

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO**

**ROB CORABI,**

**Plaintiff,**

**v.**

**No. 1:14-CV-01081 KK/LAM**

**ENPIC, INC.,**

**Defendant.**

**MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN  
THE ALTERNATIVE, FOR FAILURE TO EXHAUST TRIBAL COURT REMEDIES**

**COMES NOW**, Eight Northern Indian Pueblos Council, Inc. (hereinafter "ENIPC"), through its attorneys, CHESTNUT LAW OFFICES, P.A. (Joe M. Tenorio and Peter C. Chestnut) and hereby moves to dismiss the Complaint filed on November 27, 2014 (hereinafter "Complaint") pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure ("FED. R. CIV. P.") and LR-CV 7 of the Local Civil Rules of the United States District Court for the District of New Mexico ("D.N.M. LR-Civ."). ENIPC hereby moves for an order dismissing Plaintiff's lawsuit on the following grounds:

1. Plaintiff's Complaint fails to allege any facts either showing diversity of citizenship between the parties or showing that ENIPC violated any federal law.
2. Plaintiff's Complaint is barred by the doctrine of tribal sovereign immunity.
3. Plaintiff's Complaint alleges claims that arise on tribal land which vests exclusive jurisdiction in Ohkay Owingeh Tribal Court.
4. Plaintiff's Complaint is subject to the Tribal Exhaustion Rule.

5. This motion is based on the pleadings and papers on file in this action, and the attached brief in support of ENIPC's Motion to Dismiss for Lack of Subject Matter Jurisdiction or, in the Alternative, For Failure to Exhaust Tribal Court Remedies.

Wherefore, Defendant ENIPC requests that the Complaint be dismissed for lack of subject matter jurisdiction, or, in the alternative, for failure to exhaust tribal court remedies, and for any other relief the Court deems appropriate.

Respectfully submitted,


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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on December 30, 2014, I filed the foregoing **Motion to Dismiss for Lack of Subject Matter Jurisdiction or, in the Alternative, for Failure to Exhaust Tribal Court Remedies** electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the notice of Electronic Filing.

  
Joe M. Tenorio

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO**

**ROB CORABI,**

**Plaintiff,**

**v.**

**No. 1:14-CV-01081 KK/LAM**

**ENPIC, INC.,**

**Defendant.**

**BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF  
SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, FOR FAILURE  
TO EXHAUST TRIBAL COURT REMEDIES**

COMES NOW, Eight Northern Indian Pueblos Council, Inc. (hereinafter "ENIPC"), through its attorneys, CHESTNUT LAW OFFICES, P.A. (Joe M. Tenorio and Peter C. Chestnut) and hereby files this Brief in Support of ENIPC's Motion to Dismiss For Lack of Subject Matter Jurisdiction or, in the Alternative, For Failure to Exhaust Tribal Court Remedies. This brief is filed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure ("FED. R. CIV. P.") and LR-CV 7 of the Local Civil Rules of the United States District Court for the District of New Mexico ("D.N.M. LR-Civ.").

**1. MATERIAL FACTS**

- 1.1. ENIPC is a tribal consortium owned and controlled by the Eight Northern Indian Pueblos of New Mexico and includes the federally recognized Pueblos of Taos, Picuris, Ohkay Owingeh (formerly known as San Juan Pueblo), Santa Clara, San Ildefonso, Pojoaque, Nambe, and Tesuque. *Affidavit of Governor Phillip A. Perez*, ¶4, marked as Attachment A. (referred to herein as "*Perez Aff.*").
- 1.2. In 1991, ENIPC was incorporated as a non-profit corporation under New Mexico's Nonprofit Corporation Act. *Perez Aff.* ¶ 5.

- 1.3. ENIPC is located within the exterior boundaries of the Ohkay Owingeh, a federally recognized Indian Tribe, and maintains its principal place of business on Ohkay Owingeh's lands. Ohkay Owingeh is located about 25 miles north of Santa Fe, New Mexico. (Perez Aff. ¶ )
- 1.4. Plaintiff alleges that he was employed with ENIPC as the Executive Director, and that such employment was subject to an Employment Agreement FY 2012-053. *Complaint* ¶¶6-7
- 1.5. The office of the Executive Director for ENIPC is located at Ohkay Owingeh. *Perez, Aff.* ¶ 7.
- 1.6. The Employment Agreement FY 2012-053 was formed at Ohkay Owingeh. *Perez Aff.* ¶ 19.
- 1.7. ENIPC terminated the Employment Agreement FY 2012-053 immediately following an ENIPC Board of Governors meeting held at Ohkay Owingeh. *Perez Aff.* ¶ 21.
- 1.8. ENIPC's cause of action arose on ENIPC's premises located within the exterior boundaries of Ohkay Owingeh. *Perez Aff.* ¶ 21.
- 1.9. ENIPC informed Mr. Corabi of his termination at ENIPC's principal place of business in Ohkay Owingeh. *Perez Aff.* ¶ 22
- 1.10. The Complaint does not include any allegation of any specific act or conduct by ENIPC occurring outside Ohkay Owingeh lands. *Complaint, passim.*
- 1.11. ENIPC is a tribal consortium and enjoys the protections of the doctrine of tribal sovereign immunity. *Dille v. Council of Energy Resources Tribes*, 610 F.Supp. 157, 158 (D. Colo. 1985), *aff'd*, 801 F.2d 373 (10th Cir. 1986); *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort, et. al.*, 629 F.3d 1173 (10th Cir. 2010); *J.L. Ward*

*Associates, Inc. v. Great Plains Tribal Chairmen's Health Board*, 842 F.Supp.2d 1163 (D. SD 2012).

1.12. As a matter of federal law, ENIPC is subject to suit only where Congress has authorized the suit or ENIPC has waived its sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

1.13. Plaintiff's Complaint neither alleges congressional abrogation of sovereign immunity nor waiver of that sovereign immunity by ENIPC. *Complaint, passim*.

1.14. ENIPC has not waived its sovereign immunity in this jurisdiction, and specifically preserved its sovereign immunity in the Employment Agreement. *Perez Aff.* ¶ 23.

## **2. INTRODUCTION**

ENIPC moves for an order dismissing Plaintiff's Complaint on the grounds that Plaintiff's Complaint fails to establish either federal question or diversity jurisdiction. ENIPC also moves for an order dismissing Plaintiff's claims based on the doctrine of tribal sovereign immunity. Further, Plaintiff's claims arise from an alleged breach of contract and wrongful termination that occurred on the lands of Ohkay Owingeh, a federally recognized Indian Tribe. Because Plaintiff's claims arise on Ohkay Owingeh lands and are framed against ENIPC, a tribal consortium, Ohkay Owingeh Tribal Court has exclusive jurisdiction over Plaintiff's claims. Finally, even if this Court finds subject matter jurisdiction over Plaintiff's claims, Plaintiff's Complaint remains subject to dismissal to allow the Plaintiff to pursue his claims in Ohkay Owingeh Tribal Court.

## **3. ARGUMENT**

### **3.1. PLAINTIFF'S COMPLAINT LACKS SUBJECT MATTER JURISDICTION**

Federal courts are courts of limited jurisdiction. *Nicodemus v. Union Pacific Corp.*, 318 F.3d 1231, 1235 (10th Cir. 2003), citing, *Morris v. City of Hobart*, 39 F.3d 1105, 1111 (10th Cir. 1994). There are only two statutory bases for federal subject-matter jurisdiction: diversity jurisdiction under 28 U.S.C. § 1332 and federal-question jurisdiction under 28 U.S.C. § 1331. *Id.* A plaintiff has the burden to state allegations establishing that this Court has subject matter jurisdiction in the complaint. *Karnes v. Boeing Co.*, 335 F.3d 1189, 1193 (10th Cir. 2003) (citing *United States ex. rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999)). As shown below, the face of Plaintiff's Complaint does not establish either one of the two bases for subject matter jurisdiction.

### **3.1.1. Plaintiff's Complaint Does Not Allege Complete Diversity**

Plaintiff's Complaint does not allege facts that establish diversity jurisdiction. Federal courts "examine the face of the complaint to determine whether a party has adequately presented facts sufficient to establish diversity jurisdiction. The party asserting jurisdiction must allege facts essential to show jurisdiction." *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993), citing, *Penteco Corp. Ltd. Partnership-1985A v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991). In examining the face of the complaint, Plaintiff's Complaint must allege that the plaintiff and defendant are citizens of different states and the amount in controversy is greater than \$75,000. 28 U.S.C. § 1332(a).

While Plaintiff's Complaint alleges that the amount in controversy exceeds \$75,000, Plaintiff's Complaint alleges that both he and ENIPC are New Mexico citizens. *Compl.*, ¶¶1, 2, and 5. Plaintiff's complaint provides that Plaintiff is a New Mexico resident and that ENIPC is a corporation formed under New Mexico law. *Id.* A corporation is treated as a citizen of the state where it is incorporated and the state where it has its principal place of business. 28 U.S.C. §

1332(c). Lacking complete diversity of citizenship, this Court does not have diversity jurisdiction to entertain Plaintiff's Complaint under 28 U.S.C. § 1332. *Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1095-96 (10th Cir. 2003) (citing *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978)) (It has long been the rule that to satisfy the diversity of citizenship requirement of 28 U.S.C. § 1332(a)(1), the plaintiffs and defendants must be completely diverse: No plaintiff can be a citizen of the same state as any defendant).

Alternatively, as a tribal consortium, ENIPC is treated as an "Indian Tribe." *See Dille v. Council of Energy Resources Tribes*, 610 F.Supp. 157, 158 (D. Colo. 1985), *aff'd*, 801 F.2d 373 (10th Cir. 1986). Indian Tribes are not "citizens" for purposes of diversity jurisdiction. *See Gaines*, *supra.*, at 729; *See also, Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 80 n. 1 (2nd Cir. 2001); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974).

### **3.1.2. Plaintiff's Complaint Does Not Allege Federal Claims**

Plaintiff's Complaint fails to establish federal question jurisdiction. Federal question jurisdiction exists where the action arises "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The well-pleaded complaint rule requires that the federal question appear on the face of the plaintiff's properly pleaded complaint. *Garley v. Sandia Corp.*, 236 F.3d 1200, 1207 (10th Cir. 2001). The complaint must identify the statutory or constitutional provision under which the claim arises and allege sufficient facts to show that the case is one arising under federal law. *Martinez v. U.S. Olympic Comm.*, 802 F.2d 1275, 1280 (10th Cir. 1986).

While Plaintiff's Complaint alleges that this Court has subject matter jurisdiction (Compl., ¶3), "[m]ere conclusory allegations of jurisdiction are not enough." *See Spectrum*



*Emergency Care, Inc.*, supra., at 1160; *See also U.S. Olympic Comm.*, supra., at 1280 (merely alleging federal question is insufficient to convert a common law claim into a federal question). Plaintiff's Complaint neither identifies any statutory or constitutional provision under which Plaintiff's claims arise nor alleges sufficient facts to show the case arises under federal law. Instead, Plaintiff's Complaint simply alleges breach of contract and wrongful termination claims, with some factual allegations as to each. *Compl.*, ¶¶11-24. Plaintiff's claims arise from the termination of Plaintiff's employment with ENIPC. Breach of contract and wrongful termination claims are not federal claims. Since the terminating event arose on Ohkay Owingeh lands, these are claims that may be brought in Ohkay Owingeh Tribal Court as more particularly described in Section 3.3 of this Brief.

The rule that the federal question must appear on the face of Plaintiff's Complaint is subject to one exception: Plaintiff's cause of action may allege a state cause of action, provided its resolution turns on a substantial question of federal law. *Nicodemus*, supra., at 1235. Whether a case turns on a substantial question of federal law focuses on whether Congress evidenced an intent to provide a federal forum for a federal cause of action. *Id.*; *See also Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987) (analyzing the "complete preemption" doctrine as an exception to the well-pleaded rule). Plaintiff's Complaint, however, does not allege any federal statute that would completely preempt his common law claims. To date, the courts have only recognized the complete-preemption rule in three narrow federal statutes: the Employee Retirement Income Security Act of 1974 ("ERISA"), codified at 29 U.S.C. § 1001 et seq., the Labor Management Relations Act ("LMRA"), codified at 29 U.S.C. § 185(a), and the National Labor Relations Act ("NLRA"), codified at 29 U.S.C. § 159(a). *See e.g., Felix v. Lucent Technologies, Inc.*, 387 F.3d 1146 (10th Cir. 2004). None of those federal statutes are applicable here. Further, as noted



above and at Section 3.3 of this Motion, Plaintiff's Claims arise on Ohkay Owingeh lands. The U.S. Supreme Court has found that claims arising on tribal lands and asserted against an Indian, like ENIPC, vests exclusively in tribal courts. *See Williams v. Lee*, 358 U.S. 217 (1959). Congress has not created a federal cause of action or provided a federal forum for the type of claims alleged in Plaintiff's Complaint. Finally, preemption of state law claims may be preempted by *Williams v. Lee*, but they would not be transformed into claims arising under federal law. *See Lucent Technologies, supra.*, passim. The *Williams v. Lee* preemption is simply a defense to state law claims and leaves up to tribal courts to exclusively adjudicate those claims.

### **3.2. ENIPC IS IMMUNE FROM SUIT**

Where a defendant is protected by sovereign immunity, Plaintiff bears the burden of alleging facts that would establish waiver or abrogation of immunity. *See e.g., Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 84 (2<sup>nd</sup> Cir. 2001). Plaintiff carries the burden of alleging that either Congress expressed an unequivocal abrogation of ENIPC's sovereign immunity or that ENIPC expressed a clear and unequivocal waiver of its sovereign immunity. *See e.g., Welch v. United States*, 409 F.3d 646, 651 (4<sup>th</sup> Cir. 2005). If Plaintiff fails to meet this burden, then the entire Complaint must be dismissed. *Medina v. United States*, 259 F.3d 220, 223 (4<sup>th</sup> Cir. 2001).

Tribal sovereign immunity extends to agencies, officers and agents of a tribal government, such as ENIPC. *See Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10<sup>th</sup> Cir. 2010); *See also E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1303 (10<sup>th</sup> Cir. 2001). As a tribal consortium, ENIPC is treated as a tribe for purposes of sovereignty and tribal sovereign immunity protections. *See Dille v. Council of Energy Resources Tribes*, 610 F.Supp. 157, 158 (D. Colo. 1985), *aff'd*, 801 F.2d 373 (10<sup>th</sup> Cir.

1986). To remove any doubt as to whether entities like ENIPC enjoy tribal sovereign immunity, the Tenth Circuit adopted a 6-factor test. *See Chukchansi Gold*, supra., at 1185. Since this Court is bound by Tenth Circuit's decisions on federal law issues, we apply the 6 factor test to confirm that ENIPC enjoys in the sovereign immunity protections of the Eight Northern Pueblos that make up its membership. For the reasons provided below, ENIPC qualifies as an arm of the tribes under the 6 factor test:

**3.2.1 ENIPC qualifies as a Subordinate Economic Entity Pursuant to the *Chukchansi Gold* test.**

The Tenth Circuit issued a six-factor test in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10<sup>th</sup> Cir. 2010) to determine whether an unincorporated entity created by a federally recognized tribe and its casino have a close relationship to the tribe to share in its immunity. To measure the closeness of the relationship between the tribe and the tribal entity, the Tenth Circuit employed a six-factor test. The 6 factor test is applied where the availability of sovereign immunity is in dispute in large part because tribal entities were created under tribal or state law. *See e.g., Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6<sup>th</sup> Cir. 2009) (recognizing that a multi-factor test, which has now been modified by *Chukchansi Gold*, applies to entities incorporated under tribal or state law); *See also J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen's Health Board*, 842 F.Supp.2d 1163 (D. SD 2012) (applying test to a tribal consortium created under state law).

The 6-factor test provides:

We conclude that the following factors are helpful in informing our inquiry: (1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the

entities...Furthermore, our analysis also is guided by a sixth factor: the policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities.

*Chukchansi Gold*, supra., at 1187-1188 (internal quotes and citations removed).

The Tenth Circuit explained that, for purposes of the first factor, the method of creating a tribal entity weighs in favor of a finding that a tribal entity is entitled to tribal sovereign immunity if it is created under tribal law. *Chukchansi Gold*, supra., at 1192-1193. As noted above, ENIPC was formed under state law. However, failure to meet this one factor does not put an end to the inquiry or otherwise forecloses ENIPC from meeting the other factors. *See e.g., J.L. Ward Associates, Inc.*, supra., at 1176 (agreeing that a tribal entity created by incorporation under South Dakota non-profit act, rather than tribal law, militate against a finding of sovereign immunity, but court ultimately found that the tribal consortium was protected by tribal sovereign immunity).

The Tenth Circuit also explained that its second factor weighs strongly in favor of immunity if the tribal entity is created for the financial benefit of the Tribe and to enable it to engage in various governmental functions. *Chukchansi Gold*, supra., at 1193. Like the tribal entity in *Chukchansi Gold*, ENIPC was created to operate various tribal programs and to manage all assets and revenues of ENIPC on behalf of the Eight Northern Pueblos. *Perez Aff.* ¶ 8. ENIPC acts as a fiscal agent on behalf of the Eight Northern Pueblos in securing and administering such funding, and providing programs on behalf of the Eight Northern Pueblos to the tribal members of each Eight Northern Pueblo. *Perez Aff.* ¶ 8. ENIPC's funds are used to support governmental functions, including programs such as education, health care, community development, child care, and judicial systems. *Perez Aff.* ¶¶ 8-11. Moreover, the purposes of ENIPC are stated in the Third Article of its Articles of Incorporation as follows:

To operate exclusively for benevolent, charitable, civic community welfare, educational, and scientific purposes by developing, establishing, and operating as an independent nonprofit organization to meet the needs of the eight northern New Mexico member Pueblos of Nambe, Pojoaque, Picuris, San Ildefonso, San Juan, Santa Clara, Taos, and Tesuque and their respective members, either now or in the future and to promote and encourage the common welfare; to foster the social and economic development advancement of the eight Indian Pueblos; to preserve and protect the inherent rights of self-government, the land, and the water; and to foster and encourage the assumption of increasing civic responsibilities by the eight Pueblos and their members. The further purpose of this corporation is to help the American Indians of these Pueblos in groups and individually by assisting them directly and encouraging them to use their own efforts to assist themselves by planning, developing, and implementing various enterprises; to ameliorate the economic plight of the Indian people of these pueblos by assisting individuals, groups, and enterprises involving Indian people to become successful so that problems of economic depression, the high rates of unemployment, and poverty will be alleviated. The result of these endeavors shall be to maintain the community integrity of the Eight Northern Indian Pueblos in northern New Mexico so that the Indian people of those Pueblos will not be forced by economic reasons to seek jobs elsewhere or to leave their Pueblos, and, hence the preservation and maintenance of the traditional cultures, values, religion, and art forms of these Pueblos.

*Perez Aff.* ¶ 9.

The Articles clearly show that ENIPC was intended to benefit the eight northern Pueblos and its tribal members. Further, the ENIPC Bylaws provide that ENIPC is "organized for the express purpose(s) of providing for the general welfare of the eight northern Pueblos by providing broad based community assistance programs." *Perez, Aff.* ¶¶ 10-11. In *J.L. Ward Associates*, the federal district court of South Dakota found helpful that the purposes of the tribal consortium were "to act as a formal representative of the tribes to the federal government and to provide health care and related services to tribal members and member Indian tribes." *J.L. Ward Associates, Inc.*, *supra.*, at 1176. *J.L. Ward Associates* found that the state chartered tribally-owned entity's purposes were "closer to the functions of a tribal government than a business." *Id.*, citing to *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (9<sup>th</sup> Cir. 1998) (nonprofit

organization created by two tribes to provide services to tribal members pursuant to the Indian Self Determination and Education Assistance Act (“ISDEAA”) “served as an arm of the sovereign tribes, acting as more than a mere business.”); *see also Gavle v. Little Six*, 555 N.W.2d 284, 294 (Minn. 1996) (extending sovereign immunity to tribal business entity in part because the entity had been created for the purpose of improving the general welfare of the Indian tribe); *see also Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 658 N.E.2d 989, 992-993 (N.Y. 1995) (nonprofit corporation created by tribe was entitled to sovereign immunity in part because the corporation was established to “enhance the health, education and welfare of Tribe members, a function traditionally shouldered by tribal government”). Because ENIPC is formed for the purposes of improving the health, education and general welfare of its tribes and tribal members, and ENIPC has been awarded federal grants on behalf of the Eight Northern Pueblos to carry out the same for the benefit of the Eight Northern Pueblos and their tribal members, this factor weighs in favor of ENIPC.

The Tenth Circuit explained that the third factor weighs heavily in favor of immunity if the structure, ownership, and management of the tribal entity is controlled by the tribe or tribal members. *Chukchansi Gold*, *supra.*, at 1193. The Tenth Circuit found it sufficient that tribal members serve on the board of the tribal entity, even though its chief financial officer and general manager are not tribal members. *Id.* ENIPC is similarly structured, owned, and managed. First, ENIPC is wholly-owned by the Eight Northern Pueblos. *Perez Aff.* ¶¶ 4, 15-16. Second, ENIPC's board is comprised of the Governors of each of the Eight Northern Pueblos who are either appointed or elected by their respective tribes. *Perez Aff.* ¶ 15. Third, ENIPC is managed by an Executive Director approved by the Board of Governors of ENIPC. *Perez Aff.* ¶ 18. All of ENIPC's Board of Governors are tribal members of their respective Pueblos. *Perez*

*Aff.* ¶ 15. ENIPC and the eight northern Pueblos are “closely linked in terms of management and composition. See *J.L. Ward Associates*, *supra.*, at 1176-1177, citing to *Dille*, *supra.*, at 376.

The Tenth Circuit explained that the fourth factor weighs in favor of immunity if the tribe clearly intends for the tribal entity to have tribal sovereign immunity. *Chukchansi Gold*, *supra.*, at 1193. This factor looks at key documents, including tribal resolutions and governance documents, to determine if the tribe intended the entity to enjoy in the protections of its sovereign immunity. *Chukchansi Gold*, at 1194-1195. If the key documents contain language suggesting that the entity enjoys in the “privileges and immunities of the tribe, including sovereign immunity from suit,” then such language would weigh in favor of the tribal entity’s finding of sovereign immunity. *Chukchansi Gold*, at 1193. In our case, the Articles clearly contemplate that ENIPC enjoy in the protections of tribal sovereign immunity. The Third Article states:

Any waiver by the corporation of its sovereign immunity is not intended to be, nor shall it be construed as, a waiver of the sovereign immunity of the Pueblos or any of them, nor shall any such waiver create a liability on the part of any Pueblo for the debts or obligations of the corporation. Any exercise of this authority to sue or be sued may not be considered, operate as, a consent to the attachment of any assets of the corporation other than specific assets properly pledged as collateral or upon assets except those owned directly by the corporation.

*Perez, Aff.*, ¶ 13

There is no evidence of a specific waiver of sovereign immunity by ENIPC to allow claims against it by employees. Rather, ENIPC specifically preserved its tribal sovereign immunity protection when it entered into the Employment Agreement with Plaintiff. *Perez Aff.*, ¶ 22 .

Concerning the fifth factor, the Tenth Circuit stated that the financial relationship between the tribe and its entity weighs in favor of tribal sovereign immunity. *Chukchansi Gold*,

supra., at 1194. The Tenth Circuit found persuasive that since the casino's revenues are distributed to the tribe, "any reduction in the casino's revenue that could result from an adverse judgment against it would therefore reduce the tribe's income." *Id.* Importantly, the Tenth Circuit recognized that the tribe depends heavily on the casino revenue to fund its governmental functions, support tribal members, and search for other economic development. *Id.* Similarly, ENIPC relies heavily on revenues received by ENIPC's programs, and any reduction in ENIPC's revenues that could result from an adverse judgment would negatively impact the programs offered to the Eight Northern Pueblos and their members. *Perez Aff.* ¶ 14.

*Chukchansi Gold's* sixth factor addresses whether the purposes of tribal sovereign immunity will be served by granting the entity immunity. This factor is used to determine whether the entity's sovereign immunity would promote the tribes' general tribal or economic development. *Chukchansi Gold*, at 1195. In *Chukchansi Gold*, the court found helpful that the tribal entity's activities were so closely related to those of the tribe, and that creation of the entity further supports tribal self-determination and economic development that sovereign immunity would protect the tribe's treasury. *Chukchansi Gold*, at 1195. Similarly in *J.L. Ward Associates*, the federal district court of South Dakota found that providing adequate health care services to tribal constituents – "a group that suffers disproportionately from certain diseases and has a lower life expectancy than other Americans – is a very real concern for sovereign Indian tribes...By engaging in these activities, Great Plains promotes the preservation of tribal cultural autonomy and tribal self-determination, two of the federal policies behind tribal sovereign immunity." *J.L. Ward Associates*, at 1177. See e.g., *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234 (8<sup>th</sup> Cir. 1995) (The ISDEAA promotes the long-standing federal policy of encouraging Indian self-determination, giving Indian tribes control over the administration of



federal programs benefitting Indians.”). As noted elsewhere, ENIPC provides community services to the eight northern pueblos and their members in furtherance of tribal self-determination and that sovereign immunity would further the governmental interest of each Eight Northern Pueblo. *Perez, Aff.*, ¶¶ 8-14.

In *J.L. Ward Associates*, only two of the six factors militated against sovereign immunity, but the remaining factors established that “[the tribal consortium] is the sort of tribal entity entitled to sovereign immunity.” *J.L. Ward Associates*, at 1176. That Court concluded that a tribal consortium formed under a state non-profit act was clothed with sovereign immunity. *Id.* This Court should also find that ENIPC is a subordinate economic entity, effectively an arm of the Eight Northern Pueblos, and is protected by tribal sovereign immunity.

### **3.2.2 ENIPC’s Sovereign Immunity Has Not been Abrogated or Waived In This Jurisdiction.**

As an arm or subordinate economic entity of the Eight Northern Pueblos, ENIPC is protected by the tribes’ sovereign immunity, unless tribal sovereign immunity is either abrogated or waived. Congressional abrogation of tribal sovereign immunity “cannot be implied but must be unequivocally expressed.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Courts reviewing issues of congressional abrogation of tribal sovereign immunity look to the statute and to its legislative history for clear and unambiguous language evidencing that Congress discussed the issue of tribal sovereign immunity and decided to waive that sovereign immunity. *Bryan v. Itasca County*, 426 U.S. 373 (1976); *see also Atkinson v. Haldane*, 569 P.2d 151, 167 (Ak 1977).

Tribal waivers of sovereign immunity must also be explicit and unequivocal. Tribal waivers must be narrowly construed according to the express language of the waiver. *Osage Tribal Council v. United States Dep’t of Labor*, 187 F.3d 1174, 1181 (10<sup>th</sup> Cir. 1999); *Flint v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 545-46 (2<sup>nd</sup> Cir. 1991); *Ute Distribution Corp. v.*

*Ute Indian Tribe*, 149 F.3d 1260, 1267 (10<sup>th</sup> Cir. 1998); *Chemehuevi Indian Tribe v. California State Bd. Of Equalization*, 757 F.2d 1047, 1053 (9<sup>th</sup> Cir. 1985). Since an Indian tribe is not required by law to waive its immunity at all, “it is free to ‘prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.’” See e.g., *R&R Deli, Inc. v. Santa Ana Star Casino*, 139 N.M. 85 (Ct. App. 2006). When consent is given, the terms of the consent establish the bounds of a court’s jurisdiction. *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10<sup>th</sup> Cir. 1982). A waiver of immunity “must be clear” and when a tribe consents to suit, “any conditional limitation it imposes on that consent must be strictly construed and applied.” *Missouri River Servs. Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8<sup>th</sup> Cir. 2001); *R&R Deli, supra*.

The Complaint fails to allege that Congress authorized suit against ENIPC for the claims asserted in the Complaint. The Complaint also fails to allege that ENIPC waived its sovereign immunity permitting this suit to proceed against it for the claims asserted in this jurisdiction. In fact, just the opposite is true. The Employment Agreement clearly provides that ENIPC does not waive its sovereign immunity protections. *Perez Aff.* ¶ 23. When ENIPC decides to waive its sovereign immunity, its general practice is to issue a written board resolution expressly providing the terms of that waiver. *Perez Aff.* ¶ 24. No such resolution exists in this matter. *Perez Aff.* ¶ 24. By not providing this Court with any allegations that could establish either congressional abrogation or tribal waiver of sovereign immunity, Plaintiff’s complaint fails to allege facts necessary to show the existence of jurisdiction over ENIPC.

### **3.3. OHKAY OWINGEH TRIBAL COURT HAS EXCLUSIVE JURISDICTION OVER CLAIMS ARISING ON TRIBAL LAND**

Even if this Court finds that ENIPC is not protected by tribal sovereign immunity, this Court must dismiss Plaintiff's Complaint because tribal courts retain exclusive jurisdiction over lawsuits arising on tribal lands against tribes, tribal members and tribal entities. *See e.g., Williams v. Lee*, 358 U.S. 217 (1959). The *Williams* decision rests on the principle of inherent tribal sovereignty, and that, absent a grant of jurisdiction by Congress, the States have no power to regulate Indian affairs on a reservation. *Williams*, at 220 (Unless changed by "governing Acts of Congress," tribal courts retain exclusive jurisdiction over claims arising on tribal lands against tribes, tribal members and tribal entities). Absent federal subject matter jurisdiction, an attempted exercise of jurisdiction by this Court would hinder "the authority of tribal courts over Reservation affairs," and would infringe on the right of Ohkay Owingeh to govern its community. *Williams*, at 223. Only Congress may authorize jurisdiction over such a suit to a state or federal court. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (noting that "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.").

Here, Plaintiff's claims arise on Ohkay Owingeh lands. *Perez Aff.* ¶¶ 21-22. Plaintiff's claims are asserted against ENIPC, a tribal consortium owned and controlled by the Eight Northern Indian Pueblos of New Mexico, including Ohkay Owingeh. *Comp., passim ; Perez Aff.* ¶ 4. Since the termination occurred on Ohkay Owingeh lands and involves a tribal consortium that has Ohkay Owingeh as a member, the Ohkay Owingeh Tribal Court has exclusive jurisdiction over the claims alleged by Plaintiff. *Williams*, *supra.*, at 220.

**3.4. EVEN IF THE COURT FINDS THAT A BASIS TO SUPPORT SUBJECT MATTER JURISDICTION IS ALLEGED IN THE COMPLAINT, THE TRIBAL-**

**EXHAUSTION RULE PREVENTS THIS COURT FROM PROCEEDING WITH THIS CASE.**

Based on Congress' commitment to a policy of promotion of tribal self-determination, the United States Supreme Court developed the "tribal exhaustion rule" in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). The rule "provides that as a matter of comity, a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction if those cases are also subject to tribal jurisdiction until the parties have exhausted their tribal remedies." *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1376 (10th Cir. 1993) (quoting *Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991)); *See also National Farmers*, at 856-857; *See also, Iowa Mutual Ins. Co. v. La Plante*, 480 U.S. 9 (1987). The rule was developed, in part, out of the Court's concern that in diversity and federal question cases, "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Iowa Mutual*, at 16.

The Tenth Circuit "promotes [an] expansive application of the exhaustion rule." *See e.g., Navajo Nation v. Intermountain Steel Bldgs., Inc.*, 42 F.Supp.2d 1222, ¶2,3 (D.N.M. 1999). This means that "tribal court remedies must be exhausted with respect to issues other than the scope of the tribal court's jurisdiction." *Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe of Kansas*, 987 F.Supp. 1321, 1328 (D. Kan. 1997). Otherwise, federal court adjudication of tribal court jurisdiction would infringe "upon tribal lawmaking authority because tribal courts are best qualified to interpret and apply tribal law." *Iowa Mutual*, at 16.

While the U.S. Supreme Court has recognized three exceptions to the Tribal Exhaustion Rule, none of them apply here. First, the rule does not apply where an assertion of tribal court jurisdiction is motivated by harassment or conducted in bad faith. *National Farmers*, at 856,

n.21. Second, the rule does not apply when the tribal court action violates express jurisdictional prohibitions. *Id.* Third, the rule does not apply if tribal court exhaustion would be futile due to an inadequate opportunity to challenge the tribal court's jurisdiction. The first exception is not applicable because no party has asserted tribal court jurisdiction. The second exception is also inapplicable because the Complaint does not allege any fact suggesting that a tribal court action addressing Plaintiff's claims would be "patently violative of express jurisdictional prohibitions." *Id.* The third exception is also not applicable because the Ohkay Owingeh Tribal Courts have the authority to adjudicate civil actions such as stated in Plaintiff's Complaint.

When none of the three exceptions to the Tribal Exhaustion Rule apply, the Court engages in an analysis "based on comity concerns for Indian Tribes in maintaining their remaining sovereignty." *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1507 (10th Cir. 1997). The U.S. Supreme Court articulated the following comity concerns: 1) furthering congressional policy of supporting tribal self-government, 2) promoting the orderly administration of justice by allowing a full record to be developed in the tribal court, and 3) obtaining the benefit of tribal expertise if further review becomes necessary. *National Farmers*, *supra.*, at 856-857. Because the underlying dispute arose on Ohkay Owingeh lands, comity concerns weigh heavily in favor of requiring that the parties exhaust their remedies in the Ohkay Owingeh Tribal Court before resorting to this forum. *Navajo Nation v. Intermountain Steel Bldgs., Inc.*, at ¶11. *See also*, *Calumet*, *supra.*, at 1329.

When a Court finds that comity requires the parties to exhaust their tribal court remedies, then the U.S. Supreme Court has authorized federal district courts to either dismiss the federal case without prejudice or to stay federal court proceedings. *See e.g.*, *National Farmers*, *supra.*, at 857; *Iowa Mutual*, *supra.*, at 20, n.14.

### **3.5. PRESERVATION OF CERTAIN DEFENSES**


Pursuant to Rule 12(h), ENIPC hereby alerts the Court of its right to preserve its defense of failure to state a claim upon which relief can be granted. In the event that ENIPC's Motion to Dismiss is not granted, and the issue of applicable law is clarified, ENIPC may then proceed with a motion to dismiss for failure to state a claim upon which relief can be granted.

### **4. CONCLUSION**

Wherefore, Defendant ENIPC requests that the Complaint be dismissed for lack of subject matter jurisdiction, or, in the alternative, for failure to exhaust tribal court remedies, and for any other relief the Court deems appropriate.

Respectfully submitted,

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