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MAR 06 2013	
CLERK U S DISTRICT COURT DISTRICT OF ARIZONA	
BY _____	P DEPUTY

1 Kristan Sears
 2 89 N. Swanson PL.
 3 Casa Grande, AZ. 85193
 4

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

8 Kristan L. Sears

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

9 PLAINTIFF, PRO SE.

10

11 v

MOTION

12

RESPONSE TO DISMISS

13 Gila River Indian Community

14 Greg Mendoza (Governor)

15 William Rhodes (former governor)

16 Pam Johnson (Community Manager)

17 Randy Tracy (Director DRS)

18 Ron Lopez (Deputy Director DRS)

19 Sydney McKinney (Director Human Resources)

20 Debbie Mercado (Employee Relations)

21

22 **DEFENDANTS**

23

24

25

1 Now comes before this court the Plaintiff Kristan L. Sears, to respond to the
2 defendants Motion of Dismissal that was filed in this court on the 22nd day of
3 February 2013.

4
5 The Defendants claim for Dismissal is based on two **(2)** points:

6 **(1) The court lacks subject matter jurisdiction**

7 **(2) The claims are barred by the doctrine of tribal sovereign immunity**

8
9 It is the Plaintiff's contention that this court does in fact have
10 **jurisdiction** over this subject matter, and that **sovereign immunity** is barred
11 by **Congress** to be used as a way to prevent this lawsuit.

12
13 Attached, the courts will find two (2) Bills entitled: **(1) "American Indian**
14 **Equal Justice Act"** and **(2) "American Indian Tort Liability Insurance Act."**

15 Both of these bills were read in twice and referred to the committee on
16 Indian Affairs. On **July 14, 1998**, the United States Congress **(both the Senate**
17 **and the House of Representatives)** enacted these bills. Copies of these bills
18 were provided to the Gila River Indian Community's General Counsel on
19 **February 1, 2013**, as well as to this court as part of the Plaintiff's motion.

20
21 When **Congress enacted Bill (S1691)** in February 27th, 1998, it made it clear as
22 to the **purpose** of this bill, which states **"The purpose of this act is to**
23 **assist in ensuring Due Process and Legal Rights throughout the United States**
24 **and to strengthen the Rules of Law by making Indian Tribal Governments**
25 **subject to Judicial Review with respect to certain Civil matters."**

1 Congress goes on to state, "Congress finds that

2
3 (1) a universal principle of simple justice and accountable government
4 requires that all persons be afforded legal remedies for violation of their
5 legal rights;

6
7 (2) the fifth amendment of the Constitution builds upon that principle by
8 guaranteeing that ...no person shall be deprived of Life, Liberty, or property
9 without Due Process of Law;

10
11 (3) the Supreme Court has affirmed that Congress has a clear and undoubted
12 Constitutional Authority to define, limit, or waive the Immunity of Indian
13 tribes; and

14
15 (4) it is necessary to address the issue referred to in paragraph (3) of
16 this page in order to :

17 A- secure the rights provided under the Constitution for all persons and

18 B- uphold the principle that NO government should be above the Law.

19
20 **Indian Tribes as Defendants**

21
22 Provisions to parallel the provisions that are popularly known as "The Tucker
23 Act" Section 1362 of title 28, United States Code, as amended by section 3,
24 is further amended by adding at the end the following:
25

1 (c) (1) the DISTRICT COURTS of the United States shall have original
2 JURISDICTION in any Civil Actions or Claims against an INDIAN Tribe, with
3 respect to which matters in controversy arises under the Constitution, Laws,
4 or treaties of the United States.

5
6 (E) To the extent necessary to enforce this section, the TRIBAL IMMUNITY (as
7 that term is defined in section 2 of the American Indian Equal Justice Act)
8 of the Indian tribe (as that term is defined in such section 2) involved IS
9 WAIVED.

10
11 **LIABILITY OF INDIAN TRIBES**

12
13 An Indian tribe shall be LIABLE, relating to TORT Claims, in the same manner
14 and to the same extent, as a private individual or corporation under like
15 circumstances.

16
17 Therefore, by Congress enacting "The American Indian Equal Justice Act,"
18 Congress also used their Constitutional Authority to waive Gila River Indian
19 Community's ability to claim Sovereign Immunity as a barr from the Tribe and
20 its employees from being sued by the Plaintiff, if the Community's agents
21 actions were in violation of the Plaintiff's Constitutional Rights.

22
23 When the Community's Agents failed to provide the Plaintiff with the
24 opportunity to rebut any of the alleged accusations that was lodged against
25 her before she was terminated from their position, then the agents violated

1 the Plaintiff's Procedural Due Process, as was guaranteed by the 5th and 14th
2 amendments, and also as set down in The Gila River Indian Community Employee
3 Policy and Procedure Reference Manual.

4
5 Under the "American Indian Tort Liability Insurance Act (S 2302), which was
6 enacted by Congress, was read twice in Congress, and enacted on July 14th,
7 1998, it states that: "Tribal Immunity may not be asserted by Insurer as a
8 reason for denying a claim for damages resulting from tort liability of an
9 Indian tribe."

10
11 It goes on to state: "Jurisdiction of District Courts; notwithstanding any
12 other provision of law, the district courts shall have jurisdiction over any
13 action concerning the tort liability of an Indian tribe that is covered under
14 Insurance that meets the requirements of subsection (D), and a case to
15 recover damages through insurer that provides coverage under subsection (D)
16 may be brought WITHOUT REGARD TO WHETHER REMEDIES UNDER OTHER APPLICABLE
17 TRIBAL LAWS HAVE BEEN EXHAUSTED.

18
19 **CHAPTER 171 A (USC 28)**

20 **SEC. 2692. LIABILITY OF INDIAN TRIBES**

21
22 **(A) Subject to the limitations under subsection (C), an Indian tribe**
23 **(including a tribal organization) shall be liable for actions of the**
24 **employees of that Indian tribe (or tribal organization), relating to tort**
25 **claims, in the same manner and to the same extent as a private individual or**

1 **corporation under like circumstances."**

2
3 Because the defendants named in this lawsuit are acting on behalf of the Gila
4 River Indian Community, then the Community as a whole are in fact liable for
5 their employee's actions and Sovereign Immunity cannot be used to barr this
6 suit, as is stated in these bills that were enacted by Congress. Therefore,
7 the motion for dismissal should not be granted by this court based on the
8 fact that the Defendants have failed to provide a solid foundation for their
9 motion.

10
11 Because the "American Indian Equal Justice Act" and the American Indians Tort
12 Liability Act both affirm that this court does in fact have jurisdiction over
13 this lawsuit, then the Defendants have failed to support their claim for lack
14 of jurisdiction by this court.

15
16 It has been the Defendants continuous contention that the bills stated above
17 was not enacted or was not in existence; however, it is the Plaintiff's
18 contention that they do exist and to support her claim she has provided at
19 least (3) Indian Tribes that have established **"TORTS CLAIM ACTS."**

20
21 **(1) Oklahoma Tribal Gaming Act:**

22 SCOPE: "This act governs all tort claims arising out of incidents occurring
23 at a (tribal gaming enterprise) gaming facility that patrons assert pursuant
24 to the compact entered pursuant to tribe resolution and the "State-Tribal
25 gaming Act,"

1 "Act" means the tribe Tort Claim Act

2 "Claim" or "Tort claim" means a claim recognized at law as a private or civil
3 wrong or injury, that is independent of contract, that involves a violation
4 of duty imposed by general law, and that results in loss to a person or their
5 property as the proximate result of an act or omission of an employee of the
6 tribe or other individual acting for the tribe, except an independent
7 contractor, when that person is acting within the scope of the duties of that
8 person."

9
10 **(2) "Choctaw Torts Claim Act"**

11 "For the purpose of this title, the employee shall not be considered acting
12 within the course and scope of his employment with the tribe, if the
13 employee's conduct constituted fraud, malice, libel, slander, defamation, or
14 any criminal offense other than traffic violations; provided, however, that
15 this list shall not be considered exhaustive of the situations that may
16 constitute actions not within the scope of employment."

17
18 **(3) Confederated Tribes of The Umatilla Indian Reservation Tort Claim Code:**

19 "Subject to the limitations set forth in this code, the Confederated Tribes
20 is subject to action or suit, for its torts and those of its officers,
21 employees and agents acting within the scope of their employment or duties
22 whether arising out of government or enterprise functions. For purposes of
23 this Code, a tort is an error or omission constituting a breach of a legal
24 duty that is imposed by law, other than a duty arising from contract, the
25 breach of which results in injury to a person or damage to property for which

1 the law provides for civil rights of actions for damages or for protective
2 remedy.”

3
4 The sole purpose of these Indian tribes enacting these actions was to protect
5 their Sovereign Immunity and to comply with the actions that Congress had
6 taken in 1998. Because these tribes enacted these torts acts, they put in
7 place a way to protect all parties concerned, when it came to the wrongful
8 acts of their agents in reference to protecting civil and constitutional
9 rights of any person that has any dealing with Indian Tribes, by providing
10 them with a way to remedy any complaints that the person has against an
11 Indian tribe.

12 **CONCLUSION**

13
14 The Gila River Department of Rehabilitation and Supervision is an
15 organization that is part of the Gila River Indian Community. This
16 organization falls under the governance of the Gila River Indian Community; a
17 Sovereign Nation that is federally recognized. Therefore, all persons
18 employed in the various departments and organizations are essentially acting
19 as “Agents” for the Gila River Indian Community.

20
21 Because the defendants were acting as the Community’s agents and under the
22 “Color of Law,” as they have admitted in their sworn affidavit, then they are
23 subject to suit under this statute for deprivation of Ms. Sears’
24 Constitutional (Due Process) Rights, and are not entitled to immunity from
25 suit.

1 The issue of Sovereign Immunity for the defendants (Agents for the Community)
2 has been settled in the Gila River Indian Appeals Courts. In **Maria Jessum**
3 **verses Gila River Indian Community (CV-90-021WE)** in which the judges state:
4 "Absolute Immunity from award of damages is a defense which is available only
5 to officials serving in a Legislative Position, a Judicial Post, or as
6 Prosecutors."

7
8 "Therefore, in accordance to the above statement, the defendants in this case
9 are not entitled to absolute immunity based on the fact that they are not
10 serving in a Legislative, judicial, or prosecutor's positions."

11
12 **Confederated Salish & Kootenai Tribe (1996)** held that Tribal Officers and
13 employees can be sued in their individual capacity for money damages for ICRA
14 (Indian Civil Rights Acts) violations.

15
16 **Section 16 of the IRA (Indian Reorganization Act) 25 USC 476 defines**
17 "Business Organization of a Sovereign Nation or Indian Tribes" as follows:
18 "The governmental entity itself or an instrument of the government, a
19 federally chartered corporation or a corporation, partnership or other entity
20 or agency created by tribal or state law" disputes involving Indian Tribes
21 and or tribal entities (eg. Department of Rehabilitation and Supervision,
22 Department of Human Recourses, and the Law Office) cannot be adjudicated by
23 state courts, such disputes fall under the purview of Tribal Courts or
24 Federal Courts.

1 Because "Sovereign Immunity does not shield federal defendants from a claim
2 for injunctive relief or to the extent they are sued in their individual
3 capacities for violating a plaintiff's Constitutional Rights (**Dewald verses**
4 **United States Secretary of State (2010)**). The plaintiff can seek prospective,
5 or future, relief by asking the court to direct the future behavior of the
6 official."

7
8 Like states, tribes cannot clothe their officers with immunity to protect
9 them from the supreme law of the land. The landmark case of "**Ex Parte Young**
10 allows Federal Courts to enjoin the enforcement of unconstitutional state (or
11 federal) statues on the theory that " immunity does not extend to a person
12 who acts for the state, but who acts unconstitutionally, because the state is
13 powerless to authorize the person to act in violation of the Constitution."

14 This recognized as applying to Indian tribal officials in (**Puyallup Tribe**
15 **verses Washington Department of Game, and has been expressly cited in San**
16 **Clara Pueblo verses Martinez**), as well as elsewhere.

17
18 **In Burlington Northern Railroad Co. verses Blackfeet Tribe**, it states:
19 Sovereign Immunity does not extend to officials acting pursuant to an
20 allegedly unconstitutional statute.... Tribal sovereign immunity does not bar
21 suit for prospective relief against tribal officers allegedly acting in
22 violation of Federal Law.

23
24 "At one time Native American tribes were regarded as independent sovereign
25 nations on a par with the United States. Over the time, this status has

1 eroded as a result of U.S. Judicial decisions, and the tribes are considered
2 as a Domestic Dependent Nation with limited sovereignty.”

3
4 In the Gila River Indian Community **Constitution and Bylaws** under the heading
5 of **"ADMINISTRATION"**.....

6
7 **1.101 Powers and Duties of Governor** ... It states:

8
9 “ In addition to the powers and duties of the Governor set forth in the
10 Constitution and Bylaws of the Gila River Indian Community (1960), subject
11 to the direction and control of the Community Council the Governor shall
12 exercise the duties and responsibilities outlined below :

13
14 (A) The Governor shall have administrative directions over:

15 1 All personnel appointed or retained by the Community Council to
16 include but not limited to consultants, members of commissions,
17 boards, and special committees.

18
19 2 All Law enforcement services, personnel, agencies, offices, and
20 departments that maintain law and order on the community.

21
22 (C) The Governor shall be responsible for ensuring that all department
23 directors adhere to the Community Employee Reference Guide.

1 (G) The Governor may delegate to the Department Directors, any of his or her
2 administrative duties specified by this chapter for a reasonable period of
3 time. Delegations shall state in writing, the purpose, duties delegated, and
4 length of time for the delegation, however such delegation shall not relieve
5 the Governor of responsibility conveyed to the Governor by the Constitution
6 and Bylaws of the Gila River Indian Community (1960), Community Laws,
7 Ordinances, or Federal Laws.”

8
9 **CHAPTER 3 GILA RIVER RULES OF CIVIL PROCEDURE**

10
11 **1.302 In all civil cases the court shall apply the constitution, laws and**
12 **ordinances of the community, except as they may be in conflict with the**
13 **United States Constitution or applicable acts of Congress or applicable**
14 **regulations of the Department of the Interior.**

15
16 **FEDERAL LAWS AND SUPREME COURT RULINGS**

17
18 **INDIAN CIVIL RIGHTS ACT of 1968 (25 USC 1302) Sub-section 1302-8**
19 Tribal Government will provide equal protection to any person (member and
20 non-member) within their jurisdiction, and will not deprive any person of
21 Life, Liberty, or Property without DUE PROCESS of LAW.

22
23 **14th AMENDMENT (EQUAL PROTECTION CLAUSE)** of the United States Constitution
24 provides that NO STATE SHALL DENY TO ANY PERSON WITHIN ITS JURISDICTION THE
25 EQUAL PROTECTION OF THE LAW.

1 **5th AMENDMENT (DUE PROCESS)** Procedural Due Process is based on the concept of
2 fundamental fairness, nor be DEPRIVED of LIFE, LIBERTY, or PROPERTY, WITHOUT
3 DUE PROCESS OF LAW.
4

5 **INDIAN TORT CLAIM PROCEDURE (Chapter 171-A) SECTION 2691 - 2693**

6 The term employee of an Indian tribe includes: an officer or employee of an
7 Indian tribe (including an officer or employee of a tribal organization); and
8 any person acting on behalf of an Indian tribe in an official capacity,
9 temporarily or permanently, whether with or without compensation (other than
10 an employee of the Federal Government or the government of the State or
11 political sub-division thereof who is acting within the scope of the
12 employment of that individual).
13

14 An Indian Tribe (including a tribal organization) shall be liable for the
15 actions of the employees of that Indian Tribe (or organization), relating to
16 torts claims, in the same manner and same extent, as a private individual or
17 corporation under like circumstances, but shall not be liable for interest
18 before judgment or punitive damages.
19

20 **2693 EXCEPTIONS; WAIVER**

21 With respect to and Indian Tribe, to the extent necessary to carry out this
22 chapter, the tribal immunity of that Indian tribe is waived.
23
24
25

1 **INDIAN TRIBES AS DEFENDANTS IN TORTS DISPUTES**

2
3 **Section 1362 of title 28, United States Code**

4 Subject to the provision of Chapter 171A, the district court shall have
5 jurisdiction of civil actions in claims against an Indian tribe for money
6 damages, accruing on or after the date of enactment of this sub-section for
7 injury or loss of property, or death caused by negligent or wrongful act or
8 omission of an Indian tribe (including a tribal organization) under
9 circumstances in which the Indian tribe, if a private individual or
10 corporation would be liable to claimant in accordance with the law of the
11 State where the act or omission occurred.

12
13 **Kiowa Tribe of Oklahoma verses Manufacturing Technologies, Inc., 523 US. 1998**

14
15 Congress recognized the increasing interaction between tribal governments,
16 tribal corporations, or individual members of the Indian tribes with
17 individuals who are not members of an Indian tribe, on or off Indian
18 reservation (including property held in trust for Indian tribes) in the
19 area of economic development and commerce; the interaction referred to in
20 paragraph (1) may lead to disputes that could include claims by individuals
21 against tribal governments or tribal organizations as a result of injury in
22 tort; as Justice Kennedy stated in his opinion the doctrine of tribal
23 immunity asserted by the governing bodies of Indian tribes to shield the
24 Indian tribe from court actions that are necessary to recover for liability
25 of governing bodies of tribal organizations of Indian tribes, can " harm

1 those who are unaware that they are dealing with a tribe, who do not know of
2 tribal immunity, or who have no choice in the matter, as in the case of tort
3 victims" and in order to provide protection for individuals interacting with
4 tribal governments or organizations :

- 5
- 6 (A) Indian tribes should maintain tort liability insurance; and
 - 7 (B) tribal immunity should not be used as a basis for denial of a claim
8 under that tort liability insurance.
- 9

10 **GILMER verses INTERSTATE / JOHNSON LANE CORP.**

11 "While employees may voluntarily waive their procedural rights to trial under
12 federal employment statues, they may not involuntarily surrender their
13 substantive rights". The courts held that tribal sovereign immunity should
14 not interfere with the protection of U.S. citizens from unwarranted intrusion
15 of their liberty. Forcing non-Native Americans to involuntarily waive their
16 rights under federal statues would certainly be an intrusion on those
17 employees personal liberties and therefore tribal immunity should be denied.

18

19 **OLIPHANT verses SUQUAMISH INDIAN TRIBE (1978)**

20

21 Justice Rehnquist stated "the legislative history behind Indian Civil Rights
22 Act (ICRA) demonstrates that the proposed statues was worded to protect
23 "American Indian," but was passed only after being modified to include "any
24 person." the court given interpreted this language ICRA as meaning that the
25 statues applied to all persons under the jurisdiction of tribal governments,

1 regardless of whether they are Native Americans or not. The Supreme Court, as
2 well as some tribal courts, has held that enacting the ICRA, Congress used
3 its plenary power to expressly waive Native American Sovereign Immunity.

4
5 **NATIONAL FARMERS UNION Ins. Co. verses CROW TRIBE**

6
7 The court clarified that federal courts have jurisdiction under 28 U.S.C.
8 1331 to hear claims that a tribe has exceeded its authority, provided that
9 tribal court remedies are first exhausted.

10
11 **MARIA JESSUM verses GILA RIVER INDIAN COMMUNITY (CV90-021 WE)**

12
13 "According to the Supreme Court, "a suit against a state official in his or
14 her official capacity is not a suit against the official but rather is a suit
15 against the official's office." (Will verses Michigan Dept. of State Police,
16 491 U.S. 58, 71 (1989). It is well settled that an official capacity suit is
17 not a suit against the official personally, rather, it is only another way of
18 pleading an action against a government entity of which an officer is an
19 agent." "If a tribal officer is sued in his individual or personal capacity,
20 official immunity applies and can protect the official from liability."

21
22 1- "Generally stated, absolute immunity from an award of damages is a defense
23 which is available only to officials serving in a legislative position, a
24 judicial post, or as a prosecutor. By allowing the suit in this case to
25 proceed against the individuals in the context of a motion to dismiss, we

1 interpret prior decisions in this case to be based on the legal principle
2 that only particular government officials are entitled to absolute immunity
3 from suit which is appropriately asserted in a motion to dismiss. Denying the
4 defendants' motion to dismiss and letting the suit proceed "against the
5 individuals" reflects the correct decision that absolute immunity does not
6 apply to Johnson and Lett in this case."

7
8 Therefore, in accordance to what was said above, the defendant's in this case
9 are not entitled to absolute immunity based on the fact that they are not
10 serving in a legislative, judicial, or prosecutor positions.

11
12 2- "Qualified Immunity is applicable only to suits for damages against public
13 officials in their individual capacity, and has no application to suits
14 against them in their official capacities or to suits for injunctive relief.
15 (Confederated Salish & Kootenai Tribes Ct. App 1996) (holding that tribal
16 officers and employees can be sued in their individual capacity for money
17 damages for ICRA violations but may assert official immunity as a defense)."

18
19 "The United States Supreme Court has clearly stated that qualified immunity
20 protects officials where their conduct does not "VIOLATE CLEARLY ESTABLISHED
21 STATUTORY or CONSTITUTIONAL RIGHTS of which a reasonable person would have
22 known. (Harlow verses Fitzgerald, 457 U.S. 800,818
23 (1982). In order to successfully assert qualified immunity, the official has
24 the burden of showing she was acting within the scope of her discretionary
25 authority. The official must demonstrate that the actions at issue were (1)
taken pursuant to the performance of her duties, an (2) within the scope of

1 her authority. To be "clearly established" the right's contours must be
2 sufficiently clear that a reasonable person would understand that his or her
3 actions violate that right."

4
5 **PRECEDENT CASE FOR COMPLAINT**

6
7 **CLEVELAND BOARD of EDUCATION versus LOUDER MILL, 470 U.S. 532**

8
9 **LAWS APPLIED**

10
11 **14th Amendment to the United States Constitution**

12 **Gila River Indian Community Employee Policy and Procedure Reference Guide**

13
14 1985, The United States Supreme Court held that: certain public-sector
15 employees can have a property interest in their employment, per
16 Constitutional DUE PROCESS. (Board of Regents verses Roth), this property
17 right entails a right to "SOME KIND OF HEARING" before being TERMINATED A
18 right to oral or written notice of charges against them, an explanation of
19 the employer's evidence, and an opportunity to present their side of the
20 story. Thus, the pre-termination hearing should be an initial check against
21 mistaken decisions -- not a full evidentiary hearing, but essentially a
22 determination of whether there are reasonable grounds to believe that the
23 charges against the employee are true and support the proposed actions. In
24 this case the respondents alleged that they had no chance to respond, the
25 District Court erred in dismissing for failure to state claim.

1 As a result of the case, public sector employers are required to provide a
2 Loudermill Hearing and/or a Loudermill letter before terminating an employee.

3
4 The Supreme Court has ruled that after a party has exhausts tribal remedies,
5 federal courts have jurisdiction under 28 U.S.C. 1331 to determine whether a
6 tribe has been divested of authority over the matter in issue. Because non-
7 members generally argue that a tribal court has no jurisdiction over them,
8 the only parties who may have difficulty establishing federal question
9 jurisdiction are tribal members themselves. For that reason, the Hoopa Valley
10 Tribal Council and the Saginaw Chippewa Tribal Council have endorsed the
11 following provision:

12
13 "Any case in the highest court of an Indian tribe may be reviewed at the
14 discretion of the Court of Appeals for the circuit court in which the Indian
15 court is located, by writ of certiorari granted upon petition of any party to
16 the case after rendition of final judgment, where a claim or defense arises
17 under the Constitution, laws, treaties of the United States; provided,
18 however, that applicable tribal customs shall be given due consideration."

19
20 "DUE PROCESS is the principle that the government must respect ALL of a
21 person's rights, instead of just some of those legal rights, when the
22 government deprives a person of LIFE, LIBERTY, or PROPERTY."

23
24 The 14th Amendment to the United States Constitution reads: "No State shall
25 deprive any person of life, liberty, or property without due process of law."

1 The DUE PROCESS clause applies to "legal persons", (that is corporate
2 personhood) as well as to individuals."

3
4 Moreover, PROCEDURAL DUE PROCESS is essentially based on the concept of
5 "fundamental fairness." as construed by the courts, it includes an
6 individual's right to be adequately notified of charges or proceedings, and
7 the opportunity to be heard at these proceedings. It goes on to state that
8 Due Process has also been construed to generally protect the individual so
9 that statues, regulation and enforcement actions must ensure that no one is
10 deprived of " life, liberty, or property" without a fair opportunity to
11 affect the judgment or result. This protection extends to all government
12 proceedings that can result in an individual's deprivation, whether civil or
13 criminal in nature. (Quoted references are from the United States
14 Constitution, section on Due Process with regard to Constitutional Rights.)

15
16 The Gila River Indian Community, The Department Of Rehabilitation and
17 Supervision, and The Department of Human Resources are assuming the role of a
18 "corporate personhood" when they hire individuals and place them in positions
19 of responsibility which involves areas of hiring and firing. They then become
20 liable when the decisions and actions of those employees deprive others of
21 their Constitutional Rights as are defined in "The Indian Civil Rights Act of
22 1968, 1301 #1, and 1302, #8. It is also my contention that my rights of Due
23 Process were violated by these entities when they took the following actions:

1 1- at the time of my termination, I was summarily dismissed and escorted from
2 the premises without ever having been given an opportunity to present my side
3 of the story involving the alleged incidents. The investigation which should
4 have taken place was flawed in that only one side of the issue was reviewed
5 and proper interviews and collections of "evidence" of wrong doing, was not
6 done, or at least was not presented at the termination hearing, (Cleveland
7 Board of Education verses Loudermill.

8
9 2- The Department of Human Resources and the Department of Rehabilitation and
10 Supervision both violated my right to Due Process when they failed to provide
11 all of the "evidence" (that was collected during the investigation they
12 conducted) to me at the time of my termination.

13
14 The United States Supreme Court opinion in CLEVELAND BOARD of EDUCATION
15 verses LOUDERMILL (470 U.S. 532) 1985 "that tenured public employees
16 "plainly" had a property interest in continued employment. Furthermore, the
17 scope of this property interest was not determined by the procedures provided
18 for its deprivation: The Due Process Clause provides that the substantive
19 rights to life, liberty, and property cannot be deprived except pursuant to
20 constitutionally adequate procedures; since the categories of substance and
21 procedure are distinct "property" cannot be defined by procedures provided
22 for its deprivation." (Pp. 538 - 541 part 2 of court's decision)

23
24 As was stated by me on numerous occasions that when the Gila River Indian
25 Community's agents summarily terminated me from my position, they deprived me

1 of my property interest (wages) without adequately giving me the opportunity
2 to first defend myself against the alleged complaints that were lodged
3 against me. By doing so deprived me of my Constitutional Rights as set forth
4 in The Due Process Clause. In part 3 of the court's opinion they reiterated
5 that the essential requirements of Due Process are simple, notify me that a
6 complaint has been filed, and give me the opportunity to respond to the
7 complaint before termination. The courts found that employees who have such
8 constitutionally protected property interest in their employment are entitled
9 to "some kind of a hearing" before being terminated.

10
11 Because the agents for the community took it up them to not provide me with
12 some form of pre-termination hearing it is evident from a balancing of the
13 competing interest is at stake. In many cases today, the only thing a person
14 is entitled to before being terminated is to have an oral or written notice
15 of all charges against them, an explanation of the community's evidence, and
16 an opportunity to respond to the allegations and present their side of the
17 story. Because I was not given the opportunity to respond to the allegations
18 at the time of my termination, once again I was deprived of my Due Process
19 Rights.

20
21 Moreover, THE INDIAN CIVIL RIGHTS ACTS prohibits tribal governments from
22 infringing on the civil rights of persons over which they have jurisdiction.
23 Among the rights protected by the statute is the right to be secure from the
24 denial of "liberty or property without due process of law." Under this
25 language, terminating my jobs and then using then claim of immunity as the

1 community's legal service did is considered as a denial of liberty without
2 due process.

3
4 "Although ICRA is generally thought as a statute providing certain rights for
5 Native American, it also is applicable to a person that is non - Native
6 American on tribal land."

7
8 " As it has been stated in the previous paragraph that when ICRA was original
9 proposed that it was intended to protect Native American but was passed only
10 after being modified after it included "any person". thus the courts now
11 interpret this language as meaning that the statute applies to all persons
12 under the jurisdiction of tribal governments, regardless of whether they are
13 Native American or not."

14
15 Because the Gila River Indian Community "RULES OF CIVIL PROCEDURE" states
16 that " The courts of the Community shall have jurisdiction over any civil
17 matter in which one of the parties is a resident of the Reservation or does
18 business with in the Reservation or which arises from an event which has
19 occurred within the Reservation. The courts shall have jurisdiction of all
20 suits between members and non-members which are brought before the Courts
21 with the consent of both parties, and cases brought under the Indian Child
22 Welfare Act of 1978."

23
24 They then assumed the responsibility of the Community's actions of their
25 Agents and are therefore liable for any actions that the Department Of

1 Rehabilitation and Supervision, the Department of Human Resources, and the
2 Law Office for depriving me of my Due Process Rights for almost 4 years that
3 this has been pending.
4

5 Because the Gila River Indian Community also states that under "APPLICABLE
6 LAW" that in all civil cases they would apply the Constitution, laws, and
7 ordinances of the Community, except as they may be in conflict with the
8 Unites States Constitution or applicable Acts of Congress or applicable
9 regulations of the Department of the Interior. They also state that if the
10 matter is not covered by the laws, ordinances, or traditional customs and
11 usages of the community or by applicable federal laws or regulations, the
12 courts shall be guided by the laws of the State of Arizona.
13

14 It is apparent to all that the Gila River Indian Community has tried to (in
15 one way or another) to protect the community from any Civil Rights violations
16 by its agents but has failed to complete its endeavor to do so. The
17 Communities agents chose to ignore all of the laws, safe guards, and policies
18 that are in place, therefore placing the community in a position of having to
19 defend themselves against this action and the actions that are presently in
20 the courts now. The defendants knew that the direction they were going in was
21 wrong, and that it would bring consequences' that could be devastating to the
22 community.
23
24

25 1- " The U.S. Supreme Court has ruled that after a party has exhausted tribal
court remedies, federal courts have jurisdiction under (28 USC 1331) to

1 determine whether a tribe has been divested of authority over the matter in
2 issue (see National Farmers Union Ins. Co. verses Crow Tribe)."

3
4 Ms. Sears did in fact exhaust all of her tribal remedies, due to the fact
5 that the Tribal Court failed to render a decision in her initial case.
6 Therefore, the only next step to take was to appeal it to the Federal
7 District Courts. Regardless, S.2302 - American Indian Tort Liability
8 Insurance Act of 1998, which was enacted on July 14, 1998 states under Sec 2
9 subsection (f) JURISDICTION OF DISTRICT COURTS - Notwithstanding any other
10 provision of law, the district courts shall have jurisdiction over any action
11 concerning the tort liability of an Indian tribe that is covered under
12 insurance that meets the requirements of subsection (d), and a case to
13 recover damages through an insurer that provided coverage under subsection
14 (d) may be brought without regard to whether remedies under otherwise
15 applicable tribal law have been exhausted.

16
17 Therefore, the issue has been settled by the courts as well as tribal Courts
18 as to whether or not this court has jurisdiction over this matter. To answer
19 this issue even further, the Hoopa Valley Tribal Council and the Saginaw
20 Chippewa Tribal Council endorsed this decision by stating that: "Any case in
21 the highest court of an Indian tribe may be reviewed at the discretion of the
22 Court of Appeals for the circuit in which the Indian court is located. Where
23 a claim or defense arises under Constitution, laws or treaties of the United
24 States; provided however, that applicable tribal custom or tradition shall be
25 given due consideration."

1 Because the State and Local courts does not have jurisdiction over the day to
2 day activities of the Gila River Indian Community, and because they are a
3 "Domestic Dependent Nation", and any suits against an Indian tribe must be
4 handled through Federal Courts as would a suit against the United States then
5 this court does have jurisdiction over this matter.

6
7 Therefore, the request for dismissal from the defendants should be denied
8 based on the grounds that this court does have jurisdiction over this matter
9 as stated above.

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DEFENDANTS AFFIDAVITS

The Plaintiff contends that the Defendants Affidavits are in error when they state that

They “ **Did not personally participate in the termination against the plaintiff.**”

Because the Gila River Indian Community has in place what is commonly called the Use of “ Chain of Command” then all of the Defendants had a part in the termination of Ms. Sears at some point during the termination process.

In 2009 a memorandum from the Governor (William Rhodes) stated that :

“ Recent events have demonstrated that some community employees clearly do not have an understanding of the concept of “ chain of command”. This is especially true within the Department of Rehabilitation and Supervision (DRS). It is imperative that all community employees follow their chain of command when addressing any and all work related matters.”

(1) Immediate Supervisor

(2) Subsequent supervisor(s) within your upward command chain when applicable (such as Lieutenant’s, Detention Support Service Manager’s, Chief of Security ect.)

(3) Deputy Chief Administrator

(4) Community Manager

(5) Chief of Staff

(6) Lt. Governor

(7) Governor

The Plaintiff contends that because the Governor was specific as to how the chain of

Was to be follow that the same procedures applied to their termination as was also

Stated in the Gila River Indian Community Policy and Procedures Employees

Reference Guide.

The Plaintiff’s position with DRS was that of **Detention Support Service Manager;**

Therefore placing the plaintiff under the direct supervision of the Defendants; therefore

The decision to terminate the Plaintiff (1) had to come from their Immediate Supervisor

That was above them, and had to be passed down the chain of command to The Chief of Security (Ron Lopez) to the Compliance Investigator (James Tucker). (2) upon completion of the investigation by the compliance investigator all of the evidence that was gathered was to be presented to the Plaintiff's immediate Supervisor. Because all the Defendants contend that they did not personally participate in the Termination of the Plaintiff; then it is the Plaintiff inquiry to this court and to the Gila River Indian Community, who was the person or persons that conducted the Investigation and approved the termination of the Plaintiff.

Because Mr. Randy Tracy was the Deputy Chief Administrator at the time of the Plaintiff's termination it was part of his job description (as stated in his affidavit by him) To assure that all procedures are followed before and after the investigation to ensure the Actions being taken were with in the guidelines of policy and procedures of the Gila River Indian Community. It was his responsibility to assign the investigation to the Proper personnel for investigation and review any evidence that was to be used in The termination of the Plaintiff before any action was taken. The Compliance Investigator that was assigned would have report to Mr. Tracy with the information That he had collected; therefore providing Mr. Tracy with direct access and knowledge to The information that was presented to him personally by Mr. James Tucker (Compliance Investigator).

Because Mr. Ron Lopez was Chief of Custody and Security at the time of the Plaintiff's termination; it was his responsibility to assign and assist in the investigation Prior to the Plaintiffs termination. Mr. Lopez stated in his affidavit that part of his Responsibilities " Adjudicating grievances filed by staff and representing the Bureau in

Disciplinary actions and hearings; interpreting organizational rules, regulations and Policies and communicating department directives to ranks through subordinate Supervisory personnel.

It was part of Mr. Lopez job description to investigate any and all disciplinary actions And hearings assigned to him or Mr. Tucker by the Deputy Chief Administrator or The Administrator of the Department of Rehabilitation and Supervision. It was his Responsibility to ensure that the investigation was to be conducted in accordance to the Guidelines that were established in the Gila River Indian Community Employee Policy And Procedure Reference Manual. It was Mr. Lopez responsibility to ensure that all the Evidence was gathered and presented to the Deputy Chief Administrator or the Administrator for final decision of whether to terminate the Plaintiff or not.

Therefore Mr. Lopez was in error when he made the statement in his affidavit that he “ did not personally participate in the termination of the Plaintiff”

Because Ms. Mercado’s essential responsibility was to provide advise and Counseling to the Chief Administrator or the Deputy Chief Administrator, Compliance Investigator in regards to “ Personnel practices, policy and employment laws, Investigate employment matters to ensure tribal, federal and state regulations and/or Policies are adhered to as governed within community policy.”

It was Ms. Mercado’s responsibility to ensure that the termination of the Plaintiff was Conducted and completed within the guidelines of the Gila River Indian Community Employee Policy and Procedure Reference Guide. It was also Ms. Mercado’s Responsibility to ensure that the federal employment and fair labor acts were adhered to By the community and DRS; and that all investigations were conducted in a fair and

Impartial manner. That no disciplinary actions are to take place before all evidence Had been collected, and reviewed before any decision are made as to what Disciplinary actions if any are to be taken by the community or DRS. It was not part of Ms. Mercado's job description to write or discipline any employee That is not under her direct supervision, nor is it within the scope of her job description To tell a department manager to implement disciplinary actions of an employee. It is Within Ms. Mercado's scope of her job to make recommendations only.

Because all of the defendants stated in their sworn affidavits that:

(1) Mr. Tracy essential function was to : administering and directing numerous corrections and related administrating functions;

he failed in the scope of his duties by not providing the Plaintiff her **Procedural Due**

Process by not providing them with a fair and impartial investigation; and by not giving them the opportunity to view and dispute the claims against them as is described in the Gila River Indian Community Employee Reference Guide.

(2) Mr. Lopez essential function was to : adjudicating grievances filed by staff and representing the Bureau in disciplinary actions and hearings; interpreting organizational rules, regulations and policies and communicating Department directives to ranks through subordinate supervisory personnel.

Mr. Lopez failed to adhere to the scope of his duty when he failed to conduct and make Sure that the policies and procedures were followed during the investigation of the Plaintiffs alleged wrong doing at the time of their termination. It was his responsibility as He stated to do so. Because he failed to follow the Communitys' policy and procedures Then he violated the Plaintiff's **Procedural Due Process Rights**.

(3) Ms. Mercado essential function was to :act as liaison between department managers and community employees, provide advice and counsel to managers and

supervisors regarding personnel practices, policy and employment law; investigate employment matters to ensure tribal, federal and state regulations and/or policies are adhered to as governed within Community Policy.

Ms. Mercado failed to adhere to the scope of her duties when she failed to ensure that
The defendants adhered to what the Gila River Policy and Procedures stated in the
Employee policy and procedure reference guide. She failed to make sure that all Federal
And states laws were adhered to as well. Therefore violating the Plaintiffs Procedural
Due Process Rights

Because the Defendants were acting as Agents for the Community and they were acting
Outside of the scope of their duties then the Community is responsible for the Defendants
Action.

supervisors regarding personnel practices, policy and employment law; investigate employment matters to ensure tribal, federal and state regulations and/or policies are adhered to as governed within Community Policy.

Ms. Mercado failed to adhere to the scope of her duties when she failed to ensure that
The defendants adhered to what the Gila River Policy and Procedures stated in the
Employee policy and procedure reference guide. She failed to make sure that all Federal
And states laws were adhered to as well. Therefore violating the Plaintiffs Procedural
Due Process Rights

Because the Defendants were acting as Agents for the Community and they were acting
Outside of the scope of their duties then the Community is responsible for the Defendants
Action.

Respectfully Submitted on 6th March, 2013



KRISTAN SEARS

CERTIFICATE OF SERVICE

I HERBY CERTIFY THAT ON MARCH 6TH, 2013 THE FORGOING DOCUMENT WAS HAND DELIVERED TO THE CLERK'S OFFICE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA FOR FILING, AND A COPY WAS MAILED TO THE LAW OFFICE IN SACATON ARIZONA.

EXHIBITS

GILA RIVER INDIAN COMMUNITY

Executive Office of the Governor & Lieutenant Governor

William R. Rhodes
Governor



Joseph Manuel
Lieutenant Governor

Memorandum

TO: All DRS Staff
FROM: *WR Rhodes 5-4-09*
William R. Rhodes, Governor
DATE: May 1, 2009
SUBJ: CHAIN OF COMMAND

Recent events have demonstrated that some community employees clearly do not have an understanding of the concept of "chain of command." This is especially true within the Department of Rehabilitation and Supervision (DRS). It is imperative that all community employees follow their chain of command when addressing any and all work related matters.

Chain of Command for DRS is as follows:

Immediate Supervisor
Subsequent supervisor(s) within your upward command chain when applicable
(Such as Lieutenant's, Detention Support Services Manager's, Chief of Security etc.)
Deputy Chief Administrator
Chief Administrator
Community Manager
Chief of Staff
Lt. Governor
Governor

You must surface all work related concerns through this above stated command chain and/or through Human Resources via the official grievance process.

Staff members must give the department and executive leadership every opportunity to resolve employment related matters before proceeding to any other forum. Until every administrative remedy is exhausted, all work related matters must remain exclusively within this above stated command chain.

It has been suggested that community members have the inherent right to address employment related issues with their individual council representatives in regards to having them help seek resolution on their behalf. This is an inaccurate perception.

Any employment related matter submitted to or brought before any community, sub-committee, commission or panel for review to include but not limited to: the Law Enforcement Commission, Government and Management Standing Committee, Legislative Standing Committee and Health and Social Standing Committee must be approved by the Governor or by his or her designee before submission.

Without the Governor's, express written permission, any document(s) submitted to these committees, sub-committees and/or commissions regarding work related matters will be considered a breach of chain of command and will result in progressive disciplinary action unto and including termination.

If you have any questions, please contact Randy Tracy, Chief Administrator at (520) 562-7070.

Cc: Joseph Manuel, Lt. Governor
Greg Mendoza, Chief of Staff
Sydney McKinney, Human Resources Director
Community Manager (3)

is necessary to insure a fair appeal. Upon written request of either party the court shall allow oral argument of a duration to be specified by the presiding judge.

- E. After hearing the appeal the appellate court shall issue a ruling on its findings and may:
1. Affirm the judgement of the lower court;
 2. Order the case returned to the lower court for a new trial;
 3. Reduce the sentence imposed by the lower court;
 4. Rule that the decision of the lower court be reversed and the case dismissed.
- F. The appellate court shall deliver its opinion in writing to the parties in the case, and the opinion shall be posted in a conspicuous place in the tribal court for a period of thirty (30) days. The court clerk shall keep a permanent record of the appellate court opinions and these opinions shall be available to the members of the Community upon request.

Chapter 3. RULES OF CIVIL PROCEDURE.

1.301 CIVIL JURISDICTION

The courts of the Community shall have jurisdiction over any civil matter in which one of the parties is a resident of the Reservation or does business within the Reservation or which arises from an event which has occurred within the Reservation. The courts shall also have jurisdiction of all suits wherein all parties are members of the Community, all other suits between members and non-members which are brought before the Court with the consent of both parties, and cases brought under the Indian Child Welfare Act of 1978. (P.L. 95-608).

1.302 APPLICABLE LAW

[In all civil cases the court shall apply the constitution, laws and ordinances of the Community, except as they may be in conflict with the United States Constitution or applicable Acts of Congress or applicable regulations of the Department of the Interior.] The court may also apply the traditional customs of the Community if they are not in conflict with the laws and ordinances of the Community. Where any doubt arises as to the customs and usages of the community the court may request the advice of counsellors familiar with those customs and usages. [In deciding any matter that is not covered by the laws, ordinances or traditional customs and usages of the Community, or by applicable federal laws or regulations, the court shall be guided by the laws of the State of Arizona.]

1.303 REPRESENTATION

Any party before the Community Court may represent himself or be represented by an advocate or attorney.

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Bill Text 105th Congress (1997-1998) S.2302.IS

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	Contents Display	

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--------------------------	---	---	---

S.2302 -- American Indian Tort Liability Insurance Act (Introduced in Senate - IS)

S 2302 IS

105th CONGRESS

2d Session

S. 2302

To provide for tort liability insurance for Indian tribes, and for other purposes.

IN THE SENATE OF THE UNITED STATES

July 14, 1998

Mr. GORTON introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

A BILL

To provide for tort liability insurance for Indian tribes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `American Indian Tort Liability Insurance Act'.

SEC. 2. AMERICAN INDIAN TORT LIABILITY INSURANCE.

(a) FINDINGS- Congress finds that--

(1) **Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.**, 523 U.S. **XX** (1998), recognized the increasing interaction between tribal governments, tribal corporations, or individual members of Indian tribes with individuals who are not members of an Indian tribe, on and off Indian reservations (including property held in trust for Indian tribes) in the areas of economic development and commerce;

(2) the interaction referred to in paragraph (1) may lead to disputes that could include claims by individuals against tribal governments or tribal organizations as a result of injury in tort;

(3) as Justice Kennedy stated in his opinion in **Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.**, the doctrine of tribal immunity asserted by the governing bodies of Indian tribes to shield the Indian tribes from court actions that are necessary to recover for the liability of the governing bodies or tribal organizations of Indian tribes, can `harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims'; and

(4) in order to provide protection for individuals interacting with tribal governments or organizations--

(A) Indian tribes should maintain tort liability insurance; and

(B) tribal immunity should not be used as a basis for the denial of a claim under that tort liability insurance.

(b) DEFINITION- In this section:

(1) **INDIAN TRIBE**- The term `Indian tribe' has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

(2) **SECRETARY**- The term `Secretary' means the Secretary of the Interior.

(3) **TRIBAL IMMUNITY**- The term `tribal immunity' means the immunity of an Indian tribe from--

(A) jurisdiction of the courts; and

(B) judicial review of an action of that Indian tribe and other remedies.

(4) **TRIBAL ORGANIZATION**- The term `tribal organization' has the meaning given that term in section 4(f) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(f)).

(5) TRIBAL PRIORITY ALLOCATION- The term 'tribal priority allocation' means an allocation to a tribal priority account of an Indian tribe by the Bureau of Indian Affairs to allow that Indian tribe to establish program priorities and funding levels.

(c) INDIAN TRIBES AS DEFENDANTS IN TORT DISPUTES- Section 1362 of title 28, United States Code, is amended by--

(1) inserting '(a)' before 'The district courts';

(2) inserting '(referred to in this section as an 'Indian tribe')' after 'Interior'; and

(3) adding at the end the following:

'(b) Subject to the provisions of chapter 171A, the district courts shall have jurisdiction of civil actions in claims against an Indian tribe for money damages, accruing on or after the date of enactment of this subsection for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of an Indian tribe (including a tribal organization) under circumstances in which the Indian tribe, if a private individual or corporation would be liable to the claimant in accordance with the law of the State where the act or omission occurred.

'(c) Subject to the provisions of chapter 171A, to the extent necessary to enforce this section, the tribal immunity of the Indian tribe involved is waived.'

(d) TORT LIABILITY INSURANCE-

(1) IN GENERAL-

(A) INSURANCE- Except as provided in paragraph (2), not later than 180 days after the enactment of this Act, the Secretary shall obtain or provide tort liability insurance or equivalent coverage, on the most cost-effective basis, for each Indian tribe that receives a tribal priority allocation.

(B) COVERAGE- The insurance obtained under subparagraph (A) for an Indian tribe shall cover the governing body of the Indian tribe, each tribal organization, of that Indian tribe and each contractor or employer of that Indian tribe, within the scope of that contractor or employer. The coverage shall become effective on the date on which that coverage is obtained.

(2) EXCEPTION- If the Secretary determines that an Indian tribe described in paragraph (1) has obtained liability insurance in an amount and of the type that the Secretary determines to be appropriate (including meeting the requirement of paragraph (4)) by the date specified in paragraph (1), the Secretary shall not be required to provide additional coverage for that Indian tribe.

(3) TRIBAL IMMUNITY MAY NOT BE ASSERTED TO DENY CLAIMS Under the

determines to be appropriate under paragraph (2), tribal immunity may not be asserted by the insurer as a reason for denying a claim for damages resulting from the tort liability of an Indian tribe.

(4) AMOUNT OF COVERAGE- In carrying out this subsection, the Secretary shall ensure that each Indian tribe obtains, or is provided, in accordance with this subsection, a sufficient amount of insurance coverage to cover tort liability of the Indian tribe, under chapter 171A of title 28, United States Code.

(e) FUNDING OF TORT LIABILITY INSURANCE-

(1) INITIAL PAYMENT OF INSURANCE PREMIUMS- For the initial payment of insurance premiums for insurance obtained or provided by the Secretary under subsection (d), the Secretary shall take such action as may be necessary to ensure the payment of premiums by the Indian tribe, including adjusting the amount of the tribal priority allocation made to the Indian tribe to cover the cost of the initial payments.

(2) SUBSEQUENT PAYMENTS-

(A) IN GENERAL- After an initial payment under paragraph (1), and before the Secretary makes a tribal priority allocation for an Indian tribe, the Secretary shall verify that the Indian tribe--

(i) has insurance coverage that meets the requirements of subsection (d); and

(ii) has made such payments for premiums of that insurance as are necessary to provide insurance coverage for the fiscal year for which the tribal priority allocation is to be made.

(B) PAYMENT REQUIRED AS A CONDITION TO RECEIVING TRIBAL PRIORITY ALLOCATION- Notwithstanding any other provision of law, if the Secretary determines under subparagraph (A) that an Indian tribe has not made the payments described in subparagraph (A)(ii), the Secretary shall withhold the tribal priority allocation of that Indian tribe until such time as those payments are made.

(f) JURISDICTION OF DISTRICT COURTS- Notwithstanding any other provision of law, the district courts shall have jurisdiction over any action concerning the tort liability of an Indian tribe that is covered under insurance that meets the requirements of subsection (d), and a case to recover damages through an insurer that provides coverage under subsection (d) may be brought without regard

to whether remedies under otherwise applicable tribal law have been exhausted.

(g) REGULATIONS- To carry out this section, as soon as practicable after the date of enactment of this section, the Secretary shall issue regulations that--

(1) provide for the amount of insurance coverage or equivalent coverage needed to protect an Indian tribe for the liabilities that may be subject to a claim under chapter 171A if title 28, United States Code;

(2) establish a schedule of premiums to be assessed against an Indian tribe that is provided liability insurance under subsection (d); and

(3) establish a means to verify the amount, maintenance, and funding of insurance of Indian tribes that obtain and maintain insurance under subsection (d)(3).

(h) INDIAN TORT CLAIMS PROCEDURE-

(1) IN GENERAL- Part 6 of title 28, United States Code, is amended by inserting after chapter 171 the following:

CHAPTER 171A--INDIAN TORT CLAIMS PROCEDURE

Sec.

2691. Definitions.

2692. Liability of Indian tribes.

2693. Exceptions; waiver.

Sec. 2691. Definitions

In this chapter:

(1) The term 'employee of an Indian tribe' includes--

(A) an officer or employee of an Indian tribe (including an officer or employee of a tribal organization); and

(B) any person acting on behalf of an Indian tribe in an official capacity, temporarily or permanently, whether with or without compensation (other than an employee of the Federal Government or the government of a State or political subdivision thereof who is acting within the scope of the employment of that individual).

(2) The term 'Indian tribe' has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

(3) The term 'tribal immunity' means the immunity of an Indian tribe from--

(A) jurisdiction of the courts; and

(B) judicial review of an action of that Indian tribe and other remedies.

Sec. 2692. Liability of Indian tribes

(a) Subject to the limitations under subsection (c), an Indian tribe (including a tribal organization) shall be liable for the actions of the employees of that Indian tribe (or tribal organization), relating to tort claims, in the same manner and to the

same extent, as a private individual or corporation under like circumstances, but shall not be liable for interest before judgment or for punitive damages.

(b) Subject to the limitations under subsection (c), in any case described in subsection (a) in which a death was caused and the law of the State where the act or omission complained of occurred provides for punitive damages, the Indian tribe shall, in lieu of being liable for punitive damages, be liable for actual or compensatory damages resulting from that death to each person on behalf of whom action was brought.

(c)(1) The liability of an Indian tribe or tribal organization may not exceed--

(A) \$500,000 for each claim made under this chapter; or

(B) in any case in which more than 1 claim arises from the same occurrence for damages for a tortuous act or omission, an aggregate amount equal to \$1,000,000 for those claims.

(2) If the Secretary of the Interior determines that a limitation on the amount of liability of an Indian tribe under subparagraph (A) or (B) is appropriate, the Secretary of the Interior shall submit to Congress proposed legislation to provide for that increase.

Sec. 2693. Exceptions; waiver

(a) The provisions of this chapter and section 1362(b) shall not apply to any case relating to a controversy relating to membership in an Indian tribe.

(b) With respect to an Indian tribe, to the extent necessary to carry out this chapter, the tribal immunity of that Indian tribe is waived.

(2) CLERICAL AMENDMENT- The table of chapters for title 28, United States Code, is amended by inserting after the item relating to chapter 171 the following:

2691.

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Prev Hit	Back	HomePage
Hit List	Best Sections	Help
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Bill Text 105th Congress (1997-1998) S.1691.IS

THIS SEARCH	THIS DOCUMENT	GO TO
Next Hit	Forward	New Bills Search
Prev Hit	Back	HomePage
Hit List	Best Sections	Help
	Contents Display	

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S.1691 -- American Indian Equal Justice Act (Introduced in Senate - IS)

S 1691 IS

105th CONGRESS

2d Session

S. 1691

To provide for Indian legal reform, and for other purposes.

IN THE SENATE OF THE UNITED STATES

February 27, 1998

Mr. GORTON introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

A BILL

To provide for Indian legal reform, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; FINDINGS; PURPOSE.

(a) SHORT TITLE- This Act may be cited as the 'American Indian Equal Justice Act'.

(b) FINDINGS- Congress finds that--

(1) a universal principle of simple justice and accountable government requires that all persons be afforded legal remedies for violations of their legal rights;

(2) the fifth amendment of the Constitution builds upon that principle by guaranteeing that ` . . . no person shall be deprived of life, liberty, or property without due process of law';

(3) sovereign immunity, a legal doctrine that has its origins in feudal England when it was policy that the `King could do no wrong', affronts that principle and is incompatible with the rule of law in democratic society;

(4) for more than a century, the Government of the United States and the States have dramatically scaled back the doctrine of sovereign immunity without impairing their dignity, sovereignty, or ability to conduct valid government policies;

(5) the only remaining governments in the United States that maintain and assert the full scope of immunity from lawsuits are Indian tribal governments;

(6) according to the 1990 decennial census conducted by the Bureau of the Census, nearly half of the individuals residing on Indian reservations are non-Indian;

(7) ~~for the non-Indian individuals referred to in paragraph (6) and the thousands of people of the United States, Indian and non-Indian, who interact with tribal governments everyday, the rights to due process and legal remedy are constantly at risk because of tribal immunity;~~

(8) by providing a complete shield from legal claims, the doctrine of sovereign immunity frustrates justice and provokes social tensions and turmoil inimical to social peace;

(9) the Supreme Court has affirmed that Congress has clear and undoubted constitutional authority to define, limit, or waive the immunity of Indian tribes; and

(10) it is necessary to address the issue referred to in paragraph (9) in order to--

(A) secure the rights provided under the Constitution for all persons; and

(B) uphold the principle that no government should be above the law.

(c) PURPOSE- The purpose of this Act is to assist in ensuring due process and legal rights throughout the United States and to strengthen the rule of law by making Indian tribal governments subject to judicial review with respect to certain civil matters.

SEC. 2. DEFINITIONS.

In this Act:

(1) INDIAN TRIBE- The term `Indian tribe' means any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior.

(2) TRIBAL IMMUNITY- The term `tribal immunity' means the immunity of an Indian tribe from jurisdiction of the courts, judicial review of an action of that Indian tribe, and other remedies.

SEC. 3. COLLECTION OF STATE TAXES.

Section 1362 of title 28, United States Code, is amended--

(1) by inserting `(a)' before `The district courts';

(2) by inserting `(referred to in this section as an `Indian tribe')' after `Interior'; and

(3) by adding at the end the following:

`(b)(1) An Indian tribe, tribal corporation, or member of an Indian tribe, shall collect, and remit to a State, any excise, use, or sales tax imposed by the State on nonmembers of the Indian tribe as a consequence of the purchase of goods or services by the nonmember from the Indian tribe, tribal corporation, or member.

`(2) A State may bring an action in a district court of the United States to enforce the requirements under paragraph (1).

`(3) To the extent necessary to enforce this subsection with respect to an Indian tribe, tribal corporation, or member of an Indian tribe, the tribal immunity of that Indian tribe, tribal corporation, or member is waived.'

SEC. 4. INDIAN TRIBES AS DEFENDANTS.

(a) PROVISIONS TO PARALLEL THE PROVISIONS THAT ARE POPULARLY KNOWN AS THE TUCKER ACT- Section 1362 of title 28, United States Code, as amended by section 3, is further amended by adding at the end the following:

`(c)(1) The district courts of the United States shall have original jurisdiction in any civil action or claim against an Indian tribe, with respect to which the matter in controversy arises under the Constitution, laws, or treaties of the United States.

`(2) The district courts shall have jurisdiction of any civil action or claim against an Indian tribe for liquidated or unliquidated damages for cases not sounding in tort that involve any contract made by the governing body of the Indian tribe or on behalf of an Indian tribe.

`(d) Subject to the provisions of chapter 171A, the district courts shall have jurisdiction of civil actions in claims against an Indian tribe for money damages, accruing on or after the date of enactment of the American Indian Equal Justice Act for injury or loss of property, personal injury, or death caused by the negligent or

wrongful act or omission of an Indian tribe under circumstances in which the Indian tribe, if a private individual or corporation would be liable to the claimant in accordance with the law of the State where the act or omission occurred.

`(e) To the extent necessary to enforce this section, the tribal immunity (as that term is defined in section 2 of the American Indian Equal Justice Act) of the Indian tribe (as that term is defined in such section 2) involved is waived.'

SEC. 5. TORT CLAIMS PROCEDURE.

(a) IN GENERAL- Part 6 of title 28, United States Code, is amended by inserting after chapter 171 the following:

` CHAPTER 171A--INDIAN TORT CLAIMS PROCEDURE

` Sec.

- ` 2691. Definitions.
- ` 2692. Liability of Indian tribes.
- ` 2693. Compromise.
- ` 2694. Exceptions; waiver.

` Sec. 2691. Definitions

` In this chapter:

` (1)(A) Subject to subparagraph (B), the term `employee of an Indian tribe' includes--

` (i) an officer or employee of an Indian tribe; and

` (ii) any person acting on behalf of an Indian tribe in an official capacity, temporarily or permanently, whether with or without compensation (other than an employee of the Federal Government or the government of a State or political subdivision thereof who is acting within the scope of the employment of that individual).

` (B) The term includes an individual who is employed by an Indian tribe to carry out a self-determination contract (as that term is defined in section 4(j) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(j))).

` (2) The term `Indian tribe' means any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior.

` Sec. 2692. Liability of Indian tribes

` (a) An Indian tribe shall be liable, relating to tort claims, in the same manner and to the same extent, as a private individual or corporation under like circumstances, but shall not be liable for interest before judgment or for punitive damages.

` (b) In any case described in subsection (a) in which a death was caused and the law of the State where the act or omission complained of occurred provides for punitive damages, the Indian tribe shall, in lieu of being liable for punitive damages, be liable for actual or compensatory damages resulting from that death to each person on behalf of whom action was brought.

` Sec. 2693. Compromise

` The governing body of an Indian tribe or a designee of that governing body may arbitrate, compromise, or settle any claim cognizable under section 1362(d).

` Sec. 2694. Exceptions; waiver

` (a) The provisions of this chapter and section 1362(d) shall not apply to any case relating to a controversy relating to membership in an Indian tribe.

` (b) With respect to an Indian tribe, to the extent necessary to carry out this chapter, the tribal immunity (as that term is defined in section 2 of the American Indian Equal Justice Act) of that Indian tribe is waived.'

(b) CLERICAL AMENDMENT- The table of chapters for title 28, United States Code, is amended by inserting after the item relating to chapter 171 the following:

2691'.

SEC. 6. INDIAN TRIBES AS DEFENDANTS IN STATE COURTS.

(a) CONSENT TO SUIT IN STATE COURT- Consent is hereby given to institute a civil cause of action against an Indian tribe in a court of general jurisdiction of the State, on a claim arising within the State, including a claim arising on an Indian reservation or Indian country, in any case in which the cause of action--

(1) arises under Federal law or the law of a State; and

(2) relates to--

(A) tort claims; or

(B) claims for cases not sounding in tort that involve any contract made by the governing body of an Indian tribe or on behalf of an Indian tribe.

(b) TORT CLAIMS- In any action brought in a State court for a tort claim against an Indian tribe, that Indian tribe shall be liable to the same extent as a private individual or corporation under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

(c) FEDERAL CONSENT- Notwithstanding the provisions of the Act of August 15, 1953 (67 Stat. 588 et seq., chapter 505), section 1360 of title 28, United States

Code, and sections 401 through 404 of the Civil Rights Act of 1968 (25 U.S.C. 1321 through 1324) and section 406 of such Act (25 U.S.C. 1326) that require the consent of an Indian tribe for a State to assume jurisdiction over matters of civil law, this section constitutes full and complete consent by the United States for a State court to exercise jurisdiction over any claim referred to in subsection (a).

(d) REMOVAL- An action brought under this section--

(1) shall not be removable under section 1441 of title 28, United States Code; and

(2) shall be considered to meet the requirements for an exception under section 1441(a) of title 28, United States Code.

SEC. 7. INDIAN CIVIL RIGHTS.

Title II of the Civil Rights Act of 1968 (commonly known as the 'Indian Civil Rights Act') (25 U.S.C. 1301 et seq.) is amended by adding at the end the following:

SEC. 204. ENFORCEMENT.

The district courts of the United States shall have jurisdiction in any civil rights action alleging a failure to comply with rights secured by the requirements under this title. With respect to an Indian tribe, to the extent necessary to enforce this title, the tribal immunity of that Indian tribe (as that term is defined in section 2 of the American Indian Equal Justice Act) is waived.'

SEC. 8. APPLICABILITY.

This Act and the amendments made under this Act shall apply to cases commenced against an Indian tribe on or after the date of enactment of this Act.

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Prev Hit	Back	HomePage
Hit List	Best Sections	Help
	Contents Display	

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***STATUTES of the CONFEDERATED TRIBES of the UMATILLA INDIAN RESERVATION
As amended through Resolution No. 12-016 (March 12, 2012)***

TORT CLAIMS CODE

**CONFEDERATED TRIBES
OF THE
UMATILLA INDIAN RESERVATION**

**TITLE XXV
CHOCTAW TORTS CLAIM ACT
IMMUNITY OF TRIBE AND TRIBAL EMPLOYEES ACTING
IN THEIR OFFICIAL CAPACITY FROM SUIT;
EXEMPTIONS; LIMITATIONS; WAIVERS**

[Tribe] TORT CLAIMS ACT

Table of Contents

PART I - Title Scope and Definitions.....2

 §1. Short Title..... 2

 §2. Scope 2

 § 3. Definitions..... 2

PART II - Liability in Tort.....3

 § 4. Claims; exclusive remedy 4

 § 5. Obligation of the tribe 4

 § 6. Extent of liability..... 5

 § 7. Exemptions from liability..... 5

 § 8. Apportionment of Award 8

 § 9. Assignment..... 8

PART III - Procedure.....9

 § 10. Tort Claim Procedure 9

 § 12. Notice 10

 § 13. Tort Claim Notice Form 11

 § 14. Arbitration: 11

 § 15 Arbitration Record..... 12

§17. Provisions as cumulative.....14

§18. Severability14

§19. Effective Date15

PART I - Title Scope and Definitions

§1. Short Title

~~This act shall be known and may be cited as the [Tribe] Tort Claims Act.~~

§2. Scope

This Act governs all tort claims arising out of incidents occurring at a [Tribal gaming enterprise] gaming facility that patrons assert pursuant to the Compact entered pursuant to [Tribe] Resolution # ___ and the "State-Tribal Gaming Act," Oklahoma Title 3A, § 261 et seq.

§ 3. Definitions

As used in the [Tribe] Tort Claims Act:

- a) "Act" means the [Tribe] Tort Claims Act.
- * b) "Claim" or "tort claim" means a claim recognized at law as a private or civil wrong or injury, that is independent of contract, that involves a violation of duty imposed by general law, and that results in a loss to a person or their property as the proximate result of an act or omission of an employee of the tribe or other individual acting for the tribe, except an independent contractor, when that person is acting within the scope of the duties of that person.
- c) "Claimant" means the person that asserts a tort claim which is subject to the provisions of this act.
- d) "Compact" means the "State-Tribal Gaming Act," Oklahoma Statutes Title 3A, § 261 et seq..
- e) "Days" means a business day as specified or provided under tribal law.
- * f) "Employee" means an individual employed by the tribe on a full time or part time basis and elected or appointed officers of the