

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

ATTORNEY'S PROCESS AND
INVESTIGATION SERVICES, INC.,

Case No. C05-0168LRR

Plaintiff,

vs.

APPENDIX

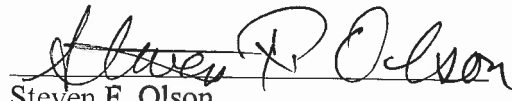
SAC & FOX TRIBE OF THE MISSISSIPPI
IN IOWA,

Defendant.

Pursuant to Local Rules 56(b) and (e), Defendant Sac & Fox Tribe of the Mississippi in Iowa submits this Appendix in support of its Motion for Summary Judgment.

Document	Appendix Page Number
Tribal Court Complaint case no. API-CV-Damages-2005-01 (August 3, 2005)	0001
Tribal Court Findings of Fact, Conclusions of Law and Order (March 26, 2008)	0010
Agreement between API and Alex Walker, Jr. (June 16, 2003)	0022
Affidavit of Homer, Bear, Jr. (Dec. 16, 2009)	0030
Affidavit of Ram K. Dhanwada (Dec. 21, 2005)	0033
Affidavit of Craig Young Bear (Dec. 14, 2009)	0035
Affidavit of Scott Knutson (Dec. 14, 2009)	0038
Plaintiff's Statement of Undisputed Facts (March 1, 2009).....	0043
Plaintiff's Response to Tribe's Statement of Undisputed Facts (April 13, 2009)	0048
API Fed. Ct. Complaint (Oct. 21, 2005)	0062
Appellant's Brief (Cover and pages 6, 14, 29, 36) (August 18, 2009)	0070
Sac and Fox Tribe of the Mississippi in Iowa Constitution	0075
Answer to Complaint by Defendant and Counterclaim (May 21, 2008)	0086
(without Exhibit, which can be found in API's Appendix at 1)	
API Appeal I (December 23, 2008)	0103

Dated: February 7, 2011


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ATTORNEYS FOR DEFENDANT

BEFORE THE COURT OF THE
SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA

Sac and Fox Tribe of the Mississippi in Iowa,

Plaintiff,

CASE NO. 05-1-CV-Damages-2005-01

v.

COMPLAINT

Attorney's Process and Investigation
Services, Inc.,

Defendant.

Plaintiff, Sac and Fox Tribe of the Mississippi in Iowa, for its complaint against
Defendant, states and alleges as follows:

JURISDICTION

1. This Court has subject matter jurisdiction in this matter pursuant to Sac and Fox
Tribe of the Mississippi in Iowa Code section 5-4101 and has personal jurisdiction over
defendant under Sac & Fox Tribe of the Mississippi in Iowa Code section 5-4102(2-8) because
the cause of this action arose within the jurisdiction of the Tribe, because the Tribe brings this
suit to cause Defendant to return funds to the Tribe which Defendant unlawfully has taken and
retained, and because defendant committed torts against the Tribe and harm to tribal real property
and to other tribal property on the Settlement.

PARTIES

2. The Sac and Fox Tribe of the Mississippi in Iowa (the Tribe) is a federally
recognized Indian Tribe, which is governed by a Tribal Council comprising seven members of
the Tribe. The Tribe owns and operates the Maskwaki Bingo-Casino-Hotel (the Casino).

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3. Defendant is a corporation organized and existing under the laws of the State of Wisconsin.

FACTS

4. Between approximately June and October, 2003, Defendant took possession of approximately \$1,022,171.26 in tribal funds.

5. The Tribe's governing body did not authorize the payment of tribal funds to Defendant.

6. On or about February 6, 2004, the Tribe demanded return of the funds which Defendant had taken. Defendant did not return any tribal funds.

7. On or about October 1, 2003, Defendant intentionally entered and remained at the Tribe's Community Center (which houses the Tribe's executive offices and records) and the Casino. Such entering and remaining was not authorized by the Tribe.

8. Defendant's entry of the Casino on October 1, 2003 constituted an intentional violation of the implementing order issued on May 22, 2003 in United States of America v. Alex Walker, Jr. (N.D. Iowa case no. 03-52-LRR). The Tribe did not and could not consent to defendants entering or remaining in violation of that Court order.

9. While entering and remaining on the Tribe's property on October 1, 2003, Defendant intentionally damaged and destroyed tribal property.

10. The reasonable cost to the Tribe to replace and repair the property which was damaged or destroyed by Defendant on October 1, 2003 was no less than \$7,035.00.

11. While entering and remaining on the Tribe's property on October 1, 2003, Defendant obtained and exercised control over all or nearly all tribal gaming information and tribal gaming commission information, including but not limited to detailed compiled tribal

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gaining financial information, information regarding the extent and scope of tribal security and surveillance coverage, information regarding ongoing gaming commission investigations, all personnel files, all legal files, and devices used to insure the integrity of the Casino's operation (hereinafter confidential property).

12. The confidential property contains detailed information regarding: patrons (including comps provided to patrons, amounts and patterns of patron betting, contact information and other information); employees (including contract terms, rates of pay, benefits, bonuses, disciplinary actions, medical information, and other personal information); and general casino business (including detailed market analysis, strategic goals and plans, detailed and itemized budgets, and other information).

13. On October 1, 2003 and at all times since then, tribal gaming statutory laws and regulations and tribal common law required that the confidential property was to be kept confidential. Those laws furthered the integrity and security of the Casino operations and the security and safety of the Casino's patrons and employees and were enacted for gaming regulatory purposes.

14. Access to the confidential property was, on October 1, 2003, restricted to certain individuals, on a need-to-know basis.

15. The confidential property had been stored in secured areas of the Casino. Defendant was able to gain access to the property only by criminally breaking into and entering the secured areas of the Casino and by the threat to use armed force and by the use of other force.

16. The confidential property was protected from disclosure by confidentiality agreements and confidentiality policies.

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17. The Tribe had taken steps which were reasonable under the circumstances to keep the confidential property confidential.

18. On October 1, 2003, the confidential property had independent financial value to the Tribe because it was not generally known to, nor readily ascertainable by proper means by, persons who could obtain economic value from its disclosure or use.

19. The Tribe would be damaged if its confidential property were released or disclosed to the public.

20. One of the reasons the Tribe strenuously protects the confidential property is that public dissemination would be expected to increase the risk of criminal activity against the Tribe (including its Casino) and/or members of the Tribe.

21. Increased criminal activity would erode public confidence in the Casino's operations, and adversely affect the Tribe, its members, and its employees.

22. The mere possibility that the Casino's record of integrity in the operation of gaming could be tarnished by increased criminal activity could result in the loss of the public's goodwill.

23. Upon information and believe, the confidential property had and has independent economic value to organized crime or other corrupting influences.

24. At the time Defendant broke into the Casino, they were accompanied by James DeMasseo and Charlie Troy, people who had been banned from the Casino for previous gross violations of tribal gaming laws. Defendant assisted DeMasseo's and Troy's access to confidential information. Confidential information included files related to DeMasseo's prior

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break-in of the Gaming Commission offices and evidence which DeMasseo had left behind when he had been removed from the Casino.

25. The confidential information had substantial value to DeMasseo.

26. At the time Defendant broke into the Tribe's Community Center and Casino, it was accompanied by Fred Dorr, who was then adverse to the Tribe and the Gaming Commission. Defendant assisted Dorr and others associated with him to gain access to confidential information. Confidential information included attorney-client privileged information in matters where Dorr was representing parties who were litigating against the Tribe.

27. The confidential information had substantial value to Dorr and his clients.

28. The Casino is in direct competition with other gaming operations in Iowa and surrounding states.

29. The confidential information had substantial value to competing gaming operations.

30. The Casino uses the services of numerous contractors, hired both by bid processes and non-bid processes.

31. The confidential information had substantial value to those with current contracts with the Tribe and to those who might seek to contract with the Tribe in the future.

32. Defendant's October 1, 2003 break-in at the Casino and Community Center was a premeditated and coordinated act in which Defendant used approximately 30 enforcers. Some of those enforcers were armed with batons and one or more was armed with a firearm, and those enforcers committed unlawful assaults and batteries and false imprisonments against tribal members and employees and wrongly restricted the movement of tribal members and employees.

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33. When Defendant broke into the Tribe's Community Center and Casino at or about 6:00 a.m. on October 1, 2003, it knew that there were tribal members and employees in both locations.

34. Neither on October 1, 2003 nor at any other time has Defendant applied for or held a license issued by the Sac and Fox Gaming Commission, and Defendant is not fit to hold a gaming license.

COUNT I
(TRESPASS TO LAND)

35. The Tribe repeats and realleges paragraphs 1-xx herein.

36. Defendant's entry of the Meskwaki Bingo-Casino-Hotel and the Sac & Fox Tribe of the Mississippi in Iowa Community Center on October 1, 2003 constitutes trespass to land.

37. As a direct and proximate result of this conduct, the Tribe has been damaged in an amount to be determined at trial.

COUNT II
(TRESPASS TO CHATTEL)

38. The Tribe repeats and realleges paragraphs 1-xx herein.

39. Defendant's use and review of non-real property of the Sac & Fox Tribe of the Mississippi in Iowa and its Casino on October 1, 2003 constitute trespass to chattel, including trade secret property interests.

40. As a direct and proximate result of this conduct, the Tribe has been damaged in an amount to be determined at trial.

COUNT III
(THEFT (CONVERSION) OF TRIBAL FUNDS)

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41. The Tribe repeats and realleges paragraphs 1-xx herein.
42. At the times that Defendant took payments from the Tribe, Defendant converted tribal funds to its own use.
43. As a direct and proximate result of this conduct, the Tribe has been damaged in an amount, not less than \$1,022,171.26, to be determined at trial.

COUNT IV

(MISAPPROPRIATION (CONVERSION) OF TRADE SECRETS)

44. The Tribe repeats and realleges paragraphs 1-xx herein.
45. Defendant unlawfully gained access to tribal trade secret information and provided tribal trade secret information to others.
46. As a direct and proximate result of this conduct, the Tribe has been damaged in an amount to be determined at trial.

PUNITIVE DAMAGES

47. No later than February 6, 2004, Defendant knew that its failure to return tribal funds caused injury to the Tribe, but Defendant deliberately acted in conscious or intentional disregard or indifference to the injury to the Tribe.
48. On October 1, 2003, Defendant knew that it lacked authority to enter or remain at the Tribe's Community Center, Casino or Gaming Commission offices.
49. On or about October 1, 2003, Defendant knew that it lacked authority to damage, destroy, or inspect the Tribe's confidential information.
50. Entering the Casino and Community Center with a sizable force of armed enforcers at approximately 6:00 a.m., knowing that tribal members and employees were in those

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buildings, demonstrated conscious or intentional disregard to the rights or safety of the Tribe and the members and employees at those locations.

51. Committing assaults and batteries and false imprisonments on tribal members and employees on October 1, 2003 demonstrates conscious or intentional disregard to the rights or safety of the Tribe and the members and employees at the Casino and Community Center.

52. Permitting James DeMasseo access to secured areas of the Casino and Gaming Commission offices, from which he had been permanently banned for prior break-ins at the Gaming Commission demonstrates conscious or intentional disregard to the rights of the Tribe, including its Gaming Commission and its Casino.

53. A substantial award of punitive damages to the Tribe is warranted in this case.

WHEREFORE, the Tribe respectfully requests that the Court award them the following relief:

1. Damages or reimbursement in an amount to be proven at trial;
2. Punitive damages;
3. All costs and disbursements; and

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4. Such other and further relief as the Court may deem just and equitable or to which the Tribe may be entitled by operation of law based on the facts presented at trial.

Dated: August 3, 2005

OLSON, ALLEN & RASMUSSEN, L.L.C.

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ATTORNEYS FOR THE SAC AND FOX
TRIBE OF THE MISSISSIPPI IN IOWA

FILED

IN THE SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA TRIBAL COURT MAR 26 2008

349 Meskwaki Road
Tama, Iowa 52339-9629

TRIBAL COURT
SAC & FOX TRIBE OF THE
MISSISSIPPI IN IOWA

Sac and Fox Tribe of the Mississippi in Iowa,

Case No. API-CV-DAMAGES-2005-01

Plaintiff,

v.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

Attorney's Process and Investigation
Services, Inc.

Defendant.

The above-entitled matter came before the Court upon the Motion to Dismiss Plaintiff's Complaint filed by Defendant Attorney's Process and Investigation Services, Inc. (API). Plaintiff Sac and Fox Tribe of the Mississippi in Iowa (the Tribe) filed a complaint in this Court seeking compensatory and punitive damages from API with respect to claims involving trespass to land, trespass to chattel, theft (conversion) of tribal funds and misappropriation (conversion) of trade secrets. The Tribe's claims pertain primarily to the payment of tribal funds to API pursuant to a written contract between API and former leaders of the Tribe. The Tribe argues that the former tribal leaders who contracted with API were without authority to bind the Tribe, and that API was sufficiently on notice of the leadership dispute existing prior to and at the time the contract was executed, to have actual knowledge that the former tribal leaders were without authority to bind the Tribe. The Tribe accordingly seeks judgment from this

API has moved to dismiss the Tribe's Complaint and argues that this Court is without subject matter jurisdiction because API is not a member of the Sac and Fox Tribe of the Mississippi in Iowa, and a tribal court's jurisdiction over a nonmember is limited. API also argues that an exercise of jurisdiction by this Court in this case would exceed the Tribe's legislative authority, and such exercise would be violative of API's due process and equal protection rights under the Indian Civil Rights Act and the United States Constitution. Additionally, or in the alternative, API argues that the Tribe expressly divested this Court of jurisdiction over any controversy arising out of the agreement it entered into with former leaders of the Tribe because the agreement specifically provided that any disputes would be submitted to arbitration, or to the Federal District Court for the Northern District of Iowa or Iowa state courts. API further argues that this Court is not an adequate or appropriate forum for the determination of jurisdiction in this case, and that exhaustion of tribal court remedies would be futile. API also argues that it has not been fully compensated for all services performed under the contract it entered into with the former tribal leaders, and to this extent it has a counterclaim against the Tribe. API argues that because the Tribal Code of the Sac and Fox Tribe of the Mississippi in Iowa does not permit this Court to hear or determine counterclaims against the Tribe that this Court is not an adequate forum for the entire controversy, and would thus constitute a violation of API's due process and equal protection right under the Indian Civil Rights Act and the United States Constitution.

The parties utilized the discovery provisions of the Rules of Civil Procedure of the Sac and Fox Tribe of the Mississippi in Iowa Tribal Court and engaged in limited discovery in order to establish a record upon which to argue their respective positions on

API's motion to dismiss. Based upon the written and oral arguments of counsel, together with the record established by the parties through limited discovery, the Courts make the following:

FINDINGS OF FACT

1. Article XII, Section 1 of the Constitution and Bylaws of the Sac and Fox Tribe of the Mississippi in Iowa provides as follows: "Upon a petition signed by not less than thirty percent of the eligible voters of the tribe, enumerated at the last general election, the Tribal Council shall call a special election to ratify or reject any action of the Tribal Council or to recall any member of the Tribal Council."
2. On September 26, 2002, Recall Petitions were submitted to Executive Management of the Sac and Fox Tribe of the Mississippi in Iowa seeking recall of the following members of the Tribal Council: Alexander Walker, Jr., Frank Wanatee, Jr., Aaron Walker, Lyle Walker, Vern Jefferson, Talbert Davenport, Sr., and Calvin Johnson, Sr. Each of the Recall Petitions contained in excess of the required thirty percent of eligible voters as enumerated in the last election.
3. On October 10, 2002, a Tribal Council meeting of the Walker Council was conducted. The minutes of the meeting reflect that recall petitions for each of the seven members of the Walker Council were voted on at a meeting of the tribal membership held on September 17, 2002.
4. At a special meeting of the Tribal Council headed by Alex Walker on March 4, 2003, the Tribal Council rejected the recall petitions that had

previously been submitted. The language of the motion provided as follows: "motion made by Aaron that at this time we are forced to act on the actions of the recall petition committee. It is illegal for what transpired; therefore I make a motion to make the petitions null and void. This is to ensure the stability of tribal operations and the general welfare." The motion was seconded, and approved.

5. On March 4, 2003, Charles Old Bear, the Hereditary Chief of the Sac and Fox Tribe of the Mississippi in Iowa, appointed an interim Tribal Council consisting of the following: Homer Bear, Jr., Wayne Pushetonequa, Harvey Davenport, Jr., Ray Young Bear, Keith Davenport, Deron Ward and Frank Blackcloud.
6. Over a majority of the voting members of the Tribe signed sheets bearing the following statements: "We the enrolled members of the Meskwaki Tribe (Sac and Fox Tribe of the Mississippi in Iowa) do hereby declare our support for the action taken by our Hereditary Chief, Charles Old Bear, and Clan Representatives to replace the current council with seven new Councilmen."
7. At a General Meeting of the tribal membership dated March 26, 2003, the minutes of the meeting reflect as follows: "[o]n March 25, 2003, Charles Old Bear, the hereditary Chief of the tribe administered the Tribal Council oath to Homer Bear, Jr., Tribal Council Chairman, and that the Chairman in turn administered the oaths of office to the other council members – Wayne Pushetonequa, Harvey Davenport, Jr., Ray Young Bear, Frank

Black Cloud, Keith Davenport, and Deron Ward, respectively”.

8. On April 14, 2003, a General Meeting of the Sac and Fox Tribe of the Mississippi in Iowa was held to determine whether the members of the Walker Council are deemed persons of honor, law abiding, and of good character, in accordance with the Constitution and Bylaws of the Sac and Fox Tribe of the Mississippi in Iowa, Article IV, Section 2. The tribal members who voted overwhelmingly determined that the following members of the Walker Council are not recognized as persons of honor, law abiding and of good character: Alexander Walker, Jr., Frank Wantee, Jr., Aaron Walker, Lyle Walker, Talbert Davenport, Sr., Vern Jefferson and Calvin Johnson, Sr.
9. On May 22, 2003, the Sac and Fox Tribe of the Mississippi in Iowa conducted a Special Election to fill seven positions on the Tribal Council. Notice of the Special Election was posted well in advance of the election in prominent locations on the settlement. The following individuals were elected by overwhelming majorities: Homer Bear, Jr. (410 votes), Wayne Pushetonequa (409 votes), Harvey Davenport, Jr. (408 votes), Ray Young Bear (380 votes), Frank Blackcloud (399 votes), Keith Davenport (402 votes), and Deron Ward (402 votes). Homer Bear, Jr., was selected Chairman of the Tribal Council. Each of the seven members of the Walker Council were on the ballot and each received votes as follows: Alex Walker, Jr. (6 votes), Frank Wanatee, Jr. (12 votes), Aaron Walker (13 votes), Lyle Walker (6 votes), Calvin Johnson (7 votes), and Vern

Jefferson (5 votes).

10. On June 6, 2003, at a special meeting of the Walker Council the following motion was approved: "Calvin Johnson motioned that, in order to determine whether tribal funds have been misappropriated by those individuals who have illegally seized control of tribal buildings and assets, it is in the best interest of the Tribe that the Tribe enter into a contract with Attorney's Process and Investigation Services, Inc. in order to investigate the possible conversion of tribal funds and any related illegal activity against the Tribe. The Chairman is hereby authorized to enter into a contract with Attorney's Process and Investigation Services, Inc. for such purpose".
11. On June 16, 2003, Alexander Walker, Jr., as Chairman of the Sac and Fox Tribe of the Mississippi in Iowa Tribal Council executed a contract with Attorney's Process and Investigation Services, Inc., for the purpose of providing investigation, security, and other related services.
12. Between June 30, 2003, and September 30, 2003, \$1,022,171.26 of tribal funds was transferred to Attorney's Process and Investigation, Inc. An Affidavit of Ram K. Dhanwada, Comptroller of the Sac and Fox Tribe of the Mississippi in Iowa, provides that the payment of \$1,022,171.26 in tribal funds to Attorney's Process and Investigation, Inc., was not authorized by the Tribe.
13. The contract executed by Alex Walker, Jr., on behalf of the Tribe on June 16, 2003, included the following dispute resolution provisions:

- a. The interpretation, performance and enforcement of this Agreement shall be governed by the applicable laws of the Tribe, the United States and the State of Iowa.
- b. Arbitration
 - i. The parties shall make efforts to settle through dialogue and negotiation any disputes that may arise out of this Agreement. However, should such efforts fail after thirty (30) days, the dispute shall be submitted to arbitration, which shall be conducted in Des Moines, Iowa, in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be heard before one arbitrator chosen by consensus of the parties. If the parties cannot mutually agree on an arbitrator, the arbitrator shall be chosen in accordance with the Rules of the American Arbitration Association. The decision of the arbitrator shall be final and binding upon the parties.
 - ii. The arbitrator shall apply the applicable laws of the Tribe (as enacted or amended), the United States and the State of Iowa. The arbitrator shall not have the power to alter, modify, amend, add to or subtract from any term or provision of this Agreement, nor to rule upon or grant any extension, renewal of continuance of this Agreement. Judgment on the award of the arbitrator may be entered by the Federal District Court for the Northern District of Iowa under the Federal Arbitration Act or Iowa state court

pursuant to Iowa law. For this purpose, the Tribe and API hereby irrevocably consent to the jurisdiction over their persons of such courts for such purpose, including to enter judgment on an arbitration award, and waive any defense based on improper venue, inconvenient venue, or lack of personal jurisdiction.

- iii. The failure of any party to submit voluntarily to arbitration shall be deemed to be a breach of this Agreement. Provided, that if either party has a good faith position that a dispute does not arise under this Agreement, that party may file an action in the Federal District Court for the Northern District of Iowa, or the Iowa state courts, to determine whether the dispute is the proper subject of arbitration under this Agreement.
13. By notice of violation dated April 30, 2003, the Chairman of the National Indian Gaming Commission informed Chairman Bear that because the Acting Assistant Secretary of the Department of Interior then recognized the Tribal Council chaired by Alex Walker as the Tribe's leadership and did not recognize the Bear Council, and because the elected council was being excluded from the Meskwaki gaming facilities, that gaming conducted by the Bear Council constituted a violation of Federal Indian gaming law and regulation.
14. By letter dated March 14, 2003, the Regional Director of the Midwest Region of the Bureau of Indian Affairs informed Chairman Bear that the BIA continued to recognize the Walker Council as the official leadership

of the Tribe. The Regional Director also informed Chairman Bear that the Constitution and Bylaws of the Sac and Fox Tribe of the Mississippi in Iowa does not include any provision for the Bureau of Indian Affairs to intervene in or review any tribal dispute resolution, and that it is the right and the responsibility of the Tribe to resolve disputes for itself in accordance with the Indian Civil Rights Act.

15. By referendum vote on March 2, 2004, the Meskwaki tribal members voted to, among other things, reject the alleged contract with the security firm API. The tribal members voting in the referendum voted unanimously to reject the API contract.
16. By letter dated May 23, 2003, the Acting Assistant Secretary of the Interior for Indian Affairs informed Chairman Bear that she was in receipt of the certification of results of the May 22, 2003, special election. The Acting Assistant Secretary explained the position of the Bureau of Indian Affairs as follows: "our position is that the May 22 special election was not called and held in accordance with tribal law and, therefore, we will not recognize the results of it".
17. By letter dated August 28, 2003, the Midwest Regional Director of the Bureau of Indian Affairs explained that the BIA continued to recognize the Tribal Council led by Alex Walker as the leadership of the Sac and Fox Tribe of the Mississippi in Iowa.
18. By affidavit dated May 18, 2003, Alexander Walker, Jr., stated that the Elected Council acknowledged receipt of the recall petitions against him

and the other members of the Council of which he was the chair; without indicating that the recall petitions were valid. Alex Walker further indicated that "[t]he Tribal Council has evidence that some of the signatures on the recall petitions were forged or coerced and some of the petitions contained duplicate signatures, thereby invalidating the recall petitions".

19. The above-referenced May 18, 2003, affidavit of Alex Walker included exhibits of two tribal members who asked that their names be removed from recall petitions. One of the two tribal members said that he did not sign any of the recall petitions, even though his name may have appeared on one or more of the petitions. The other tribal member did not allege that she did not sign the recall petitions, but requested only that her name be removed from the petitions.

CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction in this case pursuant to the Tribal Code of the Sac and Fox Tribe of the Mississippi in Iowa, section 5-4101; and this Court has personal jurisdiction over Defendant API pursuant to the Tribal Code of the Sac and Fox Tribe of the Mississippi in Iowa, section 5-4102 (2-8).
2. The Walker Council had the constitutional duty pursuant to Article XII, Section 1 of the Constitution and Bylaws of the Sac and Fox Tribe of the Mississippi in Iowa to call a special election when it was presented with recall petitions on October 10, 2002, with respect to each of the members

of the Walker Council. The Walker Council was not justified in failing to carry out its constitutional duty.

3. When the Walker Council failed to act on the recall petitions from the date the petitions were presented on October 10, 2002 through March 4, 2003, tribal members were justified in approving the exercise of the retained powers of the Hereditary Chief and Clan Representatives to establish a Tribal Council where all members are recognized as persons of honor, law abiding, and of good character.
4. The Special Election conducted on May 22, 2003 was a mandate by the tribal members that the members of the Bear Council possessed the constitutionally prescribed qualifications to hold office, and that the members of the Walker Council did not.
5. The Bureau of Indian Affairs' continued recognition of the Walker Council after the May 22, 2003 Special Election is not determinative of the fitness of individuals to serve as members of the Tribal Council of the Sac and Fox Tribe of the Mississippi in Iowa. The voting members of the Tribe shall be the sole judge of these qualifications.
6. The two spoiled signatures on the recall petitions referenced in the Alex Walker affidavit did not materially affect the outcome of any of the recall petitions, and such irregularities did not invalidate the recall petitions.
7. The Walker Council did not have the authority to bind the Tribe when it entered into the contract with API on June 16, 2003.

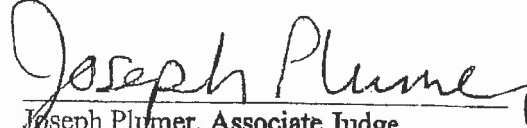
8. Because the Walker Council was without authority to bind the Tribe, the dispute resolution provisions of the API contract signed by Alexander Walker, Jr., on June 16, 2003 do not apply.

ORDER

1. Defendant API's motion to dismiss is hereby DENIED.
2. This matter shall be scheduled for further proceedings before this Court.

BY THE COURT

Dated: 3/23/08


Joseph Plumer, Associate Judge
Sac and Fox Tribe of the Mississippi in
Iowa Tribal Court

MFS
Pet/Plt (Atty) S Olson | J Rasmussen
Resp/Def (Atty) R Fry | D Kutzko; W Willey
GAL
Others J Long
Date Mailed 3-26-08 By TEM

02/12/04 15:26 FAX 8204357545

API SERVICES INC.

@007

AGREEMENT

This Agreement is made and entered into this ^{16th} day of June, 2003, in Green Bay, Wisconsin, between the Sac & Fox Tribe of the Mississippi in Iowa ("Tribe"), located at 349 Meskwaki Road, Tama, Iowa, and Attorney's Process and Investigation Services, Inc. ("API"), a Wisconsin corporation, located at 205 Doty Street, Suite 203, Green Bay, Wisconsin.

WITNESSETH

WHEREAS, the Tribe desires to engage API for investigation, security and law enforcement consulting services; and

WHEREAS, API is capable of performing the services needed by the Tribe;

NOW, THEREFORE, for good and valuable consideration, the parties agree as follows:

SECTION I - GENERAL PROVISIONS

1. RETENTION OF API

The Tribe hereby retains API to perform the services outlined within this Agreement on the terms and conditions as set forth herein. Specific requests for services, their mode and time of delivery shall be made, in writing, by the Tribe or its designee from time to time to API. The Tribe has designated Kirby Jock, Executive Director of the Tribe, as its designee to interface and coordinate API's services. Both parties understand and agree that API becomes an agent of the Government of the Tribe to the extent necessary to perform its obligations under this Agreement.

2. SERVICES

API shall perform services directly relating to the investigation of a takeover by dissidents at the Tribe's facility located on the Tribe's reservation lands.

Services shall include, but not be limited to, the following:

- A. Investigation of individuals involved in the unlawful acts against the Tribal Government.
- B. Developing a security plan for the re-opening of the Tribe's Gaming Facility.
- C. Research the feasibility of establishing Tribal police powers and assisting in the training and deployment of same if feasible.

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API SERVICES INC.

008

D. Provide general community security services to Tribal Government and its operations as is feasible.

E. Investigate allegations of unlawful acts and tribal policy violations of the dissident group involving Tribal funds, and gaming operations.

F. Assist in general security matters as directed by the Tribal government.

3. TERM AND RENEWAL

The initial term shall be for 180 days and shall automatically renew for an additional 180 days unless 30 days prior written notice is given by either party indicating a desire to terminate this Agreement at the end of the initial or any renewal period.

4. FORCE MAJEURE

No party hereto shall be liable or be in breach of any provision of the Agreement for any failure or delay in performing any obligation hereof if such failure or delay is due to fire, flood, acts of God, war, Federal or State governmental order or any other cause which is beyond the reasonable control of such party; provided, however, that such party so hindered shall promptly give notice to the other party of such occurrence and shall take necessary actions to eliminate the effects thereof to the extent possible. Nothing in this paragraph shall mean that the Tribe may excuse its own performance on the basis of an act of the Tribal Government.

5. CONFIDENTIALITY OF AGREEMENT

All provisions of this Agreement shall be held in confidence except as may be required under Federal, State, and Tribal law, regulations or ordinances; provided, however, that API may disclose any or all provisions to its bank and legal counsel, its accounting firm, its insurer, or its attorneys if requested to do so by such entities. However, API shall not under any circumstances disclose any work generated under this Agreement or any communications relating to this Agreement other than the Agreement itself without express permission of the Tribe. API shall make no other disclosure regarding the existence or contents of this Agreement unless it first notifies the Tribe and allows the Tribe thirty (30) days to object to such disclosure. Such disclosure shall not be made if the Tribe objects within the thirty (30) day time period.

6. CONFIDENTIALITY AND OWNERSHIP OF WORK PRODUCT

The parties acknowledge that the services rendered by API under this Agreement are at the direction of the Tribe and all information, materials, reports, written documentation and other work product of API of any kind produced under this Agreement are the property of the Tribe.

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API SERVICES INC.

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API shall not disclose to any third party any of the information generated hereunder, except as may be required by Federal, State or Tribal laws or regulations or other lawful order, provided that API shall notify the Tribe prior to making such disclosure and the Tribe shall have fifteen (15) days to object to the disclosure.

7. EMPLOYMENT RESTRICTIONS

The Tribe agrees that it will not, during the term of the Agreement or within 120 days of termination, hire or retain any API employee(s) or any subcontractor(s) hired, engaged and/or utilized by API in performing the services set forth in this Agreement. The parties contemplate that the Tribe may pay compensation for such consent.

8. SUBCONTRACTORS

API is authorized to retain subcontractors as, within its business judgment, it deems necessary to carry out its responsibilities under this Agreement.

It is contemplated that API, at its discretion, may employ covert agents for the furtherance of the Tribe's interest. Because of the physical safety involved in these operations, API, in its sole discretion, may refuse to identify these sources to the client.

SECTION II - COMPENSATION

1. FEES

a. In accordance with this Agreement, API shall invoice the Tribe bi-monthly on an hourly basis for services supplied at the following rates:

Project Manager	\$225.00
Senior Consultant	\$185.00
Senior Investigator	\$150.00
Investigator	\$125.00
Paraprofessional	\$ 75.00

b. Other specialists and subcontractors as determined by API and approved by the Tribe.

c. Travel time will be billed to the client at the hourly rates set forth above. Notwithstanding the foregoing, no more than eight hours in any one day can be billed to travel, and travel outside of business hours will be billed at one half the standard hourly fee.

2. EXPENSES

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API SERVICES INC.

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In addition to fees, API shall be compensated and reimbursed by the Tribe for all necessary and reasonable expenses including travel expenses, long distance telephone calls and telegraph, telecopier, overnight courier services, postage, printing and/or reproduction of documents and automobile mileage.

Should API require independent legal representation, the Tribe authorizes it up to \$3,000.00 per month.

3. PAYMENT DUE DATE AND INTEREST

a. The Tribe agrees to make payment of all work in progress and bi-monthly estimates of anticipated costs in advance. Such work in progress and bi-monthly estimates shall be due within five (5) business days of invoice. Any unpaid balance shall bear interest at a rate of one and one-half percent (1 1/2%) per month, eighteen percent annual percentage rate (18% annual interest rate). These invoices and estimates are due in advance.

b. Failure to pay invoice within five (5) business days of receipt constitutes a material breach of this Agreement and such invoice shall be considered overdue.

c. API shall be entitled to require payment of any initial retainer in the sum of \$55,000.00 before commencing work for the Tribe, against which future services will be charged. In the event that said retainer is exhausted, API may require that said funds immediately be replenished before performing any further services. Any unused retainer funds remaining at the end of the engagement shall be returned to the Tribe within ten (10) business days of the termination of the engagement.

SECTION III - ENFORCEMENT

1. VOLUNTARY TERMINATION, BREACH OF AGREEMENT - OPPORTUNITY TO CURE

Each party shall have the right to terminate this agreement at any time without cause on 30 days written notice to the other Party.

Each party shall have the right to terminate for cause on twenty (20) calendar days written notice for material financial breaches and ten (10) business days written notice for all other material breaches of this Agreement. Upon receipt of such notice, the breaching Party shall have the opportunity to cure or undertake substantially to cure within the applicable period. Upon termination for cause, the non-breaching party shall be indemnified by the breaching party for any loss or damage proximately caused by reason of the breach.

2. GOVERNING LAW AND ARBITRATION

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API SERVICES INC.

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a. The interpretation, performance and enforcement of this Agreement shall be governed by the applicable laws of the Tribe, the United States and the State of Iowa.

b. Arbitration

i. The parties shall make efforts to settle through dialogue and negotiation any disputes that may arise out of this Agreement. However, should such efforts fail after thirty (30) days, the dispute shall be submitted to arbitration, which shall be conducted in Des Moines, Iowa, in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be heard before one arbitrator chosen by consensus of the parties. If the parties cannot mutually agree on an arbitrator, the arbitrator shall be chosen in accordance with the Rules of the American Arbitration Association. The decision of the arbitrator shall be final and binding upon the parties.

ii. The arbitrator shall apply the applicable laws of the Tribe (as enacted or amended), the United States and the State of Iowa. The arbitrator shall not have the power to alter, modify, amend, add to or subtract from any term or provision of this Agreement, nor to rule upon or grant any extension, renewal or continuance of this Agreement. Judgment on the award of the arbitrator may be entered by the Federal District Court for the Northern District of Iowa under the Federal Arbitration Act or Iowa state court pursuant to Iowa law. For this purpose, the Tribe and API hereby irrevocably consent to the jurisdiction over their persons of such courts for such purpose, including to enter judgment on an arbitration award, and waive any defense based on improper venue, inconvenient venue, or lack of personal jurisdiction.

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

3. ARBITRATION AND LITIGATION COSTS

The arbitrator or Court may order the non-prevailing party to pay for all costs of arbitration and/or litigation including actual attorneys' fees if the arbitrator or Court finds the non-prevailing party acted in bad faith.

SECTION IV - MISCELLANEOUS

1. LEGAL AUTHORITY

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API SERVICES INC.

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Both parties warrant that they have the requisite legal authority to enter into this Agreement and bind the parties hereto, including any Tribal Resolution or other necessary or appropriate Tribal action.

2. INDEMNIFICATION AND HOLD HARMLESS

a. The Tribe shall indemnify and hold harmless API and APT's principals, employees, representatives, agents and subcontractors against all claims, damages, demands, judgments, causes of action of any nature or expenses, including attorneys' fees and litigation costs, arising from any directives, authorizations, acts or omissions of the Tribe; the Tribe shall not indemnify and hold harmless API, its principals, employees, representatives, agents or subcontractors against any claims, damages, demands, judgments, causes of action of any nature or expenses arising from the negligence or intentional misconduct of API, its principals, employees, representatives, agents or subcontractors.

b. If API is named as a party to any suit or other legal action arising out of API's lawful and good faith performance of its obligations under this Agreement, the Tribe agrees to afford all protections available to API as an agent of the Tribal Government, including but not limited to, sovereign immunity and qualified immunity. In addition to the provisions of subsection a., the Tribe also agrees to reimburse API for the time spent by API personnel in defending or responding to such suit or legal action and attorneys' fees and litigation costs incurred by API in such suit or legal action. The Tribe shall have the right to review such costs before they are incurred.

3. FEDERAL APPROVAL

The Tribe agrees to submit this Agreement within thirty days of execution by both parties, as appropriate, for approval if required by Federal law or Tribal law. In the event that the National Indian Gaming Commission and/or the U.S. Department of Interior determine that any of the Agreement's provisions are contrary to Federal law or otherwise found void and unenforceable, the Tribe and API agree to renegotiate those provisions to bring them into conformance with Federal law.

4. TAXATION AND CHANGES IN APPLICABLE TRIBAL LAW

The Tribe agrees that API shall not be subject to any form of Tribal tax, other than nondiscriminatory processing fees and work permits if required, for the work performed under this Agreement. In the event that change(s) in Tribal law (as enacted or amended) make API's further performance of its obligations under this Agreement impossible, or if such change(s) substantially deprive API of the economic benefit of this Agreement, API shall be entitled to be excused from further performance of its obligations and treat such change(s) as a termination by the Tribe without cause.

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API SERVICES INC.

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5. NOTICES

All notices required or authorized to be served shall be served by overnight courier at the following addresses or the most recent address on file:

Attorney's Process and Investigation Services, Inc.
205 Doty Street, Suite 203
Green Bay, WI 54301

Sac & Fox Tribe of the Mississippi in Iowa
c/o Chairman Alex Walker
2982 F Avenue
Montour, IA 50173

Notice shall be effective on the first business day after deposit with the courier on which the courier will guarantee delivery.

6. SEVERABILITY

If any provision or section of this Agreement is invalidated or ineffective or contrary to law, or if the parties agree to cease services under a section, then the remaining provisions of this Agreement shall remain in full force and effect. There shall be substituted for any such provision deemed to be invalid or void or ineffective or contrary to law a suitable provision which, as far as is legally possible, comes nearest to what the parties desired or would have desired according to the sense and purpose of the Agreement.

7. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. The Tribe acknowledges that for this purpose "successors and assigns" shall also include any subsequent Tribal Government of any form, including any Government formed pursuant to any constitution adopted after execution of this Agreement. The parties agree to notify the other party within 30 days in any instance of a successor organization or assignment.

8. NON-WAIVER

Failure by any party to enforce any term or provision of the Agreement in any specific instance shall not constitute a waiver by any such party of any such term or provision in any subsequent instance without any limitation or penalty whatsoever. The rights and remedies herein provided are cumulative and not exclusive of any rights or remedies provided by law.

9. BEST EFFORTS

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API SERVICES INC.

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The parties agree to use their best efforts to carry out this Agreement.

10. HEADINGS

The headings set forth in this Agreement are for convenience only and do not qualify or affect the terms or condition of this Agreement.

11. DISCLAIMER

API is not a law firm and is not retained to provide legal advice to the Tribe. API will conform with all applicable law but the Tribe understands that it should consult it(s) attorneys on legal issues related to this Agreement and services provided thereunder.

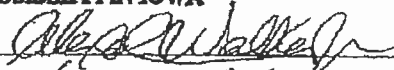
12. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and shall supersede all previous representations, understandings and agreements among the parties. No modifications of this Agreement shall be of any force or effect unless reduced to writing and signed by the parties, and no modification shall be effectuated by any documents containing terms or conditions at variance with those set forth in this Agreement except as otherwise agreed upon in writing by the parties.

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date and year first above written.

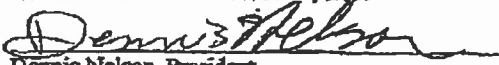
SAC & FOX TRIBE OF THE
MISSISSIPPI IN IOWA

By:


Its Chairman Tribal Council

ATTORNEY'S PROCESS AND
INVESTIGATION SERVICES, INC.

By:

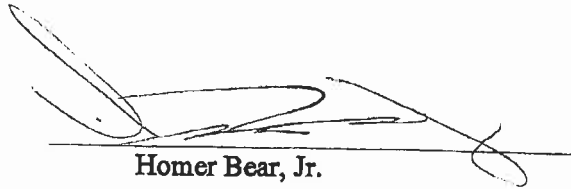

Dennis Nelson, President

them that they were not authorized to be on the premises and that they were required to leave. They did not leave after being so instructed.

4. The Community Center houses the Tribe's executive offices, personnel offices and financial offices, and each of these offices contains confidential tribal records.
5. At the time that Defendant and others entered the Tribe's Community Center, Defendant and others did not have authorization from the Tribe to enter the Community Center.
6. Under the Tribe's Constitution and Bylaws, any lawful expenditure of tribal funds requires prior approval by the Tribal Council and written authorization from the Tribal Chairman and Treasurer. Article X, Section 1(j) of the Tribe's Constitution provides the Council with the power "to receive, appropriate and expend for public purposes funds coming within the control of the Tribal Council."
7. Article I, Section 3 of the Tribe's Bylaws provides "No money shall be disbursed without the consent of the Tribal Council and without the signature of the Chief and the Treasurer."
8. I have been informed that between June and October, 2003, API took \$1,022,171.26 of the Tribe's money. As Chairman of the Tribe during that period, I know that the Tribe did not authorize any payment of tribal funds to Defendant, and that I never signed or otherwise approved any payment of tribal funds to Defendant. Defendant's receipt of tribal funds was unlawful.

Further affiant sayeth not.

Dated: December 16, 2009



Homer Bear, Jr.

Subscribed and sworn to before me
on December 16, 2009.



Notary Public

RAM K. DHANWADA
Commission Number 102210
My Commission Expires November 21, 2010

BEFORE THE COURT OF THE
SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA

Sac and Fox Tribe of the Mississippi in Iowa,

Plaintiff,

CASE NO. API-CV-DAMAGES-2005-01

v.

Attorney's Process and Investigation
Services, Inc.,

**AFFIDAVIT OF
RAM K. DHANWADA**

Defendant.

Sac & Fox Tribe of the Mississippi in Iowa Settlement) ss:

I, Ram K. Dhanwada, being first duly sworn on oath, do hereby depose and state as follows:

1. I am the Comptroller of the Sac & Fox Tribe of the Mississippi in Iowa, and have held that position since May 2, 1994.

2. As Comptroller, I have reviewed expenditures of tribal funds made from account number #84241785, held in Wells Fargo Bank (the account) between March and November, 2003. The account was held in the name of the Tribe, and all funds in the account were tribal property.

3. Exactly \$1,022,171.26 of tribal funds was transferred from the account to Attorney's Process and Investigation, Inc., as follows:

<i>Transfer date</i>	<i>Check or Wire transfer no.</i>	<i>Transfer amount</i>
June 30, 2003	* Letter to the bank for wire transfer only	\$55,000.00
July 1, 2003	01333	\$85,000.00
July 11, 2003	01193	\$110,000.00
July 22, 2003	01199	\$110,000.00
August 14, 2003	00823	\$110,000.00
	00656	\$60,000.00
September 26, 2003	Check #141	\$142,171.26
September 30, 2003	01334	\$350,000.00
Total Payment		\$1,022,171.26

4. Each of the above listed wire transfers and checks show that the recipient of

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the tribal funds was Attorney's Process and Investigation, Inc.

5. One of my job duties as Comptroller is to inspect expenditures of tribal funds those described in the preceding chart, to determine if there is proper tribal authorization for the expenditures. The payment of \$1,022,171.26 from the account to Attorney's Process and Investigation, Inc. was not authorized by the Tribe.

Further affiant sayeth not.

Dated: December 21, 2005

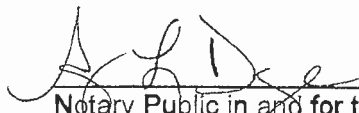


Ram K. Dhanwada

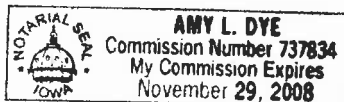
Notary Public

Sac & Fox Tribe of the Mississippi in Iowa Settlement ss:

On this 21st day of December, A.D. 2005, subscribed and sworn to before me, the undersigned, a Notary Public in and for the said county, in said State, personally appeared Ram K. Dhanwada, 349 Meskwaki Road, Tama, IA 52339, to me, known to be the identical person(s) named in and who executed the above signature.



Notary Public in and for the State of Iowa



CASE NO. API-CV-DAMAGES-2005-01

**AFFIDAVIT OF
CRAIG YOUNG BEAR**

**Attorney's Process and Investigation
Services, Inc.,**

Defendant.

I, Craig Young Bear, being first duly sworn on oath, do hereby depose and state as follows:

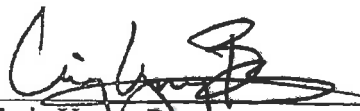
- S&F 0035**

- compact provisions;
 - c. Issuing licenses to qualified entities and individuals and denying licenses to unqualified entities and individuals;
 - d. Keeping records, in the regular course of business, of all applications for gaming licenses and of all gaming licenses issued.
4. Based upon the Gaming Commission records kept in the regular course of business, API, Dennis Nelson, Bob Prentice and Daniel Bord did not hold a gaming license from the Sac & Fox Tribe of the Mississippi in Iowa at any time in 2003 or thereafter and had not applied for any gaming license which would have been active for any part of 2003 or thereafter.
 5. The Gaming Commission did not authorize API to enter the Tribe's Casino or the Gaming Commission's offices on October 1, 2003.
 6. At about 6:00 a.m. on October 1, 2003, a group of people intentionally and unlawfully entered the Gaming Commission's offices, casino business offices and Casino security and surveillance offices. At that time they had access to gaming chips, machine components and other gaming supplies. They also had access to confidential files and documents.
 7. A person who does not hold a gaming license or who is not being voluntarily escorted by a person who holds the proper class of license and who also has additional authority is legally barred from entering Gaming Commission offices, casino business offices, or Casino security and surveillance offices.
 8. On October 1, 2003, API and its agents were legally barred from entering

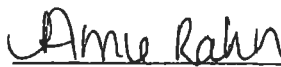
Gaming Commission offices, casino business offices, or Casino security
and surveillance offices, and API and its agents violated the Tribe's
gaming regulatory laws by entering those areas of the Casino.

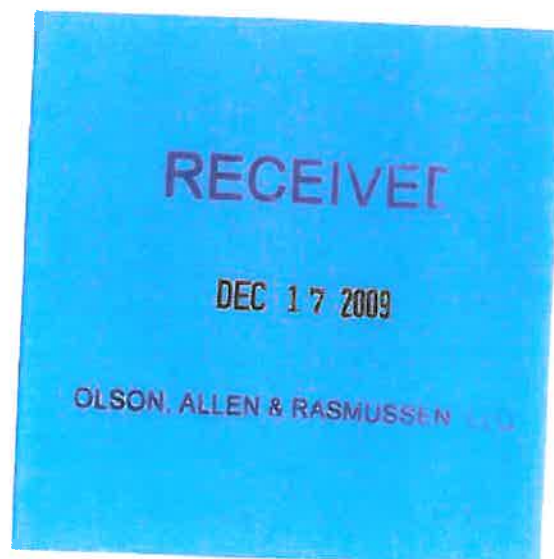
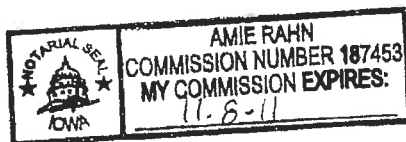
Further affiant sayeth not.

Dated: December 14, 2009


Craig Young Bear

Subscribed and sworn to before me
on December 14, 2009.


Notary Public



Archeiga informed me that the casino was turned over to my department, and that my department was required to take appropriate action to keep the gaming floor closed and to prevent any Gaming at the Casino.

4. After the Casino was closed, the Tribe posted notices at all entrances to the gaming floor, providing notice that the gaming floor was closed and that entry was prohibited by any person who did not have a gaming license or who was not being voluntarily escorted by a properly licensed and authorized Casino security staff member.
5. On October 1, 2003 at or about 5:50 a.m., Attorney's Process and Investigation Services, Inc. (Defendant) and others entered the Casino and remained in the Casino. Defendant API took these actions through its agents Daniel Bord and Bob Prentice, and at the time it was accompanied by Charlie Troy (a terminated and banned employee) and James DeMasseo (a terminated and banned employee).
6. The information that Troy and DeMasseo had been banned was public knowledge, and was widely known in the community.
7. At the time Defendant and others entered the Casino, the Casino was closed to the general public.
8. At the time Defendant and others entered the Casino, Defendant and others did not have authorization to enter the Casino from the Tribe.
9. After Defendant entered the Casino, it was instructed by my Department to leave. It did not comply with that instruction.
10. At the time Defendant entered the Casino, it was committing trespass.

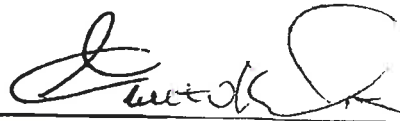
11. On October 1, 2003, Defendant and others entered the “back of the house” area of the Casino—i.e. those areas which people who do not hold gaming licenses or who are not being voluntarily escorted by gaming license holders are prohibited by the Tribe’s gaming regulatory laws from entering.
12. Entry to the “back of the house” is heavily restricted by the Tribe through its gaming laws and regulations, and any person who enters the back of the house is subject to such regulatory control.
13. Some of Defendant’s actions on October 1, 2003 were captured on fair and accurate security videotapes which I have watched. Those videotapes show that API gained access to the areas of the Casino closed to the public when a person, who was either API’s agent or a person working in concert with API, using an expandable police baton to smash out a window in a secured door leading to the finance offices area, then reaching through the broken window to unlock the door.
14. The areas API entered included security and surveillance offices, gaming management offices, and Gaming Commission offices.
15. Before Defendant entered the “back of the house” area of the Casino, that area was locked.
16. The Casino has no record of Defendant, its apparent president Dennis Nelson, Daniel Bord or Bob Prentice ever holding or applying for a gaming license.
17. On October 1, 2003, one of my department’s employees, Officer Greg

Moore, was in possession of keys which provided access through secured doors in the Casino. Those keys were the property of my Department, and were in the physical possession of Officer Moore when API entered the Casino. One of API's agents grabbed Officer Moore and physically took the keys from the officer without the officer's permission. Later on October 1, 2003, API officer Bob Prentice was in possession of, and used those keys.

18. Use and possession of the keys is regulated by the Tribe's gaming laws, and possession and use by Prentice is unlawful under the Tribe's gaming laws.
19. On October 1, 2003, Defendant had access to the Casino's tokens or chips, cash, machine components, and other gaming supplies.
20. On October 1, 2003, Defendant was in control of and used portable communication devices which were the property of my department.
21. On October 1, 2003, Defendant and others had control over the Casino's security and surveillance office.
22. API caused damage during its trespass. Damage included destruction of a window, as described above, and need to rekey the entire property because API had physically taken physical control of keys to secured doors. That rekeying was required to reestablish casino security as required by the Tribe's gaming laws and regulations. The Tribe's out-of-pocket cost to rekey the property was \$7,035.

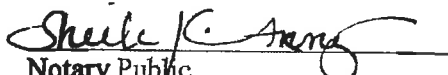
Further affiant sayeth not.

Dated: December 14th, 2009

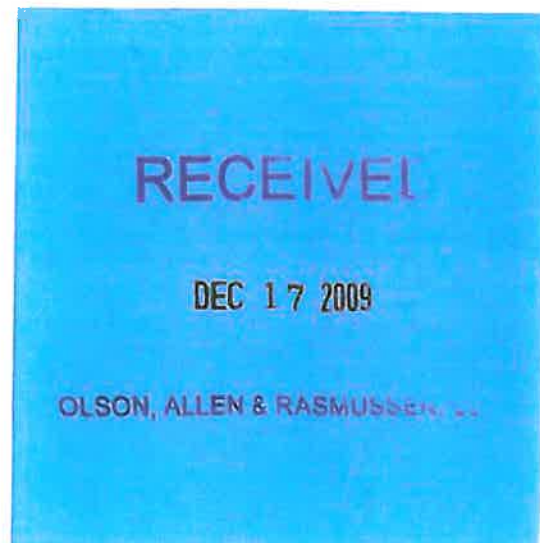
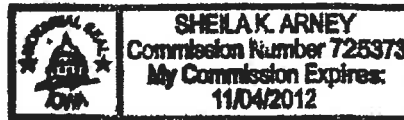


Scott Knutson

Subscribed and sworn to before me
on December 14, 2009.



Notary Public



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

ATTORNEY'S PROCESS AND)	
INVESTIGATION SERVICES, INC.,)	
	)	No. 1:05-CV-00168-LRR
Plaintiff,)	
	)	Statement of Material Undisputed Facts in
v.	)	Support of API's Motion for Partial
	)	Summary Judgment on Jurisdictional
SAC AND FOX TRIBE OF THE	)	Grounds
MISSISSIPPI IN IOWA,)	
)	
Defendants.)	

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56(a)(3), Plaintiff, Attorney's Process and Investigation Services, Inc. (API) submits the following statement of material undisputed facts in support of its Motion for Partial Summary Judgment:

1. The Tribe is a federally recognized Indian Tribe, which owns and operates the Meskwaki Bingo-Casino-Hotel (the Casino). App. 9 (Tribal Court Complaint ¶ 1, Exhibit C)¹.

2. API is a Wisconsin corporation in the business of investigative, security and law enforcement consulting. App. 10 (Tribal Court Complaint, ¶ 2, Exhibit C); App. 1 (June 2003 Agreement, p. 1, Exhibit B).

3. On June 16, 2003, API entered into an Agreement for consulting services with the Tribe. App. 1-8 (June 2003 Agreement, Exhibit B).

¹ All references to "Exhibits" are to exhibits made part of the Tribal Trial Court record.

4. The Agreement was executed on behalf of the Tribe by Alex Walker, who at the time was the Chairman of the Elected Tribal Council. App. 8 (June 2003 Agreement, Exhibit B); App. 79 (*Memorandum and Order*, p. 1).

5. The scope of services that API agreed to provide included “[d]eveloping a security plan for the re-opening of the Tribe’s Gaming Facility” and “investigat[ion] [of] allegations of unlawful acts and tribal policy violations of the dissident group involving Tribal funds, and gaming operations.” App. 1-2 (June 2003 Agreement, §I.2.B and E).

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

- i. The parties shall make efforts to settle through dialogue and negotiation any disputes that may arise out of this Agreement. However, should such efforts fail after thirty (30) days, the dispute shall be submitted to arbitration, which **shall** be conducted in Des Moines, Iowa, in accordance with the Commercial Arbitration Rules of the American Arbitration Association.
- ii. The arbitrator shall apply the applicable laws of the Tribe (as enacted or amended), the United States and the State of Iowa. The arbitrator shall not have the power to alter, modify, amend, add to or subtract from any term or provision of this Agreement, nor to rule upon or grant any extension, renewal or continuance of this Agreement. Judgment on the award of the arbitrator may be entered by the Federal District Court for the Northern District of Iowa under the Federal Arbitration Act or Iowa state court pursuant to Iowa law. For this purpose, the Tribe and API hereby irrevocably consent to the jurisdiction over their persons of such courts for such purpose, including to enter judgment on an arbitration award, and waive any defense based on improper venue, inconvenient venue, or lack of personal jurisdiction.
- iii. The failure of any party to submit voluntarily to arbitration shall be deemed to be a breach of this Agreement. Provided, that if either party has a good faith position that a dispute does not arise under this Agreement, that party may file an action in the Federal District Court for the Northern District of Iowa, or the Iowa state courts, to determine whether the dispute is the proper subject of arbitration under this Agreement.

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

7. At the time that Alex Walker signed the Agreement in June of 2003 on behalf of the Tribe, the Walker Council was recognized by the Bureau of Indian Affairs as the governing tribal council. App. 82-83 (*Memorandum and Order*, p.4-5); App. 60 (NIGC "Notice of Violation" (NOV) dated April 30, 2003, Exhibit D)

8. The National Indian Gaming Commission (NIGC) specifically stated in its NOV dated April 30, 2003, that it deferred to the Bureau of Indian Affairs in defining the "tribe" for purposes of receiving federal services and determining eligibility of the government's "special programs." App. 60 ¶ 3. (NOV, Exhibit D).

9. The NIGC found that "[t]he gaming at Meskwaki is not being conducted by the Tribe – that is, by the governmental authority recognized by the Secretary of the Interior – or by an entity licensed by the tribal government pursuant to the NIGC's regulations." App. 61 ¶ 5 (NOV, Exhibit D)

10. On several occasions following his appointment by the Hereditary Chief, Homer Bear or others on his behalf contacted either the Department of the Interior or its Bureau of Indian Affairs seeking recognition for his Council from the Bureau of Indian Affairs. App. 82 (*Memorandum and Order*, pp. 4-5).

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

Assistant Secretary for Indian Affairs, Exhibit R-1); App. 65 (May 9, 2003 letter from Deputy Commissioner of Indian Affairs, Exhibit R-2); App. 66 (May 23, 2003 letter from Secretary of the Interior in response to request to certify special election stating that it “was not called and held in accordance with tribal law and, therefore, we will not recognize the results of it.” Exhibit R-3).

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

13. In August 2005, the Tribe filed its complaint in Tribal Trial Court alleging tort claims against API, including for conversion of Tribal funds, trespass and misappropriation of trade secrets. App. 9 -17 (Tribal Court Complaint, Exhibit B).

14. In September of 2005, API moved to dismiss the Tribe’s complaint on the ground that the Tribal Court lacked jurisdiction over it. App. 18-23 (API’s Motion to Dismiss). Following discovery on the jurisdictional issue, on July 27, 2006, the Tribal Trial Court held a hearing on API’s motion. App. 83 (*Memorandum and Order*, p. 5); App. 24-59 (Transcript of Hearing).

15. On March 26, 2008, the Tribal Court denied API’s motion. App. 67-78 (Tribal Trial Court’s Findings of Fact, Conclusions of Law and Order (Order)).

16. The Court of Appeals filed its *Memorandum and Order* affirming the Tribal Trial Court on December 23, 2008. App.79-96.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

☒ Electronically via ECF for ECF registrants

☐ U.S. Mail _____

☐ Fax _____

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☐ Hand Delivered _____

By

K. Frieden

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

ATTORNEY'S PROCESS AND)	
INVESTIGATION SERVICES, INC.,)	
	)	No. 1:05-CV-00168-LRR
Plaintiff,)	
)	
v.	)	API'S REPLY TO THE TRIBE'S
	)	STATEMENT OF UNDISPUTED
SAC AND FOX TRIBE OF THE	)	FACTS
MISSISSIPPI IN IOWA,)	
)	
Defendants.)	

INTRODUCTION

As a preliminary matter, API believes that the Tribe has not complied with Local Rule 56(b). As noted below in API's Reply, many of the so-called "undisputed facts," presumably submitted for the proposition that they preclude summary judgment, are legal conclusions, not statements of fact. Others are unsupported and consistently disputed allegations from the Tribe's Tribal Court Complaint. Further, the Tribe has not complied with the requirement under Rule 56(b) and 56(e) that the statements be supported by specific appendix citations, and API is hampered in its ability to reply because the references made to the relevant portions of the Tribal Trial Court's Order and the Court of Appeals' Memorandum and Order¹ are not sufficiently

¹ Tribal Trial Court's *Findings of Fact, Conclusions of Law and Order* (referred to as the "Tribal Trial Court's Order"), API's Appendix filed in support of its Motion for Partial Summary Judgment (Appendix) at pp. 67-78 and Tribal Court of Appeals' *Memorandum and Order*, API's Appendix at pp. 79-96. References are to API's Appendix filed March 1, 2009. It should be noted that although the introduction to API's Appendix recites it was filed in connection with API's Resistance to the Tribe's Motion to Dismiss, it was in fact filed as part of API's summary judgment papers. (Document 63.4).

specific to apprise either API or the Court as to which portions of the record the Tribe relies on for support.

Moreover, as noted below, the statements concerning what the Tribal Court found as a matter of tribal law as to who was the governing tribal council are not material, because API is not urging this Court to interpret or apply tribal constitutional law or other tribal law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("A fact is material only when it is a fact that 'might affect the outcome of the suit under the governing law.'"). As discussed at length in API's Brief in Support of its Motion for Summary Judgment on Jurisdictional Grounds (API's Summary Judgment Brief), pp. 17-19, the scope of the Tribe's federal sovereign immunity, and the question of which governing council had the authority to waive that federal immunity and perform actions related to the Tribe's federally granted sovereign powers, are matters of *federal* law. *See Kiowa Tribe of Okla. v. Manuf. Tech., Inc.*, 523 U.S. 751, 759 (1998). Similarly, the Tribe's allegations concerning the nature of API's conduct are not material, because the Tribe's trespass, conversion and misappropriation claims do not turn on whether API's alleged conduct was criminal, forcible, armed, premeditated, or coordinated. *See* API's Reply Brief, pp. 5-9; *see also, Plains Commerce Bank v. Long*, 128 S. Ct. 2709, 2726 (2008).

REPLY

Pursuant to Rule 56 and Local Rule 56(d), Plaintiff Attorney's Process and Investigation Services, Inc. (API) makes the following reply to the Tribe's "Statement of Undisputed Facts":

1. In 2002, the Tribal Council chaired by Alex Walker, Jr. (hereinafter "the Walker Council" or "former Walker Council") was presented with petitions for recall elections. The

Walker Council violated the Tribe's Constitution and their oath of office by not setting those recall petitions for a vote prior to March 4, 2003. Sac & Fox Tribe of the Mississippi in Iowa v. Attorney's Process and Investigations, Inc., Finding of Fact; Conclusion of Law 7 and Order Sac & Fox Trial Ct. Case no. API-CV -DAMAGES-2005-01 (March 26, 2008), off's Sac & Fox Ct. App. Case no. API-CV-App-2008-02-124, Opinion (Dec. 23, 2008) (hereinafter the March 26, 2008 Order and the December 23, 2008 Opinion, respectively).

Response: API admits that in 2002, the Tribal Council chaired by Alex Walker, Jr. was presented with petitions for recall elections. API further admits that the Walker Council did not set the recall petitions for a vote prior to March 4, 2003.

However, API submits that the statement "[t]he Walker Council violated the Tribe's Constitution and their oath of office by not setting those recall petitions for a vote prior to March 4, 2003" sets forth a conclusion of tribal law, not a statement of fact. Although the Tribal Court of Appeals included this action by the Walker Council in its recitation of material facts, App. 79, the Tribal Trial Court made it clear that this was a conclusion of law. *See* ¶2, Conclusions of Law, Tribal Trial Court's Order, App. 76. ("The Walker Council had the constitutional duty pursuant to Article XII, Section 1 of the Constitution and Bylaws of the Sac and Fox Tribe of the Mississippi in Iowa to call a special election when it was presented with recall petitions on October 10, 2002, with respect to each of the members of the Walker Council. The Walker Council was not justified in failing to carry out its constitutional duty.") In addition, API submits that this statement is not material for the reasons stated in its introduction above, i.e., that the issues before this Court are a matter of federal, not tribal law.

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

Response: The Tribe fails to point to any specific portion of either the Tribal Trial Court's Order or the Court of Appeals Memorandum and Order that supports this statement. API denies the statement in its entirety because it is not a statement of fact, but rather a conclusion of tribal law made by the Tribal Trial Court. See ¶¶ 3, 4, Conclusions of Law, Tribal Trial Court's Order, App. 76. In addition, API submits that this statement is not material for the reasons stated in its introduction above, i.e., that the issues before this Court are a matter of federal, not tribal law.

3. The Plaintiff entered into a contract, dated June 16, 2003, and which bears a signature for the other contracting party which reads "Alex Walker, Jr." (the "June 16, 2003 contract").

Response: API admits ¶3, but notes that the Tribe fails to point to any specific portion of the Tribal Trial Court's Order that supports this statement.

4. Alex Walker, Jr. and others who had served on a Tribal Council with him had been lawfully removed from tribal office, and the members of a Council chaired by Homer Bear, Jr. had been lawfully elected to the Council prior to June 16, 2003. (March 26, 2008 Order).

Response: The Tribe fails to point to any specific portion of the Tribal Trial Court's Order that supports this statement. API denies the statements contained in ¶4 in their entirety because they constitute conclusions of tribal law, not statements of fact. Specifically, these statements appear to be a summary of the Tribal Trial Court's Conclusions of law ¶¶ 3, 4, 5, and

7, App. 77. Moreover, API submits that the statements contained in ¶4 are not material for the reasons stated in its introduction above, i.e., that the issues before this Court are a matter of federal, not tribal law.

5. The Tribe is not a party to the June 16, 2003 contract and has not entered into any contract with Plaintiff. (March 26, 2008 Order, at Conclusion of Law 7).

Response: API denies the statements contained in ¶5 in their entirety because, as recognized by the Tribe by citing ¶7, Conclusions of Law, of the Tribal Trial Court's Order, they constitute conclusions of tribal law, not statements of fact. App. 77.

6. Neither the Tribal Chairman nor the Tribal Council Treasurer signed any documents permitting payment of tribal funds to Plaintiff. (December 23, 2008 Opinion at 3-4).

Response: API denies the statements contained in ¶6 in their entirety because they are merely disputed allegations, and not supported by any portion of the record, including the portion of the Tribal Court of Appeals Memorandum and Order relied on by the Tribe. That portion of the Memorandum and Order merely repeats the Tribe's allegations, and does not contain any findings. App. 81-82.

In addition, who was "Tribal Chairman" authorized to pay API is the central issue of federal law in this case. It is uncontested that Alex Walker signed the June 16, 2003, Agreement between API and the Tribe, App. 8, which authorized payment for services to API and it is up to this Court to determine whether he had the authority to do so as a matter of federal law. See discussion at API's Summary Judgment Brief, pp. 16-21; *see also Goodface v. Grassrope*, 708 F.2d 335, 338-339 (8th Cir. 1983) (stating that it is the Bureau of Indian Affairs that makes the

determination which tribal government is recognized for purposes of conducting business relating to the Tribe's federally regulated activities).

7. Between June 16, 2003 and October 31, 2002, Plaintiff took possession of \$1,022,171.26 in Tribal funds. (Tribal Ct. Compl. §4).

Response: API admits that it was paid \$1,022,171.26 by the Tribe pursuant to the June 16, 2003 Agreement. App. 1-8. To the extent ¶7 can be read for the proposition that API did not have the authority to receive its fees, API denies the statements contained in ¶7. The Agreement was executed on behalf of the Tribe by Alex Walker, who at the time was the Chairman of the Elected Tribal Council. App. 8. Whether or not Alex Walker was authorized to enter into the Agreement and pay API the fees it received is an issue of federal law for this Court to determine. *See* discussion in API's Summary Judgment Brief, pp. 16-21; *see also Goodface v. Grassrope*, 708 F.2d 335, 338-339 (8th Cir. 1983) (explaining that it is the Bureau of Indian Affairs that makes the determination which tribal government is recognized for purposes of conducting business relating to the Tribe's federally regulated activities).

8. The June 16, 2003 contract stated that Plaintiff 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."

Contract between Sac & Fox Tribe of the Mississippi in Iowa and API, Inc. §1(2)(A-F).

Response: API admits ¶8, with the qualification that subparagraph D begins with the word "Provide," not "Providing." App. 2. In admitting this ¶, API notes that the Tribe

characterizes the document as the "Contract between Sac & Fox Tribe of the Mississippi in Iowa and API, Inc.," and API concurs with this characterization.

9. As part of its work for Walker, Plaintiff, on October 1, 2003, perpetrated a criminal, forcible, (Tribal Ct. Compl. §15), armed, (Tribal Ct. Compl. §31), premeditated, (Tribal Ct. Compl. §32) coordinated (Tribal Ct. Compl. §32) trespass into the Tribe's government center and casino, (Tribal Ct. Compl. §7) in an attempted forcible takeover of the Tribe's property and government.

Response: API denies the statements contained in ¶9 in their entirety. The Tribe provides no record support for these statements, as it is required to do pursuant to Local Rule 56(b). These are not statements of fact, but merely disputed allegations in the Complaint filed in Tribal Court. App. 9-17. "Merely disputed allegations, unsupported by specific facts or evidence beyond the nonmoving party's own conclusions, are insufficient to withstand a motion for summary judgment." *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir.2007) (citation omitted). Finally, API notes that paragraph 31, relied on by the Tribe, has nothing to do with armed conduct, but rather alleges: "The confidential information had substantial value to those with current contracts with the Tribe and to those who might seek to contract with the Tribe in the future." Even if these statements were "fact" rather than merely disputed allegations, they are not material, i.e., they would not "affect the outcome of the suit under governing law." *Anderson*, 477 U.S. at 248 The Tribe's trespass, conversion and misappropriation claims do not turn on whether API's alleged conduct was criminal, forcible, armed, premeditated, or coordinated. See API's Reply Brief, pp. 5-9; see also, *Plains Commerce Bank v. Long*, 128 S. Ct. 2709, 2726 (2008).

10. As part of its armed assault, Plaintiff committed assaults, batteries, unlawful imprisonment and other criminal acts. (Tribal Ct. Compl. §31).

Response: API denies the statements contained in ¶10 in their entirety. The Tribe provides no record support for these statements, as it is required to do pursuant to Local Rule 56(b). These are not statements of fact, but merely disputed allegations in the Complaint filed in Tribal Court. App. 9-17. “Merely disputed allegations, unsupported by specific facts or evidence beyond the nonmoving party's own conclusions, are insufficient to withstand a motion for summary judgment.” *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir.2007) (citation omitted). Further, API notes that ¶31 of the Complaint alleges only the following: “The confidential information had substantial value to those with current contracts with the Tribe and to those who might seek to contract with the Tribe in the future.” Even if these statements were “fact” rather than merely disputed allegations, they are not material, i.e., they would not “affect the outcome of the suit under governing law.” *Anderson*, 477 U.S. at 248. The Tribe’s trespass, conversion and misappropriation claims do not turn on whether API’s alleged conduct was criminal, forcible, armed, premeditated, or coordinated. See API’s Reply Brief, pp. 5-9; see also, *Plains Commerce Bank v. Long*, 128 S. Ct. 2709, 2726 (2008).

11. As part of its armed assault, Plaintiff 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. (Tr. Ct. Compl. 23) Plaintiff acted in conscious or intentional disregard of, or indifference to, the rights of, safety of, or damages to the Tribe. (Tr. Ct. Compl. 34, 37).

Response: API denies the statements contained in ¶11 in their entirety. The Tribe provides no record support for these statements, as it is required to do pursuant to Local Rule 56(b). These are not statements of fact, but merely disputed allegations in the Complaint filed in Tribal Court. App. 9-17. "Merely disputed allegations, unsupported by specific facts or evidence beyond the nonmoving party's own conclusions, are insufficient to withstand a motion for summary judgment." *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir.2007) (citation omitted). Further, API notes that ¶¶ 23, 34, and 37 of the Complaint do not support the allegations made in ¶11. App. 4-5. Even if these statements were "fact" rather than merely disputed allegations, they are not material, i.e., they would not "affect the outcome of the suit under governing law." *Anderson*, 477 U.S. at 248. The Tribe's trespass, conversion and misappropriation claims do not turn on whether API's alleged conduct was criminal, forcible, armed, premeditated, or coordinated. See API's Reply Brief, pp. 5-9; see also, *Plains Commerce Bank v. Long*, 128 S. Ct. 2709, 2726 (2008).

12. As part of its armed assault, Plaintiff worked in the Tribe's Casino, (Tribal Ct. Compl. §7) 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).

Response: API denies the statements contained in ¶12 in their entirety. The Tribe provides no record support for these statements, as it is required to do pursuant to Local Rule 56(b). These are not statements of fact, but merely disputed allegations in the Complaint filed in Tribal Court. App. 9-17. "Merely disputed allegations, unsupported by specific facts or evidence beyond the nonmoving party's own conclusions, are insufficient to withstand a motion

for summary judgment.” *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir.2007) (citation omitted). Even if these statements were “fact” rather than merely disputed allegations, they are not material, i.e., they would not “affect the outcome of the suit under governing law.” *Anderson*, 477 U.S. at 248. The Tribe’s trespass, conversion and misappropriation claims do not turn on whether API’s alleged conduct was criminal, forcible, armed, premeditated, or coordinated. *See* API’s Reply Brief, pp. 5-9; *see also, Plains Commerce Bank v. Long*, 128 S. Ct. 2709, 2726 (2008).

13. Plaintiff did not submit an application for a gaming license to the Tribe's Gaming Commission. (Tr. Ct. Compl 33).

Response: Although API does not believe that this is a proper statement of fact within the meaning of Federal Rule of Civil Procedure 56(c) and Local Rule 56 (b), as it is not supported by any portion of the record, and is a mere allegation, API admits that it did not submit an application for a gaming license to the Tribe’s Gaming Commission. API notes that ¶33 of the Complaint does not support the allegation made in ¶13, but rather states: “When Defendant broke into the Tribe’s Community Center and Casino at or about 6:00 a.m. on October 1, 2003, it knew that there were tribal members and employees in both locations.” Even if this statement were “fact” rather than merely a disputed allegation, it is not material, i.e., it would not “affect the outcome of the suit under governing law.” *Anderson*, 477 U.S. at 248. The Tribe’s trespass, conversion and misappropriation claims do not turn on whether API’s alleged conduct was criminal, forcible, armed, premeditated, or coordinated. *See* API’s Reply Brief, pp. 5-9; *see also, Plains Commerce Bank v. Long*, 128 S. Ct. 2709, 2726 (2008).

14. Plaintiff was not granted a gaming license from the Tribe's Gaming Commission.

(Tr. Ct. Compl. 33).

Response: Although API does not believe that this is a proper statement of fact within the meaning of Federal Rule of Civil Procedure 56(c) and Local Rule 56 (b), as it is not supported by any portion of the record, and is a mere allegation, API admits that it was not granted a gaming license from the Tribe's Gaming Commission. Further, ¶33 of the Complaint does not support the allegation made in ¶14, but rather states: "When Defendant broke into the Tribe's Community Center and Casino at or about 6:00 a.m. on October 1, 2003, it knew that there were tribal members and employees in both locations." Even if this statement were "fact" rather than merely a disputed allegation, it is not material, i.e., it would not "affect the outcome of the suit under governing law." *Anderson*, 477 U.S. at 248 The Tribe's trespass, conversion and misappropriation claims do not turn on whether API's alleged conduct was criminal, forcible, armed, premeditated, or coordinated. *See* API's Reply Brief, pp. 5-9; *see also, Plains Commerce Bank v. Long*, 128 S. Ct. 2709, 2726 (2008).

15. Plaintiff is morally unfit to hold a gaming license. (Tr. Ct. Compl. §33.)

Response: API denies the statement contained in ¶15 in its entirety. The Tribe provides no record support for these statements, as it is required to do pursuant to Local Rule 56(b). This is not a statement of fact, but merely an allegation. "Merely disputed allegations, unsupported by specific facts or evidence beyond the nonmoving party's own conclusions, are insufficient to withstand a motion for summary judgment." *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir.2007) (citation omitted). Further, ¶33 of the Complaint does not support the allegation made in ¶15, but rather states: "When Defendant broke into the Tribe's Community Center and Casino at or about 6:00 a.m. on October 1, 2003, it knew that there were tribal

members and employees in both locations.” Even if these statements were “fact” rather than argument merely disputed allegations, they are not material, i.e., they would not “affect the outcome of the suit under governing law.” *Anderson*, 477 U.S. at 248. The Tribe’s trespass, conversion and misappropriation claims do not turn on whether API’s alleged conduct was criminal, forcible, armed, premeditated, or coordinated. *See* API’s Reply Brief, pp. 5-9; *see also*, *Plains Commerce Bank v. Long*, 128 S. Ct. 2709, 2726 (2008).

16. On August 18, 2005, the Tribe filed suit in the Sac & Fox Tribe of the Mississippi in Iowa Court against Plaintiff. (Tr. Ct. Compl.)

Response: API admits ¶16.

17. On or about September 23, 2005, API moved to dismiss the Tribal Court suit. (December 23, 2008 Opinion at 5).

Response: API admits ¶17.

18. Through its motion to dismiss, API raised the issue of whether the Tribe was a party to the June 16, 2003 contract, and the Tribal Court determined that issue based upon API’s motion. (March 26, 2008 Order; December 23, 2008 Opinion at 5).

Response: API admits that API raised the issue of whether the Tribe was a party to the June 16, 2003 contract, and the Tribal Court determined that issue based upon API’s motion *applying tribal law*. *Memorandum and Order*, pp. 8-18, App. 86-96.

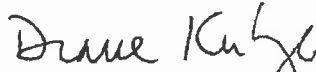
19. In prosecuting its motion to dismiss the Tribal Court suit, API sought and received permission to conduct discovery related to its motion to dismiss. (December 23, 2008 Opinion at 5).

Response: API admits ¶19.

20. On May 21, 2008, Plaintiff filed their Counterclaims against the Tribe in the captioned matter in which it asserted that the Tribal Court had jurisdiction to compel arbitration. (Tribal Ct. Answer). That claim remains pending in the Tribal Court.

Response: API admits that it filed an answer and counterclaim in Tribal Court. API did so following this Court's order requiring API to exhaust all Tribal Court remedies. *Attorney's Process and Investigation Services, Inc. v. Sac and Fox Tribe of the Mississippi in Iowa*, 401 F. Supp. 2d 952, 963 (N.D. Iowa 2005). API further admits that the Tribe's claims and API's counterclaim remain pending in the Tribal Court.

Respectfully submitted,



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The undersigned hereby certifies that a copy of this document was served upon counsel of record for each party to the action in compliance with FRCP 5 on the <u>13th</u> day of <u>April, 2009</u> by:	
<input checked="" type="checkbox"/>	Electronically via ECF for ECF registrants
<input type="checkbox"/>	U.S. Mail _____
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<input type="checkbox"/>	Fed Ex _____
<input type="checkbox"/>	Hand Delivered _____
By	<u>K. Fieder</u>

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

Attorney's Process and Investigation)	
Services, Inc.,)	
	)	No. C05-0168LRR
Plaintiff,)	
)	
v.	)	COMPLAINT
)	
Sac and Fox Tribe of the Mississippi in Iowa,)	
)	
Defendant.)	

Attorney's Process and Investigation Services, Inc. (API) for cause of action states:

THE PARTIES

1. API is a Wisconsin corporation with its principal place of business in Green Bay, Wisconsin.

2. The Tribe is a federally recognized Indian Tribe, which owns and operates the Meskwaki Bingo-Casino-Hotel (the Casino).

PERSONAL JURISDICTION

3. The events that gave rise to this action occurred in part in this jurisdiction and the Court accordingly has personal jurisdiction over the Tribe.

SUBJECT MATTER JURISDICTION

4. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §1331 (federal subject matter jurisdiction). Nat. Farmer's Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 852 (1985)(issue of a tribe's power to compel nonmember of

tribe to submit to jurisdiction of federal court is federal question that gives rise to federal subject matter jurisdiction); Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1295-96 (8th Cir. 1994) (same).

5. Because this action is not an intratribal dispute, but rather involves the power of a Tribal Court over a nonmember, this is a dispute over which this Court has jurisdiction. Cf. In re Sac & Fox Tribe of the Mississippi in Iowa / Meskwaki Casino Litigation, 340 F.3d 749, 763 (8th Cir. 2003).

6. The Court has and should exercise jurisdiction over this matter at the present time because to require Tribal Court remedies to be exhausted as a matter of comity would be futile, as the Tribal Court is not an adequate forum in which to litigate this controversy. Nat'l Farmer's Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855-56, 856 n. 21 (1985) (As a matter of comity, federal court will defer to a Tribal Court's determination of jurisdiction; it will not, however, do so when exhaustion of tribal remedies would be futile).

7. This Court has jurisdiction over API's breach of contract claim and the jurisdiction to compel arbitration of the parties' dispute and/or to make a declaration concerning the validity of the agreement pursuant to 28 U.S. C. §1365(a) supplemental jurisdiction.

VENUE

8. Venue is proper in this action pursuant to 28 U.S.C. §1391(b).

FACTS

9. API is in the business of investigative, security and law enforcement

consulting.

10. On June 16, 2003, API entered into an Agreement for consulting services, attached as Exhibit A to this Complaint.

11. The Agreement in relevant part provided with regard to any dispute that would arise from performance of services under the Agreement:

- i. The parties shall make efforts to settle through dialogue and negotiation any disputes that may arise out of this Agreement. However, should such efforts fail after thirty (30) days, the dispute shall be submitted to arbitration, which shall be conducted in Des Moines, Iowa, in accordance with the Commercial Arbitration Rules of the American Arbitration Association.
- ii. The arbitrator shall apply the applicable laws of the Tribe (as enacted or amended), the United States and the State of Iowa. The arbitrator shall not have the power to alter, modify, amend, add to or subtract from any term or provision of this Agreement, nor to rule upon or grant any extension, renewal or continuance of this Agreement. Judgment on the award of the arbitrator may be entered by the Federal District Court for the Northern District of Iowa under the Federal Arbitration Act or Iowa state court pursuant to Iowa law. For this purpose, the Tribe and API hereby irrevocably consent to the jurisdiction over their persons of such courts for such purpose, including to enter judgment on an arbitration award, and waive any defense based on improper venue, inconvenient venue, or lack of personal jurisdiction.
- iii. The failure of any party to submit voluntarily to arbitration shall be deemed to be a breach of this Agreement. Provided, that if either party has a good faith position that a dispute does not arise under this Agreement, that party may file an action in the Federal District Court for the Northern District of Iowa, or the Iowa state courts, to determine whether the dispute is the proper subject of arbitration under this Agreement.

Exhibit A, Section III (2)(b).

12. The Tribal Council that entered into the Agreement on behalf of the Tribe with API was recognized by the Bureau of Indian Affairs. That Tribal Council was

known as the "Elected Council". See In re Sac & Fox Tribe of the Mississippi in Iowa / Meskwaki Casino Litigation, 340 F.3d 749, 752 (8th Cir. 2003).

13. The authority of the Elected Council was challenged by what has been termed the "Appointed Council." Id.

14. On information and belief, the present Tribal Council is the same as or a successor in interest to the Appointed Council.

15. After the dispute between the Elected Council and the Appointed Council, the present Tribal Council created the Tribal Court and enacted the dispute resolution provisions of its Code as well as Rules of Civil Procedure and other substantive law provisions.

16. While the Tribe made partial payment to API for services rendered, it ceased payment in November of 2003, thus breaching the contract.

17. The Tribe has not sought arbitration in this matter.

18. Instead, on August 3, 2005, the Tribe filed a Complaint in Tribal Court. (Attached as Exhibit B). The Tribe's Tribal Court Complaint completely ignores the Agreement that governs the relationship between the parties. Instead, the Complaint purports to raise common law tort claims relative to actions of API that were, in fact, authorized by the Agreement.

19. The Tribe in its Tribal Court Complaint purports to invoke the jurisdiction of the Court under the dispute resolution provisions that the present Tribal Council or a predecessor in interest created subsequent to the events that are at the center of the present dispute. Presumably the Tribal Council will seek to enforce the procedures and

substantive law provisions that it created in the Tribal Court proceedings. Upon information and belief, counsel for the Tribe that is prosecuting this action against API consulted with the Tribal Council in the drafting of the dispute resolution proceedings and other provisions of the Code. See article reprinted from the Waterloo Courier dated April 17, 2005 (attached as Exhibit C).

20. On September 26, 2005, API moved to dismiss the action pending in Tribal Court on the grounds that (1) the Tribal Court lacks subject matter jurisdiction over API as a non-member and (2) that any dispute under the Agreement must be submitted to arbitration. (That Motion and Memorandum of Authority are attached as Exhibits D and E). The motion also requested the opportunity to conduct discovery specifically directed to the issue of Tribal Court jurisdiction.

21. On September 26, 2005, API made a demand on the Tribe for arbitration.

22. On October 20, 2005, API received the Tribe's Response to Motion to Dismiss (attached as Exhibit F).

23. Hearing on Defendant's Motion is presently set for November 15, 2005.

CLAIMS AGAINST THE TRIBE

COUNT I

Declaration pursuant to 28 U.S.C. §2201, the Federal Declaratory Judgment Act that the Tribal Court is without jurisdiction over API and that exhaustion in Tribal Court would be futile and therefore not required

24. The allegations of paragraphs 1-23 are incorporated herein.

25. API seeks a declaration pursuant to 28 U.S.C. §2201, the Federal Declaratory Judgment Act, that:

- (a) The Tribe lacks the power to subject API as a non-Indian to the jurisdiction of the Tribal Court.
- (b) As a preliminary matter before determining whether the Tribe has the power to subject a non-Indian to tribal court jurisdiction, that exhaustion of Tribal Court remedies is not required because exhaustion would be futile, i.e., the Tribal Court is not an adequate forum for this controversy because (a) to permit the Tribal Court to adjudicate this claim would be violative of API's right to due process and equal protection; and (b) the Tribal Court by its own laws and rules does not have jurisdiction over API's counterclaim – which may be compulsory in nature – for unpaid services and therefore API would be deprived of the opportunity to litigate the entire controversy and vindicate its legal rights.

COUNT II

Breach of Contract and Request for Order Compelling Arbitration or a Declaration by the Court as to the validity of the Arbitration Clause

- 26. The allegations of paragraphs 1-23 are incorporated herein.
- 27. The Tribe's failure to fully pay API for services rendered constitutes a breach of the Agreement between the parties.
- 28. Further, the Tribe's claims against API arise from the Agreement.
- 29. Section III(2)(b) of the Agreement between the parties and Section 4 of the Federal Arbitration Act (FAA), 9 U.S.C. §4, require arbitration of all claims in Des Moines, Iowa pursuant to the Rules of the American Arbitration Agreement.
- 30. Section 4 of the FAA permits "a party aggrieved by the alleged failure,

neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States District Court ... for an order directing that ... arbitration proceed in the manner provided for in [the arbitration] agreement."

31. The Agreement specifically provides that if either party to the Agreement urges in good faith that the dispute does not arise from the Agreement, the issue should be addressed by this Court or a state court. Exhibit A, Section III(2)(b)(iii).

32. In agreeing to arbitration, the Tribe waived sovereign immunity with regard to any dispute that arises from the Agreement and accordingly should be required to arbitrate the dispute between the parties. C & L Enterprise, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 419 (2001) (an arbitration clause in a contract constitutes a waiver of tribal sovereign immunity).

33. Although as a general principle, a party seeking to compel arbitration must exhaust issues related to the Tribe's power to subject a nonmember such as API to the jurisdiction of the Tribal Court, such exhaustion is not required where, as here, there is a clearly worded forum selection clause that dictates that all disputes be submitted to arbitration, see FGS Constructors v. Carlow, 64 F.3d 1230, 1233 (8th Cir. 1995), and further requires that any dispute about the arbitrability of the dispute under the agreement be submitted in the first instance to this Court or to state court.

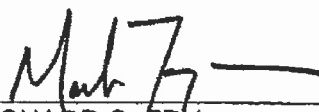
34. Accordingly, API as a "party aggrieved" by the Tribe's failure to arbitrate is entitled to an order compelling the Tribe to arbitrate its dispute and the breach of contract claims of API all of which arose under the Agreement.

35. In the alternative, if the Court believes that there is an issue with regard to

the arbitrability of the dispute in the first instance, it should retain jurisdiction and issue a declaration pursuant to 28 U.S.C. §2201 that the Tribe's claim arises under the Agreement and must be arbitrated prior to issuing an order compelling arbitration.

WHEREFORE, API prays for judgment entered in its favor and against the Tribe as follows:

- (a) A determination that API is not required to exhaust remedies in Tribal Court prior to a determination on the merits by this Court on API's claims.
- (b) A declaration that the Tribal Court is without jurisdiction to determine the Tribe's dispute against API.
- (c) An order compelling arbitration in Des Moines of all claims pursuant to the rules of the American Arbitration Association or, in the alternative, a declaration that the Tribe's claims and API's claims must be arbitrated pursuant to the Agreement between the parties.



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ATTORNEYS FOR PLAINTIFF

No. 09-2605

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**ATTORNEY'S PROCESS AND INVESTIGATION SERVICES, INC.
Plaintiff-Appellant,**

v.

**SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA,
Defendant-Appellee.**

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

**APPELLANT ATTORNEY'S PROCESS AND INVESTIGATION
SERVICES, INC.'S OPENING BRIEF**

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ATTORNEYS FOR PLAINTIFF-APPELLANT

On June 16, 2003, API entered into the June 2003 Agreement with the Tribe to provide services for the Tribe and its casino. App. 570-577 (June 2003 Agreement). Because the Tribe's casino was then shut down by federal order, the services API agreed to provide included "[d]eveloping a security plan for the re-opening of the Tribe's Gaming Facility" and "investigat[ion] [of] allegations of unlawful acts and tribal policy violations of the dissident group involving Tribal funds, and gaming operations." App. 570 (June 2003 Agreement, § I.2.B and E). The Agreement also provided that all disputes "that may arise out of this Agreement" shall be arbitrated. App. 570 (June 2003 Agreement, § III.2).

The June 2003 Agreement was executed on behalf of the Tribe by Alex Walker while he was the chairman of the Tribe's federally recognized council. See App. 577 (June 2003 Agreement); App. 647, 650-651 (*Tribal Court of Appeals Memorandum and Order*, p. 1). Between March and August 2003, the months immediately before and after Walker negotiated the June 2003 Agreement, federal officials at the Bureau of Indian Affairs (BIA) repeatedly affirmed that they recognized Walker, and only Walker, as the sole head of the Tribe.¹ On April 30, after Bear had wrested control of

¹ In March 2003, BIA recognized Walker. App. 631. In April 2003, the Acting Assistant Secretary for Indian Affairs and the Deputy Commissioner of Indian Affairs recognized Walker. App. 632. In May 2003, the Secretary of the Interior recognized Walker. App. 633-634. And in August 2003, two months after Walker and API entered their Agreement, BIA again recognized Walker. App 643.

prevents the “radical[] expans[i]on” of jurisdiction). Likewise, the requirement that Indian law challenge and turn on jurisdiction-conferring conduct keeps Indian jurisdiction over nonmembers “limited.” *Plains Commerce*, 128 S. Ct. at 2720. The well-pleaded complaint rule is “bright-line,” requires no speculation, and so allows “an early decision on” jurisdiction. 13D Wright, *supra*, § 3566, p. 274; *see Holmes Group*, 535 U.S. at 832. The same is invaluable for tribal regulatory jurisdiction because the *Montana* rules apply, not just to the adjudicative jurisdiction of tribal courts (where jurisdiction should be resolved readily and promptly), but also to the regulatory jurisdiction of tribal legislatures (where the potential applicability of tribal law should be knowable before it is violated). Finally, the well-pleaded complaint rule ensures that a plaintiff is the “master of his complaint.” *Holmes Group*, 535 U.S. at 831 (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-399 (1987)). The emphasis on the nonmember conduct does the same for a tribal-court plaintiff: to obtain tribal-court jurisdiction, he must plead claims that challenge and turn on conduct that a tribe has power to regulate.

Another similar method applies when courts must determine whether a state crime is the same as a generic crime in the federal career-criminal laws, *see Taylor v. United States*, 495 U.S. 575 (1990), or whether it generically “involves conduct” identified in the federal career-criminal laws, *James v. United States*, 550 U.S. 192, 201-202 (2007) (emphasis added); *see also Nijhawan v. Holder*, 129 S. Ct. 2294, 2299 (2009). Applying the so-

nonconsensual aspects of API's relationship with the Tribe and its members. API allegedly had only one consensual relationship with an Indian (Walker), but the Tribe's particular tort claims do not challenge that. *Compare Plains Commerce*, 128 S. Ct. at 2716 (disagreeing that the first *Montana* exception authorized tribal jurisdiction over a discrimination claim that merely "arose directly from [a] preexisting commercial relationship"); *Nord v. Kelly*, 520 F.3d 848, 856 (8th Cir. 2008). Furthermore, neither "expressly" nor by its "actions" has API consented to jurisdiction. *Id.* at 2724. By requiring arbitration and permitting the parties to compel arbitration and enforce arbitral judgments in only state and federal courts, the June 2003 Agreement plainly manifests API's withholding of consent to tribal civil jurisdiction. *See id.* at 2729 (Ginsburg, J., dissenting) (arbitration and forum selection clauses manifest a non-Indian's withholding of consent).

E. Because The Tribe Has No Civil Jurisdiction Over API, The District Court's Rulings Must Be Reversed.

Since the Tribe may not lawfully regulate API through the tribal civil laws invoked in the Tribe's complaint, the tribal courts have no civil jurisdiction to adjudicate the Tribe's claims. *See Plains Commerce*, 128 S. Ct. at 2720 ("A tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."). Not only must the district court's dismissal of API's declaratory judgment claim therefore be reversed; but for the same reasons, API must be awarded summary judgment on that claim. *See id.* at 2727 (awarding judgment rather than remanding for further proceedings).

law *must* enter into certain contracts. Casinos must have security services so they can operate in a manner that “adequately protects . . . safety.” 25 U.S.C. § 2710(b)(2)(E). They must hire investigators to do background checks on casino employees. 25 U.S.C. § 2710(b)(2)(F).

The Tribe cannot seriously maintain that the Agreement was beyond the authority of the person charged by the federal government with operating the Tribe’s casino. Unlike, say, a contract to build a school, the Agreement plainly is casino-related. Indeed, its stated purposes were to provide federally required security and investigation services. *See* App. 570-571 (June 2003 Agreement at 1-2). And inasmuch as the purpose of the Agreement was to use force to remove Bear from the casino, *cf.* App. 788 (District Court Opinion 18), Walker had federal authority to do that, too, as the Notice of Violation recognizes. App. 629 (NOV ¶ 5.B (finding that Walker was “unable to regain control” of the casino “without the use of force”)). In all events, even if that supposed aspect of the Agreement exceeded Walker’s authority, the other aspects of the Agreement, including its arbitration clause, were authorized and remain valid and binding.

In sum, Walker’s status under tribal law is utterly immaterial to the Agreement’s validity. The federal government, as it had the power (and obligation) to do, picked Walker to run the Tribe’s casino. The Agreement was made pursuant to that federal authority, so it is valid and binding against the Tribe.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

CONSTITUTION AND BY-LAWS OF
THE SAC AND FOX TRIBE OF THE
MISSISSIPPI IN IOWA

APPROVED DECEMBER 20, 1937

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1938

CONSTITUTION AND BY-LAWS OF THE SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA

PREAMBLE

We, the Mesquakie Indians, enrolled members of the Sac and Fox Tribe of the Mississippi in Iowa, hereinafter referred to as the Sac and Fox Tribe in Iowa, now living on the Sac and Fox Settlement located near Tama, Tama County, Iowa, in order that we may perpetuate our ancient tribal affairs, transact tribal business, and promote our own and our posterity's social, economic, educational, and general welfare, with the guidance of Providence, do hereby organize ourselves into one body and adopt this Constitution as the basis of our community self-government.

ARTICLE I-TERRITORIAL JURISDICTION

SECTION 1. This Constitution shall apply to the territory embraced in the present holdings of the Sac and Fox Tribe in Iowa, known as the Sac and Fox Settlement, jurisdiction of which was accepted by the United States by the Act of June 10, 1896 (29 Stat. 331), and to such other land as may be added thereto by or for the Tribe.

ARTICLE II -MEMBERSHIP

SECTION 1. The membership of the Sac and Fox Tribe in Iowa shall consist of the following persons:

- (a) All persons whose names appear on the official census roll of January 1, 1937, of the Sac and Fox Tribe in Iowa except those designated in the said roll as not enrolled members of the Tribe, provided that within one year the Tribal Council may correct this roll subject to the approval of the Secretary of the Interior.
- (b) All children born since the completion of said roll whose father is a member of the Tribe and whose parents were residing on the reservation at the time of the birth of said children.
- (c) All children born since the completion of said roll whose father is a member of the Tribe but whose parents were not residing on the reservation at the time of the birth of said children may be admitted to membership by a majority vote of the Tribal Council.

SEC. 2. Persons who are descendants of members of this Tribe but not entitled to membership under section 1 may be adopted into the Sac and Fox Tribe by a majority vote of the Tribal Council, providing that such persons have resided on the reservation for a period of five years.

- (a) The application for membership into the Tribe shall be made by self, parents, or guardians to the Membership Committee of the Tribal Council, and thereupon the said committee shall investigate for the Tribal Council to determine the desirability of adoption.
- (b) Persons adopted under this section shall not be entitled to hold office under this Constitution or participate in the payments resulting from the treaties of the Tribe with the

United States, but may enjoy other privileges of tribal members.

SEC. 3. Any member of the Tribe who resides away from the reservation for a period of ten years and who has not within that time signified to the Tribal Council his desire to continue his membership shall lose his membership in the Tribe but may later be adopted into the Tribe under the same membership status as previously enjoyed, by a majority vote of the Tribal Council after residing on the reservation for one year.

SEC. 4. Any person or persons who are intermarried with members of this Tribe shall not be granted membership or adoption into the Tribe under this Constitution.

ARTICLE III-NAME AND OBJECT OF GOVERNING BODY

SECTION 1. The name of the governing body of this organization shall be the Sac and Fox Tribal Council.

SEC. 2. The object of this Sac and Fox Tribal Council is to have authority to represent the Tribe in all matters pertaining to the business of the Tribe.

ARTICLE IV-COMPOSITION AND QUALIFICATIONS OF GOVERNING BODY

SECTION 1. The Tribal Council shall consist of seven members elected at large from those members of the Tribe living within the boundaries of the Sac and Fox Settlement who are entitled to vote and hold office.

SEC. 2. All members of the Tribal Council must be recognized as persons of honor, law abiding, and of good character. The voting members of the Tribe shall be the sole judge of these qualifications.

SEC. 3. All members of the Tribal Council must be at least twenty-five years of age, and must be descendants of parents both of whom are enrolled members of the Sac and Fox Tribe in Iowa.

SEC. 4 No person shall be disqualified on account of sex from holding any office created by this Constitution.

ARTICLE V-ELECTION OF THE GOVERNING BODY

SECTION 1. The first election under this Constitution shall be held within thirty days after the approval of this Constitution by the Secretary of the Interior. At this election seven members of the Tribal Council shall be elected; the three receiving the smallest number of votes shall serve until midnight of the first Monday in November, 1939, and the four receiving the greatest number of votes shall serve until midnight of the first Monday in November, 1941. Thereafter, all members of the Tribal Council shall be elected for a term of four years.

SEC. 2. The general election of the Tribal Council by the Tribe shall be held on the third Tuesday of October of each odd-numbered year, beginning 1939, and the necessary number of candidates receiving the greatest number of votes shall be considered elected.

SEC. 3. The primary election by all voters of the Tribe shall be held at the usual voting place of the Tribe on the second Tuesday in October in each odd-numbered year.

SEC. 4. All elections shall be conducted by secret ballot.

SEC. 5. Special elections authorized by this Constitution may be held at the time designated by the Tribal Council which is authorized to order such elections.

ARTICLE VI-TERM OF OFFICE

SECTION 1. Except as otherwise provided in section 1, Article V, the term of office of Tribal Council members, chosen at each general election, shall be four years, commencing on Tuesday, next after the first Monday in November, following each general election and will expire at midnight of the first Monday in November.

ARTICLE VII-NOMINATIONS FOR COUNCIL MEMBERS

SECTION 1. Nominations for members of the Tribal Council shall be made at a general meeting of the Tribe to be held on the first Tuesday in October. Each voter present shall be entitled to write down the names of his candidates for all positions to be filled. The candidates named shall be eliminated according to those who receive the least number of votes, in as many balloting as are necessary, until there remain not more than three times as many candidates as there are positions to be filled. The names of these remaining candidates shall be posted in public places on the reservation, and a primary election shall be held at which time the eligible voters of the Tribe shall vote on the remaining candidates selected at the first general meeting. The two-thirds receiving the greatest number of votes shall be considered candidates for the general election.

SEC. 2. If the attendance is less than thirty per cent of the eligible (voters of the Tribe at the general meeting for nominations, a special general meeting shall be called not later than Friday of the same, week and eligible voters of any number who attend shall be authorized by this Constitution to make the required number of nominations.

SEC. 3. The present Tribal Council, with the assistance of the Constitution Committee, shall call and supervise the election of the first Tribal Council under this Constitution. Thereafter, the elected Tribal Council shall conduct and supervise tribal elections and make and post necessary regulations for its procedure.

SEC. 4. Any tie votes resulting from any election shall be decided by eligible voters by special election as provided in Article V, section 5, of this Constitution.

ARTICLE VIII-OFFICERS

SECTION 1. The officers of the Tribe shall consist of a Chief of the Council, an Assistant Chief of the Council, a Secretary of the Council, and a Treasurer of the Council, all of whom shall be elected by a majority vote of the Tribal Council from its own members, except that the Secretary may be elected by the Council from outside its membership if none of the members of the Council has sufficient training for that position, in which case the Secretary shall have no vote.

SEC. 2. Any member of the Tribal Council who willfully fails to attend four consecutive meetings of the Tribal Council may be removed from office by a majority vote of the Tribal Council only after such accused member has been given an opportunity to appear before the Tribal Council in his own defense.

ARTICLE IX-VACANCIES

SECTION 1. Should a vacancy occur in the Tribal Council from any cause before the expiration of the term for which the member was elected, such a vacancy shall be filled for the remainder of the term by a special election called by the Tribal Council, unless the vacancy occurs within thirty days of a general election, and the person elected shall commence to serve as soon as he has qualified.

ARTICLE X-POWERS OF THE TRIBAL COUNCIL

SECTION 1. *Enumerated Powers.*-The Tribal Council shall exercise, the following rights and powers, subject to any limitations imposed by the constitution or statutes of the United States and to all express limitations upon such rights and powers contained in this Constitution and By-laws.

(a) To negotiate with the Federal, State and local Governments on behalf of the Tribe and to advise and consult with the representatives of the Interior Department on all activities of the Department that may affect the Sac and Fox Reservation.

(b) To employ counsel for the protection and advancement of the rights of the Tribe and its members, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior.

(c) To approve or veto any sale, disposition, lease, or encumbrance of tribal lands, interest in lands or other tribal assets which may be authorized or executed by the Secretary of the Interior, the Commissioner of Indian Affairs or any other qualified official or agency of government.

(d) To advise the Secretary of the Interior with regard to all appropriation estimates or Federal projects for the benefit of the Tribe prior to the submission of such estimates to the Bureau of the Budget and to Congress.

(e) To protect and preserve the property and natural resources of the Tribe.

(f) To encourage the agriculture and trade of the community, and to foster the arts, crafts, tradition and culture of the Sac and Fox tribe.

(g) To lease tribal land in accordance with law and to make assignments of tribal land to members of the Tribe in accordance with Article XI of this Constitution.

(h) To impose license fees on nonmembers of the Tribe or associations of nonmembers coming upon the reservation to do business or to reside, subject to review by the Secretary of the Interior.

(i) To levy and collect funds for the payment of state taxes.

(j) To receive, appropriate and expend for public purposes funds coming within the control of the Tribal Council, but no salaries shall be paid to Council members or other tribal officers without the approval of the Tribe.

(k) To regulate the use and disposition of property of members or associations of members of the Tribe in so far as necessary to protect the peace, safety, and general welfare of the Tribe. Any such regulation which directly affects nonmembers of the Tribe shall be subject to review by the Secretary of the Interior.

(l) To charter associations of members of the Tribe which may request such charter.

(m) To settle disputes among members of the Tribe which are not submitted to any State or Federal Court and which are brought before the Tribal Council by any member of the Tribe, after notice and an opportunity to be heard has been given to all parties concerned, and to impose fines to enforce its decisions which may be executed by attachment.

(n) To take action to preserve order among members of the Tribe which action shall be supplementary to and not in conflict with the activities of the federal and state authorities.

(o) To provide for the appointment of guardians for minors and mental incompetents by ordinance or resolution subject to review by the Secretary of the Interior.

(p) To regulate the procedure of the Tribal Council, tribal officers and tribal meetings.

(q) To appoint tribal committees and agencies and to delegate to them the execution of any of the foregoing powers, reserving the right to review any action taken.

SEC. 2. Any resolution or ordinance which, by the terms of this constitution, is subject to review by the Secretary of the Interior, shall be presented to the Superintendent of the reservation, who shall, within ten days thereafter, approve or disapprove the same. If the Superintendent shall approve any ordinance or resolution, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same bearing his endorsement, to the Secretary of the Interior, who may, within ninety days from the date of enactment, rescind the said ordinance or resolution for any cause, by notifying the Tribal Council of such decision.

If the Superintendent shall refuse to approve any resolution or ordinance submitted to him, within ten days of its enactment, he, shall advise the Tribal Council of his reasons therefor. If these reasons appear to the Tribal Council insufficient, it may, by a majority vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within ninety days from the date of its enactment, approve the same in writing, whereupon the said ordinance shall become effective.

SEC. 3. *Future Powers.*-The Tribal Council may exercise such further powers as may in the future be delegated to the Tribe by the Secretary of the Interior or by any duly authorized official or agency of the State or Federal Government or by members of the Tribe.

SEC. 4. *Reserved Powers.*-Any rights and powers heretofore vested in the Sac and Fox Tribe in Iowa, but not expressly referred to in this Constitution, shall not be abridged by this article, but may be exercised by the people of the Sac and Fox Tribe in Iowa, through the adoption of appropriate by-laws and constitutional amendments.

ARTICLE XI-LAND ASSIGNMENTS

SECTION 1. It is hereby recognized that all the land within the Sac and Fox Reservation is tribal land, having been bought by the Tribe with its common funds, and is now held in trust for the Sac and Fox Tribe in Iowa by the Secretary of the Interior.

SEC. 2. The present assignments of tribal agricultural land now recognized by the Tribe are hereby confirmed, subject to the following conditions:

(a) Any disputes as to extent or possession of assignments of agricultural land shall be settled by the Tribal Council.

(b) If the present assignee fails to use the land for a period of two years, or leases, rents, or grants the use of the land in any way, or fails to make proper use of the land, the Tribal Council may cancel the assignment or so much thereof as is not used or is improperly used, after giving notice to the assignee and an opportunity to present his defense.

(c) When the present assignee dies, the Tribal Council shall reassign the land, subject to the same conditions, to an heir or person designated by the assignee in writing, provided that such heir or devisee needs the land for his own use and is able and willing to use it.

(d) No person not a member of the Tribe may hold or inherit an assignment of tribal land. Any male member of the Tribe, who marries some other person than a member of the Sac and Fox Tribe in Iowa may hold, inherit, and use an assignment of the tribal land; but any female member of the Tribe, who marries some other person than a member of the Sac and Fox Tribe in Iowa, shall not hold, inherit, nor use any assignment of tribal land, however the children of such female members, when adopted into the Sac and Fox Tribe in Iowa, may hold, inherit, and use an assignment of the tribal land.

(e) Improvements made upon assigned land by the assignee shall belong to him and if the land containing such improvements is reassigned by the Tribal Council during the life of the assignee to any person, or after the death of the assignee to a person who is not a relative nor heir nor devisee of the assignee, the assignee or his heirs may sell or remove such improvements under the supervision of the Tribal Council.

SEC. 3. The present homesites of members of the Tribe not situated on assignments of agricultural land are hereby confirmed, subject to the following conditions:

(a) Any disputes as to extent or possession of the homesites shall be settled by the Tribal Council.

(b) If a homesite is vacated by the occupants, the Tribal Council may reassign it to a member of the Tribe, or if any of the garden or timber land recognized as part of a homesite is not used for a period of two years or is improperly used, the Tribal Council may reassign the part not used or misused.

(c) Homesites may be transferred among, inherited by, and willed to members of the Tribe under the supervision of the Tribal Council.

(d) Improvements made upon a homesite by the assignee shall belong to him and if the land containing such improvements is reassigned by the Tribal Council during the life of the assignee to any person, or after the death of the assignee to a person who is not a relative nor heir nor devisee of the assignee the assignee, or his heirs may sell or remove such improvements under the supervision of the Tribal Council.

SEC. 4. The Tribal Council may make new agricultural or homesite assignments on any unassigned tribal land subject to the conditions set forth in sections 2 and 3 and to such other conditions as the Tribal Council and assignee may agree upon.

SEC. 5. The Tribal Council shall manage all unassigned tribal land for the benefit of the Tribe.

SEC. 6. No person or association may use assigned or unassigned tribal land for agricultural or business purposes unless he or it has an assignment confirmed or granted under this Constitution, or a lease, permit or license from the Tribal Council.

SEC. 7. The Tribal Council may make all necessary regulations and forms to carry out the provisions of this article.

ARTICLE XII-REFERENDUM AND RECALL

SECTION 1. Upon a petition signed by not less than thirty per cent of the eligible voters of the Tribe, enumerated at the last general election, the Tribal Council shall call a special election to ratify or reject any action by the Tribal Council to recall any member of the Tribal Council.

BY-LAWS OF THE SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA

ARTICLE I-DUTIES OF OFFICERS

SECTION 1. The Chief of the Council shall conduct all meetings of the Tribal Council and of the Tribe and perform the usual duties of a Chairman. In his absence the Assistant Chief shall act in his stead.

SEC. 2. The Secretary shall keep permanent records of all meetings of the Tribal Council and of the Tribe, copies of which shall be provided the Superintendent of the reservation and the Commissioner of Indian Affairs. He shall also keep records of all transactions of the Tribal Council and handle the correspondence and notices of the Tribe. In his absence, his post shall be filled pro tem.

SEC. 3. The Treasurer of the Tribal Council shall receive, receipt for, deposit, and account for all funds handled through the Tribal Council. No money shall be disbursed without the consent of the Tribal Council and without the signature of the Chief and the Treasurer. The books of the Treasurer shall be open to inspection by members of the Tribe and by the Commissioner of Indian Affairs at all reasonable hours. An audit of accounts shall be made once a year and at such other times as the Tribal Council or Commissioner may require.

When sufficient funds have accumulated in the tribal treasury in the opinion of the Tribal Council or of the Commissioner of Indian Affairs to warrant it, the Treasurer shall give a bond satisfactory to the Tribal Council and the said Commissioner.

SEC. 4. The Tribal Council select and qualify an official interpreter, from the Tribe who shall perform the usual duties of an interpreter.

SEC. 5. Each member of the Tribal Council except the Chief shall constitute a special committee on the following matters of interest to the Tribe: (a) agriculture, (b) employment, (c) local, State and Federal projects, (d) education, (e) homes and health, (f) membership and taxation.

Service on these committees shall be assigned by the Tribal Council which may redesignate the committees and reassign the duties thereof and assign such other duties as may require committee attention.

SEC. 6. Each member of the Tribal Council shall be required to take an oath of office on the day he enters his office, pledging faithful performance of his duty and support of this Constitution. The oath shall be administered by the Superintendent of the reservation or by the Chief of the Tribal Council in office.

SEC. 7. The Tribal Council is hereby required to make complete reports of its business transactions at least once a year to the members of the Tribe, one copy of the report to be filed with the agency office and the original copy of the report to be kept by the secretary of the Tribal Council.

ARTICLE II-MEETINGS OF TRIBAL COUNCIL

SECTION 1. The Tribal Council shall meet any time before the fifteenth of each month, and at such other times as the Tribal Council may designate or the chief appoint.

SEC. 2. Five members of the Tribal Council shall constitute a quorum at any meeting.

SEC. 3. The order of business shall be as follows:

Call to order.

Roll call.

Ascertainment of quorum.

Reports.

Unfinished business.

New business.

ARTICLE III-MEETINGS OF THE TRIBE

SECTION 1. In addition to meetings in connection with tribal elections, the Tribal Council shall have the authority to call the Tribe for general meetings. Upon a petition signed by at least 30 per cent of the eligible voters of the Tribe it shall be the duty of the Tribal Council to call a meeting of the Tribe.

SEC. 2. Thirty per cent of the total number of the eligible voters, enumerated at the last general election of the Tribe shall constitute a tribal quorum.

SEC. 3. Written notice of all meetings shall be posted in public places at least five days in advance.

ARTICLE IV-QUALIFICATIONS FOR VOTING

SECTION 1. Every member of the Tribe who is twenty-one years of age or over and who has been residing on the reservation for at least six months preceding any election, shall be entitled to vote in all tribal elections except that in any election on an amendment to this Constitution and By-laws all adult members of the Tribe shall be entitled to vote.

SEC. 2. Qualified members who are temporarily living away from the reservation may vote by absentee ballot upon request to the Tribal Council fifteen days prior to any election; provided, that no

ballot received after the polls have closed shall be counted; provided, further, that said ballot must be cast before a Notary Public, or other qualified official authorized to administer oaths.

ARTICLE V-AMENDMENTS

This Constitution and By-laws may be amended by a majority vote of the adult members of the Sac and Fox Tribe in Iowa voting at an election called for that purpose by the Secretary of the Interior, provided that at least thirty per cent of those entitled to vote shall vote in such election; but no amendment shall become effective until it shall have been approved by the Secretary of the Interior. It shall be the duty of the Secretary of the Interior to call an election on any proposed amendment, upon receipt of a written resolution of the Tribal Council and signed by at least five members of the Tribal Council.

ARTICLE VI-ADOPTION

This Constitution and By-laws, when ratified by a majority of the adult members of the Sac and Fox Tribe in Iowa, voting at a special election called for the purpose by the Secretary of the Interior, provided that at least thirty per cent of those entitled to vote shall vote in such election, shall be submitted to the Secretary of the Interior, and if approved, shall be effective from the date of approval.

CERTIFICATION OF ADOPTION

Pursuant to an order, approved October 15, 1937 by the Acting Secretary of the Interior, the attached Constitution and By-laws was submitted for ratification to the members of the Sac and Fox Tribe of Mississippi in Iowa, and was on November 13, 1937 duly ratified by a vote of 80 for, and 78 against, in an election in which over 30 per cent of those entitled to vote cast their ballots, in accordance with section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935, (49 Stat. 378).

YOUNG

BEAR,

Chief, Sac and Fox Tribal Council.

IRA D. NELSON,
Superintendent, Sac and Fox Sanatorium.

I, Oscar L. Chapman, the Assistant Secretary of the Interior of the United States of America, by virtue of the authority granted me by the Act of June 26, 1936 (49 Stat. 1967), do hereby approve the attached Constitution and By-laws of the Sac and Fox Tribe of the Mississippi in Iowa.

All rules and regulations heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said constitution and by-laws, are hereby declared inapplicable to the Sac and Fox Tribe of the Mississippi in Iowa.

All officers and employees of the Interior Department are ordered to abide by the provisions of the said constitution and by-laws.

Approval recommended December 13, 1937.

WILLIAM ZIMMERMAN, Jr.,
Assistant Commissioner of Indian Affairs.

OSCAR L.

CHAPMAN,

Assistant Secretary of the Interior.

[SEAL]

WASHINGTON, D. C., *December 20, 1937.*

BEFORE THE COURT OF THE
SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA

SAC and FOX TRIBE of the MISSISSIPPI) in IOWA,)	
)	
Plaintiff,	)	No. API-CV-Damages-2005-01
)	
vs.)	
)	
ATTORNEY'S PROCESS and	)	ANSWER TO COMPLAINT BY
INVESTIGATION SERVICES, INC.,	)	DEFENDANT AND
	)	COUNTERCLAIM
Defendant.)	

Defendant Attorney's Process and Investigation Services, Inc., for answer to the
Tribe's complaint, states:

JURISDICTION

1. This Court has subject matter jurisdiction in this matter pursuant to Sac and Fox Tribe of the Mississippi in Iowa Code section 5-4101 and has personal jurisdiction over defendant under Sac & Fox Tribe of the Mississippi in Iowa Code section 5-4102(2-8) because the cause of this action arose within the jurisdiction of the Tribe, because the Tribe brings this suit to cause Defendant to return funds to the Tribe which Defendant unlawfully has taken and retained, and because defendant committed torts against the Tribe and harm to tribal real property and to other tribal property on the Settlement.

ANSWER: The allegations of paragraph 1 are denied.

PARTIES

2. The Sac and Fox Tribe of the Mississippi in Iowa (the Tribe) is a federally recognized Indian Tribe, which is governed by a Tribal Council comprising seven members of the Tribe. The Tribe owns and operates the Meskwaki Bingo-Casino-Hotel (the Casino).

ANSWER: The allegations of paragraph 2 are admitted.

3. Defendant is a corporation organized and existing under the laws of the State of Wisconsin.

ANSWER: The allegations of paragraph 3 are admitted.

FACTS

4. Between approximately June and October, 2003, Defendant took possession of approximately \$1,022,171.26 in tribal funds.

ANSWER: The allegations of paragraph 4 not herein specifically admitted are denied. It is admitted that the Tribe paid money to Defendant for services pursuant to an Agreement with the Tribe, a copy of which is attached as Exhibit A.

5. The Tribe's governing body did not authorize the payment of tribal funds to Defendant.

ANSWER: The allegations of paragraph 5 are denied.

6. On or about February 6, 2004, the Tribe demanded return of the funds which Defendant had taken. Defendant did not return any tribal funds.

ANSWER: The allegations of paragraph 6 not herein specifically admitted are denied. It is admitted that Defendant has not returned the moneys paid to it pursuant to the Agreement attached as Exhibit A.

7. On or about October 1, 2003, Defendant intentionally entered and remained at the Tribe's Community Center (which houses the Tribe's executive offices and records) and the Casino. Such entering and remaining was not authorized by the Tribe.

ANSWER: The allegations of paragraph 7 not herein specifically admitted are denied. It is admitted that on October 1, 2003, defendant entered the Tribe's Community Center at the direction and under the authority of the Tribe's governing body and pursuant to the terms of the Agreement attached as Exhibit A.

8. Defendant's entry of the Casino on October 1, 2003 constituted an intentional violation of the implementing order issued on May 22, 2003 in United States of America v. Alex Walker, Jr. (N.D. Iowa case no. 03-52-LRR). The Tribe did not and could not consent to defendants entering or remaining in violation of that Court order.

ANSWER: The allegations of paragraph 8 are denied.

9. While entering and remaining on the Tribe's property on October 1, 2003, Defendant intentionally damaged and destroyed tribal property.

ANSWER: The allegations of paragraph 9 are denied.

10. The reasonable cost to the Tribe to replace and repair the property which was damaged or destroyed by Defendant on October 1, 2003 was no less than \$7,035.00.

ANSWER: Defendant denies that it damaged or destroyed the Tribe's property and denies for lack of sufficient information the remainder of the allegations of paragraph 10.

11. While entering and remaining on the Tribe's property on October 1, 2003, Defendant obtained and exercised control over all or nearly all tribal gaming information and tribal gaming commission information, including but not limited to detailed compiled tribal gaming financial information, information regarding the extent and scope of tribal security and surveillance coverage, information regarding ongoing gaming commission investigations, all personnel files, all legal files, and devices used to insure the integrity of the Casino's operation (hereinafter confidential property).

ANSWER: The allegations of paragraph 11 are denied.

12. The confidential property contains detailed information regarding patrons (including comps provided to patrons, amounts and patterns of patron betting, contact information and other information); employees (including contract terms, rates of pay, benefits, bonuses, disciplinary actions, medical information, and other personal information); and general casino business (including detailed market analysis, strategic goals and plans, detailed and itemized budgets, and other information).

ANSWER: Defendant denies that it took possession of or had access to the Tribe's property, and denies for lack of sufficient information to form a belief the contents of the property referred to in paragraph 12.

13. On October 1, 2003 and at all times since then, tribal gaming statutory laws and regulations and tribal common law required that the confidential property was to be kept confidential. Those laws furthered the integrity and security of the Casino operations and the security and safety of the Casino's patrons and employees and were enacted for gaming regulatory purposes.

ANSWER: Defendant denies for lack of sufficient information to form a belief the allegations of paragraph 13.

14. Access to the confidential property was, in October 1, 2003, restricted to certain individuals, on a need-to-know basis.

ANSWER: The allegations of paragraph 14 are denied for lack of sufficient information to form a belief.

15. The confidential property had been stored in secured areas of the Casino. Defendant was able to gain access to the property only by criminally breaking into and entering the secured areas of the Casino and by the threat to use armed force and by the use of other force.

ANSWER: The location of alleged confidential property is denied for lack of sufficient information to form a belief and all other allegations of paragraph 15 are denied.

16. The confidential property was protected from disclosure by confidentiality agreements and confidentiality policies.

ANSWER: The allegations of paragraph 16 are denied for lack of sufficient information to form a belief.

17. The Tribe had taken steps which were reasonable under the circumstances to keep the confidential property confidential.

ANSWER: The allegations of paragraph 17 are denied for lack of sufficient information to form a belief.

18. On October 1, 2003, the confidential property had independent financial value to the Tribe because it was not generally known to, nor readily ascertainable by proper means by persons who could obtain economic value from its disclosure or use.

ANSWER: The allegations of paragraph 18 are denied for lack of sufficient information to form a belief.

19. The Tribe would be damaged if its confidential property were released or disclosed to the public.

ANSWER: The allegations of paragraph 19 are denied for lack of sufficient information to form a belief.

20. One of the reasons the Tribe strenuously protects the confidential property is that public dissemination would be expected to increase the risk of criminal activity against the Tribe (including its Casino) and/or members of the Tribe.

ANSWER: The allegations of paragraph 20 are denied for lack of sufficient information to form a belief.

21. Increased criminal activity would erode public confidence in the Casino's operations, and adversely affect the Tribe, its members, and its employees.

ANSWER: The allegations of paragraph 21 are denied for lack of sufficient information to form a belief.

22. The mere possibility that the Casino's record of integrity in the operation of gaming could be tarnished by increased criminal activity could result in the loss of the public's goodwill.

ANSWER: The allegations of paragraph 22 are denied for lack of sufficient information to form a belief.

23. Upon information and belief, the confidential property had and has independent economic value to organized crime or other corrupting influences.

ANSWER: The allegations of paragraph 23 are denied for lack of sufficient information to form a belief.

24. At the time Defendant broke into the Casino, they were accompanied by James DeMasseo and Charlie Troy, people who had been banned from the Casino for previous gross violations of tribal gaming laws. Defendant assisted DeMasseo's and Troy's access to confidential information. Confidential information included files related to DeMasseo's prior break-in of the Gaming Commission offices and evidence which DeMasseo had left behind when he had been removed from the Casino.

ANSWER: Defendant admits that at the time Defendant entered the Casino, James De Masseo and Charlie Troy were present in the Casino. The Defendant denies

for lack of sufficient information any details concerning either of these individuals' backgrounds. All other allegations of paragraph 24 are denied.

25. The confidential information had substantial value to DeMasseo.

ANSWER: The allegations of paragraph 25 are denied for lack of sufficient information to form a belief.

26. At the time Defendant broke into the Tribe's Community Center and Casino, it was accompanied by Fred Dorr, who was then adverse to the Tribe and the Gaming Commission. Defendant assisted Dorr and others associated with him to gain access to confidential information. Confidential information included attorney-client privileged information in matters where Dorr was representing parties who were litigating against the Tribe.

ANSWER: The allegations of paragraph 26 not herein specifically admitted are denied. Defendant admits that at the time Defendant entered the Casino, Fred Dorr was present in the Casino.

27. The confidential information had substantial value to Dorr and his clients.

ANSWER: The allegations of paragraph 27 are denied for lack of sufficient information to form a belief.

28. The Casino is in direct competition with other gaming operations in Iowa and surrounding states.

ANSWER: The allegations of paragraph 28 are denied for lack of sufficient information to form a belief.

29. The confidential information had substantial value to competing gaming operations.

ANSWER: The allegations of paragraph 29 are denied for lack of sufficient information to form a belief.

30. The Casino uses the services of numerous contractors, hired both by bid processes and non-bid processes.

ANSWER: The allegations of paragraph 30 are denied for lack of sufficient information to form a belief.

31. The confidential information had substantial value to those with current contracts with the Tribe and to those who might seek to contract with the Tribe in the future.

ANSWER: The allegations of paragraph 31 are denied for lack of sufficient information to form a belief.

32. Defendant's October 1, 2003 break-in at the Casino and Community Center was a premeditated and coordinated act in which Defendant used approximately 30 enforcers. Some of those enforcers were armed with batons and one or more was armed with a firearm, and those enforcers committed unlawful assaults and batteries and false imprisonments against tribal members and employees and wrongly restricted the movement of tribal members and employees.

ANSWER: The allegations of paragraph 32 are denied.

33. When Defendant broke into the Tribe's Community Center and Casino at or about 6:00 a.m. on October 1, 2003, it knew that there were tribal members and employees in both locations.

ANSWER: The allegations of paragraph are denied.

34. Neither on October 1, 2003 nor at any other time has Defendant applied for or held a license issued by the Sac and Fox Gaming Commission, and Defendant is not fit to hold a gaming license.

ANSWER: The allegations of paragraph 34 not herein specifically admitted are denied. It is admitted that defendant has not applied for or held a license issued by Sac and Fox Gaming Commission.

COUNT I
(TRESPASS TO LAND)

35. The Tribe repeats and realleges paragraphs 1-xx herein.

ANSWER: The allegations of paragraphs 1-34 of this answer are incorporated herein.

36. Defendant's entry of the Meskwaki Bingo-Casino-Hotel and the Sac & Fox Tribe of the Mississippi in Iowa Community Center on October 1, 2003 constitute trespass to land.

ANSWER: The allegations of paragraph 36 are denied.

37. As a direct and proximate result of this conduct, the Tribe has been damaged in an amount to be determined at trial.

ANSWER: The allegations of paragraph 37 are denied.

COUNT II
(TRESPASS TO CHATTEL)

38. The Tribe repeats and realleges paragraphs 1-xx herein.

ANSWER: The allegations of paragraphs 1-37 of this answer are incorporated herein.

39. Defendant's use and review of non-real property of the Sac & Fox Tribe of the Mississippi in Iowa and its Casino on October 1, 2003 constitute trespass to chattel, including trade secret property interests.

ANSWER: The allegations of paragraph 39 are denied.

40. As a direct and proximate result of this conduct, the Tribe has been damaged in an amount to be determined at trial.

ANSWER: The allegations of paragraph 40 are denied.

COUNT III
(THEFT (CONVERSION) OF TRIBAL FUNDS)

41. The Tribe repeats and realleges paragraphs 1-xx herein.

ANSWER: The allegations of paragraphs 1-40 of this answer are incorporated herein.

42. At the times that Defendant took payments from the Tribe, Defendant converted tribal funds to its own use.

ANSWER: The allegations of paragraph 42 not herein specifically admitted are denied. It is admitted that defendant was paid by the Tribe for services rendered.

43. As a direct and proximate result of this conduct, the Tribe has been damaged in an amount, not less than \$1,022,171.26, to be determined at trial.

ANSWER: The allegations of paragraph 43 are denied.

COUNT IV
(MISAPPROPRIATION (CONVERSION) OF TRADE SECRETS)

44. The Tribe repeats and realleges paragraphs 1-xx herein.

ANSWER: The allegations of paragraphs 1-43 of this answer are incorporated herein.

45. Defendant unlawfully gained access to tribal trade secret information and provided tribal trade secret information to others.

ANSWER: The allegations of paragraph 45 are denied.

46. As a direct and proximate result of this conduct, the Tribe has been damaged in an amount to be determined at trial.

ANSWER: The allegations of paragraph 46 are denied.

PUNITIVE DAMAGES

47. No later than February 6, 2004, Defendant knew that its failure to return tribal funds caused injury to the Tribe, but Defendant deliberately acted in conscious or intentional disregard or indifference to the injury to the Tribe.

ANSWER: The allegations of paragraph 47 are denied.

48. On October 1, 2003, Defendant knew that it lacked authority to enter or remain at the Tribe's Community Center, Casino or Gaming Commission offices.

ANSWER: The allegations of paragraph 48 are denied.

49. On or about October 1, 2003, Defendant knew that it lacked authority to damage, destroy, or inspect the Tribe's confidential information.

ANSWER: The allegations of paragraph 49 are denied.

50. Entering the Casino and Community Center with a sizable force of armed enforcers at approximately 6:00 a.m., knowing that tribal members and employees were in those buildings, demonstrated conscious or intentional disregard to the rights or safety of the Tribe and the members and employees at those locations.

ANSWER: The allegations of paragraph 50 are denied.

51. Committing assaults and batteries and false imprisonments on tribal members and employees on October 1, 2003 demonstrates conscious or intentional disregard to the rights or safety of the Tribe and the members and employees at the Casino and Community Center.

ANSWER: The allegations of paragraph 51 are denied.

52. Permitting James DeMasseo access to secured areas of the Casino and Gaming Commission offices, from which he had been permanently banned for prior break-ins at the Gaming Commission demonstrates conscious or intentional disregard to the rights of the Tribe, including its Gaming Commission and its Casino.

ANSWER: The allegations of paragraph 52 are denied.

53. A substantial award of punitive damages to the Tribe is warranted in this case.

ANSWER: The allegations of paragraph 53 are denied.

WHEREFORE, Defendant prays that the complaint be dismissed at the Tribe's costs.

DEFENSES

1. The Tribal Court lacks subject matter jurisdiction over the Tribe's claims because this case does not fall under the limited circumstances under which a Tribe may exercise jurisdiction over a non-member.

2. The Tribal Court lacks subject matter jurisdiction over the Tribe's claims because the Tribe divested itself of jurisdiction by agreeing to arbitrate all claims arising from the Agreement between the parties, attached hereto as Exhibit A.

3. These claims are preempted by the Federal Arbitration Act requiring arbitration of the claims.

4. Punitive damages are not recoverable because the standards for imposing such damages under the law are vague, arbitrary, and ambiguous and do not define with sufficient clarity the prohibited conduct or mental state which gives rise to such claims; further any award of punitive damages would violate Defendant's due process and equal protection rights pursuant to the Indian Civil Rights Act, 25 U.S.C. §1303.

5. Defendant reserves the right to file additional applicable defenses as warranted by the facts.

COUNTERCLAIM

COUNT I – Breach of Contract

1. Defendant performed services for the Tribe pursuant to the Agreement between the parties dated June 16, 2003, attached as Exhibit A.

2. The Tribe breached the Agreement by failing to fully compensate Defendant for services performed.

WHEREFORE, Defendant prays for judgment from the Tribe in an amount to fairly compensate it for unpaid services rendered to the Tribe.

**COUNT II – Application for Declaration of Rights Pursuant to the
June 16, 2003 Agreement**

1. The Tribe's failure to fully pay Defendant for services rendered constitutes a breach of the Agreement between the parties.

2. Further, the Tribe's claims against Defendant arise from the Agreement.

3. Federal Arbitration Act (FAA), 9 U.S.C. §4, require arbitration of all claims in Des Moines, Iowa pursuant to the Rules of the American Arbitration Agreement.

4. Specifically Section 4 of the FAA permits "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States District Court ... for an order directing that ... arbitration proceed in the manner provided for in [the arbitration] agreement."

5. The Agreement expressly provides that if either party to the Agreement urges in good faith that the dispute does not arise from the Agreement, the issue should

be addressed by the United States District Court or a state court. Exhibit A, Section III(2)(b)(iii).

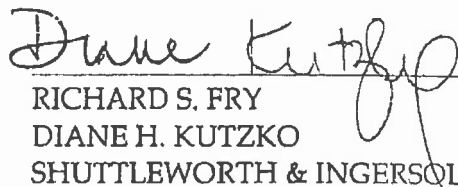
6. In agreeing to arbitration, the Tribe waived sovereign immunity with regard to any dispute that arises from the Agreement and accordingly should be required to arbitrate the dispute between the parties. C & L Enterprise, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 419 (2001) (an arbitration clause in a contract constitutes a waiver of tribal sovereign immunity).

7. Defendant respectfully requests that the Court issue a declaration pursuant to §5-6201 of the Tribal Code and Court Rule 31 that the Tribe's claims arises under the Agreement and must be arbitrated prior to issuing an order compelling arbitration.

8. In the event that the Court determines that the Tribe's claims arise under the Agreement, Defendant further respectfully requests that the Court enter an order compelling arbitration pursuant to the Agreement.

WHEREFORE, defendant prays as follows:

- (a) For judgment in an amount to fairly compensate it for unpaid services rendered to the Tribe, together with interest and the costs of this action.
- (b) In the alternative, a declaration that the Tribe's claims and Defendant's claims must be arbitrated pursuant to the Agreement between the parties and/or an order compelling arbitration in Des Moines of all claims pursuant to the rules of the American Arbitration Association.



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ATTORNEYS FOR SAC AND FOX
TRIBE OF THE MISSISSIPPI IN IOWA

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that a copy of this document was served upon counsel of record for each party to the action in compliance with IRCP 1.442(2) on the <u>2</u> day of <u>May</u> , 2008, by:	
<input checked="" type="checkbox"/> U.S. Mail	<input type="checkbox"/> Fax
<input type="checkbox"/> Hand Delivered	<input type="checkbox"/> Fed Exp
<input type="checkbox"/> Other	
<u>K. Frieden</u>	

FILED

DEC 23 2008

APPELLATE COURT OF THE
SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA

TRIBAL COURT
SAC & FOX TRIBE OF THE
MISSISSIPPI IN IOWA

Sac and Fox Tribe of the Mississippi in Iowa,

Plaintiff,

v.

Case No. API-CV-APP-2008-02-124

Attorney's Process and Investigation Services,
Inc.

Defendant.

MEMORANDUM AND ORDER

I. Background

This appeal arises from a dispute regarding the validity of a contract that the embattled former Sac & Fox Tribe of the Mississippi in Iowa's (the "Tribe's") Tribal Council, the "Walker Council," allegedly entered on behalf of the Tribe with a nonmember security services company, Defendant Attorney's Process and Investigation Service, Inc. ("API"). The Tribe filed a complaint in Tribal Court, making a variety of tort claims against API, basing its argument in part on the fact that the contract was invalid because the Walker Council had no authority to enter it. The Tribe argued that by the time the Walker Council purported to enter the contract, the tribal membership had ousted the Walker Council, and API was aware of the ouster. The Tribe therefore made various tort claims and sought reimbursement for all money paid under the contract. API moved to dismiss, mainly arguing that the Tribal Court lacked subject matter jurisdiction over it, and that the contract was valid, requiring arbitration of any disputes. On March 26, 2008, the Tribal Court held that it had subject matter jurisdiction over API and that the contract was, indeed, invalid, and API appealed (the "Tribal Court Order"). The material facts and procedural posture are as follows.

A. Walker Council's refusal to act on recall petitions.

As of September 2002, the popularly-elected, seven-member Tribal Council included Alexander Walker, Jr., Frank Wanatee, Jr., Aaron Walker, Lyle Walker, Vern Jefferson, Talbert Davenport, Sr., and Calvin Johnson, Sr. See Tribal Court Order at 3 ¶ 2. On September 26, 2002, the Walker Council received recall petitions for all seven members, which complied with constitutional requirements for validity, in that they contained signatures of more than thirty percent of eligible voters. Id. at 3 ¶¶ 1-2, citing Art. XII, § 1 of the Const. and Bylaws of the Tribe ("Tribal Const.") (authorizing recall petitions). The petitions stated on their face that they

were based on "the right as provided by Article XII, Section 1, of the Constitution and By Laws." Tribe's App'x at Tab 1 (recall petitions for all seven members). On October 10, 2002, the Walker Council ostensibly accepted the petitions, but never acted on them and failed to set recall elections. See Tribal Court Order at 3 ¶ 3, 4 ¶¶ 3-4. Almost five months later, on March 4, 2003, the Walker Council rejected the petitions, which it had no authority to do.¹ Id. at 3 ¶ 4, 4 ¶ 4.

B. Response of Hereditary Chief Old Bear and Tribal membership.

Also on March 4, the Hereditary Chief Charles Old Bear took action to appoint an entirely different interim Tribal Council, including Homer Bear, Jr., Wayne Pushetonequa, Harvey Davenport, Jr., Ray Young Bear, Keith Davenport, Deron Ward, and Frank Blackcloud (known as the "Bear Council").² Id. at 4 ¶ 5. On March 26, 2003, at a General Meeting of the Tribal membership, Hereditary Chief Old Bear administered the required oaths of office. Id. at 4 ¶ 7, 5 ¶ 7; see also API App'x at Tab 6, Ex. U-10 (Tribal Council Mtg. Minutes, 3/26/03).

On April 14, 2003, at another General Meeting, a majority of the eligible voters signed a declaration of support for Hereditary Chief Old Bear's actions. See Tribal Court Order at 5 ¶ 8; see also Tribe's App'x at Tab 6 (Tribal members' declaration of support); API App'x at Tab 6, U-15-17 (Gen'l Mtg. Minutes, 4/14/03). At the top of the sheets was language detailing the purpose of the meeting as follows:

To determine if all members of the Tribal Council must be recognized as persons of honor, law abiding, and of good character. The voting members of the Tribe shall be the sole judge of these qualifications.

The [Tribal] Constitution requires in ARTICLE IV, Sec. 2 that all members of the Tribal Council must be recognized as such. We the undersigned voting members of the Tribe have attempted to use other provisions of our Constitution to officially make these decisions about the qualifications of the elected Tribal Council. We have been disallowed by the elected Tribal Council the use of the constitutional recall procedure.

¹ While the Walker Council later claimed that there were defects in two of the petition signatures, it did not make this assertion until May 2003. See Tribal Court Order at 9 ¶ 18, 10 ¶¶ 18-19. Given the *de minimus* nature of this defense, the Tribal Court gave it no weight and this finding did not affect its conclusions of law. Id. We agree with that assessment.

² While the Tribal Court made no findings of fact based upon a March 8, 2003 letter Chief Bear wrote to "Meskwaki Tribal Members," the letter is part of the record and memorializes the Walker Council's refusal to act on the petitions, the Bureau of Indian Affairs's ("BIA's") deferral to the Tribe to resolve the leadership dispute internally, the unavailability of a Tribal Court at that time to address the dispute, and Hereditary Chief Old Bear's actions after reviewing "the Tribe's traditional ways." See Tribe's App'x at Tab 5. It also appears to bear the signatures of the members of the new Bear Council. Id.

Because the elected Tribal Council has denied the use of the Constitution to the members of the Tribe, we the voting members of the Tribe, are compelled to carry out our constitutional duty to determine if all members of the elected Tribal Council can be recognized as persons of honor, law abiding, and of good character.

Tribe's App'x at Tab 6. The sheets went on to state that where a Tribal Council member was not "a person of honor, law abiding, and of good character, his position shall terminate immediately upon the final vote tally." *Id.* The voters who signed this declaration represented a majority of the eligible voters, "overwhelmingly" determining that none of the seven members of the Walker Council met this standard. *See* Tribal Court Order at 5 ¶ 8.

On May 22, 2003, the Tribe also conducted a special election to fill the seven Tribal Council member positions, and all seven members of the Bear Council were elected, again by overwhelming majorities. *Id.* at 5 ¶ 9, 6 ¶ 9. And although the Tribal Court did not make findings on this point, the record appears to show that the Tribe thereafter held an election in the fall of 2003, and the Bear Council was again confirmed in its entirety. *See, e.g.,* Tribe's Suppl. Hrg. Br. at 2 (8/25/06) (noting Bureau of Indian Affairs ("BIA") recognized results of fall 2003 election).

C. Walker Council's refusal to step down, entry of API Contract, and API's alleged torts.

At no time before the fall 2003 elections did the Walker Council stop purporting to conduct business on behalf of the Tribe. It continued to hold itself out as the official Tribal Council. On June 16, 2003, after most of the events described above had occurred and there were significant questions as to whether the Walker Council had any legitimate authority, the Walker Council purported to enter into a contract on behalf of the Tribe with API (the "Contract"). *See* Tribal Court Order at 6 ¶ 11. The purpose of the API Contract was to "determine whether tribal funds have been misappropriated by those individuals who have illegally seized control of tribal buildings and assets," and API was to "investigate the possible conversion of tribal funds and any related illegal activity against the Tribe." *Id.* at 6 ¶ 10; *see also* API App'x at Tab 6, Ex. B (API Contract, 6/16/03). The Contract contained an arbitration clause that required any dispute under the Contract to be submitted to arbitration in lieu of Tribal Court or other court, and that any arbitration award would be enforced in Iowa state or federal court. *See* Tribal Court Order at 6 ¶ 13, 7 ¶ 13, 8 ¶ 13.

Between June 30, 2003 and September 30, 2003, the Tribal Court found (and API did not dispute) that \$1,022,171.26 was transferred from the Tribe to API. *Id.* at 6 ¶ 12. The Court's basis for this number was the affidavit of the Comptroller of the Tribe, Ram K. Dhanwada. *Id.* This figure represents more than \$11,000 per day for this period of time. The affidavit further included Mr. Dhanwada's claim that the transfer "was not authorized by the Tribe."³ *Id.* Despite the Tribe's demand that API return the money, claiming it was never authorized by the actual Tribal Council, the Bear Council, it has never been returned. The Tribe claimed that "the former

³ Both parties earlier had stipulated this statement of opinion be stricken from the affidavit. *See* API App'x at Tab 4 (Hrg. T. (7/27/06) at 8 lns. 13-25, 9 lns. 1-16).

tribal leaders who contracted with API [the Walker Council] were without authority to bind the Tribe, and that API was sufficiently on notice of the leadership dispute existing and prior to and at the time the Contract was executed, to have actual knowledge that the former tribal leaders were without authority to bind the Tribe." Tribal Court Order at 1. This formed the basis of the Tribe's conversion claim against API. *Id.*

Moreover, the Tribe alleged in its Complaint that API committed various other torts against the Tribe, largely associated with events of October 1, 2003. *See* Tribal Compl. at 2-6. The Tribe claimed on that date that API trespassed in the Tribe's Community Center and Casino, which is on trust land within the Tribe's reservation (the "Settlement," in and around Tama, Iowa), and seized Tribal property. *Id.* The Tribe claimed that API "broke in" with "approximately 30 enforcers," some of whom "were armed with batons and one or more was armed with a firearm," and who "committed unlawful assaults and batteries and false imprisonments against tribal members and employees," amongst other allegations. *Id.* at 5 ¶ 32. While there, the Tribe also claimed API intentionally damaged and destroyed Tribal property. *Id.* at 2 ¶¶ 7-10.

The Tribe further alleged that API "obtained and exercised control over all or nearly all tribal gaming information and tribal gaming commission information, including but not limited to detailed compiled tribal gaming financial information, information regarding the extent and scope of tribal security and surveillance coverage, information regarding ongoing gaming commission investigations, all personnel files, all legal files, and devices used to insure the integrity of the Casino's operation" *Id.* at 2 ¶ 11, 3 ¶ 11. This confidential property contained detailed, sensitive information regarding every aspect of the gaming operation to which access was restricted, was stored in secured areas, was subject to various tribal gaming laws and regulations, included valuable trade secrets, was protected from disclosure by confidentiality agreements and policies, and which would damage the Tribe if disclosed. *Id.* at 3 ¶¶ 13-16, 4 ¶¶ 17-19. The Tribe alleged that API received access to it "only by criminally breaking into and entering the secured areas of the Casino and by the threat to use armed force and by the use of other force." *Id.* at 3 ¶ 15. The Tribe claimed it suffered property damages, and that it would suffer other serious damages through any disclosure of this information. *See, e.g.,* 2 ¶ 10, 4 ¶ 19.

D. Federal agency position that Walker Council retained leadership until at least until fall 2003 elections.

Before and after the Bear Council was installed in the spring of 2003, Hereditary Chief Old Bear and others communicated with various federal agencies regarding the new Bear Council. *See, e.g.,* Tribal Court Order at 8 ¶¶ 13-14, 9 ¶¶ 14, 16-17. But these agencies refused to recognize the Bear Council for purposes of gaming activities and other federal government matters until the fall 2003 elections. *Id.* at 8 ¶ 13 (noting on April 30, 2003 that the National Indian Gaming Commission ("NIGC") sent notice of violation based on continued recognition of Walker Council on); 9 ¶ 14 (March 14, 2003 letter from Midwest Regional Director of the BIA refusing to recognize Bear Council); 9 ¶ 16 (May 23, 2003 letter from Secretary of the Interior in response to request to certify special election stating that it "was not called and held in accordance with tribal law and, therefore, we will not recognize the results of it"); 9 ¶ 17 (August 28, 2003 letter from BIA stating it continued to recognize Walker Council). While the record

does not expressly state this, the Secretary of the Interior (and, correspondingly, all other federal agencies) continued to recognize the Walker Council, and apparently refused to recognize the Bear Council, for at least six months after the Hereditary Chief took action.⁴

E. Tribal Court case.

In August 2005, the Tribe filed a complaint seeking damages from API relating to its tort claims, including for conversion of Tribal funds and the October 1, 2003 trespass and misappropriation of trade secrets. See Tribal Court Order at 1.

In September 2005, API moved to dismiss under Tribal Court Rule C-7(b) (and later submitted an "Application to Conduct Limited Discovery" under Rule C-15). This was based in part on its argument that the Tribal Court's lacked subject matter jurisdiction over API as a nonmember. ~~Id. at 2. In the alternative, API argued that the Contract was valid and, therefore, its arbitration~~ clause was binding upon the Tribe, and no Tribal Court remedy was available. Id.

The parties conducted limited discovery, as API had requested. Id. at 2-3. This included exchange of documents and at least one deposition, and the parties submitted supplemental briefing and appeared at a hearing on July 27, 2006. See API's App'x at Tab 4 (Hrg. T., 7/27/06).

On March 23, 2008, the Tribal Court denied API's motion.⁵ See Tribal Court Order at 12 ¶ 1. It held that it had subject matter jurisdiction under Section 5-4101, and personal jurisdiction over API under Section 5-4102 (2)-(8). Tribal Court Order at 10 ¶ 1. It held that the Walker Council violated its constitutional duty to hold elections once it received the recall petitions. Id. at 10-11 ¶ 2, citing Tribal Const. Art. XII, § 1. When the Walker Council abrogated its duty, the Tribal members "were justified in approving the exercise of the retained powers of the Hereditary Chief and Clan Representatives to establish a Tribal Council where all members are recognized as persons of honor, law abiding, and of good character." Id. at 11 ¶ 3. The Tribal Court also stated that the May 22, 2003 Special Election was "a mandate" on behalf of the Bear Council, and against the Walker Council. Id. at 11 ¶ 4. The Tribal Court further held that the BIA's

⁴ See, e.g. Tribe's Suppl. Hrg. Br. at 2 (8/25/06) (noting BIA recognized results of fall 2003 election). The NIGC ultimately ordered the Tribal Casino closed because it did not view the Bear Council as authorized to operate it. See API App'x Tab 6, Ex. D (NIGC Notice of Violation, 4/30/03); see also In re: Sac & Fox Tribe of the Mississippi in Iowa/Meskwaiki Casino Litig., 340 F.3d 749, 753-55 (8th Cir. 2003) (discussing casino closure and NIGC action due to non-federally-recognized Bear Council operating it in place of Walker Council).

⁵ The two-and-a-half-year delay in reaching final decision occurred in part because API, in the fall of 2005, simultaneously filed in federal court in the Northern District of Iowa in an attempt to force arbitration under the API Contract. See Attorney's Process and Investigation Servs., Inc. v. Sac and Fox Tribe of the Mississippi in Iowa, 401 F. Supp. 2d 952 (N.D. Iowa 2005). The Northern District of Iowa held that API had to first exhaust remedies in Tribal Court, stayed any further proceedings, and also noted that the Tribe might have sovereign immunity from API's claims. Id. at 957-63. Additionally, both parties filed a high volume of briefs in the Tribal Court leading up to the Tribal Court Order.

continued recognition of the Walker Council after the Special Election was not determinative of the Walker Council's actual fitness, and that "[t]he voting members of the Tribe shall be the sole judge of these qualifications." *Id.* at 11 ¶ 5. Therefore, the Tribal Court concluded that the Walker Council had no authority to bind the Tribe to the API Contract in June 2003, and the dispute resolution provisions therein did not apply. *Id.* at 11 ¶ 7, 12 ¶ 8. API appealed.⁶

II. Legal Discussion

A. Basis for appeal.

While this Court has already granted leave for this interim appeal, we reserved the question of the legal basis for it. *See* Order Granting Appeal and Setting Briefing Schedule (May 28, 2008). The Court hears this matter as a discretionary appeal under Tribal Code Section 5-4401(b)(1), as it deals with an "order not otherwise appealable involving a controlling question of law or substantial difference of opinion, and immediate appeal may materially advance termination of proceeding." The controlling questions of law here involve defining the Tribe's subject-matter and personal jurisdiction over non-member companies that conduct themselves on the Settlement. This issue is at the heart of this case, and has repercussions both for the tort claims that remain to be heard by the Tribal Court, as well as for any future case involving the Tribe and a nonmember company. Additionally, we rely on our broad authority to hear the appeal of "any other order not otherwise appealable" under Section 5-4401(b)(2).

It is not an appeal of right under Section 5-4401(a), as API has urged, because there has been no "prevention of judgment from which appeal might otherwise be taken." *See* API Br. at 7-8, *citing* § 5-401(a)(3). API's primary argument was that it was been deprived of its defense that the Tribe had authorized payment to API because the Tribal Court had unduly relied on a stricken portion of an affidavit the Tribe had offered. *See* API Br. at 8; Tribal Court Order at 6 ¶ 12 (*citing* Dhanwada Aff.). API argued that "in finding that the Alex Walker Council had no authority to sign the June 16, 2003 Agreement, the trial court has essentially deprived API of its defense that it was acting with authority and further potentially has prevented API from obtaining a judgment in its favor on the merits." API's Br. at 8; 15-16.

This is a misconstruction of appellate procedure, and a misreading of the Tribal Court Order. First, as a matter of law, if a defense has been excluded, a defendant may nevertheless appeal its exclusion at the conclusion of trial—we are empowered to review any and all of the Tribal Court's conclusions of law *de novo*. *See* Tribal R. App. P. A-7. We can then remand for additional proceedings on that defense, if it was improperly excluded. *See* § 5-4403(b) (allowing remand). There is no basis to claim that an interlocutory appeal is necessary here. Second, while the cited portion of the Dhanwada affidavit was, indeed, stricken, the Tribal Court did not rely upon the affidavit to support its ultimate decision that the underlying Contract was invalid. Indeed, the Tribal Court did not even cite the Dhanwada Affidavit for the truth of fact that Tribe

⁶ Since the time this appeal was filed, API has also counterclaimed for breach of contract against the Tribe in Tribal Court, seeking additional payments under the Contract. Despite this counterclaim, API has also briefed here its claim that the Tribal Court is "not an adequate forum for the entire controversy" based on the claim that the Tribal Court cannot hear counterclaims against the Tribe. *See* API Br. at 15.

didn't authorize payment. The Tribal Court simply recounted some of the stricken content, committing, at most, harmless error. See Tribal Court Order at 6 ¶ 12; see also API App'x at Tab 4 (Hrg. T. (7/27/06) at 8 lns. 13-25, 9 lns. 1-16). In any case, the Tribal Court's citation to the affidavit in no way affects the proper timing or availability of appeal.

B. Scope of appeal.

In addition to the question of whether this should be heard as an appeal of right under Section 5-4401(a), we distill the arguments API has submitted on appeal to the following four: (a) that the API Contract is binding on the Tribe because the Walker Council had actual authority to sign it in June 2003, requiring binding arbitration to settle any disputes thereunder; (b) that the BIA and other federal agency's recognition of the Walker Council is conclusive; (c) that the Tribal Court lacks subject matter jurisdiction over API as a nonmember for purposes of the Tribe's tort claims under the two grounds for such jurisdiction articulated in Montana v. United States, 450 U.S. 544 (1981); and (d) that even if the Walker Council did not have actual authority to enter the API Contract, it had "apparent authority," and the Contract should therefore be enforceable against the Tribe.⁷

The Tribe has countered: (a) that the actions taken by the Hereditary Chief and Tribal membership before June 16, 2003 "lawfully and constitutionally removed from the Walker Council the power to bind the Tribe to contracts; (b) that the BIA's determination that the Walker Council was the official council is not determinative; (c) that the Tribal Court has jurisdiction over API under Montana; and (d) that the doctrine of apparent authority cannot apply against the Tribe. See Tribe's Br. at 18-24.⁸

C. Standard of review.

We review findings of fact for clear error. See Tribal R. App. P. A-7 (empowering Tribal Court of Appeals to review Tribal Court's factual findings and conclusions of law); see also Fed. R. Civ. P. 52 (a)(6) (setting out clear error standard); United States v. National Association of Real Estate Boards, 339 U.S. 485, 495-96 (1950) (citations omitted) (same). We review *de novo* the Tribal Court's legal conclusions, including regarding subject matter and personal jurisdiction and

⁷ API has not challenged the Tribal Court's determination that this matter should first properly be submitted to the Tribal Court and that it is subject to the doctrine of tribal court exhaustion, as the Northern District of Iowa also properly held. See Attorney's Process and Investigation Servs., Inc., 401 F. Supp. 2d at 957-63. API has also asserted that the Tribal Court should "defer" to the federal court in order to permit API's main claim and counterclaim both to be heard. But this is not a proper articulation of the underlying issues of tort versus contract law. There is no legal basis for API to claim that it will "lose" a contract claim if it could not be heard in Tribal Court along with the tort claims. More importantly, API did not assert its counterclaim until *after* this appeal was filed, so any appellate opinion would be purely advisory and the issue is not properly before the appellate court. See API's App. Br. at 15.

⁸ We need not reach the issue of the Tribe's 2004 vote not to ratify the Contract, which both parties have briefed, for the reasons discussed below. See, e.g., API Br. at 19-21; Tribe's Br. at 24-26.

mixed questions of law and fact. See, e.g., Mallett v. Bowersox, 160 F.3d 456, 459 (8th Cir. 1998) (citations omitted).

D. Tribal law and BIA recognition.

The threshold question here is one of Tribal law. Whether or not the API Contract is valid depends upon whether the Walker Council had authority to enter it, which in turn depends upon whether the Tribe, according to its laws, properly removed the Walker Council. It is well-established that such an intratribal dispute is exclusively within the tribe's own purview to decide.⁹

As a general matter, "[c]ivil jurisdiction over tribal-related activities presumptively lies in tribal courts unless a specific treaty provision or federal statute affirmatively limits the jurisdiction." Sac and Fox Tribe of the Mississippi in Iowa v. Bear, 258 F. Supp. 2d 938, 942 (N.D. Iowa 2003), citing Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987); see also Duncan Energy v. Three Affiliated Tribes, 27 F.3d 1294, 1299 (8th Cir. 1994) (discussing federal limits of tribal jurisdiction over nonmembers under Montana); Goodface v. Grassrope, 708 F.2d 335, 338 (8th Cir. 1983) (expressing "doubt" regarding whether there would be federal jurisdiction over purely intratribal leadership dispute); Shorthull v. Looking Elk, 677 F.2d 645, 650 (8th Cir. 1982) (actions for relief based on "tribal deprivations of rights" generally must be resolved through tribal forums). If a tribe has not taken affirmative action to surrender its sovereign control over internal affairs, and if Congress has not exercised its plenary power to reduce such tribal authority, the tribe possesses exclusive and inherent authority over such issues as intratribal leadership disputes. See 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) (same, stating "[t]he right to conduct an election without federal interference is essential to the exercise of the right to self-government."); Wheeler v. U.S. Dept. of Int., 811 F.2d 549, 552 (10th Cir. 1987) (stating "when a tribal forum exists for resolving a tribal election dispute, the Department must respect the tribe's right to self-government and, thus, has no authority to interfere . . ."); Boe v. Ft. Belknap Indian Cnty., 642 F.2d 276, 278-80 (9th Cir. 1981) (tribal election disputes raise no federal question).

That the BIA did not recognize the Bear Council does not affect our analysis of Tribal law. 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. The Eighth Circuit considered a similar intratribal dispute in Goodface, laying out the distinction between BIA recognition of a tribal council, and the intratribal selection of a tribal council. 708 F.2d at 338-39. There, one of two competing tribal councils of the Lower Brule Sioux Tribe (the "1982 council") brought suit in federal district court based upon the BIA's refusal to recognize it instead of the earlier "1980 council" after an interim election. Id. at 337. The BIA thereafter declared that the election dispute "was an intratribal matter which must be resolved by the Tribe." Id. In the interim, though, it decided

⁹ For federal decisions recognizing this principle, see Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (federal courts lack jurisdiction to decide where tribes have "the power of regulating their internal social relations," to make their own "substantive law in internal matters," and to enforce those laws). See also Kiowa Tribe of Okla. v. Mfg. Technologies, 523 U.S. 751, 763 (1998) (reaffirming Martinez).

not to offer official recognition to *either* council, but to deal with both as necessary to maintain "basic" tribal services. *Id.* Thereafter, the district court, interpreting the tribal constitution and bylaws, determined that the 1982 council was entitled to recognition and entered injunctive relief to that effect. *Id.*

The Eighth Circuit reversed, stating that it was only because the BIA was involved that it had jurisdiction of any part of the dispute. *Id.* at 338. It held that the BIA abused its discretion in refusing to recognize *one* council, creating a gap in services. *Id.* It held "[a]lthough it was necessary to remedy the situation by ordering the BIA to recognize one governing body, the district court overstepped the boundaries of its jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election dispute." *Id.* at 339. The Eighth Circuit vacated that portion of the district court's order recognizing the 1982 council, ordered the BIA to recognize the 1982 council as an interim solution only for federal funding purposes, and directed the rival tribal councils to "~~seek a tribal remedy, for as previously noted, substantial doubt exists~~ that federal courts can intervene under any circumstances to determine the rights of the contestants in a tribal election dispute." *Id.*; see also *Wheeler*, 811 F.2d at 552; *Sac and Fox Tribe of the Mississippi in Iowa*, 258 F. Supp. 2d at 942 (holding no basis for federal court jurisdiction over intratribal leadership dispute); *Tarbell v. U.S. Dept. of Int.*, 307 F. Supp. 2d 409, 422-26 (N.D.N.Y. 2004) (discussing BIA recognition process and tribal leadership dispute);

In discussing *Goodface*, API argues that "[r]ecognition by the BIA legitimizes a particular Council in its commercial dealings," which is true, in some respects. API Br. at 22. But it is *not* the case, as API then concludes, that the BIA establishes whether nonmembers can conduct business with the Tribe. *Id.* at 23. The federal government owes no duty to private companies that contract with Indian tribes; rather, it owes a broad trust responsibility to federally-recognized Indian tribes. See, e.g., Exec. Order No. 13336, American Indian and Alaska Native Ed., 40 Weekly Comp. Pres. Doc. 713 (Apr. 30, 2004) (confirming the government-to-government relationship and trust responsibility); see also *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (discussing "ward-guardian" relationship between tribes and U.S. and defining Indian tribes as "domestic dependent nations"); *Worcester v. Georgia*, 31 U.S. 515 (1832) (laying foundations of trust doctrine).

This is the reason for the federal tribal recognition process—to enable the federal government to carry out its trust responsibility to provide services to tribes by defining what constitutes a tribe. See, e.g., H.R. Rep. No. 103-781, 103rd Conf., 2d Sess., 2 (1994) (defining recognition as "a formal political act, [which] permanently establishes a government-to-government relationship between the United States and the recognized tribe as a 'domestic dependent nation,' and imposes on the government a fiduciary trust relationship to the tribe and its members.") (citations omitted). Recognition "imposes upon the Secretary of the Interior specific obligations to provide a panoply of benefits and services to the tribe and its members." *Id.* at 3 (citations omitted). This "unequivocal federal recognition of tribal status is a prerequisite to receiving the services provided by the Department of the Interior's Bureau of Indian Affairs (BIA), and establishes tribal status for all *federal* purposes." *Id.* (emphasis added). In sum, while federal recognition typically provides some certainty for a private business in determining whether to contract with an Indian tribe, it is not an insurance policy. The BIA recognition process exists for the benefit of the federal-tribal relationship, not to give disappointed third parties an authority higher than the tribe as to tribal law.

The potential for chaos because of a tribal leadership dispute is plain. The Tribe suffered serious financial losses during this time, including the loss of the majority of its operating expenses due to the closure of its casino, which arose from the complications of this leadership conflict and the lack of federal recognition for the Bear Council. This type of damage is lasting and it is difficult to mend all relationships that suffer during such times. A chilling effect on those willing to contract with the Tribe may be inevitable, even if such an event is rare. Nevertheless, businesses that choose to work with an affirmatively *ousted* tribal council are taking a substantial risk. They ought not be heard to complain when the gamble fails. Neither a private security company utilizing force, nor the BIA, can prop up a tribal government that may have lost its legitimacy to govern. That legitimacy question is a tribal one. BIA recognition does not "select" the tribal council, and is not conclusive for purposes of private dealings with a Tribe. Indeed, API has not even asserted that it relied on the BIA's recognition in deciding to work with the Walker Council. The BIA's failure to extend federal recognition to the Bear Council has no bearing on our analysis of the underlying dispute.

E. Application of Tribal law.

We uphold the Tribal Court's determination that the Walker Council violated Article XII Section 1 of the Tribal Constitution in refusing to hold recall elections upon receipt and acceptance of recall petitions. The Tribal Constitution plainly required the Walker Council to act upon the petitions, and the Walker Council did not. We also uphold the Tribal Court's ruling that Hereditary Chief Old Bear and the Tribal membership were entitled to take all the actions they did thereafter in order to remove the Walker Council and install the Bear Council.

As a threshold matter, we feel that this is close to a political question, which would remove from us the power to second guess another "branch" of Tribal government. It is an inherent, sovereign right of a tribe to determine how it will choose its leaders: "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Martinez*, 436 U.S. at 55, *citing Worcester*, 31 U.S. at 559. Even the adoption of a tribal constitution does not have the effect of diminishing a tribe's inherent sovereign powers (although it limits the tribe's institutional structure while it is in effect). See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n. 14 (1982) ("[N]either the Tribe's Constitution nor the Federal Constitution is the font of any sovereign power of the Indian tribes."). Therefore, it is somewhat presumptuous for a tribal court, five years after the fact and before the court was even formed, to determine whether a tribe has validly elected its past leaders. Even if we determined that the Tribe did so improperly at the time, it would be moot—there has, in the meantime, been a federally-recognized election. The only purpose for our evaluation at this time is in order to resolve this dispute.

It is true that the Tribal Court is now the adjudicative body of the Tribe, with the power to uphold and interpret the Tribe's Constitution. See, e.g., § 5-2102 ("Except as otherwise provided by the laws of the Tribe, the Tribal Court shall exercise all judicial and dispute resolution powers of the Tribe, subject only to the limitations provided in the laws of the Tribe."); see also §§ 5-4101 (defining broad Tribal Court subject matter jurisdiction), 5-4302 (defining applicable law for Tribal Court to apply). But at the time this dispute arose, there was no arguable interpreter of any Tribal law besides the Tribal Council, the Tribal membership, or the Hereditary Chief (and Clan Leaders). Given the patently unconstitutional behavior of the Walker Council in rejecting

the recall petitions, it is not for us to say that the Tribal membership and Hereditary Chief Old Bear acted improperly in deciding to strip the Walker Council of authority and appoint a new council on April 14, 2003. See Tribal Court Order at 11 ¶¶ 3-4. The Tribal Court appropriately held that the public vote, and majority support, for this action on May 22, 2003 was sufficient to make the Bear Council the official Tribal Council. Id.

Furthermore, we also find sufficient legal support in Tribal law for the actions of the Hereditary Chief and the Tribal membership. The combination of retained traditional powers and the Tribal membership's reasonable exercise of its constitutional ability to determine fitness were sufficient to remove the Walker Council and seat the Bear Council in its place.

n. Retained powers of Hereditary Chief.

First, the question is whether the Hereditary Chief retained the power to remove the Walker Council and appoint the Bear Council. API argues that the 1937 Constitution stripped the Hereditary Chief of the ability to take such actions, and that to "vest" the Hereditary Chief with the power to appoint a Tribal Council would require actual amendment to the Constitution itself. See API Br. at 18-19, citing Art. X, Section 4 (stating "[a]ny rights and powers heretofore vested in the [Tribe] but not expressly referred to in this Constitution, shall not be abridged by this article, but may be exercised by the people of the Tribe, through the adoption of appropriate by-laws and constitutional amendments"). API also argues that the Tribe's actions were a contradiction of "clear provisions" of the Tribal Constitution regarding elections. It urges us to look to Cheyenne-Arapaho precedent that requires that tribal "customs (and their perimeters) be both documented and subjected to the normal rules of the adversary system" API Br. at 19, citing Hoffman v. Cheyenne-Arapaho Election Bd., 7 Okla. Trib. 126, 2000 WL 33976522 (Cheyenne Arapaho 2000).

One of the cornerstones of Sac & Fox Tribal law remains traditional Tribal practices, and there is no requirement that they be written down. Section 5-4302(a) provides that the Tribal Court shall follow the common law, including the customs and traditions, of the Tribe. And although the Tribal Court did not cite it as the basis for decision, Section 1-2101(a) of the Tribal Code provides:

Except as superseded by the Constitution and By-laws of the Tribe or this Code, the custom and traditions of the Tribe are hereby declared to be the common law of the Tribe and shall be the law applicable within the Settlement and shall be the rule of decision in all agencies, departments, commissions, and tribunals of the Tribe.

Moreover, "the common law of the Tribe shall supplement this Code and this Code shall be interpreted whenever possible as supplementing and not displacing the common law of the Tribe." § 1-2101(c). According to the Code, Section 1-2101 was adopted by Tribal Council Resolution on February 22, 2002, more than a year before the Hereditary Chief's actions. Contrary to API's assertions, the Tribe *has* passed "appropriate by-laws" to incorporate any and all traditional Tribal law, to the extent that it needed to in order to comply with the Tribal Constitution.

Additionally, since it was formed in 2005, the Tribal Court has been authorized to determine, memorialize, and then apply traditional Tribal law in its decisions. For example, while the Tribal Court has the option of determining Tribal custom through a community panel authorized as in Section 5-2501, it is not mandatory.

The record in this case does not include much detail regarding the specific basis in Tribal tradition for Hereditary Chief Old Bear's actions to strip the Walker Council of authority and appoint a new one. But the Tribal Court determined that the Hereditary Chief did, indeed, retain this power. The Tribal Court held that the actions of the Hereditary Chief and of the Tribal membership were a justified "exercise of the retained powers . . . to establish a Tribal Council where all members are recognized as persons of honor, law abiding, and of good character." Tribal Court Order at 11 ¶ 3. We believe that the Tribal Court made a sufficient inquiry into this matter of traditional law, and because the Tribal membership also ratified Hereditary Chief Old Bear's actions, we agree.

Most important here is the fact that the great majority of the Tribe publicly ratified Chief Old Bear's actions, and affirmatively agreed more than once to the choice of each of the Bear Councilmembers. It is an extraordinary concept that such action would *not* be sufficient to effect a change in tribal leadership. The Tribe literally had no other mechanism to remove the Walker Council in a timely fashion. The BIA cannot assist in these internal matters, and no federal or state court forum is available. Nor should it be. Given that the Tribal Court did not yet exist, there was no other forum to resolve this dispute, save for under traditional Tribal principles and by popular mandate. As in any democratic form of government, it is the people who must choose the legitimate Tribal government. When the Walker Council ignored the lawful recall procedures and frustrated the will of the people, the constitutional road map could not function properly. A government that does not follow the law cannot then hide behind it. It was appropriate for the Tribal membership to resort to the traditional Tribal practice when formal procedures broke down.

b. Tribal membership's authority under Tribal Constitution.

Second, we affirm that the Tribal membership does, indeed, retain the power to determine the fitness of members of the Tribal Council under the plain language of the Tribal Constitution. See Tribal Const., Art. IV § 2. This provision is included in the portion of the Tribal Constitution entitled "Article IV—Composition and Qualifications of Governing Body," while separate sections deal with elections and recalls. See Tribal Const., Arts. V, XII. But there is no express limitation upon the Tribal membership implementing this provision, in conjunction with the Hereditary Chief's legitimate exercise of traditional Tribal law, in order to effect the removal of a Tribal council. In light of the Walker Council's unconstitutional refusal to set a new election, the Hereditary Chief and Tribal membership took a lawful route to remove the Walker Council.

API would retroactively strip the Tribe of any recourse to remove a Tribal Council the Tribe no longer wanted, forcing it to wait until the fall 2003 elections and federal recognition. But no one could predict that the BIA would refuse to extend recognition to the Bear Council until that late date. The record does not show that the BIA clearly explained its refusal, nor that the fall 2003 elections were conducted under different circumstances than the May 2003 election. This result

would be both absurd and unintended. Any of the actions taken by Chief Old Bear, at least once ratified by the Tribal membership, were sufficient to make the Bear Council the official Tribal Council for the purpose of the Tribe's dealings at least with private third parties, if not federal agencies. Therefore, the Tribal Court properly held that the Hereditary Chief's actions of April 14, 2003 at the General Council and the Special Election on May 22, 2003 were sufficient to effect a change in Tribal leadership. We need not consider any of the later actions the parties discuss. Because the Walker Council was without actual authority to enter the API Contract in June 2003, it is invalid and nonbinding on the Tribe.

F. Jurisdiction over API.

The Tribe's ability to actually recover from API on its underlying claims, which have yet to be decided by the Tribal Court, depends upon whether the Tribal Court has jurisdiction over API.¹⁰

a. Personal jurisdiction over API.

The Tribal Court properly determined that it had personal jurisdiction over API under Tribal Code Sections 5-4102(2)-(8), and API has not challenged that determination. Except as limited by other federal or Tribal law, the Tribal Court has broad personal jurisdiction over persons, including nonmembers, who conduct business or take other actions within the Settlement. API unquestionably "conducted business" within the settlement, "used" property within the Settlement, and is alleged to have "committed a tortious act" within the Settlement, amongst other grounds. §§ 5-4102(2)-(8).

b. Subject matter jurisdiction under Montana.

More detailed analysis is required on the topic of the Tribal Court's subject matter jurisdiction over API in connection with the Tribe's tort claims, the only affirmative claims in the case at the time it was appealed.

The Tribal Code provides the Tribal Court can hear tort claims involving the Tribe and anyone else. Except as limited by federal or other Tribal law, the Tribal Court has original jurisdiction over "all civil causes of action and over all controversies between any persons." § 5-4101. This was the basis for the Tribal Court's determination that it had subject matter jurisdiction.

The question, then, is whether there is any limit in federal law. As a general matter, in addition to their authority to determine their own leadership, tribes retain the inherent power to make both criminal and civil laws, and the inherent power to administer justice. See, e.g., Iowa Mut. Ins., 480 U.S. at 14-15 (1987) ("[t]ribal courts play a vital role in tribal self-government and the

¹⁰ We do note, though, that certain of the tort claims could likely stand against API even if the API Contract were valid, to the extent that the claims are not dependent upon the Contract. If the Contract were valid, we acknowledge that it could possibly require binding arbitration. See C & L Ents., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418-19 (2001) (recognizing comprehensive arbitration scheme in contract between tribe and company was a consent to arbitration and a waiver of tribal sovereign immunity). But where the dispute centers on whether the Contract was ever authorized by one of the ostensible parties, there can be no requirement that the dispute be submitted to arbitration.

Federal Government has consistently encouraged their development.”) (citations omitted). Tribes have presumed authority over both their members and their territory, which traditionally included some authority over nonmembers conducting themselves in Indian country. See id.; see also United States v. Mazurie, 419 U.S. 544, 557 (1975). Tribes also have the power to exclude persons from tribal territory (including trust and other Indian lands). See, e.g., Worcester, 31 U.S. at 561. And “civil jurisdiction over the activities of non-Indians on reservation lands presumptively lies in tribal courts, unless affirmatively limited by a specific treaty provision or federal statute.” Attorney’s Process and Investigation Servs., 401 F. Supp. 2d at 958, citing Bruce H. Lien Co. v. Three Affiliated Tribes, 93 F.3d 1412 (8th Cir. 1996), citing Iowa Mut. Ins. Co., 480 U.S. at 16.

These powers remain intact until and unless preempted by federal authority: “[b]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.” Merrion, 455 U.S. at 148 n. 14; see also Martinez, 436 U.S. at 60 (“[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent”).

Federal law does impose certain limits on tribal civil adjudicatory jurisdiction, relating to nonmembers. See Montana, 450 U.S. at 565; see also Plains Commerce Bank v. Long Family Land and Cattle Co., Inc., 128 S.Ct. 2709 (2008); Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997). The Supreme Court has stated that “a tribe’s inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations.” Montana, 450 U.S. at 564; see also Nevada v. Hicks, 533 U.S. 353, 361 (2001) (“Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.”).

The Montana case addresses the general rule of that there is no tribal jurisdiction over the activities of nonmembers, and also identifies the two exceptions. The first Montana exception is where there is a “consensual relationship” between a tribe and a nonmember, including “commercial dealing, contracts, leases, or other arrangements.” Montana, 450 U.S. at 565. This does not apply to the Tribe’s tort claims—as API correctly points out, these are premised on *lack* of consent and turn on the Tribe’s claim that there was no valid Contract. See API Br. at 12.

But the second Montana exception does potentially apply to tort claims a tribe asserts against a nonmember:

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 565-66.

It is easier by far to find federal cases refusing to apply this second exception, than those allowing it. To invoke it, the Supreme Court has stated that the tribal impact must be “*demonstrably serious and must imperil* the political integrity, the economic security, or the

health and welfare of the Tribe." Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 431 (1989) (emphasis added). Most recently, the Supreme Court in Plains Commerce Bank confirmed that "[t]he second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' conduct *menaces* the political integrity, the economic security, or the health or welfare of the tribe." 128 S.Ct. at 2726 (emphasis added). The Supreme Court went so far as to quote a commentator who suggested that "[t]he elevated threshold for application of the second Montana exception suggests that tribal power must be necessary to avert *catastrophic consequences*." Id., citing F. Cohen, Cohen's Handbook on Federal Ind. Law, § 4.02[3][c], at 232, n. 220 (emphasis added). And the Eighth Circuit recently refused to apply the second Montana exception where only "the personal health and welfare of a few individual members" were involved. Nord v. Kelly, 520 F.3d 848, 856-57 (8th Cir. 2008) (declining to apply second exception where injured plaintiff was tribal member suing based on accident on state highway running through Red Lake Reservation). What these cases do is demarcate the outer limits of the second Montana exception: in order to justify an exercise of tribal jurisdiction under the second exception, a nonmember's conduct must in some way severely threaten the entire tribe's political integrity, economic security, or health and welfare.

Tribal powers are at their zenith of inherent sovereign authority over Indian trust lands within their reservations. Correspondingly, this provides the strongest basis upon which to articulate tribal jurisdiction over nonmembers. A key issue under the Montana analysis remains where the conduct took place. Montana by its terms applied only to conduct by nonmembers on fee land, and did not speak to nonmember conduct on trust land. 450 U.S. at 565-66. Since then, Strate and other cases have extended the Montana analysis to other land types within reservations, but we are not aware of any precedent where a federal court has done so for trust land. See, e.g., Strate, 520 U.S. at 453 (equating a state right-of-way with non-Indian owned fee land for purposes of Montana analysis); Hicks, 533 U.S. at 360 (refusing to extend tribal adjudicatory jurisdiction over nonmembers conducting themselves on fee land owned by an individual Indian and within a reservation); Plains Commerce Bank, 128 S.Ct. at 2726 (tribe could not assert regulatory jurisdiction over sale of fee land within reservation by one nonmember bank to nonmember purchaser).

The Supreme Court has recently confirmed that "[t]he status of the land 'is relevant insofar as it bears on the application of Montana's exceptions'" Plains Commerce Bank, 128 S.Ct. at 2720, citing Hicks, 533 U.S. at 376 (reservation land status is "one factor to consider" in determining whether an exercise of tribal authority over nonmembers was "necessary to protect tribal self-government or to control internal relations") (internal citation omitted). In the Plains Commerce opinion, the Supreme Court repeatedly reiterated that one of the lynchpins of the decision, in which the Court found no tribal jurisdiction, was that the land in question was fee land. 128 S.Ct. at 2726 (highlighting that Montana analysis applies to *non-Indian fee land*) (emphasis added); id. at 2722, citing Hicks, 533 U.S. at 360 (stating that with only the exception of Brendale, 492 U.S. at 408, the Court has "never upheld under Montana the extension of tribal civil authority over nonmembers on *non-Indian land*." (emphasis in original); id. at 2723 ("[C]ertain forms of nonmember behavior, even on *non-Indian fee land*, may sufficiently affect the tribe as to justify tribal oversight." (emphasis added)). Moreover, the tribe in Plains Commerce Bank could not show that there was any "conduct" on the reservation fee land that affected the tribe whatsoever, only the fact of the sale itself, which the tribe had attempted to regulate. Id. at 2723-24.

We hold that one key fact of this case is that the issue presents nonmember conduct on trust land. We do not believe that Montana applies to such conduct at all, and neither the Supreme Court nor any of the federal circuit courts has held to the contrary. Under its inherent sovereign powers to legislate, to make laws governing conduct, and to exclude those who enter the Settlement, and under the Tribal Constitution and Bylaws, the Tribe retains *presumptive* civil jurisdiction over nonmembers committing torts on tribal trust land.

To the extent that a Montana exception is necessary to recognize tribal court jurisdiction, it does apply, this is the rare case that squarely falls within the second Montana exception, even under the most limited reading of tribal jurisdiction. This case is based upon allegedly egregious torts that nonmember API committed against the entire Tribe by converting Tribal funds and by storming the Tribal Center and Casino on behalf of the ousted Walker Council. The allegations in the Complaint are that API expressly contracted to address significant Tribal governmental issues, and to exercise essentially Tribal governmental authority.

The locus of the allegedly tortious nonmember conduct was the Tribal Community Center and Casino, which is on trust land within the Tribe's reservation. This is the Tribe's economic engine, and is where some of the Tribe's most sensitive documents are kept. It was precisely these things over which API sought control, on behalf of the Walker Council. Any tortious activity in which a nonmember engages, directly aimed at the Tribe's gaming operations, while on trust land, is more than sufficient grounds to justify the Tribal Court exercising civil adjudicatory jurisdiction over the nonmember.

Regardless of the limits of tribes' civil regulatory and adjudicatory jurisdiction over nonmembers, Plains Commerce and other post-Montana cases make plain that where a nonmember engages in this type of violent, tortious conduct on trust land, they come squarely within the Tribe's jurisdiction. This Court agrees that it is difficult to conceive of conduct that would constitute a more direct threat to the political integrity, the economic security, and the health and welfare of the Tribe. The Tribe's claims include a count for conversion of more than \$1 million of Tribal money. See Tribal Court Order at 6 ¶ 12. The Walker Council paid API these funds in exchange for API's performance of some of the actions that the Tribe alleges were tortious, including API's strike force of "30 enforcers," some of whom were armed, and who on October 1, 2003 allegedly broke into the Tribe's Community Center and Casino. Compl. at 5 ¶ 32. The Tribe's other claims arise from this conduct and allege property damages and appropriation of trade secrets. Id. at 3 ¶¶ 13-16, 4 ¶¶ 17-19. This display of force was an attempt by the Walker Council, with API's support, to seize both political and economic control of the Tribe, despite the fact that the Tribal members had overwhelmingly rejected the Walker Council and chosen the Bear Council. The means of doing so was through API, which had no authority from the real representatives of the Tribe to be there. This action was a direct threat to every aspect of tribal integrity, and to the right of the Tribe to "make its own laws and be governed by them." Hicks, 533 U.S. at 361. API's voluntary conduct falls within the second Montana exception and justifies the Tribal Court's exercise of jurisdiction over API for purposes of hearing the Tribe's tort claims.

G. Doctrine of apparent authority.

API also argues that, under the doctrine of apparent authority, the API Contract should be enforced against the Tribe. See API Br. at 23-24. The Tribal Court did not reach this question. Nevertheless, we deal with this as a matter of law, and as a matter of first impression here. We hold that the doctrine of apparent authority does not apply to Tribal contracts, and there is no need for remand.

First and foremost, there is no written provision in Tribal law providing for the defense of "apparent authority," or promissory estoppel, and no party has argued that there is a basis in Tribal common law for this tort defense to be asserted against the Tribe. See §1-2101 ("The common law of the Tribe expressly does not include the common law of any other Indian tribe, the common law of England, the United States or any other foreign jurisdiction . . ."). And even under U.S. common law, a third party "is expected to know the law and may not rely on the conduct of Government agents contrary to the law." Heckler v. Cmty. Health Servs., 467 U.S. 51, 63 (1984); see also Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 389 (1947). While this principle is most commonly applied to bar recovery for agreements with unauthorized, purported agents of the government, it applies equally where there is reason to doubt that an entity holding itself out as the highest level of government is, indeed, just what it says it is, in light of evidence to the contrary. In these circumstances, the Tribe cannot be held responsible. While we expect any application of the rule in the future to apply primarily to individual dealings with Tribal agents, and do not reach the question of possible exceptions under other scenarios, we adopt the rule that the doctrine of apparent authority does not apply against the Tribe.¹¹

The undisputed facts also demonstrate that, even were the defense of apparent authority available, API could not prevail. API cannot show that it in good faith "relied" on the false representation of the actual Tribe, which was represented by that time by the Bear Council. API was fully aware of the leadership dispute. Nor is there any claim that API affirmatively knew of or relied on the federal-agency position. The Walker Council entered the API Contract expressly for the purpose of expelling "tribal dissidents," or those associated with the Bear Council, from the Tribe's gaming operation. Tribal Court Order at 6 ¶¶ 10-11; API App'x at Tab 6, Ex. B (API Contract). While there is no record of whether API actually was aware of the May 2003 Special Election, it proceeded at its own risk, under these circumstances. A company engaged in such a line of work ought to proceed with extreme caution.

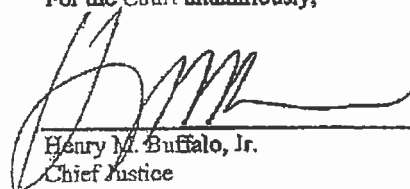
¹¹ We reject the reasoning of Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe, 107 P.3d 402 (Colo. Ct. App., Div. II 2004). See API Br. at 24. It is a nonbinding, minority opinion from a state court of appeals. Moreover, it contains serious errors of law. For example, Rush Creek curiously holds that someone without actual authority to waive a tribe's sovereign immunity can nevertheless do so, simply by using effective waiver language. This is contrary to Supreme Court precedent. See Martinez, 436 U.S. at 49; Kiowa Tribe of Okla. v. Mfg. Techs. Inc., 523 U.S. 751 (1998); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991). We doubt that the state or federal governments would countenance waivers of their own sovereign immunity by those without authority to give them. We decline to do so either.

III. Conclusion.

For the foregoing reasons, it is hereby ordered that the Tribal Court's order is **SUSTAINED**.

For the Court unanimously,

Date: 12/23/08


Henry M. Buffalo, Jr.
Chief Justice

MFS _____
Pet/Plff Atty Olson; J Resmussen
Resp/Def Atty R Fry; A Kutzko; Winkley
GAL _____
Others _____
Date Mailed 12-23-08 By TFM