what the NIGC would have allowed, the Tribe could not allow the Casino to reopen under Walker's control because Walker lacked tribal office. Additionally, there is no record evidence to support API's claim that the NIGC would have allowed Walker to operate the Casino. The order of closure was served on Bear, Walker and the Tribe, it directed all three to close the Casino, and it stated that one of the reasons for closure was the risk of harm and violation of gaming laws, based upon evidence that Walker was then merely considering attempting a forcible seizure of the Casino.

sovereign. A simple contract dispute hardly warrants overturning an entire body of federal law, defeating these long-standing federal policies.

III. THE TRIBE'S SUIT WAS CLEARLY CONSISTENT WITH FEDERALLY IMPOSED LIMITATIONS ON TRIBAL COURT JURISDICTION.

The final issue in this appeal is whether the Tribal Court had jurisdiction over claims based upon API's intentional tortuous conduct against the Tribe. Both the Tribal Court and the federal District Court held that the present matter is the quintessential example of a matter which comes within the Tribe's jurisdiction. As discussed below, these holdings are clearly correct, and API does not seriously dispute that the conduct alleged by the Tribe brings API's conduct within the Tribal Court's jurisdiction. Instead, API offers a convoluted argument that this Court should federalize and supervise many areas of tribal procedural and pleading rules in a way which would eliminate tribal court jurisdiction under the second prong of the Montana test.

A. THE TRIBE HAS CLEARLY ESTABLISHED AUTHORITY TO PROHIBIT, REGULATE, AND OTHERWISE EXERCISE JURISDICTION OVER ITS GOVERNMENT CENTER AND CASINO AND OVER ENTITIES WHICH ENTER THE TRIBE'S LAND TO ATTEMPT TO OVERTHROW THE TRIBE'S LAWFULLY ELECTED GOVERNING BODY.

Tribal Court jurisdiction over non-Indians on tribally owned land has been recognized since at least Worcester v. State of Georgia, 6 Pet. 515 (1832), where the Cherokee Tribe had given Worcester permission to be on its lands, but he was

convicted under Georgia law making it a crime for a white person to be on Cherokee land without permission of the State. The United States Supreme Court reversed the conviction, holding:

> The Cherokee nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of Cherokees themselves or in conformity with treaties, and with the acts of Congress.

The Supreme Court quoted and applied the above holding from Worcester in Williams v. Lee, 358 U.S. 217 (1959). William, a non-Indian, brought suit in the Arizona state courts, asserting that Lee, a member of the Navajo Tribe, had breached a contract by failing to make all monetary payments required under a contract. Though the claim arose on Indian land within the Navajo Reservation, Arizona's courts held they had jurisdiction over the suit. But a unanimous United States Supreme Court held the Navajo court system had exclusive jurisdiction over the claim, reasoning that because tribes retain the sovereign authority to make their own laws and be ruled by them, including laws exercising sovereign regulatory and adjudicatory power over all tribally-owned land in Indian Country, the Navajo Tribal Court properly had jurisdiction of the case. It held:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs, and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation, and the transaction with an Indian took place there.

Worcester notes that a tribe's jurisdiction over its own land can be diminished by an act of Congress or treaty. The most common present day scenario where a congressional act might lead to diminishment stems from the failed federal allotment laws. During the allotment era, lands on some tribal reservations ended up being owned in fee by non-Indians, and tribal jurisdiction over non-members on those non-Indian owned lands is limited. Montana, 450 U.S. at 544.[13]

The Meskwaki Settlement does not contain allotted lands, API's agents were armed thugs, not state officers, and there is no federal statute which authorized API's entry onto the Tribe's land. Under Worcester and Williams, claims against API arising from a consensual relationship with tribal members and its subsequent actions on the Settlement, and in particular claims which require a court to determine who the Tribe's leaders were in 2003, are within the Tribal Court's jurisdiction. Any argument to the contrary contradicts controlling precedent.

[13] See also Nevada v. Hicks, 533 U.S. 353 (2001) (either adding an additional "exception" to Worcester or interpreting the existing exception more broadly than in prior decisions, the Court held that a state game warden, when exercising state power to investigate an off-reservation offense, was not subject to tribal jurisdiction for claims based upon the state actor's actions on non-tribally owned reservation land).

B. EVEN ABSENT SUCH A PRESUMPTION OF JURISDICTION, THE TRIBAL COURT HAS JURISDICTION UNDER THE "PROTECTIVE" PRONG OF THE MONTANA TEST.

API based its motion to dismiss the Tribal Court proceedings and bases its current appeal upon a distinct misinterpretation of the United States Supreme Court holding in Montana, 450 U.S. at 544. In Montana, the Supreme Court discussed two independent grounds for tribal civil regulatory jurisdiction over non-members:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565 (citations omitted). See also Plains Commerce, 128 S.Ct. 2709, 2724 (2008) (reiterating the validity of both "Montana exceptions"). Nevada v. Hicks, 533 U.S. 353 (2001) (same).

In Strate v A-1 Contractors, 520 U.S. 438 (1997), the Supreme Court held that the Montana Rule, including both of its exceptions, defines the scope of a Tribe's adjudicatory power on non-fee land:

> Regarding activity on non Indian fee land within a reservation, Montana delineated--in a main rule and exceptions--the bounds of the power tribes retain to exercise "forms of civil jurisdiction over non

> Indians." As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.

Both of the "Montana exceptions" are well established under federal law, and clearly permit Tribal Court jurisdiction in this matter. While the Tribe believes that this case comes within the first Montana exception because API entered into a consensual relationship with Walker, the District Court did not decide whether the first Montana exception provided Tribal Court jurisdiction, and API does not address the first Montana exception in its opening brief. While it seems impossible to imagine that this Court would hold that the second Montana exception does not provide sufficient basis for tribal court jurisdiction, if this Court were to make that holding, the Court would need to remand for the District Court to decide whether the Tribal Court had jurisdiction under the first Montana exception.

The Tribal Court has jurisdiction under the "protective" prong of Montana, which states: "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana, 450 U.S. at 565. The Montana Court's reference to fee land in the quoted language was not a limitation on the holding, but was instead a reflection of the fact that when the action occurs

on the Tribe's own land, the conduct has a direct effect on the Tribe's interests, and therefore its protective prong is, *a priori*, satisfied.

In Hicks, the Supreme Court announced that, contrary to the prevailing understanding of most commentators and authorities, the Montana test applied, at least when the conduct complained of is that of a state officer, even on non-fee land. Hicks referred to the status of the land as only one factor in a multi-factor test which must to be applied to determine whether a tribal court had jurisdiction. This removal of the previously understood bright line rule created uncertainty, but the Supreme Court's decision in Plains Commerce Bank removed much of that uncertainty. In Plains Commerce Bank, the Supreme Court clarified that although the status of the land was a factor which could be outweighed, ownership by the United States in trust for a tribe was a very substantial factor, such that it is the very rare case where it is outweighed.

Appellant here has created an argument with many premises, one which was rejected by the Supreme Court in Plains Commerce Bank: in that case the respondent asserted the federal courts should consider status of the land as a relatively unimportant factor when it decides whether a tribal court has jurisdiction, but the Supreme Court rejected that argument in clear, express terms. The Court referred to tribal jurisdiction over non-fee land as "plenary" and noted that this plenary jurisdiction is lost when the land is converted to fee simple. Id. at

2718. The Supreme Court next analyzed, at length, its own numerous cases which show "the critical importance of land status to the jurisdictional analysis." Id. at 2719. As the Court discussed, those cases establish that tribal courts almost always have jurisdiction over conduct on tribal land but usually lack jurisdiction over activities by non-members on non-Indian owned land. E.g. Id. at 2721-22 (discussing its prior precedents permitting tribal taxation of activities on tribally owned land but preventing most tribal taxation of activities on non-Indian owned land.)

As described in Plains Commerce Bank, on tribally owned land, a tribe has jurisdiction over contract disputes arising on non-fee land, Williams, 358 U.S. 217, the "'traditional and undisputed power to exclude persons' from tribal land", Plains Commerce, at 2723, quoting Duro, 495 U.S. at 696, the power to tax conduct on tribal land, the power enforce tribal license requirements related to conduct on the Tribe's land, and the power to manage tribal land.

The examples of tribal court jurisdiction over non-members on tribally owned land which the Supreme Court cited with approval in Plains Commerce Bank carried significantly less impact on the tribes than API's conduct in the present matter, and the Tribal Court therefore clearly had jurisdiction under Plains Commerce Bank.

To support its argument, API pulls out one word of dicta from Plains Commerce and asserts that this dicta provides the new legal standard for application of the second prong of the Montana test. In Plains Commerce the Supreme Court stated that the sale of fee land by one non-Indian to another non-Indian "cannot fairly be called 'catastrophic' for tribal self-government." 128 S.Ct. at 2727. But the Court did not state that "catastrophe" was the applicable standard, and more important, the Supreme Court's single use of the word "catastrophe" was in reference to activities on non-Indian owned land, and like Plains Commerce Bank itself, the secondary source which the Supreme Court was quoting also used "catastrophe" to describe the level of harm for a tribal court to have jurisdiction over non-member actions on non-Indian land. F. Cohen, Handbook of Federal Indian Law § 4.02[3][c], at 232, n. 220 (2005 ed.)

There is simply no Supreme Court case elevating the standard for tribal court jurisdiction based on the "protective" exception announced in Montana from conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," to conduct which has a "catastrophic" effect. API's conduct here clearly had much more than just "some direct effect on political integrity, the economic security, or the health or welfare of the tribe. As the Tribal Court of Appeals noted, and the District Court quoted with approval, it is nearly impossible to even begin to conceive of conduct that would

pose a greater, or more direct threat to the political integrity, economic security, or the health and welfare of the Tribe than the conduct engaged in by API. API sent its mercenary thugs to conduct an armed invasion of the Tribe's center of government, its Gaming Commission Offices, and of the Tribe's Casino, its "economic engine", API District Court II (App. 789). It attempted to seize control of these locations from the Tribe's legitimately elected Tribal Council, thereby threatening the Tribe's political integrity. It harmed or threatened the safety of Tribal members and employees, illegally took over a million dollars of Tribal funds, and seized highly sensitive and confidential information belonging to the Tribe, thereby threatening the Tribe's economic security and welfare. Its invasion of the Casino placed Casino profits and the Tribal programs funded thereby at risk. API's conduct created serious threats, as well as actual harm, to the Tribe's economic security, political integrity, and general welfare.

Only something along the lines of a full-scale military invasion involving mortars, rockets, and tanks could be more catastrophic to the Tribe. Catastrophic risk is not required, but API's actions did pose catastrophic risk to nearly all of the Tribe's core governmental functions and property.

API clearly understands that it's conduct, as alleged in the Tribe's complaint, is sufficient to provide the Tribal Court with jurisdiction under the second prong of Montana, and API therefore argues to this Court that the Tribal

Court should have applied the "well pled complaint rule", a rule of federal statutory interpretation, to determine whether to grant a motion to dismiss under Tribal Court Rule 7(b)(1) (which is similar to Federal Rule of Civil Procedure 12(b)(1).

API did not raise this "well pled complaint" argument in the Tribal Court or in the District Court below, and it cannot raise it here. "In general, Court of Appeals does not address issues raised for the first time on appeal, nor would it be appropriate to address an issue raised only in a reply brief." XO Missouri, Inc. v. City of Maryland Heights, 362 F.3d 1023 (8th Cir. 2004). This result is particularly appropriate in the present matter, where API is now, in the Circuit Court, raising an issue related to tribal pleading, and where, if API had timely raised it and if the argument had any merit, any defect would have been curable by a motion to amend the complaint. E.g., API Br. 23 (noting that API's argument for "lack of jurisdiction" is based on the current tribal court complaint, and even API acknowledges that other claims may have been possible) E.g. Inge v. Rock Financial Corp., 281 F.3d 613 (6th Cir. 2002) (holding that even where a plaintiff had already amended the complaint twice and the parties had litigated motions to dismiss based upon the well-pleaded complaint rule, the trial court erred by

denying Plaintiff's motion seeking to cure the deficiency through a third amended complaint); Tingey v. Pixley-Richards West, Inc., 953 F.2d 1124 (9th Cir. 1992).[14]

But even if the Court were to consider API's new argument, that argument is clearly without merit. API is attempting to use the well-pleaded complaint doctrine to strike, *post facto*, the Tribe's pleadings related to the jurisdictional facts and related to the damages caused by API's intentional torts[15]. API then argues that if this Court strikes those jurisdictional allegations, this Court should hold that the Tribe did not plead sufficient grounds for Tribal Court jurisdiction. There is no precedent supporting API's attempt to federalize tribal pleading practice, federalize the procedures a tribal court is required to follow when deciding motions to dismiss, or federalize the elements of claims of intentional torts against the Tribe. The Tribe believes all of the allegations of its Tribal Court Complaint (with the

[14] In the tribal court proceeding, API briefly claimed that the Tribal Court should apply a tribal law version of the well-pleaded complaint rule when analyzing application of the first Montana exception. In that context, API's argument had at least some logic—API asserted that because the Tribe had chosen not to plead the existence of a contract, the Court should not consider API's claim that there was a contract when the Court decided the jurisdictional motion. But the first Montana exception is not before the Court, and API did not mention the pleaded complaint doctrine in relation to the second Montana exception, where application would have made no logical sense.

[15] In its brief, API argues that this Court should determine the elements of the pending Tribal Court claims and then hold that a "well pled" tribal court complaint would be limited to allegations related to those elements. The Tribe does not agree. Jurisdictional facts, facts related to the scope of damages, and other facts are also well-pled.

possible exception of the allegation that API is non-Indian)[16] are proper, and that the Tribal Court could adopt any suitable mode of proceeding to resolve API's challenge to Tribal Court jurisdiction (and therefore could, certainly, adopt the mode of proceeding which API suggested—resolution of the pivotal claims on the merits after discovery).[17]

Like many of the issues which API raises, there are already numerous cases directly on point or closely on point, but API has already lost in the Tribal court and in the District Court based upon those direct cases, and so API acknowledges the applicable legal rule before starting on a multipart argument to try to avoid the consequences from cases directly on point here. Here, as the Tribal Court and District Court held, the allegations of the Tribe's complaint, supplemented by the Tribal Court's resolution of factual disputes which API raised in its motion to dismiss, establish that this case is firmly within the core of tribal court jurisdiction under the second Montana exception. While its attorneys are clever, this case must

[16] It is ironic that API raises the well pled complaint doctrine, because the allegation that API is a non-Indian was pled in anticipation of API's attempt to challenge tribal court jurisdiction, and therefore is the only allegation which would arguably not be "well pled" in a federal court complaint.

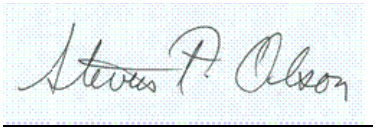
[17] It is also ironic that API now argues that the Tribal Court should have applied the relatively complex "well pled complaint" rule. In the Tribal Court, API previously argued, based upon Tribal Code §5-2103 that tribal court pleading rules should be interpreted so informally as to have not even required API to file an answer to the Tribal Court complaint.

be decided based upon precedent, not on clever arguments which are entirely without substance and contrary to governing precedent.

Here National Farmers Union and its progeny contemplate that tribal courts will develop the factual record for challenges to tribal court jurisdiction, and that the federal courts will use that tribally-developed factual record. Contrary to these many holdings, and with absolutely no relevant case authority in support, API argues that the Tribal Court is not supposed to develop the record at all, but is instead supposed to review only the Complaint when it decides whether it has jurisdiction. This Court should apply sound precedent, and reject API's convoluted argument.

CONCLUSION

For all of the reasons stated above, the Tribal Court had jurisdiction over claims stemming from API attempting to remove the Tribe's governing body and taking tribal funds as compensation for its mercenary activities



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