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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

COUNTY OF MARICOPA

LOREN R. SHIRK, Plaintiff, v. MICHAEL LANCASTER, *et al.*, Defendants.	No. CV-2007-018088 **BRIEF OF *AMICUS CURIAE* IN OPPOSITION TO PLAINTIFF'S MOTION TO SET ASIDE JUDGMENT**

Amicus Curiae Gila River Indian Community ("Community") hereby submits is Brief in Opposition to Plaintiff's Motion to Set Aside Judgment:[1]

ARGUMENT

I. THE BURDEN OF PROOF ON A RULE 12(b)(1) MOTION IS ON THE PARTY ASSERTING JURISDICTION AND IT WAS UP TO THE PLAINTIFF, NOT DEFENDANTS, TO ESTABLISH A WAIVER OR ABROGATION OF TRIBAL SOVEREIGN IMMUNITY.

Plaintiff's approach to the general issue of having this Court reconsider a final judgment entered over two years ago—and from which he did not appeal—is that it was Defendants' obligation to make an argument equally available to him at the time, but that he did not make. This is not only counterintuitive, but contrary to the well-established law

[1] The caption of this brief was changed to reflect procedural status of this matter.

of jurisdictional challenges under Ariz. R. Civ. P. 12(b)(1) and its federal counterpart, Fed. R. Civ. P. 12(b)(1), which allocate the burden of proof on jurisdictional challenges to the plaintiff. Ariz. R. Civ. P. 12(b)(1) permits a party to raise the defense of "lack of jurisdiction over the subject matter." Arizona's Rule 12(b) is similar to Fed. R. Civ. P. 12(b), which utilizes an identical mechanism for making jurisdictional challenges.

Arizona courts have defined subject matter jurisdiction as:

> [T]he power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court, by law of its organization, to deal with the abstract question.

Gatecliff v. Great Republic Life Ins. Co., 154 Ariz. 502, 507, 744 P.2d 29, 33 (Ariz.App. 1987) (citations omitted). When a challenge is made to the court's subject matter jurisdiction, "the court may take evidence and resolve factual disputes essential to its disposition of the motion; but such preliminary jurisdictional fact-finding is not equivalent to summary judgment." *Gatecliff*, 154 Ariz. at 506, 744 P.2d at 33 (citations omitted).

Tribal sovereign immunity is a matter of subject matter jurisdiction. *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1303 (10th Cir. 2001), which may be challenged in federal practice by a motion to dismiss under Fed. R. Civ. P. 12(b)(1), *see Holt v. United States*, 46 F.3d 1000, 1003-03 (10th Cir. 1995). Once a challenge is made, the burden of proof on a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *Valles v. Pima County*, 642 F.Supp.2d 936, 943 (D.Ariz. 2009) (citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994)). Although the defendant is the moving party in a motion to dismiss, the plaintiff is the party invoking the court's

jurisdiction. Therefore, the plaintiff bears the burden of proof on the necessary jurisdictional facts. *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir.2001). Under the federal rule, as with the Arizona rule, the court is not "restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

In his Motion to Set Aside Judgment Pursuant to Ariz. R. Civ. Proc. Rule 60(c) ("Motion to Set Aside"), Plaintiff seeks to have the Court set aside its prior final judgment on the basis of his claim that 25 U.S.C. § 450f(c) is an express waiver of the Community's sovereign immunity. Motion to Set Aside at 3. In a blatant attempt to reverse the burden of proof under Rule 12(b)(1), Plaintiff argues that "Defendants did not address 25 U.S.C. § 450f(c) in any of their moving papers." *Id.* As a main point in his argument, Plaintiff claims "Defendants Failed to Disclose Congress Required The Tribe to Waive Sovereign Immunity Up to the Limits Of Its Federally Mandated Insurance." *Id.* at 4. Plaintiff also contends, "Simply put, the Defendants, here, did not bring 25 U.S.C. § 450f(c) to the attention of the Court." *Id.*

Plaintiff's argument is contrary to the well-established law of challenges to subject matter jurisdiction under Rule 12(b)(1). Instead of acknowledging his failure to raise the argument in the prior proceedings, he argues that it was somehow the Defendants' burden to bring the law to the attention of the Court. It was not.[2] Once Defendants filed a motion to dismiss pursuant to Rule 12(b)(1), the burden shifted entirely to the Plaintiff to

[2] Not only because plaintiff had the burden of proof, but also because the law does not apply, as argued *infra*.

establish the facts or law invoking the subject matter jurisdiction of the Court. In the context of tribal sovereign immunity, the burden is easily identified and stated, that "sovereign immunity bars lawsuits against Indian tribes in state court absent a clear waiver by the tribe or congressional abrogation." *Filer v. Tohono O'odham Nation Gaming Enters.*, 212 Ariz. 167, 170, 129 P.3d 78, 81 (Ariz.App. 2006) (citations omitted).

Thus, if Plaintiff believes that 25 U.S.C. § 450f(c) is a Congressional abrogation of the Community's sovereign immunity, he had the burden of raising the argument in responding to the Defendants' original Rule 12(b)(1) Motion to Dismiss; it was not the Defendants' burden. However, as noted below, 25 U.S.C. § 450f(c) is not a Congressional abrogation of the Community's sovereign immunity.

II. 25 U.S.C. § 450f(c)(3) IS NOT A WAIVER OF TRIBAL SOVEREIGN IMMUNITY.

Plaintiff contends that 25 U.S.C. § 450f(c)(3) constitutes a waiver of tribal sovereign immunity. It does not. The original language of 25 U.S.C. § 450f(c), as contained in the Indian Self-Determination Act of 1975 ("ISDA"), provided:

> The Secretary is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this title to obtain adequate liability insurance: *Provided, however*, That each such policy of insurance shall contain a provision that the insurance carrier shall waiver any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waiver or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance.

§ 102(c), P.L. 93-638 (Jan. 4, 1975). Even at its inception, the ISDA language regarding liability insurance coverage was neither a mandate nor a waiver of tribal sovereign immunity.

To begin, the ISDA authorized the Secretary to require a tribe entering into a "Section 638" contract to obtain adequate liability insurance. The statute left it to the discretion of the Secretary to determine (a) whether liability insurance was required and, if so (b) what amount would be adequate. Waivers of tribal sovereign immunity must be express and unequivocal. *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 955 (9th Cir. 2000) (citation omitted). The original and current language of 25 U.S.C. § 450f(c) is neither express nor unequivocal. *The statute does not waive or require an Indian tribe to waive its sovereign immunity*; rather, it prohibits the insurer of an Indian tribe from raising the defense of sovereign immunity for claims made within the insurance coverage and liability limits.[3] Because waivers of sovereign immunity must be narrowly construed in favor of the sovereign, the Court should reject the argument based upon the plain language of 25 § 450f(c).

While the analysis could end with the plain language of 25 U.S.C. § 450f(c)(3), subsequent amendments to the ISDA further clarify why the presence of insurance coverage would not constitute a waiver of sovereign immunity. 25 U.S.C. § 450f(c) was amended to add the following language in subsection (c)(1):

> Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this subchapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.

[3] 25 U.S.C. § 450f(c) is poorly drafted. While claims are made to insurance companies, litigation is generally against their insured(s) which, in this case, would be the Indian tribe, tribal officials, or tribal employees.

25 U.S.C. § 450f(c)(1). This was in conjunction with other amendments to the ISDA which provided that tribal employees providing services under self-determination agreements are deemed to be federal employees. 25 U.S.C. § 450f(d).

The addition of Federal Tort Claim Act coverage in the amendments to the ISDA was clearly intended to replace the insurance requirement. The legislative history indicates that this was for two reasons: First, prior to the amendments, the costs of liability insurance were taken from funds provided to tribal contractors and the Senate Indian Affairs Committee was "concerned that tribal contractors have been forced to pay for liability insurance out of program funds, which in turn, has resulted in decreased levels of services for Indian beneficiaries." S. Rep. No. 100-274 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2620, 2645. Thus, even if a tribe contracted to perform certain activities, the ultimate cost of liability was borne by the United States.

Second, the activities and services carried out under the self-determination statutes are federal responsibilities. *Id.* And, as the Senate Report on the 1990 amendments notes, "The nature of the legal liability associated with such responsibilities does not change because a tribal government is performing a Federal function." *Id.* Because the federal government is covered by the FTCA while performing those functions for Indian tribes, Congress determined that it would be appropriate to provide the same protection to Indian tribes carrying out self-determination functions. *Id.* The applicability of the FTCA negates the need for separate insurance coverage and most self-determination contracts or agreements incorporate FTCA coverage.[4]

[4] In 1990, the Congress made the amendments incorporating FTCA coverage into 25

III. INTERPRETATIONS OF 25 U.S.C. § 450f(c)(3) HAVE CONCLUDED THAT IT IS NOT A WAIVER OF TRIBAL SOVEREIGN IMMUNITY.

25 U.S.C. § 450f(c) was discussed and analyzed in detail by the United States Court of Appeals for the Ninth Circuit in *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), a case in which an action was brought in federal court against tribal and non-tribal police officers. In rejecting a claim that 25 U.S.C. § 450f(c) waived sovereign immunity, the court first looked at the language of the statute, noting that it addresses "the rights and limitations of the insurance carrier, not the Tribe. This provision expressly precludes the *insurer* from defeating a claim covered by the policy by an invocation of the tribe's sovereign immunity." 869 F.2d at 1346 (emphasis in original). The court concluded that, *if* section 102(c) of the ISDA . . . constitutes a waiver of sovereign immunity, it is only a very limited waiver authorizing the United States government to claim indemnity against the tribe." *Id.* at 1346-47 (emphasis added).[5]

U.S.C. § 450f permanent by enacting § 314, title III of Pub. L. No. 101-512. As the House report explained:

> The Committee has included language to make the extension of Federal Tort Claims protection to tribal P.L. 93-638 [ISDA] contractors permanent. It is unfortunate that the Department did not respond in a timely manner to the Committee's direction last year to undertake a study to show if other means of meeting the legal requirement for the Secretary to provide liability coverage for tribal contractors would be preferable. However, since the Department delayed taking action to respond to this directive, the Committee has no choice but *to provide the required liability coverage on a permanent basis by extending the Federal Tort Claims Act coverage.*

H.R. Rep. No. 101-789, at 72 (1990) (emphasis added).

[5] Indeed, Plaintiff made the same argument in the FTCA case, arguing that he could not proceed directly against the Community under 25 U.S.C. § 450f(c) because the limitations were against the insurer, not the tribe, and because the interpretation in *Evans* was that 25 U.S.C. § 450f(c) was not a waiver of sovereign immunity, but might provide the United States with a right of indemnification. Plaintiffs' Response to Motion to Dismiss at 16, *Shirk v. United States*, No. 09 CV 1786 PHX NVW (Doc. #28, filed June 11, 2010).

The analysis of *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), appears to be sound, as it is actually supported by the case cited by the United States (*United States v. CNA Financial Corp.*, 168 F.Supp.2d 1109 (D.Alaska 2001), *rev'd*, 113 Fed.Appx. 205 (9th Cir. 2004)) in briefing of the FTCA action involving Plaintiff. While the Secretary *may* require, as part of a self-governance agreement, an Indian tribe to obtain insurance coverage and waive its sovereign immunity, no such requirement was imposed on the Community and, as 25 U.S.C. § 450f(c) indicates, one factor the United States considers when determining whether to impose such a requirement is the coverage of the FTCA, which has effectively replaced liability insurance.

Another case relied on in the federal action for the proposition that 25 U.S.C. § 450f(c)(3) is a waiver of sovereign immunity is *Demontiney v. United States*, 255 F.3d 801 (9th Cir. 2001). In *Demontiney*, the Ninth Circuit affirmed the dismissal of Demontiney's suit on the grounds that "neither the United States nor the Tribe had waived its sovereign immunity to suit in the district court." *Id.* at 801. In arriving at this conclusion, the Ninth Circuit analyzed the terms of the Chippewa Cree Tribe's contract with the United States, finding that a provision identical to the one in the Community's self-governance compact,[6] which was "the only express discussion of sovereign immunity . . . indicates that the Tribe did not intend to waive its sovereign immunity." *Id.* at 812-13). As to the claim that 25 U.S.C. § 450f(c) abrogated tribal sovereign immunity, the Ninth Circuit held that **"***the ISDEAA does not abrogate the Tribe's sovereign immunity in*

[6] The *Compact of Self-Governance Between the Gila River Indian Community and the United States of America* (2003) ("*Compact*"), adopted by Gila River Indian Community Resolution GR-97-03 (July 2, 2003), is attached as Exhibit 7 to Motion to Dismiss (filed Jan. 28, 2007) in these proceedings.

*this action.***"** *Id.* at 813 (emphasis added).

Finally, it is worth noting that the regulations implementing the self-determination statutes consider the FTCA to be the exclusive remedy for non-medical related claims:

> **§ 900.204 Is FTCA the exclusive remedy for a non-medical related tort claim arising out of the performance of a self-determination contract?**
>
> Yes. Except as explained in § 900.183(b), no claim may be filed against a self-determination contractor or employee based upon performance of non-medical related functions under a self-determination contract. Claims of this type must be filed against the United States under FTCA.

25 C.F.R. § 900.204.

The authorities Plaintiff cites do not support the argument or provide a cursory analysis. When first citing 25 U.S.C. § 450f(c)(3)(A), he uses the parenthetical "(waiving tribal sovereign immunity for insurance claims mandated under the Indian Self Determination Education Assistance Act (ISDEAA))." However, placing the language you want in a parenthetical expression changes neither the language of the statute nor its interpretation. Next, Plaintiff cites to Cohen's *Handbook of Federal Indian Law* and a law review article, but without any analysis. The unpublished Washington intermediate appeals court case cited in Plaintiff's Reply in support of his interpretation of 25 U.S.C. § 450f(c)(3)(A), *Townsend v. Muckleshoot Indian Tribe*, 2007 WL 316504 (Wash.App. Feb. 5, 2007), does not cite the federal statute; rather, it is a case in which an Indian tribe *voluntarily* waived its sovereign immunity up to the limits of its insurance coverage. However, the Court of Appeals of Washington did note that waivers of immunity must be unequivocal. 2007 WL 316504 at *2 (citations omitted).

Finally, the most compelling evidence in support of Defendants' position in this

matter is the actual language of the Community's *Compact*. Section 3 of the *Compact* states:

> The Community is deemed by the Act to be covered under the Federal Tort Claims Act ("FTCA"), while performing programs, services, functions and activities under this Compact and any funding agreement incorporated herein.

Compact § 3(a) at 9. The *Compact* does not contain any waiver of sovereign immunity; to the contrary, it contains a provision as follows:

> Nothing in this Compact or any funding agreement incorporated herein shall be construed as –
>
> (a) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by the Community.

Id. § 14(a) at 11.[7] Plaintiff does not attempt any analysis of the actual language of the *Compact* which, as noted, contains nearly identical language to the agreement in *Demontiney*.

CONCLUSION

Plaintiff cannot provide one single instance of a situation in which an Indian tribe, tribal official or tribal employee was sued in a state court and the state court found that sovereign immunity was waived pursuant to 25 U.S.C. § 450f(c)(3)(A). The reason is because the statute is not a waiver of tribal sovereign immunity and, in 1990, was amended to extend coverage under the Federal Tort Claims Act in lieu of the United States purchasing liability insurance. This places Plaintiff in exactly the same position he would occupy in the absence of a self-governance agreement: Seeking coverage under the FTCA.

[7] The Compact does authorize the Community to purchase additional insurance, but the provision is clearly optional. *Compact* § 3(c) at 10.

Based on the foregoing, Amicus Curiae Gila River Indian Community respectfully requests that this Court enter an order denying the Motion to Set Aside Judgment.

RESPECTFULLY SUBMITTED this 8th day of June, 2011.

GILA RIVER INDIAN COMMUNITY

By /s/ Thomas L. Murphy
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