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6  
7 **IN THE UNITED STATES DISTRICT COURT**  
8 **FOR THE DISTRICT OF ARIZONA**

9 Kristan L. Sears,

10 Plaintiff,

11 v.

12  
13 Gila River Indian Community, Greg  
Mendoza (Governor), William Rhodes  
14 (Former Governor), Pam Johnson  
(Community Manager), Randy Tracy  
15 (Director DRS), Ron Lopez (Deputy  
Director DRS), Sydney McKinney  
16 (Director Human Resources), Debbie  
17 Mercado (Employee Relations),

18 Defendants.

No. 2:12-CV-02203-PHX-ROS

**MOTION TO DISMISS**

19  
20 Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Defendant Gila River  
21 Indian Community (the “Community”) moves the Court to dismiss this matter  
22 on the grounds that (1) the court lacks subject matter jurisdiction; and (2) the  
23 claims are barred by the doctrine of tribal sovereign immunity.

## STANDARD OF REVIEW

1  
2 Defendant seeks dismissal pursuant to Fed. R. Civ. P. 12 (b)(1) for lack  
3 of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a  
4 claim as to any claims made. An attack of subject matter jurisdiction pursuant  
5 to Fed. R. Civ. P. 12(b)(1) may be facial or factual. *Safer Air for Everyone v.*  
6 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *White v. Lee*, 227 F.3d 1214,  
7 1242 (9th Cir. 2000). In a facial attack, the moving party asserts that the  
8 allegations of the complaint are insufficient on their face to invoke federal  
9 jurisdiction. *Safer Air, supra*, 373 F.3d at 1039. In contrast, in a factual  
10 attack, the moving party disputes the truth of the allegations that, standing  
11 alone, would otherwise invoke federal jurisdiction. *Id.*

12  
13  
14 In resolving a factual attack on jurisdiction, the court may review  
15 evidence beyond the complaint without converting the motion to dismiss into  
16 a motion for summary judgment. *Savage v. Glendale Union High School*, 343  
17 F.3d 1036, 1039 n. 2 (9th Cir. 2003); *White, supra*, 227 F.3d at 1242. The  
18 court need not presume the truthfulness of the allegations in plaintiff's  
19 complaint. *Id.* Once the moving party has converted the motion to dismiss  
20 into a factual attack by presenting affidavits or other evidence properly before  
21 the court, the party opposing the motion must furnish affidavits or other  
22  
23

1 evidence necessary to satisfy its burden of establishing subject matter  
2 jurisdiction. *Safer Air, supra*, 373 F.3d at 1039 (citation omitted).

3 The standards governing a Rule 12(b)(1) motion permit a court to  
4 proceed as it never could under either Rule 12 (b)(6) or Rule 56. *Thornhill*  
5 *Pub. Co. v. Gen. Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

6 The allegations of a complaint are not accepted as true, as would be the case  
7 in a Rule 12 (b)(6) motion, and the plaintiff has the burden of proving facts  
8 establishing subject matter jurisdiction, a burden shifting different than Rule  
9 56. Because no presumptive truthfulness attaches to the plaintiff's allegations,  
10 the trial court may weigh and decide the evidence on the issue, even if the  
11 material facts are disputed. *Id.* at 733 (citation omitted).

12  
13  
14 Once a proper factual attack on subject matter jurisdiction is made: (1)  
15 the district court does not have the discretion to accept the allegations of the  
16 complaint over properly supported and undisputed facts, and (2) the plaintiff  
17 has the affirmative burden of proving facts which establish subject matter  
18 jurisdiction. *Safer Air, supra*, 373 F.3d at 1039.

19  
20 This motion is a factual attack on the subject matter jurisdiction of the  
21 court. Defendants contend this court does not have subject matter jurisdiction  
22 over a wrongful termination or tort claim against the Gila River Indian  
23

1 Community and Community officials and employees, acting in their official  
2 capacities.

3 **STATEMENT OF FACTS**

4  
5 1. Plaintiff's Complaint "*Wrongful Termination (Due Process*  
6 *Rights)*" is brought under the American Indians Torts [sic] Liability Act of  
7 1998,<sup>1</sup> the American Indian Equal Justice Act of 1998, and the Indian Civil  
8 Rights Act. Complaint, Doc. 1, at 2 and 4.<sup>2</sup>

9 2. Plaintiff alleges that the Defendants failed to follow Civil  
10 Procedures and thereby violated her Due Process Rights. Complaint, Doc. 1, at  
11 4.

12  
13 3. Plaintiff affirms that all named individuals are employed in the  
14 various departments and are essentially acting as "agents" for the Gila River  
15 Indian Community. Complaint, Doc. 1 at 5

16 4. At the time of the acts complained of Defendants Randy Tracy,  
17 Ron Lopez, and Debbie Mercado were employed by the Gila River Indian  
18 Community in various capacities. *Affidavit of Randy Tracy, Exhibit 1, ¶¶ 2,3;*  
19

20  
21 \_\_\_\_\_  
22 <sup>1</sup> Defendant does not believe this legislation was ever enacted.

23 <sup>2</sup> Because of inconsistent numbering of Plaintiff's Complaint, the page numbers  
are those assigned by the Court's ECF system.

1 *Affidavit of Ron Lopez, Exhibit 2, ¶¶ 2, 3; Affidavit of Debbie Mercado, Exhibit*  
2 *3, ¶¶ 2, 3.*

3           5.     The Gila River Indian Community is a federally-recognized Indian  
4 Tribe. Federal Register, Vol. 77, No. 155 (August 10, 2012), at 47868-47873.

5           6.     The Complaint names all individual defendants in their official  
6 capacities (Governor, Former Governor, Community Manager, Director DRS,  
7 Deputy Director DRS, Director of Human Resources, and Employee Relation).  
8 Complaint, Doc. 1 at 1.

9           7.     When Plaintiff served her Complaint on the Gila River Indian  
10 Community, she did so at the government offices of the Gila River Indian  
11 Community located within the exterior boundaries of the Reservation; however,  
12 she has not served the individual defendants. *Exhibit 1, ¶ 6; Exhibit 2, ¶ 6;*  
13 *Exhibit 3, ¶ 6.*

14           8.     All actions undertaken by Debbie Mercado in this matter were  
15 undertaken in her official capacities and within the scope of her authority.  
16 *Exhibit 3 ¶¶ 3, 4, 5.*

17  
18  
19  
20                   **ARGUMENT AND AUTHORITIES**

21           **I. PLAINTIFF'S CLAIMS UNDER THE INDIAN SELF**  
22           **DETERMINATION ACT, INDIAN CIVIL RIGHTS ACT,**  
23           **FEDERAL TORT CLAIMS ACT AND OTHER LAWS FAIL AS**  
              **A MATTER OF LAW.**

1 In order to avoid dismissal, Plaintiff must allege a valid basis or claim  
2 by which this Court may exercise subject matter jurisdiction. While Plaintiff  
3 cites to a number of federal laws, none of those laws authorize her suit or  
4 provide a basis for this Court to exercise jurisdiction over an Indian tribe,  
5 tribal officials and tribal employees for what is essentially a tribal matter  
6 governed by tribal law.  
7

8 **A. The United States Constitution and the Bill of Rights are not a**  
9 **constraint on Indian tribes such as the Gila River Indian**  
10 **Community.**

11 “As separate sovereigns pre-existing the Constitution, tribes have  
12 historically been regarded as unconstrained by those constitutional provisions  
13 framed specifically as limitations on federal or state authority.” *Santa Clara*  
14 *Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). The Supreme Court has stated  
15 that “as the powers of the local self-government enjoyed by the Cherokee  
16 Nation existed prior to the constitution, they are not operated upon by the fifth  
17 amendment, which, as we have said, had for its sole object to control the  
18 powers conferred by the constitution on the national government.” *Talton v.*  
19 *Mayes*, 163 U.S. 376, 384 (1896). Federal courts have since extended the  
20 holding of *Talton* to other provisions of the Bill of Rights and the Fourteenth  
21 Amendment. *See, e.g., Twin Cities Chippewa Tribal Council v. Minnesota*  
22  
23

1 *Chippewa Tribe*, 370 F.2d 529, 533 (8th Cir. 1967); *Martinez v. Southern Ute*  
2 *Tribe*, 249 F.2d 915, 919 (10th Cir. 1957).

3 Plaintiff's claims under the United States Constitution, including her  
4 due process claims, fail as a matter of law.

5  
6 **2. The Indian Civil Rights Act does not waive sovereign  
immunity except in the limited case of habeas relief.**

7  
8 When the Indian Civil Rights Act of 1968 ("ICRA") was enacted,  
9 Congress chose to limit the remedy to habeas relief. 25 U.S.C. § 1303. In  
10 enacting the ICRA, "Congress acted to modify the effect of *Talton* and its  
11 progeny by imposing certain restrictions upon tribal governments, similar but  
12 not identical, to those contained in the Bill of Rights and the Fourteenth  
13 Amendment." *Santa Clara Pueblo, supra*, 436 U.S. at 57. Congress has  
14 expressly limited any waiver of sovereign immunity to the privilege of the  
15 writ of habeas corpus provided in 25 U.S.C. §1303. *Id.* at 58-59. "Nothing on  
16 the face of Title I of the ICRA purports to subject tribes to the jurisdiction of  
17 federal courts in civil actions for injunctive or declaratory relief." *Id.* at 59.  
18 Federal courts addressing a habeas petition under § 1303 of the ICRA,  
19 mandate that two prerequisites be satisfied before they will hear a habeas  
20 petition filed under the ICRA: (1) the petitioner must be in custody; and (2)  
21 the petitioner must have exhausted tribal remedies. *Jeffredo v. Macarro*, 599  
22 F.3d 913, 918 (9th Cir. 2010) (citations omitted). In *Jeffredo* the court held  
23

1 the court could not circumvent their lack of jurisdiction over the matters by  
2 expanding the scope of the writ of habeas corpus to cover exactly the same  
3 subject matter that they lacked jurisdiction to hear [tribal decisions regarding  
4 disenrollment of members]. *Id.* at 920.

5  
6 Because Plaintiff does not seek habeas relief, and no other relief is  
7 available under ICRA, her ICRA claims fail as a matter of law.

8 **3. The Indian Self-Determination Act does provide a basis for**  
9 **any of Plaintiff's claims.**

10 The Indian Self-Determination Act ("ISDA"), which is part of the  
11 Indian Self-Determination and Education Assistance Act of 1975  
12 ("ISDEAA") provides legal authority for tribal governments to "contract"  
13 with the federal government and to assume authority for providing different  
14 governmental services, including law enforcement and policing services  
15 within their communities. 25 U.S.C. § 450 *et seq.* Agreements between tribal  
16 governments and the Bureau of Indian Affairs ("BIA") made pursuant to  
17 ISDEAA are commonly referred to as "638 contracts." 25 U.S.C. § 450f.  
18 Tribal employees who engage in activities in furtherance of activities under  
19 the 638 contract are deemed federal employees and there are therefore  
20 covered by the Federal Torts Claim Act ("FTCA"). 25 U.S.C. § 450f(c).  
21 While the United States typically enjoys immunity from suit, the FTCA  
22 provides a limited waiver of sovereign immunity for suits brought alleging a  
23



1 federal government employee's negligence, wrongful act, or omission of any  
2 employee of the government while acting in the scope of his office or  
3 employment. 28 U.S.C. § 2675.

4  
5 For individuals with tort claims against a tribal contractor, the FCTA is  
6 the exclusive remedy. 25 C.F.R. § 900.204. However, FTCA actions may not  
7 be brought against Indian tribes, tribal officials or employees, but against the  
8 United States. 25 C.F.R. §§ 900.201, 900.208. In order to bring an FTCA  
9 action against the United States, certain procedural requirements must be met,  
10 including providing timely notice of the claim. 28 U.S.C. § 2675. Finally, the  
11 FTCA specifically excludes claims for wrongful termination. 28 U.S.C. §  
12 2675. *See also*, 25 C.F.R. § 900.183.

13  
14 The Fifth Circuit stated that when a former employee filed a complaint  
15 alleging wrongful termination under the FTCA that "the Plaintiff's claims  
16 seem to rest on the asserted failure of the Exchange Service to comply fully  
17 with its own procedures, the alleged bias that infected the decision maker, and  
18 certain defects in the proscribed procedures that in themselves constituted a  
19 denial of due process. They do not, therefore, fall within the language of the  
20 Tort Claims Act extending jurisdiction over claims 'for injury or loss of  
21 property, or personal injury or death caused by the negligent or wrongful act  
22 or omission of any employee of the Government while acting within the scope  
23

1 of his office or employment'. 28 U.S.C. § 1346 (b).” *Young v. United States*,  
2 498 F.2d 1211, 1218 (5th Cir. 1974).

3 For these reasons, Plaintiff’s ISDA and FTCA claims fail as a matter of  
4 law.

5  
6 **B. THE COMMUNITY AND COMMUNITY OFFICIALS**  
7 **AND EMPLOYEES ARE IMMUNE FROM SUIT AS**  
8 **THERE HAS BEEN NO WAIVER OF SOVEREIGN**  
9 **IMMUNITY**

10  
11 **1. The Community is immune from suit and there has been no**  
12 **waiver of sovereign immunity.**

13 As an independent ground for dismissal under Rule 12(b)(1), Defendant  
14 states that it and the individual defendants are immune from suit. “Indian  
15 tribes have long been recognized as possessing the common-law immunity  
16 from suit traditionally enjoyed by sovereign powers.” *Santa Clara Pueblo,*  
17 *supra*, 436 U.S. at 58. Tribes enjoy immunity because their sovereignty pre-  
18 dates the federal constitution, and immunity was thought to preserve the  
19 autonomy of tribal governments. *United States v. Oregon*, 657 F.2d 1009,  
20 1013 (9th Cir. 1982). Just as the United States has permitted individuals to  
21 make claims against federal and state officials under *Bivens v. Six Unknown*  
22 *Fed. Narcotics Agents*, 403 U.S. 388 (1971), and 42 U.S.C. § 1983, it is a  
23 matter of legislative policy as to whether or how such an action might be  
extended to Indian tribes, tribal officials or employees. Like the federal

1 government, tribes may only be sued where there has been a valid waiver of  
2 sovereign immunity, either through Congressional action or tribal consent.  
3 Any waiver of sovereign immunity cannot be implied but must be  
4 unequivocally expressed. *United States v. Testan*, 424 U.S. 392, 399 (1976).  
5 Tribes may waive their sovereign immunity, but such waivers must be  
6 “expressed unequivocally” and cannot be implied. *Santa Clara Pueblo*,  
7 *supra*, 436 U.S. at 58. (citations omitted).  
8

9 For these reasons Plaintiffs’ claims fail and the Complaint must be  
10 dismissed.

11 **2. Community Officials and Community employees are**  
12 **immune from suit and there has been no waiver of**  
13 **sovereign immunity.**

14 It is also well-settled that tribal officials who are acting within their  
15 official capacity and scope of their authority are immune from suit. *Oregon*,  
16 *supra*, 657 F.2d at 1013 n. 8 (holding that tribal officials “when acting in their  
17 official capacity and within the scope of authority” are shielded from lawsuits  
18 by sovereign immunity); *see also Davis v. Littell*, 398 F.2d 83, 84-85 (9th Cir.  
19 1968). Sovereign immunity extends to the actions of individual tribal  
20 government officials operating within the scope of their authority because  
21 “the sovereign can only act through agents.” *Larson v. Domestic and Foreign*  
22 *Commerce Corp.*, 337 U.S. 682 (1949). A suit against tribal officers in their  
23

1 official capacities is, in essence, a suit against the tribe, and such suits are  
2 therefore barred by tribal sovereign immunity. *Lineen v. Gila River Indian*  
3 *Community*, 276 F.3d 489, 492 (9th Cir. 2002). Plaintiff's cannot circumvent  
4 tribal immunity through pleading devices, and cannot circumvent tribal  
5 immunity by naming an officer of the tribe rather than the sovereign entity.  
6 *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008)  
7 (citations omitted). Tribal immunity protects tribal employees acting in their  
8 official capacity and within the scope of their authority. *Id.* *Cook* brought  
9 suit against the Avi Casino Enterprise, Inc. and several employees of the Avi  
10 Casino seeking compensatory and punitive damages for negligence and dram  
11 shop liability under Arizona's liquor liability statute and Fort Mojave tribal  
12 law. *Id.* at 721. The court dismissed the matter holding that the Avi Casino  
13 and the individual employees were protected by tribal sovereign immunity.  
14 *Id.* at 727. Likewise in this case, the Gila River Indian Community has not  
15 waived its sovereign immunity and the Community and Community  
16 employees are protected by tribal sovereign immunity when acting in their  
17 official capacity and within the scope of their authority.  
18  
19  
20

21 For these reasons Plaintiff's claims fail and the Complaint must be  
22 dismissed.  
23



1 cites authorizes suit or provides a basis for this Court to exercise jurisdiction  
2 over an Indian tribe, tribal officials and tribal employees in a tribal matter  
3 essentially governed by tribal law. Plaintiff's claim of wrongful termination is  
4 a tribal employment matter that falls within the tribe's role of self-governance  
5 and not subject to interference from other sovereigns. The Community and  
6 Community officials and employees are immune from suit as there has been  
7 no waiver or abrogation of sovereign immunity.  
8

9 In a case containing a similar complaint and allegations this court, per  
10 Judge Bolton, dismissed the complaint concluding that the federal courts do  
11 not have subject matter jurisdiction over such cases. *Valencia Avery v. Gila*  
12 *River Indian Comty., et al.*, No. CV-12-02192-PHX-SRB, Docs. 10 and 11.  
13 See Exhibits 4 and 5. The alleged violations under the Fifth and Fourteenth  
14 Amendments to the United States Constitution, the Arizona common law of  
15 employment, the Indian Civil Rights Act, the Indian Tort Claim procedure, the  
16 Indian Self-Determination Act of 1975 and the American Indian Torts  
17 Liability Act of 1998 as alleged by Plaintiff Sears are almost identical to those  
18 alleged by Plaintiff Avery in No. CV-12-02192-PHX-SRB.  
19  
20

21 WHEREFORE Defendant Gila River Indian Community prays that this  
22 Court dismiss this matter for lack of subject matter jurisdiction, dismiss this  
23

1 matter under the doctrine of sovereign immunity, and for such other relief as  
2 the Court deems proper.

3 RESPECTFULLY SUBMITTED this 22nd day of February, 2013.  
4

5 s/Rebecca A. Hall  
6 Linus Everling  
7 Thomas L. Murphy  
8 Rebecca A. Hall  
9 *Attorneys for Defendants*

10 **CERTIFICATE OF SERVICE**

11 I hereby certify that on February 22, 2013, I electronically transmitted the  
12 foregoing document to the Clerk's Office of the United States District Court for  
13 the District of Arizona using the CM/EMF system for filing and mailed a copy  
14 via first class United States Postal Service to Plaintiff:  
15

16 Kristan Sears  
17 89 N Swanson Place  
18 Casa Grande, Arizona 85193

19 s/Rebecca A. Hall  
20  
21  
22  
23