

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

EAGLESUN SYSTEMS PRODUCTS, INC.)	
)	
Plaintiff,)	
)	
v.)	No. 13-CV-438-CVE-PJC
)	
ASSOCIATION OF VILLAGE)	
COUNCIL PRESIDENTS,)	
)	
Defendant.)	

DEFENDANT’S MOTION TO DISMISS AND BRIEF IN SUPPORT

COMES NOW Defendant, Association of Village Council Presidents (“AVCP”), and moves the Court to dismiss Plaintiff’s Complaint [Doc. # 2] pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

BRIEF IN SUPPORT

Defendant, AVCP is a non-profit corporation that provides governmental services to 56 Native Alaskan tribes in the Yukon-Kuskokwim Delta region in Southwest Alaska. The 56 member tribes retain full control over AVCP, as its Board of Directors is comprised of one representative from each of the tribes. Plaintiff is a Tulsa software company that sold software to AVCP for use in the governmental programs and services AVCP provides to its member tribes. Plaintiff alleges that AVCP allowed another software company, Front Range, to access this software and that Front Range infringed Plaintiff’s copyright in creating new software for AVCP. Plaintiff seeks monetary damages and equitable relief arising from alleged claims for misappropriation of trade secrets, copyright infringement against AVCP, and breach of contract. (Complaint [Doc. # 2] at ¶¶ 37-51 and Prayer for Relief.) However, AVCP and its 56 member tribes are federally recognized Indian tribes entitled to sovereign immunity under federal law.

AVCP is also immune from suit as a non-profit organization that provides governmental services and benefits to its member tribes and as a subordinate economic entity, or arm of the tribe, entitled to assert its member tribes' immunity. As tribal immunity deprives this Court of subject matter jurisdiction over Plaintiff's claims, AVCP requests the Court to dismiss this case pursuant to Rule 12(b)(1). AVCP reserves the right to assert any and all other available rights or defenses to Plaintiff's claims pending the Court's ruling on the issue of tribal immunity.

STATEMENT OF FACTS

1. Defendant, AVCP is a non-profit corporation comprised of 56 Native Alaskan tribes of the Yukon-Kuskokwim Delta region in Southwest Alaska. (Declaration of Myron Naneng, President of AVCP, Exhibit "1," at ¶ 4.)

2. AVCP's member tribes are located in small remote villages scattered over an approximately 59,000 square mile area (roughly the size of the state of Oregon). The villages are isolated and there are no roads connecting these villages to each other or the rest of the State. (*Id.* at ¶ 5.)

3. AVCP was originally formed by its member tribes in 1963 as an unincorporated association, primarily to assert the tribes' claims to the lands they had inhabited for many generations. (*Id.* at ¶ 6; *see also* Memorandum from Beatrice E. Shober, Bureau of Indian Affairs ("BIA") district social worker to BIA's Alaska Area Director dated September 27, 1963, Exhibit "2.")

4. In 1966, AVCP filed a claim to tribal lands with the U.S. Bureau of Land Management on behalf of its member Native Alaskan tribes. (*See* Bylaws of AVCP, Inc., dated September 13, 1969, Exhibit "3" (stating that the "corporation shall exercise all rights pertaining to [AVCP's] Alaska Native land claim dated October 19, 1966.)

5. After passage of the Economic Opportunity Act of 1964 (“EOA”), which provided for the creation of community action agencies and programs to assist poor persons in rural areas in obtaining government services, the U.S. Office of Economic Opportunity (“OEO”), charged with implementing the EOA, established what became known as the Rural Alaska Community Action Program (“RurAl Cap”). Pursuant to the EOA’s requirements, the OEO incorporated RurAl Cap as a non-profit corporation under Alaska law. Due to a high poverty level among rural Alaskans, the OEO designated Alaska as a target area in 1966. RurAl Cap then began organizing regional community development corporations to implement the EOA in rural Alaska. DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 338 (2d. Ed. 2002); *see also* 42 U.S.C. §§ 9806-07 (providing that condition of receiving financial assistance under the EOA were to be provided to “community development corporations.”)

6. In 1968, the Alaska Legislature authorized the Alaska Department of Revenue to distribute \$50 million to Native Alaskan tribes from revenue the department anticipated receiving as royalties from oil leases in the state. A.S. 38.30.140. In order to receive these funds, the State required Native Alaskan tribes to incorporate under the Alaska Business Corporation Act and the funds were to be paid to the corporations. A.S. 38.30.170; A.S. 38.30.190. (Copies of these statutes from the Alaska Native Claims State Settlement Act of 1968 (“ANCSSA”) are attached hereto as Exhibit “4.”)

7. Therefore, in order to participate and receive benefits for its member tribes under the EOA and anticipated royalties from the State of Alaska, AVCP was incorporated under Alaska law in 1969 as a “closed corporation representing the Eskimo, Indian, and Aleut people of the area.” As outlined in its original bylaws, AVCP was incorporated as a “union of self-governing villages within the boundaries of the claim, sharing common interests and working for

the common welfare of all.” The original structure set forth in its 1969 Bylaws persists to the present day. (1969 Bylaws, Exh. 3; Bylaws of AVCP, revised October 5, 2005, Exhibit “5;” Naneng, Decl., Exh. 1 at ¶¶ 8, 9.)

8. The Board of Directors of AVCP, which manages the affairs of the non-profit corporation, is comprised of one representative from each of the 56 member tribes. Each village’s tribal government elects its own member for the Board. Elected board members must be a member of the tribe and a tribal government official of the member tribe. (Exh. 5 at Article IV.)

9. AVCP’s corporate mission is to serve its member tribes by providing “social service, human development, and culturally-relevant programs that promote tribal self-determination and self-governance and works to protect tribal culture and traditions.” (Naneng Decl., Exh. 1 at ¶ 10.)

10. To carry out its mission, AVCP administers a wide range of programs traditionally provided by governmental entities to benefit its member tribes. These programs, funded almost exclusively by state and federal grants and allocations, include the following social service programs: Temporary Assistance of Needy Families (“TANF”); Vocational Rehabilitation; Head Start; Tribal Justice; Environmental Compliance; Historic Preservation; Tribal Services; Housing Improvement Program; Energy Assistance; Elder’s Program; Education, Employment and Training; Child Care Assistance Program; Transportation; as well as programs which offer cultural, environmental, and technical assistance to its member tribes. (*Id.* at ¶ 11.)

11. All of the services of AVCP are provided to promote the welfare and preserve and protect the Native Alaskan culture of AVCP’s member tribes. (*Id.* at ¶ 12.)

ARGUMENT AND AUTHORITY

Tribal immunity is a question of subject matter jurisdiction and is properly challenged by a motion to dismiss under Fed. R. Civ. P. 12(b)(1). *Miner Elec, Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007). A Rule 12(b)(1) challenge can take one of two forms: 1) a facial attack as to the sufficiency of the complaint's jurisdictional allegations; or 2) a factual attack in which the movant goes beyond the allegations contained in the complaint and challenges the very facts upon which jurisdiction depends. *Paper, Allied-Indust., Chem. and Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005.)

When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). In such instances, a court's references to evidence outside the pleadings does not convert the motion to a Rule 56 motion.

Pringle v. United States, 208 F.3d 1220, 1222 (10th Cir. 2000). "Whenever it appears by suggestion that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action." Fed. R. Civ. P. 12(h)(3). As the party invoking federal jurisdiction, plaintiff has the burden of proving subject matter jurisdiction as a threshold matter. *Marcus v. Kan. Dep't of Revenue*, 170 F.3d 1305, 1309 (10th Cir. 1999).

Here, Plaintiff alleges in its Complaint that AVCP is not a federally recognized Indian tribe and does not possess sovereign immunity, citing *Runyon v. Ass'n. of Village Council Presidents*, 84 P.3d 437 (Alaska 2004). (Plaintiff's Complaint [Doc. #2] at ¶ 4.) In *Runyon*, the Alaska Supreme Court held, although each of AVCP's member tribes is protected by sovereign immunity, because AVCP was incorporated under Alaska law and any judgment against AVCP would not reach the assets of its member tribes, AVCP was "not entitled to the protection of the villages' sovereign immunity." *Runyon*, 847 P.3d at 440. However, the issue of tribal immunity

from suit “is a matter of federal law and is not subject to diminution by the States.” *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 756 (1998) (citing *Three Affiliated Tribes of Fort Berhold Reservation v. Wold Eng’g*, 476 U.S. 877, 891; *Washington v. Confederated Tribes of Colville Reservation*, 477 U.S. 134, 154 (1980).) As will be shown below, AVCP and its member tribes not only meet the definition of “Indian tribe” under federal statutory and decisional law, but AVCP also qualifies as a tribal organization or corporation and is entitled to sovereign immunity as an arm of the tribe under federal law.

I.

AVCP and its member tribes are federally recognized “Indian tribes” entitled to tribal sovereign immunity.

The U.S. Constitution (Article I, section 8, clause 3, the “Indian Commerce Clause”) grants Congress “plenary and exclusive power over Indian affairs.” *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Where Congress, through enactment of a statute, has deemed a group of Native Americans as a “federally recognized tribe,” the tribe is entitled to sovereign immunity. *Three Affiliated Tribes*, 476 U.S. 877, 890 (1986); *Puyallup Tribe, Inc. v. Dep’t of Game*, 433 U.S. 165, 172 (1977). “The rule that a tribe of Indians under the tutelage of the United States is not subject to suit without the consent of Congress is too well settled to admit of argument.” *Haile v. Saunooke*, 246 F.2d 293, 297 (4th Cir. 1957). In cases involving Native Americans, “federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit.” *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985).)

As was recognized by the Alaska Supreme Court in *Runyon*, each of AVCP’s member tribes “retain those fundamental attributes of sovereignty ... which have not been divested by Congress or by necessary implication of the tribe’s dependent status,” and are “therefore

protected by tribal sovereign immunity.” *Id.* at 439 (citations omitted) (alteration in original). Moreover, AVCP and other regional associations of Native Alaskan tribes recognized in the Alaska Native Claims Settlement Act (“ANCSA”), *see* 43 U.S.C. § 1606(a)(4), are specifically included within the definition of “Indian tribes” in a host of federal statutes. *See e.g.*, 25 U.S.C. § 450b(e) (providing that any “Alaska Native village or regional or village corporation as defined or established pursuant to [ANCSA]” is an “Indian tribe” for the purposes of the Indian Self-Determination and Education Assistance Act); 42 U.S.C. § 619(4)(B)(iv) (providing that AVCP and other Alaska Native regional non-profit corporations are specifically recognized as Indian tribes for the purpose of receiving benefits under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996); 25 U.S.C. § 458aaa(b) (Tribal Self-Governance Program); 25 U.S.C. §§ 1903(3) and (8) (Indian Child Welfare Act); 25 U.S.C. § 3802(4) (Indian Dams Safety Act); 25 U.S.C. § 4001(2) (American Indian Trust Fund Management Reform Act); 38 U.S.C. § 3115(c) (Training and Rehabilitation for Veterans with Service-Connected Disabilities). Because Congress has specifically and explicitly recognized AVCP and its member tribes as Indian tribes in federal statutes, they are entitled to tribal sovereign immunity as a matter of law.

II.

AVCP is also entitled to sovereign immunity as a tribal entity created by its member tribes to carry out and further governmental objectives of the tribes.

Even if this Court were to determine that AVCP is not entitled to tribal immunity as a federally recognized Indian tribe, this and other courts have also found associations created by tribes to “further governmental objectives possess attributes of tribal sovereignty and cannot be sued absent an immunity waiver.” *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1135 (N.D. Okla. 2001) (citing *Kiowa Tribe of Oklahoma*, 523 U.S. at 757–58

(1998), *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).) Such protection has also been extended to entities incorporated by federally recognized tribes, including associations of multiple tribes, under state law. *See e.g., Ransom v. St. Regis Mohawk Educ. & Comty. Fund, Inc.*, 635 N.Y.S.2d 116 (1995) (holding a non-profit corporation incorporated by tribe under District of Columbia Non-profit Corporation Act was entitled to tribe's sovereign immunity); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (9th Cir. 1998) (holding a non-profit corporation incorporated by two federally-recognized tribes under state law qualified for the Indian tribe exemption under Title VII); *J.L. Ward Assoc.'s, Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 542 F.Supp.2d 1163 (D.S.D. 2012) (holding that the association of 16 federally-recognized tribes from four states incorporated as a non-profit corporation under South Dakota law "to communicate and participate with the Indian Health Service and other federal agencies on health matters" was entitled to sovereign immunity.)

Although in the context of tribal immunity under Title VII, The Tenth Circuit has also held that associations of federally recognized tribes are entitled to assert tribal immunity of its member tribes. *See Dille v. Council of Energy Resource Tribes*, 801 F.2d 373 (10th Cir. 1986). In *Dille*, the Court held that a business entity comprised of 39 Indian tribes was entitled to the Indian tribe exemption under Title VII. In *Dille*, similar to AVCP, the defendant entity's members were limited to tribal entities, its board of directors was made up of designated representatives from each tribe and, therefore, the member tribes had exclusive control of the company's operations. *Id.* at 374. The Court further found it important that the purpose of the organization was to advance the welfare and economic conditions of its member tribes and was engaged in the type of activity Congress sought to encourage by exempting Indian tribes from the requirements of Title VII. *Id.* Thus, the Court held that the organization was entitled to the tribal

immunity of its member tribes:

Congress certainly could not have intended to withdraw the exemption anytime a group of Indian tribes coalesce for a common purpose related to economic development. Because the council is entirely comprised of the member tribes and the decisions of the council are made by the designated representatives of those tribes, CERT falls directly within the scope of the Indian Tribe exemption that Congress included in Title VII.

Id. at 375-76. It is of note that the EEOC has also recognized that AVCP is entitled to tribal sovereign immunity. (Dismissal and Notice of Rights dated June 13, 2013, Charge No. 551-2013-01110, Exhibit “5,” (providing EEOC was closing file on basis of “Tribal Sovereignty”).) Therefore, AVCP is also entitled to sovereign immunity as a non-profit corporation carrying out governmental objectives on behalf of its member tribes.

III.

AVCP is also entitled to sovereign immunity as a subordinate economic entity or arm of its member tribes.

The Tenth Circuit has adopted a test to determine if a tribe’s economic entity qualifies as subordinate economic entity entitled to share the tribe’s immunity. *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010). The factors which the Court deemed important to this inquiry included:

(1) the method of creation of the economic entit[y]; (2) [its] purpose; (3) [its] structure, ownership, and management, including the amount of control the tribe has over the entit[y]; (4) the tribe’s intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entit[y]...and (6) whether the purposes of tribal sovereign immunity are served by granting [the entity] immunity.

Id. (citations omitted). Important in the holding in *Breakthrough*, was the Court’s express rejection of the “real party in interest” test utilized by the Alaska Supreme Court in *Runyon*, and that court’s treatment of the financial relationship between the tribe and the entity and the question of whether a judgment against the entity would reach the tribe’s monetary assets as a

threshold determination. The *Breakthrough* Court held that, although the financial relationship was a factor to be considered as part of the test, it was not the “dispositive inquiry.” *Id.* at 1187. Applying the *Breakthrough* factors, AVCP is also entitled to assert its member tribes sovereign immunity as a subordinate economic entity.

As to the first factor, AVCP was originally created as an unincorporated association to further the interests of its member tribes and to assert its claims to the member tribe’s native lands. Further, based upon the fact that the Board of Directors of AVCP is comprised of representatives of each of the 56 member tribes, it is clear that AVCP was created to be a subordinate entity closely related to its member tribes. Although AVCP later became incorporated as a non-profit corporation under Alaska law, a factor which the Tenth Circuit Court of Appeals recently held would normally vitiate a tribal subordinate entity’s claim to sovereign immunity, *see Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144 (10th Cir. 2012), it is AVCP’s position that its non-profit status, the nature of the services it provides, and the factors that led to it being incorporated under Alaska law distinguish AVCP from the types of for-profit business entities which that Court held should not be entitled to tribal immunity.

In *Somerlott*, the Court examined an assertion of tribal immunity by a for-profit company that contracted with the Department of Defense to provide staffing for a chiropractic service at an Army hospital in Fort Sill. Although the company was a wholly-owned subsidiary of the Cherokee Nation, the company provided services to mostly non-Indians, was off reservation, and was incorporated as a limited liability corporation under Oklahoma law. The Court found that the “subordinate economic entity test is inapplicable to entities which are legally distinct from their members and which voluntarily subject themselves to the authority of another sovereign.” *Id.* at 1159-50. However, in the case of AVCP, it was originally organized as an unincorporated

association of its member tribes. Moreover, AVCP did not later become incorporated in order to shield the member tribes' assets from the liabilities of the association; rather, AVCP incorporated under Alaska law because it was required to do so in order to receive government benefits under the EOA and anticipated royalty payments from the State of Alaska on behalf of its member tribes. (*See* Statement of Facts, *supra*, at ¶¶ 5-7; Naneng Decl., Exh. 1 at ¶ 7.) AVCP is also a non-profit corporation that provides traditionally governmental services to its member tribes, which is certainly distinguishable from the type of for-profit business that was at issue in *Somerlott*. As such, it is AVCP's position that its method of creation favors finding it is entitled to share in its member tribes' sovereign immunity as an arm of these tribes.

As to the second and sixth factors, the traditional purpose for recognition of tribal sovereign immunity is "to promote the federal policies of tribal self determination, economic development, and cultural autonomy." *See e.g., Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985). The express purpose and mission of AVCP is to serve its member tribes by providing "social service, human development, and culturally-relevant programs that promote tribal self-determination and self-governance and works to protect tribal culture and traditions." (Naneng Decl., Exh. 1 at ¶¶ 10-12.) By providing a wide variety of social and tribal services to its member tribes in pursuit of this mission, AVCP clearly furthers the traditional purposes of tribal sovereign immunity.

Regarding the third factor, the Board of Directors of AVCP, which manages the affairs of the non-profit corporation, is comprised of one representative from each of the 56 member tribes. (Exh. 5 at Article IV.) Therefore, the member tribes control the affairs of AVCP. As to the fourth factor, it is clear from AVCP's corporate documents that it was formed as a "union of self-governing villages within the boundaries of the claim, sharing common interests and working for

the common welfare of all.” (Exh. 3.) Further, there is no clearly expressed language in the formation documents that indicates the member tribes intended for AVCP not to share their sovereign immunity. (*See* Exhs. 3, 5.)

Applying the fifth factor, AVCP is incorporated under Alaska law and any liability of AVCP would not technically reach the member tribe’s monetary assets. However, because AVCP provides governmental services with funds provided by federal and state grants allocated for distribution to its member tribes, any liability imposed upon AVCP would come directly from funds allocated for the purpose of administering and distributing benefits to the member tribes. The member tribes rely upon the benefits and services provided by AVCP through its programs. Any reduction in funds that may result from an adverse verdict would greatly impact the benefits and services intended for AVCP’s member tribes.

In conclusion, as a non-profit corporation and association of federally recognized tribes created to further governmental purposes and to provide traditionally governmental services to its member tribes, it is AVCP’s position that it is also entitled to assert the tribal immunity of its 56 member tribes.

IV.

As AVCP is entitled to tribal immunity, this Court lacks subject matter jurisdiction over Plaintiff’s claims against AVCP.

In its Complaint [Doc. # 2], Plaintiff has alleged claims for monetary damages and equitable relief for alleged breach of contract, misappropriation of trade secrets, and copyright infringement against AVCP. (*Id.* at ¶¶ 37-51 and Prayer for Relief.) However, Indian tribes and their subordinate entities are immune from suits seeking monetary damages or equitable relief for such claims. *See e.g., Multimedia Games, Inc.*, 214 F. Supp. 2d at 1137 (granting summary judgment on plaintiff software company’s claims for monetary damages and equitable relief for

alleged copyright infringement, breach of contract and misappropriation of trade secrets against subordinate economic entity of Indian tribe on the basis of tribal immunity); *Nahno-Lopez v. Houser*, 627 F. Supp. 2d 1269, 1285 (W.D. Okla. 2009) (dismissing plaintiff software company's claims of copyright infringement, breach of contract and misappropriation of trade secrets against subordinate economic entity of Indian tribe claims for monetary damages and equitable relief against Indian tribe and tribal officials acting in their official capacities under tribal immunity), *aff'd*, 625 F.3d 1279 (10th Cir. 2010); *see also Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 760 (1998) (holding Indian tribes "enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities....").

V.

ESP has not alleged waiver and AVCP has not waived its sovereign immunity.

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), the U.S. Supreme Court held that, although an Indian tribe could waive its sovereign immunity, such waiver must be "unequivocally expressed by the tribe." Further, waiver of sovereign immunity "does not arise through silence, implication, or innuendo." *Multimedia Games, Inc.*, 214 F. Supp. 2d at 1140 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 & n. 14 (1982); *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1263 (10th Cir. 1998)). A waiver of immunity must be "beyond doubt." *Id.* (citing *Florida Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1126 (11th Cir. 1999)). Waivers of immunity are to be strictly construed in favor of the tribe. *Ramey Const. Co., Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982) (citations omitted).

Here, Plaintiff has not alleged in its Complaint that AVCP has waived its sovereign immunity. As stated above, due to the circumstances that led to AVCP being incorporated under

Alaska law, it is AVCP's position that the fact of AVCP's incorporation cannot be construed as any intent by AVCP or its member tribes to waive AVCP's tribal immunity. *See Tuveson v. Florida Governor's Council on Indian Affairs*, 734 F.2d 730, 734 (11th Cir. 1984) (finding agency's incorporation as a non-profit corporation was not a sufficiently explicit waiver of sovereign immunity). Moreover, there is no language contained in AVCP's corporate formation documents that would indicate that AVCP or its member tribes intended to waive its sovereign immunity. (*See e.g.*, Exhs. 3, 5.) AVCP anticipates Plaintiff will assert that provisions contained in a 2013 amendment to a licensing and services agreement (*see* Amendment to Licensing Agreement and Services Agreement, Exh. 1 to Plaintiff's Complaint [Doc. #2]), indicate that AVCP has waived any claim of sovereign immunity and consented to a suit by Plaintiff in this Court for equitable relief. However, it is AVCP's position that these provisions do not represent a clear and unequivocal consent to this action in the Northern District of Oklahoma. Further, in entering into the agreement, AVCP did not intend to waive sovereign immunity. (Naneng Decl., Exh. 1 at ¶ 13.) As Plaintiff has the burden of proving subject matter jurisdiction as a threshold matter, *Marcus*, 170 F.3d at 1309, and has not yet alleged any claims of waiver, AVCP will reserve further arguments regarding this issue in response to any specific arguments regarding waiver asserted by Plaintiff.

CONCLUSION

In conclusion, AVCP is a federally recognized Indian Tribe under federal law and, as such, is entitled to sovereign immunity. AVCP is also entitled to assert its member tribes' sovereign immunity as a non-profit corporation and association that provides governmental services to its member tribes or as a subordinate entity of its sovereign member tribes. Further, Plaintiff has not alleged, nor has there been any clear and unequivocal abrogation of sovereign

immunity by Congress or AVCP for any of the claims alleged by Plaintiff in this matter. Therefore, Plaintiff's claims should be dismissed for lack of subject matter jurisdiction.

WHEREFORE, premises considered, Defendant, AVCP, requests the Court to dismiss Plaintiff's claims against it for lack of subject matter jurisdiction.

All of which is respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2013, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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