Docket No. 15-36003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLENN EAGLEMAN, *et al*.,

Plaintiffs-Appellants,

v.

ROCKY BOYS CHIPPEWA-CREE TRIBAL BUSINESS COMMITTEE OR COUNSEL, Richard Morsette, Chairman, *et al*.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, GREAT FALLS DIVISION
U. S. District Court No. CV-14-73-GF-BMM – Honorable Brian Morris

CHIPPEWA-CREE HOUSING AUTHORITY, DONNA S. HAY and THELA BILLY'S ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

Jurisdiction is exclusive in the courts of the Rocky Boy's Chippewa Cree Reservation and the District Court lacks subject matter jurisdiction necessary to reach the merits of any of Appellants' claims.

This Court has appellate jurisdiction from the final order issued by the District Court under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court lacks subject matter jurisdiction due to the exclusive jurisdiction of the courts of the Rocky Boy's Chippewa Cree Reservation?

2. Whether the District Court properly determined the "sue and be sued" clause in the tribal ordinance establishing the Chippewa Cree Housing Authority is not an unequivocal waiver of sovereign immunity?

3. Whether the District Court properly determined Defendants Donna S. Hay and Thela Billy, employees of Chippewa Cree Housing Authority, enjoy tribal sovereign immunity for actions taken within the scope of their employment?

STATEMENT OF THE CASE

Appellants originally filed suit against the Chippewa Cree Housing Authority and its officials/employees, Donna S. Hay and Thela Billy (collectively hereinafter "CCHA"), in the Chippewa Cree Tribal Court ("Tribal Court") in 2009

alleging damages resulting from an explosion occurring in April of 2007. (Excerpt of Record ("ER") 2:80, ¶ 19). Appellants Glenn and Celesia Eagleman are members of the Chippewa-Cree Tribe ("Tribe") and Theresa Small, Mr. Eagleman's niece, is a Fort Belknap Reservation tribal member, and all Appellants resided on the Chippewa-Cree Reservation on trust property at the time of the explosion. (ER2:78, 85, ¶¶ 2, 67-70). By filing their complaint in Tribal Court, Appellants voluntarily and expressly availed themselves of the jurisdiction of the Tribal Court. (ER2:85, ¶¶ 66 & 70).

CCHA moved to dismiss Appellants' action in Tribal Court because Appellants failed to file their claim within the applicable one year statute of limitation and because CCHA enjoyed sovereign immunity. (Supplemental Excerpt of Record ("SER") 1:1-3). Appellants responded but did not expressly request an opportunity to conduct discovery to support their erroneous belief sovereign immunity was waived. (SER1:4-17). While Appellants addressed CCHA's sovereign immunity, they did not suggest any basis for waiver which would require discovery. SER1:9-14. Rather, Appellants' focus was on the "sue and be sued" clause in the charter documents establishing CCHA and the erroneous belief CCHA's procuring insurance was an implicit waiver of sovereign

immunity. (*Id*.) Appellants did not submit any discovery requests to CCHA during the pendency of the Tribal Court action. (SER1:21-22, 27).[1]

The Tribal Court ultimately dismissed Appellants' claims, holding they were barred by the applicable one year statute of limitation ***and*** CCHA's sovereign immunity. (SER1:39). Appellants appealed the Order to the Chippewa Cree Appellate Court ("Tribal Appellate Court").

For the first time, at the Tribal Appellate Court level, Appellants suggested discovery was needed. However, Appellants did not actually request an opportunity for discovery, let alone suggest how further discovery from CCHA could yield an alleged waiver of sovereign immunity. (SER1:40-45). Rather, Appellants limited the scope of the suggested discovery to establishment ordinances of unidentified corporate defendants and proof of insurance. (SER1:42-43).

The Tribal Appellate Court ultimately affirmed the Tribal Court's dismissal of Appellants' claims against CCHA. (SER1:59-60). However, the Tribal Appellate Court reversed the dismissal of Appellants' claims against Mike Morsette, who did not enjoy sovereign immunity, and remanded to Tribal Court for

[1] While Appellants' counsel alleged they had submitted informal requests for information to CCHA prior to the Tribal Court litigation being filed, CCHA has no record of such alleged requests and Appellants have not produced any such alleged requests. (SER1:22). As such, Appellants' counsel's representations provided nothing for the District Court to rely on. Moreover, even if such requests were made, denial of pre-litigation information requests is not a denial of due process.

further proceedings. (*Id.; see also* SER1:61-62). Thus, Appellants were left with a potential remedy against Mr. Morsette. Appellants currently recognize they have not exhausted their remedies in Tribal Court:

> **The case [against Mr. Morsette] remains pending in tribal court**…Mr. Morsette has been served, but the tribal court has not set a trial schedule. Neither he nor [Appellants] ha[ve] requested a trial schedule or dismissal. [**Appellants] would have to prove the same facts twice in the action against Mr. Morsette, Thela Billy, Susan Hay, and CCHA**. Plaintiffs have left that case to be decided as to the allegations related to Mr. Morsette until after all the defendants are known through these proceedings, Plaintiffs may then efficiently pursue their rights against the remaining defendants as a group.

(SER1:64 (emphasis added)). Additionally, even if Appellants were ultimately provided the relief they seek, and the District Court were to remand to Tribal Court for further proceedings, Appellants' claims would remain dismissed due to their failure to file suit within the applicable statute of limitations.

Appellants then attempted to seek review of the Appellate Court's Opinion from the Chippewa-Cree Business Committee ("Business Committee"). (SER1:68). However, the Business Committee advised Appellants it is a separate branch of tribal government and could not provide judicial review. (*Id.*)

Appellants took no further action against CCHA until they filed their Complaint in the District Court, approximately three years after the Tribal Appellate Court's Opinion was issued. (SER1:69-72). Appellants twice amended their Complaint and did not complete service until June 2015. (ER2:63, 74).

CCHA moved the District Court to dismiss Appellants' claims on five separate grounds: (1) Appellants' Complaint is time barred; (2) the issue of sovereign immunity is moot because the Tribal Court dismissed Appellants' claims on the alternative basis Appellants missed the applicable tribal statute of limitations; (3) Appellants' claims should be dismissed on the basis of laches; (4) the District Court does not have subject matter jurisdiction to provide appellate review of the Tribal Court or Tribal Appellate Court; and (5) CCHA and its Employees enjoy sovereign immunity. (SER1:73-78). The District Court, in granting CCHA's Motion to Dismiss, declined to opine on all other grounds for dismissal other than sovereign immunity. (ER1:1-12). While CCHA does not contend the conclusion the District Court reached was wrong if the District Court properly exercised jurisdiction, the District Court should, as a threshold issue, dismissed Appellants' Complaint for lack of subject matter jurisdiction. Appellants are pursuing this appeal of the District Court's summary judgment order in favor of CCHA.[2] (ER2:14-15).

[2] While Appellants have challenged the determination CCHA and its Employees enjoy sovereign immunity in District Court, they do not contend any other tribal defendant lacks sovereign immunity protection.

STATEMENT OF STANDARDS OF REVIEW

The existence of sovereign immunity is a question of law this Court reviews de novo. *See e.g., Idaho v. Court d'Alene Tribe*, 794 F.3d 1039, 1042 (9th Cir. 2015). Courts **have no discretion** about whether to apply the doctrine of sovereign immunity, for it "involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy . . . , the application of which is within the discretion of the court." *People of State of Cal. ex rel. California Dept. of Fish and Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) (emphasis added). Because sovereign immunity is a preliminary jurisdictional issue, courts are required to resolve any factual disputes on the merits when deciding a motion to dismiss for sovereign immunity and are not bound by allegations of the complaint. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir.1977); *see Osborn v. United States*, 918 F.2d 724, 728-29 (8th Cir.1990). When subject matter jurisdiction is challenged, "'[n]o presumptive truthfulness attaches to [a] plaintiff's allegations.'" *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009) (citing *Augustine v. United States,* 704 F.2d 1074, 1077 (9th Cir. 1983)). In resolving a motion to dismiss for sovereign immunity, "court may 'hear evidence regarding jurisdiction' and 'resolv[e] factual disputes where necessary.'" *Robinson,* 586 F.3d at 685 (citing *Augustine*, 704 F.2d at 1077).

SUMMARY OF ARGUMENT

The District Court does not have subject matter jurisdiction due to the exclusive jurisdiction of the courts of the Rocky Boy's Chippewa Cree Reservation. As such, the District Court cannot (1) reach the merits of Appellants' claims; (2) act as an appellate body for the Tribal Court or Tribal Appellate Court; or (3) re-determine what the Tribal Court and Tribal Appellate Court had already properly concluded: that CCHA and its employees enjoyed sovereign immunity as an arm of the Chippewa Cree Tribal Government ("the Tribe"). Due to the District Court's unwarranted assumption of subject matter jurisdiction, this matter should be remanded to the District Court for dismissal on jurisdictional grounds.

Alternatively, the District Court properly concluded the "sue and be sued" clause at issue, which is at best unclear and ambiguous, is not an unequivocal waiver of CCHA and its employees' sovereign immunity. To reach any other conclusion would fly in the face of established principles of sovereign immunity and negate key language of the Tribe's Ordinance establishing CCHA as a governmental arm of the Tribe.

Additionally, the District Court properly concluded CCHA's employees enjoyed sovereign immunity because they were acting within the scope of their employment with CCHA and any damages awarded against them would flow to the CCHA, not the employees. Per Appellants' own allegations and admissions,

the CCHA Employees were acting exclusively within the scope of their employment at all times relevant to Appellants' claims and any damages that could be awarded against them would flow to CCHA.

ARGUMENT

I. THE COURT SHOULD NOT REACH THE MERITS OF THIS APPEAL.

a. The District Court Lacked Subject Matter Jurisdiction Due to the Chippewa Cree Tribe's Exclusive Jurisdiction.

The issue of subject matter jurisdiction may be raised at any stage of a judicial proceeding, even after entry of judgment. Fed.R.Civ.P. 12(h)(3); *Oregon v. Leg. Services Corp.*, 552 F.3d 965, 969 (9th Cir. 2009). Once a court determines it lacks subject matter jurisdiction, it must dismiss the action. *Id.* CCHA raised the issue regarding the District Court's lack of subject matter jurisdiction initially by its Motion to Dismiss. Though a threshold issue, the District Court did not address its subject matter jurisdiction in its Order granting summary judgment in favor of CCHA. As such, CCHA raises the issue again on appeal. The Court must address this issue as Appellants request this Court remand this case to the District Court for re-decision, which it cannot do in the absence of subject matter jurisdiction. *See* Appellants' Brief, p. 22.

Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Santa Clara Pueblo v.*

Martinez, 436 U.S. 49, 55, 98 S. Ct. 1670, 1675 (1978). Tribes have power to make their own substantive law in internal matters, and to enforce that law in their own forums. *Id.* (internal citations omitted). "Tribal courts have repeatedly been recognized as appropriate forums for the ***exclusive adjudication*** of disputes affecting important personal and property interests of both Indians and non-Indians." *Burrell v. Armijo*, 456 F.3d 1159, 1167 (10th Cir. 2006) (*citing Santa Clara Pueblo,* 436 U.S. at 65–66) (emphasis added); *see also Montana v. United States,* 450 U.S. 544, 566, 101 S.Ct. 1245 (1981) (Determining Indian tribes possess inherent authority to exercise civil jurisdiction, even over nonmembers). Additionally, the Tribe expressly retained *exclusive* civil jurisdiction over actions arising in whole or in part within the exterior boundaries of the Reservation. Chippewa-Cree Law and Order Code ("CCLOC"), Title I, Chapter 2, § 2.2.

No general federal statute limits tribal jurisdiction over tribal members, and federal law acknowledges tribal jurisdiction. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14, 107 S. Ct. 971, 975 (1987) ("Indian tribes retain 'attributes of sovereignty over both their members and their territory…'") (internal citations omitted). The District Court, as a court of limited jurisdiction, must have some basis to exercise subject matter jurisdiction over the claims raised by Appellants in the form of a grant of authority by both constitutional requirements and federal

statute. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S. Ct. 2396, 2403 (1978).

Furthermore, as a general rule, federal courts must recognize and enforce tribal court judgments under principles of comity. *AT & T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002). "**Unless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason, it *must* enforce the tribal court judgment *without reconsidering issues decided by the tribal court***." *Burrell,* 456 F.3d at 1168 (citing *AT & T Corp.,* 295 F.3d at 905) (emphasis added); *see also Marceau v. Blackfeet Hous. Auth.* (hereinafter "*Marceau III"*), 540 F.3d 916, 920 (9th Cir. 2008) ("principles of comity *require federal courts to dismiss or abstain from deciding claims over which tribal court jurisdiction is 'colorable*,' provided that there is no evidence of bad faith or harassment.") (emphasis added); *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1043-44 (9th Cir. 1996) ("Unless…the Tribal Court lacked jurisdiction…proper deference to the tribal court system precludes relitigation of issues raised...and resolved in the Tribal Courts."); *Iowa Mutual Insurance Company,* 480 U.S. at 19 (Federal court's exercise of jurisdiction over reservation affairs may impair the authority of tribal courts). As the *Burrell* Court stated:

> [W]e **emphasize that *federal courts are not the general appellate body for tribal courts*. As the Supreme Court has instructed, the federal policies promoting tribal self-government and self-determination instruct us to**

> ***provide great deference to tribal court systems*, their practices, and procedures**. This heed we do not take lightly.

Burrell, 456 F.3d at 1173 (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845, 856 (1985) (emphasis added)).

Typically, federal court review is limited to instances where a tribe's assumption of subject matter jurisdiction is challenged. *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir.), *as amended* (Sept. 13, 1999), *amended*, 197 F.3d 1031 (9th Cir. 1999). Additionally, only two circumstances preclude recognition of Tribal Court judgments: when the tribal court either lacked jurisdiction or denied the losing party due process of law. *AT & T Corp.*, 295 F.3d at 903. However, a denial of due process alone does not confer jurisdiction upon a district court to act as an appellate body for a tribe; rather, it merely precludes recognition and enforcement of a tribal court decision under principals of comity. *Id.*

Tribal court subject matter jurisdiction over Indians is first and foremost a matter of internal tribal law. *See Fisher v. Dist. Court of Sixteenth Judicial Dist. of Montana, in & for Rosebud Cnty.*, 424 U.S. 382, 386, 96 S. Ct. 943, 946 (1976) (Where litigation involves only Indians, courts may not infringe on right of reservation Indians to make their own laws and be ruled by them); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 153-54 (1980). Tribal members involved in intratribal disputes are directed to the

remedies available to them in their own tribal courts and from the officials they have elected. *Santa Clara Pueblo*, 436 U.S. at 98 S. Ct. 1670; *see also E.E.O.C. v. Karuk Tribe Hous. Auth.,* 260 F.3d 1071, 1081 (9th Cir. 2001) (Intratribal disputes should be resolved internally within the tribe); *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1012 (10th Cir. 2007) (Review of Tribe's determination sovereign immunity barred suit against non-Indians, was only available where non-Indians had also been denied any remedy in tribal forum).[3] As the *Santa Clara Pueblo* Court stated:

> [S]ubject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves, may "undermine the authority of the tribal court . . . and hence . . . infringe on the right of the Indians to govern themselves." *A fortiori*, resolution in a foreign forum of intratribal disputes of a more "public" character…cannot help but unsettle a tribal government's ability to maintain authority.

Santa Clara Pueblo, 436 U.S. at 59-60, 98 S. Ct. at 1677-78 (internal citations omitted). Moreover, **challenge of a tribe's jurisdiction must be made initially in tribal court**, pursuant to the doctrine requiring exhaustion of tribal court remedies. *Iowa Mut. Ins. Co*, 480 U.S. at 16; *Nat'l Farmers,* 471 U.S. 845.

CCHA is unaware of any authority which would authorize Appellants to utilize the District Court to provide appellate review of the Tribal or Tribal

[3] The *Miner Electric* Court also held that ", in an action against an Indian tribe… [28 U.S.C.] § 1331 will only confer subject matter jurisdiction where another statute provides a waiver of tribal sovereign immunity or the tribe unequivocally waives its immunity." *Miner Elec.,* 505 F.3d at 1011.

Appellate Court and/or provide the injunctive relief they seek in the form of the District Court's oversight on remand to the Tribal Court system. Additionally, maintenance of federal court jurisdiction does not appear to be appropriate unless a tribal court erroneously determines it has jurisdiction over a matter involving non-Indians. *Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1132 (9th Cir. 1995); *Burrell*, 456 F.3d at 1168. There are no non-Indian litigants in this matter.

Appellants initially represented to the District Court it may assume subject matter jurisdiction, at least in part, over their underlying cause(s) action. (ER2:63-74). However, Appellants have never challenged Tribal Court jurisdiction. (*Id.*) In fact, the opposite is true. Even at the District Court level, Appellants requested the District Court re-determine the issue of sovereign immunity previously decided by the Tribal Court and Tribal Appellate Court and remand to Tribal Court for re-decision. (ER2:72, ¶¶ 39-40; SER1:23); *see also* Appellants' Brief, p. 22 ("further proceedings in tribal court" are required). Moreover, Appellants expressly acknowledge Tribal Court is the appropriate and exclusive jurisdiction and expressly and voluntarily availed themselves of Tribal Court jurisdiction. (ER2:85, ¶¶ 66 & 70; SER1:65 ("**The Chippewa-Cree Tribal Court has exclusive jurisdiction** over the underlying civil case for personal injury suffered within the exterior bounds of the reservation." (emphasis added)).

Since Appellants are not challenging Tribal Court jurisdiction, the determinations made by the Tribal Court and Appellant Court regarding CCHA's sovereign immunity are part of the underlying matter and should not be disturbed absent a challenge of Tribal Court jurisdiction. Under these facts, the District Court's assumption of subject matter jurisdiction over Appellant's underlying intratribal action was not warranted. The District Court should have instead dismissed Appellants' claims on the basis it lacks subject matter jurisdiction.

The law supports exclusive tribal court jurisdiction over this intratribal matter. Appellants chose the tribal forum. This is not a case where they were dragged unwillingly into Tribal Court. All Appellants vehemently sought to avoid dismissal in Tribal Court after CCHA's sovereign immunity was raised. (SER1:4-17). Accordingly, the Tribal Court's exclusive assumption of subject matter jurisdiction was proper, and its determination Appellants' claims were barred by CCHA's sovereign immunity and the applicable tribal statute of limitations is not subject to appellate review by the federal District Court.

Lacking subject matter jurisdiction, this matter should be remanded to the District Court with instruction for dismissal for lack of jurisdiction.. Any other conclusion would plainly infringe upon the Tribe's inherent right as a sovereign government to make its own laws and be ruled by them.

b. Appellants Were Not Denied Due Process.

Appellants requested the District Court declare their case was erroneously dismissed by the Tribal Court on principals of sovereign immunity and enjoin the Tribal Court from applying sovereign immunity on remand. (ER2:72-73, ¶¶ 39-45). It is an absurd proposition that tribal sovereigns can be enjoined from applying sovereign immunity. Again, Appellants do not challenge Tribal Court jurisdiction. Rather, they simply take issue with the result obtained in their chosen and exclusive forum and improperly seek a redetermination of that issue in the federal forum.

While Appellants argued to the District Court they had allegedly been denied due process in an attempt to establish subject matter jurisdiction, Appellants' claims on this point were not supported. Moreover, as noted above, a denial of due process, even if proven, alone does not confer subject matter jurisdiction on the District Court. Appellants claimed they were denied due process because their purported "request" for discovery to establish a waiver of sovereign immunity was denied and because the Tribal Court ruled on CCHA's motion to dismiss quickly and without holding a hearing on the issue. (SER1:66). Even if *AT & T Corp.*, *supra*, 295 F.3d at 903 (holding denial due process to losing party may preclude recognition of Tribal Court judgments), could be stretched to provide the District Court with authority to review and remand to Tribal Court, the

pleadings from the Tribal and Appellate Court demonstrate no denial of due process occurred.

While the Tribal Court action was pending, Appellants did not serve discovery requests to CCHA or expressly request discovery regarding an alleged waiver of CCHA's tribal sovereign immunity. (SER1:4-17, 20-21, 27). Appellants never expressly requested the Tribal Court permit discovery regarding CCHA's sovereign immunity prior to ruling on the Motion to Dismiss. (SER1:12). Rather, Appellants' focus was on the "sue and be sued" clause found in the charter documents establishing CCHA and their misplaced belief procuring insurance implicitly waives sovereign immunity. (SER1:9-14).

Additionally, while discovery was available to Appellants at the time they filed the Complaint in Tribal Court, Appellants did not issue any written discovery throughout the pendency of the Tribal Court action. (SER1:21-22, 27). With regard to written discovery at the Tribal Court level, Appellant's counsel stated: "I didn't even know you could file discovery when you filed your complaint. And, so I was waiting for the process to work its way out and I figured – I had no idea – I was totally surprised that we were dismissed." (SER1:27).

For the first time, on appeal to the Tribal Appellate Court, Appellants suggested discovery was needed. However, Appellants limited the scope of their suggestion to include discovery of establishment ordinances of unidentified

corporate defendants and proof of insurance. (SER1:40-45). Of course, formal discovery was unnecessary to obtain ordinances, which are public documents, and the purchase of insurance cannot implicitly waive sovereign immunity.[4] When asked why Appellants could not acquire public documents through public requests, Appellants' counsel merely shrugged his shoulders and then stated: "It's just a lot of work to have to go that route." (SER1:24). Moreover, the Tribal Appellate Court had no duty to entertain Appellants' request for discovery which had not been raised initially in the Tribal Court proceedings. After completion of briefing, and in the face of Appellants' poorly articulated "request" for discovery, the Tribal Appellate Court properly affirmed dismissal of Appellants' claims.[5]

It should also be noted that discovery could not have yielded a written contract by which CCHA could have waived its sovereign immunity. The only

[4] While purchase of insurance as a waiver of sovereign immunity is not at issue in this appeal, *see Seminole Tribe of Fla. v. McCor,* 903 So.2d 353, 359 (Fla.2d DCA 2005) ("[T]he purchase of insurance may simply be a measure to provide protection for the Tribe's assets against the possibility that the Tribe's immunity will be abrogated or ignored."); *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977) (The purpose of tribal sovereign immunity would be defeated if it could be implicitly waived to the extent of insurance coverage); *Miccosukee Tribe of Indians v. Napoleoni*, 890 So.2d 1152 (Fla. 1st DCA 2004) (Rejecting argument that tribe's purchase of workers' compensation insurance is a waiver of tribal immunity); *see also White Mountain Apache Tribe v. Industrial Comm'n of Arix.,* 696 P.2d 223, 228-29, (Ariz. Ct. App. (1985) (Authority for Indian tribe to purchase workers' compensation insurance does not rise to level of waiver of sovereign immunity).

[5] CCHA maintains further discovery could not yield an unequivocal written waiver of sovereign immunity, as none exists.

written agreement, a Low Rent Dwelling Lease, between CCHA and Appellants was entered in the record before the District Court. (SER1:28-29, 31-38). After reviewing the agreement, Appellants conceded it did not contain a waiver of sovereign immunity and further stated Appellants' "basis for claiming a waiver of sovereign immunity doesn't have a strong foundation." (SER1:25-26).

Similar to Appellants' failure to request discovery prior to the Tribal Court resolving the Motion to Dismiss, Appellants did not request the Tribal Court set a hearing on the motion to dismiss, despite having the opportunity to do so. (SER1:4-17). The Tribal Court Rules of Civil Procedure do not require a hearing be set on dispositive motions. (SER1:19).

Under these circumstances, it simply cannot be said Appellants were denied due process. Courts are neither required to entertain novel requests, nor are they tasked with directing parties towards the efforts necessary to protect their interests or provide parties with legal advice. Rather, the parties themselves are tasked with prosecuting and defending claims within the existing confines of law. If a party feels discovery may impact a preliminary sovereign immunity defense, the onus is on that party to adequately raise the issue and articulate a request for such discovery. Similarly, where the rules of the tribunal do not require a hearing on dispositive motions, and a party desires a hearing, the onus is on the party to so request the hearing. Where a party does not adequately take advantage of the

devices available to it, thereby potentially damaging itself, the party's failure does not amount to a denial of due process by the tribunal or the opposing party.

Here, Appellants failed to conduct or adequately request discovery and failed to request a hearing on the Motion to Dismiss, despite knowing a hearing was not mandatory. Because Appellants were not denied due process, there is no support for the District Court to deny recognition of the Tribal Court's dismissal or Tribal Appellate Court's affirmation of the Tribal Court.

c. Appellants Did Not Exhaust All Available Tribal Remedies.

Exhaustion of **all** tribal remedies is required before a federal court may entertain a claim that a tribal court exceeded the lawful limits of its jurisdiction. *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004). "A district court has no discretion to relieve a litigant from the duty to exhaust tribal remedies prior to proceeding in federal court." *Marceau III, supra,* 540 F.3d at 920. Even if Appellants were challenging tribal court jurisdiction, the exhaustion rule would bar assumption of subject matter jurisdiction by the District Court.

The rule requiring exhaustion of tribal remedies is imposed to preserve and strengthen Native American cultures by insuring tribal institutions are not denied the opportunity to resolve tribal disputes or make tribal policy. *St. Marks v. Chippewa–Cree Tribe of Rocky Boy Reservation, Mont.,* 545 F.2d 1188, 1189 (9th Cir.1976). Furthermore, federal courts' exercise of jurisdiction over reservation

affairs impairs the authority of tribal courts. *Alvarez v. Tracy*, 773 F.3d 1011, 1014-15 (9th Cir. 2014) (citation omitted). "As such, [t]he *Supreme Court's policy of nurturing tribal self-government* **strongly discourages** federal courts from assuming jurisdiction over unexhausted claims." *Id.* (emphasis added). Thus, "the court is required to '**stay its hand**' until [a] party has exhausted ***all*** **available tribal remedies**." *Id.* (emphasis added); *see also Marceau III*, 540 F.3d at 921 ("tribal court must have the first opportunity to ***address all issues*** within its jurisdiction" under principals of exhaustion) (emphasis added).

Appellants may have exhausted all avenues in tribal court exclusive to the issue of CCHA's sovereign immunity; however, they did not exhaust ***all*** **available tribal remedies**.[6] While the Tribal Appellate Court upheld dismissal of Appellants' claims against the defendants who enjoy sovereign immunity, the Appellate Court remanded Appellants' case to Tribal Court for further proceedings against Defendant Mike Morsette, who did not enjoy sovereign immunity. (SER1:45-62). Appellants acknowledge their claims against Mr. Morsette remain pending in Tribal Court. (SER1:64). Similar to the Court's observation of the plaintiff in *Alvarez, supra,* had Appellants pursued the full extent of their tribal remedies, "it is possible that a tribal court would have granted relief, and we would not be here today." *See Alvarez*, 773 F.3d at 1022. On this basis, Appellants'

[6] None of the exceptions to tribal exhaustion requirements are present. *See Nevada v. Hicks,* 533 U.S. 353, 369, 121 S.Ct. 2304 (2001).

action before the District Court was at best premature; however, CCHA maintains there is no basis for District Court jurisdiction regardless of any exhaustion.

Similarly, Appellants allege because their claims were dismissed, they would be left without a remedy if this Court denies the relief they seek. This argument is fallacious because the Tribal Appellate Court expressly remanded the matter back to Tribal Court for further proceedings against Defendant Morsette. (SER1:45-62). Importantly, as noted above, Appellants admit they would have to prove the same elements to succeed with their claim against Mr. Morsette as they would against CCHA. (SER1:64 ("Plaintiffs would have to prove the same facts twice in the action against Mr. Morsette, Thela Billy, Susan Hay, and CCHA.")). Thus, if Appellants are left without any remedy, it is solely attributable to their failure to prosecute claims against Mr. Morsette, who was held not to be immune from suit. Appellants' assertion they would be left without a remedy if this Court upholds the District Court's decision is not only misleading but should not be charged against CCHA or the Tribal Court, which have no control over Appellants' pursuit of claims against other parties.

Moreover, the mere fact that application of sovereign immunity may leave a litigant without a remedy, while unfortunate, is the known consequence of a sovereign's inherent immunity, whether exercised by tribes, the United States, or any other sovereign. Under this context, it seems that denying a litigant a remedy

for sovereign immunity cannot act as a basis for district court assumption of jurisdiction.

This Court should not authorize federal district courts to act as general appellate bodies for every tribal court dispute in which a litigant is unhappy with the outcome. To do so would open the doors to unprecedented assumption of subject matter jurisdiction by district courts to the detriment of fundamental principles of tribal sovereignty and self-determination. Moreover, district court dockets would be flooded if they were required to act as general appellate bodies for tribes. Accordingly, the Court should remand this case to the District Court and direct it to dismiss the matter for lack of subject matter jurisdiction. Alternatively and as more thoroughly discussed below, the Court should affirm the District Court's well-reasoned Order dismissing Appellants' action on the basis CCHA enjoys sovereign immunity.

II. THE DISTRICT COURT PROPERLY HELD THE "SUE AND BE SUED" CLAUSE AT ISSUE DID NOT WAIVE CCHA'S SOVEREIGN IMMUNITY.

The District Court properly concluded CCHA is entitled to dismissal because it enjoys tribal sovereign immunity. Appellant does not dispute CCHA is an arm of tribal government or that any writing apart from the "sue and be sued" clause resulted in a waiver of sovereign immunity. (SER1:25-26). Rather, Appellant's sole contention appears to be that the Tribe allegedly waived CCHA's

sovereign immunity generally through the "sue and be sued" clause found in the establishment Ordinance for CCHA. However, not only did Appellants admit CCHA did not waive its sovereign immunity for actions in Federal District Court, a plain review of the applicable authority supports this conclusion.

Immunity from suit is a fundamental element of sovereignty, whether exercised by the federal government, states or tribes. *Santa Clara Pueblo*, 436 U.S. at 58. To be effective, a waiver of sovereign immunity must be expressed unequivocally. *Id.* "There is a **strong presumption** against waiver of tribal sovereign immunity." *Ingrassia v. Chicken Ranch Bingo & Casino*, 676 F. Supp. 2d 953, 956 (E.D. Cal. 2009) (citing *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001) (emphasis added). Without such waiver, sovereign immunity functions as an absolute jurisdictional bar. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) ("The entitlement is an *immunity from suit* rather than a mere defense to liability.") (emphasis added)); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

If waiver of sovereign immunity is alleged, the plaintiff bears the burden of demonstrating the alleged waiver. *Ingrassia*, 676 F. Supp. 2d at 956-957 (citations omitted). Here, Appellants bore the heavy burden of proving – by a preponderance of the evidence – that CCHA waived sovereign immunity before the District Court could assume jurisdiction. *See, e.g., Makarova v. United States*, 201 F.3d 110, 113

(2nd Cir. 2000). They failed to meet this burden, and thus the District Court properly concluded CCHA enjoys sovereign immunity in Federal District Court.

a. Appellants Concede the District Court Properly Concluded Sovereign Immunity Barred their Action in Federal District Court.

Appellants concede CCHA did not waive its sovereign immunity relative to their action filed in Federal District Court. As Appellants correctly observed, "[t]he Supreme Court recently noted that 'the law governing waivers of immunity by foreign sovereigns' is instructive for a court considering an asserted waiver of tribal immunity." Appellants' Brief, pp. 17-18 (quoting *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 86-87 (2nd Cir. 2001) (citing *C&L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma,* 532 U.S. 411, 423, fn. 3 (2001)). Appellants state further:

> [C]ourts apply two complementary principles to waivers: (1) a sovereign's waiver must be unambiguous, and (2) **a sovereign's interest encompasses not merely whether it may be sued, but *where* it may be sued.** The principle that a bare "sue and be sued" clause in the contexts of foreign and state sovereign immunity constitutes a waiver of immunity **only in the courts of the sovereign**, provides guidance to resolve the effect of the sue and be sued clause.
>
> …
>
> When the Second Circuit applied this guidance, it concluded that the additional authority granted to the [housing authority]—to waive by contract "any immunity from suit which it might otherwise have"—describes the power to waive the agency's immunity to courts **outside the reservation.** That additional authority to contract does not prevent suit in the courts of the sovereign.

Appellants' Brief, p. 18 (citing *Garcia*, 268 F.3d at 86-87) (underline emphasis in original, other emphasis added); see also *Corzo v. Banco Central de Reserva del Peru,* 243 F.3d 519, 523 (9th Cir.2001) (foreign sovereign immunity) ("[W]hile an entity may be amenable to suit in its home country under some circumstances, it does not necessarily follow that it lacks sovereign immunity from suit in the United States."); *United States v. Park Place Assocs., Ltd.,* 563 F.3d 907, 923 (9th Cir.2009) (citing *Arford v. United States,* 934 F.2d 229, 231 (9th Cir.1991) ("A waiver of sovereign immunity means the sovereign is amenable to suit in a court properly possessing jurisdiction; it does not guarantee a forum.")[7]; *Bromfield v. Oregon*, No. 3:16-CV-00509-BR, 2016 WL 2337701, at *2 (D. Or. May 2, 2016) ("A general 'sue and be sued' clause is not sufficient to waive sovereign immunity to suits in federal court."); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989) ("Absent an affirmative textual waiver in the terms of a contractual agreement or tribal constitution, federal courts have consistently declined to find tribal consent to federal jurisdiction.").

However, Appellant's most important concession is as follows:

> [T]he **[Chippewa Cree] Ordinance 3-63 "sue and be sued" clause** is unambiguous, and **limits suit to the *tribal courts, except where* CCHA *otherwise waives immunity in a contract.***
> **…**

[7] "Tribal sovereign immunity is coextensive with other common law immunity principles." *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013).

> Here, the Chippewa Cree Rocky Boy's Tribe is the sovereign…CCHA may be sued in the courts of its' sovereign. **[CCHA] may not be sued elsewhere based on the bare 'sue and be sued' clause.**[8]

Appellants' Brief, pp. 18-19 (emphasis added). This concession is fatal to Appellants' appeal.

Per Appellants' concession, the District Court's determination that sovereign immunity barred Appellants' suit against CCHA *in Federal District Court* was the proper result under the law. However, Appellants are apparently confused with the scope of the District Court's Order. The Order does not address CCHA's sovereign immunity as it relates to the Tribal Court's jurisdiction; rather, the District Court's determination is limited in scope to the effect of CCHA's sovereign immunity on its ability to hear the matter and the District Court properly concluded CCHA's sovereign immunity divested it of jurisdiction *only* and granted dismissal on this basis. (ER1:2-12). Thus, the effect of the relevant "sue and be sued" clause on the Tribe's jurisdiction is not properly at issue before this Court.

Again, the District Court's holding is limited to the proper conclusion dismissal was appropriate regarding *its* ability to hear the case. (ER1:4, 12). (District Court notes CCHA argued "that tribal **sovereign immunity divests *the***

[8] CCHA contends the "sue and be sued" clause at issue is not a waiver of CCHA's sovereign immunity in any jurisdiction. However, since the issue of whether the "sue and be sued" clause barred suit in Tribal Court is not properly before this Court, CCHA reserves its arguments on that issue to the extent necessary following resolution of this appeal.

[*District*] *Court* of any subject matter jurisdiction that it arguably may possess" and held "[t]he 'sue and be sued' clause alone should not act as a general waiver of tribal sovereign immunity." (emphasis added)) On this basis alone, the Court should affirm the District Court's decision.

b. To the Extent this Court Looks Beyond the Scope of the District Court's Holding, CCHA's Sovereign Immunity Was Not Waived.

CCHA is an arm of the Chippewa-Cree Tribal Government and enjoys immunity from suit. A tribe's sovereign immunity extends both to tribal governing bodies and to tribal agencies which act as an arm of the tribe. *Ingrassia*, 676 F. Supp. 2d at 956 (citing *Allen v. Gold Country Casino,* 464 F.3d 1044, 1046 (9th Cir. 2006)). An agency or arm of tribal government enjoys sovereign immunity, and its immunity must be unequivocally waived if an action is to be maintained. *Linneen v. Gila River Indian Comm.,* 276 F.3d 489, 492 (9th Cir. 2002); *Stock West Corp. v. Lujan,* 982 F.2d 1389, 1398 (9th Cir. 1993).

The Tribe has statutorily preserved sovereign immunity for itself and its employees:

> *The Tribe shall be immune from suit in any civil action, and its officers and* ***employees immune from suit for any liability arising from the performance of their official duties***, except as required by federal law or the Chippewa-Cree Constitution and By-Laws, or as specifically waived by a resolution or ordinance of the Business Committee.

CCLOC, Title I, Chapter 3, § 3.3. The Ordinance establishing CCHA preserves the vital principle that CCHA enjoys sovereign immunity and provides CCHA may

only waive its sovereign immunity by written instrument. *See* Tribal Ordinance 3-63 ("Ordinance 3-63"), § V(2)(a).

The Tribe's statutory requirements for waiver of sovereign immunity to be in writing are consistent with United States Supreme Court interpretation of the sovereign immunity doctrine. *C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751(1998); *Santa Clara Pueblo*, 436 U.S. at 58. "*A waiver of sovereign immunity* may not be implied, but **must be *unequivocally* expressed by either the Tribe or Congress**." *Amerind Risk Mgt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011) cert. denied, 132 S. Ct. 1094, 181 L. Ed. 2d 977 (U.S. 2012); (citation omitted) (emphasis added); *Santa Clara Pueblo*, 436 U.S. at 58. Additionally, a tribe's relinquishment of its immunity must be "clear." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). **If there is *any ambiguity* in a tribe's waiver of sovereign immunity, courts are required to apply the interpretation which results in the narrowest waiver of the immunity in favor of the sovereign**. *U.S. v. Nordic Village Inc.*, 503 U.S. 30, 34, 112 S. Ct. 1011, 1014-15 (1992) **([a sovereign's] consent to be sued "must be 'construed *strictly in favor* of the sovereign**'") (citations omitted) (emphasis added)).

There are only two ways CCHA can be divested of its sovereign immunity: (1) Congress may waive tribal immunity; or (2) CCHA may waive its immunity by written contract. Ordinance 3-63, § V(2)(a); *Oklahoma Tax Comm'n,* 498 U.S. at 509. As no congressional waiver would arguably apply, CCHA can only be divested of its sovereign immunity if it waives sovereign immunity by written contract. Ordinance 3-63, § V(2)(a); *Oklahoma Tax Comm'n*, 498 U.S. at 509. This was never done. (SER1:25-26, 28-29, 31-38). While a contract was executed between Appellants and CCHA, Appellant's concede no waiver of CCHA's sovereign immunity could be found in the contract. (SER1:25-26). Accordingly, the District Court's dismissal was appropriate because CCHA is a tribal government agency and is immune from suit absent a clear and unequivocal waiver.

c. The "Sue and Be Sued" Clause Alone is Not a General Waiver of CCHA's Sovereign Immunity

While Appellants suggest the "sue and be sued" clause acts as an unequivocal, general waiver of CCHA's sovereign immunity protections, this is not accurate. At best, the "sue and be sued" clause is ambiguous and unclear, and this ambiguity must be resolved in favor of CCHA. *Nordic Village Inc.*, *supra,* 503 U.S. at 34, 112 S. Ct. at 1014-15. However, based on Appellants' own statutory construction arguments, the only reasonable interpretation of the "sue and

be sued" clause is it is NOT an unequivocal waiver of CCHA's sovereign immunity.

Statutes must, if possible, be construed in such fashion that every word has some operative effect. *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992). Appellant acknowledges this rule of statutory construction. Appellants' Brief, p. 10. Here the relevant statute, in pertinent part, reads as follows:

> The Council hereby gives its irrevocable consent to **allowing [CCHA]** to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance…
> and…
> hereby authorizes the Authority **to agree by contract to waive** any immunity from suit which it might otherwise have.

See Ordinance 3-63, § V(2)(a) (emphasis added) (clause separated for easy reference).

It is Appellants' argument that the first part of the clause acts as a general waiver of CCHA's sovereign immunity. Appellants' Brief, p. 10. However, contrary to reason, Appellants further suggest the second part of the clause "gave CCHA the **additional authority to waive immunity**…" *Id.* (emphasis added). If the Court subscribes to Appellants' interpretation, it would render the entire second part of the clause meaningless. Specifically, if the first part of the clause acts as a general waiver of CCHA's sovereign immunity, CCHA would not need any additional authority enabling it to waive sovereign immunity by written instrument,

as its sovereign immunity would already have been waived generally. This is not a logical construction. Statutes are not construed to contain surplusage. This is precisely what Appellants' argument would result in.

Contrary to Appellants' assertion, it is not CCHA's position that "the Business Committee allowed suit only if CCHA had first waived immunity in contract." *See* Appellants' Brief, p. 10. Rather, it is CCHA's position that the Tribe consented to allow CCHA to make the determination of whether it would waive its sovereign immunity, and if CCHA exercised this power, the Tribe prescribed a method by which CCHA could memorialize the waiver in a written instrument consistent with the Tribe's own requirement that waiver of sovereign immunity be memorialized in writing.

Appellants' argument that the two separate references to "hereby" each give the clause separate effect is equally unavailing. It is clear that the first part of the clause is a reference to the Tribe's consent *allowing CCHA* to exercise, in its discretion, the power to sue and be sued in its corporate name. Ordinance 3-63, § V(2)(a). This consent conversely authorized CCHA NOT to sue and NOT to be sued in its corporate name. *Id.* The clause specifically identifies CCHA as the entity empowered to utilize its discretion with regard to the decision of whether or not to waive its sovereign immunity, i.e. sue or be sued. Where CCHA chooses to

exercise its power to waive sovereign immunity, it may do so by written instrument. *Id.*

The second part of the clause merely prescribes the method by which CCHA may waive its immunity. Ordinance 3-63, § V(2)(a). Thus, while the first "hereby" delineates the Tribe's consent to allow CCHA to exercise discretion regarding a waiver of immunity, the second "hereby" merely prescribes the method by which CCHA may do so. Neither referenced "hereby" could be omitted from the clause as each is a necessary precursor to the language it precedes: (1) the first resulting in the Tribe's consent for CCHA to waive immunity; and (2) the second resulting in a prescribed method for waiver.

Unlike Appellants' interpretation, CCHA's interpretation does not render any portion of the "sue and be sued" clause meaningless, in violation of the rules of statutory construction. This is consistent with other jurisdictions that have expressly considered the issue. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 30 (1st Cir. 2000) ("The better view holds that the enactment of such an ordinance [containing a 'sue and be sued' clause], in and of itself, does not waive a tribe's sovereign immunity. After all, the ordinance, by its terms, authorizes the Authority to shed its immunity from suit "***by contract***," and ***these words would be utter surplusage if the enactment of the ordinance itself served to perfect the waiver***.") (emphasis added).

As demonstrated, the "sue and be sued" clause at issue simply provides the Tribe's consent to CCHA for it to agree to waive its sovereign immunity on an as-needed basis in order to carry out its functions. Consistent with the Tribe's requirement that any waiver of its sovereign immunity be memorialized in a writing, it similarly required that any waiver of sovereign immunity by CCHA also be memorialized in a writing. CCLOC, Title I, Chptr. 3, § 3.3; *compare* Ordinance 3-63, § V(2)(a). From this better reasoned analysis, the Court should affirm the District Court.

d. The Authority Cited By Appellants Is Invalid And Contrary To The Majority Of Circuits That Have Considered The Issue.

As an initial matter, it is important to note that the authority most heavily relied upon by Appellants was expressly vacated on the point of law for which they rely upon it. *Marceau v. Blackfeet Housing Authority,*455 F.3d 974, 977 (9th Cir. 2006), opinion reinstated in part, superseded in part, 540 F.3d 916 (9th Cir. 2008) ("hereinafter" *Marceau I*). As the Court held in *Marceau III, supra,* regarding its prior determination addressing waiver of tribal sovereign immunity, "[o]ur doing so was in error, and we now vacate that holding and decline to reach the issue." *Marceau III,* 540 at 921 (emphasis added).

Moreover, not only is *Marceau I* not valid authority, it is not persuasive either. First, it should be noted in *Marceau I* the Court was interpreting a "sue and be sued" clause of the Blackfeet Housing Authority. It is apparent from the

discussion in *Marceau I* that the Court gave great deference to the Blackfeet Tribal Court's prior decisions holding its establishment ordinance waived its Housing Authority's sovereign immunity. *Marceau I,* 455 F.3d at 979. This deference was also apparent in the Court's discussion in *Marceau II. See Marceau v. Blackfeet Hous. Auth.*, 519 F.3d 838, 843 (9th Cir.), opinion amended and superseded on denial of reh'g, 540 F.3d 916 (9th Cir. 2008). Under principals of comity, this was perhaps the correct result. However, here, the Tribal Court and Tribal Appellate Court have held the opposite: that CCHA's sovereign immunity is not waived by the "sue and be sued" clause at issue. (SER1:39, 45-62). Under principals of comity and because a sovereign's consent to be sued must be construed strictly in favor of the sovereign, this determination should not be disturbed. *See Nordic Village Inc.*, *supra,* 503 U.S. at 34, 112 S. Ct. at 1014-15.

Additionally, the public policy considerations relied upon in *Marceau I* are also unavailing because it creates a meaningless distinction between tribes themselves and their political subdivisions and governmental arms. The *Marceau I* Court, citing *Namekagon Development Co. v. Bois Forte Reservation Housing Authority,* 395 F.Supp. 23, 29, (D. Minn. 1974), aff'd, 517 F.2d 508 (8th Cir. 1975) stated it would be unfair to dismiss a lawsuit on the basis of sovereign immunity against a housing authority, where it entered into contractual relationships with outsiders, because those outsiders would be left without a remedy in the event a

dispute arose. *Marceau I,* 455 F.3d at 979. However, this is simply a risk of doing business with, or living within, a sovereign which has not waived sovereign immunity. Simply, the Tribe itself could not be held to have waived sovereign immunity on principals of "fairness," and neither should its governmental arms. Rather, an unequivocal waiver is required. While sovereign immunity sometimes leads to unfortunate results, this is a known risk of entering relationships with sovereigns that have not waived their immunity. However, there are devices available to those who enter such relationships by which they can protect themselves. One such device is expressly contemplated by the "sue and be sued" clause at issue: requesting the sovereign agree by written instrument to waive its immunity. Any party, including Appellants, can request this waiver. Thus, principals of "fairness" have no place in determining a sovereign's inherent immunity. Rather, it is up to the sovereign to legislate appropriately to protect its citizenship and/or outsiders. Simply, federal courts should adhere to the principal that tribal sovereigns are free to make their own laws and be ruled be them, despite what they may view as an unfair result.

Furthermore, similar to Appellants, the Court in *Marceau I* did not support its opinion with any authority more current than 1987 from any federal jurisdiction. In fact, Appellants and *Marceau I* only cite authority from within two Circuits, the Eighth Circuit and the Ninth Circuit, to support the proposition that a "sue and be

sued" clause alone may act as a general waiver of tribal sovereign immunity. However, as noted more thoroughly below, the Eighth Circuit's more recent line of cases distanced themselves from that conclusion, and in fact, have spun about-face and held the opposite: that such clauses alone are NOT a waiver of sovereign immunity. *See Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1044 (8th Cir. 2000); *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583-84 (8th Cir. 1998); *Buchanan, supra,* 40 F. Supp. 2d 1043. Following *Dillon,* CCHA is unaware of any Eighth Circuit Opinion that has followed the former line of *Namekagon* cases.

Moreover, other than *Marceau I,* the Ninth Circuit has never squarely addressed the issue of whether a "sue and be sued" clause standing alone, can waive tribal sovereign immunity. As stated above, *Marceau I* is not precedent. Similarly, the dicta cited by Appellant from *R.J. Williams Co. v. Fort Belknap Housing Authority,* 719 F.2d 979 (9th Cir. 1983) is also not precedent. As such, the issue remains unresolved in the Ninth Circuit.

If this Court were to resurrect the reasoning of *Marceau I,* it would be in the slim minority of jurisdictions who have considered this issue. Appellate and district courts, from within at least five other circuits have reached the opposite conclusion in relatively recent opinions. *See Ninigret Dev. Corp.*, 207 F.3d at 30 (1st Cir. 2000) ("The better view holds that the enactment of such an ordinance

[containing a 'sue and be sued' clause], in and of itself, does not waive a tribe's sovereign immunity."); *Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043, 1046-47 (E.D. Wis. 1999) (interpreting a "sue and be sued" clause identical to that at issue before this Court as not creating a general waiver of sovereign immunity); citing *Garcia*, *supra,* 268 F.3d at 86-87 (interpreting identical "sue and be sued" clause as not waiving sovereign immunity in federal court); *Warren v. United States*, 859 F. Supp. 2d 522, 542 (W.D.N.Y. 2012), aff'd, 517 F. App'x 54, 2013 WL 1748957 (2d Cir. 2013) ("sue and be sued" clause alone did not waive sovereign immunity); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1044 (8th Cir. 2000); *Dillon,* 144 F.3d at 583-584 ("Sue and be sued" clause in tribal ordinance did not constitute a waiver of sovereign immunity); *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 922 (6th Cir. 2009) ("sue and be sued" clause did not act as a general waiver of tribal sovereign immunity).

While Appellants point out the Blackfeet and Navajo tribal courts have held "sue and be sued" clauses to waive sovereign immunity, the Chippewa Cree Tribe and other tribes have held otherwise. *See Eagleshield v. Standing Rock Housing Authority,* Case No. SOC-12-710, Order Granting Motion to Dismiss, p. 4 (Standing Rock Sioux Tribal Court 2014) (Order contained in Addendum). Moreover, the Navajo authority relied upon by Appellants was, per their

admission, abrogated by the Navajo Tribe's subsequent legislative action and is thus no longer valid authority. Appellants' Brief, p. 15, ft. nt. 9. In any event, these decisions are likewise not precedential. That being said, principles of comity and tribal self-determination should lead the Court to observe with approval, the former decision of the Chippewa Cree Tribal Court, as there are no factors present which would permit denying recognition of that decision.

Finally, *Maryland Casualty Co. v. Citizens National Bank of West Hollywood,* 361 F.2d 517 (5th Cir. 1966) is also readily distinguishable on the point of law Appellants rely upon it for and provides little support for Appellants' argument. In fact, Appellants' point out the key distinction: that there was no clause requiring the tribe's sovereign immunity to be waived by contract in the "sue and be sued" clause interpreted in *Maryland Casualty Co.* *See* Appellants' Brief, p. 11 (citing *Maryland Casualty Co.* 361 F.2d at 521). Again, this authority relied upon by Appellants is not precedential support for the proposition the "sue and be sued" clause at issue here is a general waiver of CCHA's sovereign immunity.

e. CCHA's Tribal Officials Enjoy Sovereign Immunity.

It is well settled tribal sovereign immunity extends to tribal officials when acting in their official capacity and within the scope of their authority. *Ingrassia*, 676 F. Supp. 2d at 956 (citing *United States v. Oregon,* 657 F.2d 1009, 1013 n. 8

(9th Cir. 1981); *Linneen*, *supra,* 276 F.3d at 492; *Cook v. AVI Casino Enterprises, Inc.,* 548 F.3d 718, 727 (9th Cir. 2008). Additionally, the Tribe has expressly extended and preserved its sovereign immunity to tribal officials and "employees" "for any liability arising from the performance of their official duties." CCLOC, Title I, Chptr. 3, § 3.3. Moreover, even if Ordinance 3-63 could be read to be a general waiver of the Chippewa Cree Housing Authority's sovereign immunity, there is absolutely no language indicating the Tribe authorized a waiver of sovereign immunity for tribal officials or employees by that instrument. Ordinance 3-63, § V(2)(a).

The viability of a plaintiff's claims against tribal officials turns on two considerations: (1) whether plaintiffs have sued the tribal officials in their official or personal capacity; and (2) whether the remedy would operate against the Tribe. *See Maxwell v. County of San Diego*, 708 F.3d 1075, 1087-90 (9th Cir. 2013).

The substance of Appellants' allegations before the Tribal Court did not suggest Ms. Hay or Ms. Billy acted outside their official capacity or scope of their authority with regard to the alleged actions or omissions alleged in the Tribal Court Complaint. In fact, Appellants' allegations did not identify actions attributable to Ms. Hay or Ms. Billy outside their official capacity and both are expressly referenced by Appellants in their capacity as CCHA officials. ER2:82-84, ¶¶ 36, 51-63. Appellants alleged: (1) "[Ms.] Billy, an employee of CCH[A]," authorized

the disposal of condemned house materials; and (2) "[Ms.] Hay, Director of CCH[A]," and/or CCHA allegedly defrauded Appellants regarding availability of insurance coverage for rebuilding the house or their damages. *Id*. Notably, these allegations did not meet the heightened pleading standard required for allegations of fraud. *See* Fed.R.Civ.P. 9(b). (In pleading fraud or misrepresentation a plaintiff "must state with particularity the circumstances constituting fraud or mistake."); *In re iPhone 4s Consumer Litig.*, 637 F. App'x 414, 415 (9th Cir. 2016) (under the Rule 9(b) standard a plaintiff must allege the "who, what, where, when, and how" of the misconduct and explain what is false or misleading about the statement made and why it is false). The referenced allegations make up the entirety of Ms. Hay and Ms. Billy's involvement in Appellants' underlying lawsuit.

Notably, before the District Court, while Ms. Hay and Ms. Billy are named as defendants in the caption, they are not identified as parties to the action. ER2:63, 68. Moreover, other than referencing Ms. Hay and Ms. Billy in the caption, they are not mentioned anywhere else in Appellants' Second Amended Complaint before the District Court. ER2:63-74. In fact, Appellants do not even suggest in their Second Amended Complaint that the Tribal Court erred in dismissing Ms. Hay or Ms. Billy on principals of sovereign immunity. *Id.*

In any event, Appellants will be hard pressed to establish CCHA's authorizing disposal of the bits and pieces of the exploded home and explaining

Appellants' alleged damages were not compensable under CCHA's insurance coverage, was in any way beyond either employee's official capacity or scope of authority. While Appellants named Ms. Hay and Ms. Billy in their individual capacity, the Court should look beyond the terms used to the substance of the Tribal Court and District Court complaints and recognize this was a mere pleading device aimed at sidestepping sovereign immunity. Because the referenced actions of Ms. Hay and Ms. Billy could only be done in their capacity as CCHA employees, and such actions are the type that would be implicitly authorized during the course of employment, they are entitled to sovereign immunity protection under the established principles of law. This suit was brought against these officials "*because of* their official capacities—that is, because the powers they possess in those capacities enabled them to grant [or deny] the [Appellants] relief on behalf of [CCHA]," and thus they should be immunized from suit. *Maxwell,* 708 F.3d at 1088 (9th Cir. 2013) (emphasis in original).

Previous immunity decisions explain the difference between official and personal capacities suits under the new "remedy-focused" analysis. For example, an intoxicated tribal casino employee operating a motor vehicle struck and injured the plaintiff in *Cook*, *supra,* 548 F.3d at 721. The casino employee had been served alcohol at a casino function by other casino employees. *Id.* The plaintiff sued the casino and other casino employees in their official capacity to establish

vicarious liability against the tribe. *Id.* at 720. The Ninth Circuit determined that despite the employee's individual actions, the *tribe represented the "real, substantial party in interest and [was] entitled to invoke sovereign immunity*." *Id.* (emphasis added). The Court ultimately precluded plaintiffs from "circumvent[ing] tribal immunity through a *mere pleading device*." *Id.* (internal quotations omitted) (emphasis added).

Moreover, as the District Court properly held, any recovery here against Ms. Hay or Ms. Billy would ultimately come from CCHA, a governmental entity of the Tribe. In fact, Appellants expressly concede this. When the District Court inquired as to where any potential recovery would come from, Appellants' counsel responded: "[t]he recovery will come out of the funding of rents from [the] Housing [Authority], and that's **the only possible source.**" (SER1:22) (emphasis added).

As noted above, the focus is whether the remedy sought would ultimately come out of the tribal treasury or the tribal official's pocket. *Maxwell*, 708 F.3d at 1087-90. **Tribal sovereign immunity bars suits where recovery would operate against the Tribe**. *Id.* (emphasis added). Courts should focus on the essential nature and effect of the relief sought and evaluate whether "the judgment sought would *expend itself on the public treasury* or domain, or *interfere with the public*

administration, or if the effect of the judgment would be to *restrain the* [*sovereign*] *from acting*, or compel it to act." *Maxwell*, 708 F.3d at 1088.

In addition to Appellants' concession, it should be noted there is no contractual right to indemnity established between Ms. Hay and Ms. Billy and CCHA. However, indemnity is available to Ms. Hay and Ms. Billy against CCHA in the event suit is permitted against these individual tribal officials/employees. *O'Hara v. Teamsters Union Local No. 856*, 151 F.3d 1152, 1158 (9th Cir. 1998) (employer must indemnify employee for actions taken within the scope of employment where those losses are a direct consequence of the discharge of employee's duties); Mont. Code Ann. § 2-9-305 (governmental entity shall indemnify employee for conduct within the course and scope of the employee's office or employment); Mont. Code Ann. § 39-2-701 (employer shall indemnify an employee for all that the employee necessarily expends or loses in direct consequence of the discharge of duties as an employee, even though unlawful); CCLOC, Title I, Chptr 1, § 1.9 (in the absence of Tribal law in civil matters, the Tribal Court may apply the laws of the United States or the State of Montana).

Here, the District Court properly determined Appellants "fail[ed] to differentiate" the alleged conduct of the tribal employees undertaken in their official capacities compared to alleged conduct undertaken in their personal capacities or differentiate the alleged conduct from the conduct of any other named

defendant. (ER1:8). The District Court found the plaintiffs brought the suit against the tribal employees "*because of* their official capacities with [the Tribe]". (ER1:9) (emphasis in original). While the District Court found the plaintiffs sought to recover from the tribal employees in their official capacity and in their individual capacity, the Court found determinative that any judgment against the officials would "operate against the Tribe." *Id.* On this basis, the District Court properly held the Tribe "represents the real and substantial party in interest under these circumstances." *Id*.

While the District Court understandably hung its hat on the financial impacts to CCHA, it should also be noted that a suit against these tribal officials would interfere with CCHA's ability to carry out its public administration and restrain it from acting. Namely, if employees of CCHA could be sued individually for actions taken in their official capacity, without any liability flowing to CCHA, CCHA would not be able to fill those positions. As such, a holding authorizing such suits would detrimentally impact CCHA's ability to function.

Appellants suggest, without merit, CCHA's insurance coverage should negate the established principals of tribal official sovereign immunity. However, the fact Appellants seek to hold CCHA's insurance liable for any alleged damages caused by the alleged actions of Ms. Hay and Ms. Billy, is telling of the ultimate effect on tribal coffers. Here, even if CCHA's insurance were to cover any alleged

damages, CCHA, not Ms. Hay or Ms. Billy, would be the party in interest who would be financially impacted by way of paying the deductible and increased premiums. Even if Ms. Hay and Ms. Billy had individual insurance coverage for Appellants' claims, which they don't, it likely wouldn't cover the damages sought, whether the amount is $2,000,000 or $20,000,000, and indemnity would be required. Thus, Appellants' argument on this point further supports the correctness of the District Court's determination.

Appellants also suggest *Burrell, supra,* 456 F.3d 1159 applies to their allegations against Donna Hay and Thela Billy. Appellants' Brief, p. 21. However, their use of *Burrell* actually supports CCHA's position. The *Burrell* plaintiffs alleged the tribal officials committed fraud and theft through use of their officials' powers and other acts outside their authority. *Burrell,* 456 F.3d at 1162-63. Here, Appellants did not allege theft by the Donna Hay or Thela Billy, and their allegation of fraud at the Tribal Court level, while insufficiently plead, alleges Ms. Hay misled them with regard to the availability of CCHA's, not her personal, insurance money. (ER2:63-74; 77-88). Simply, *Burrell* does not support Appellants' position.

Under the foregoing recitation of facts and law, Ms. Hay and Ms. Billy clearly enjoy tribal sovereign immunity as tribal officials. Accordingly, the District Court's decision should be affirmed. Any other result would impact

CCHA's sovereign immunity and subject it, through the back door, to liability for which it has not waived its immunity or consented to suit. Moreover, failure to dismiss this action would interfere with tribal self-governance, as it would impact the public administration of CCHA's governmental functions.

CONCLUSION

For the reasons stated herein, the Court should decline to decide the issues raised by Appellants and remand this matter to the District Court with instructions to dismiss due to the District Court's lack of subject matter jurisdiction to act as a general appellate body for the Tribe. Alternatively, the Court should affirm the Court's well-reasoned Order dismissing this matter due to CCHA's sovereign immunity. CCHA **does not** waive oral argument.

DATED this 8th day of August, 2016.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By: */s/ Evan M.T. Thompson*
Evan M.T. Thompson

Attorneys for Chippewa-Cree Housing Authority, Donna S. Hay and Thela Billy

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellees-Defendants Chippewa-Cree Housing Authority, Donna S. Hay and Thela Billy know of no related cases pending before this Court.

By: */s/ Evan M.T. Thompson*
Evan M.T. Thompson

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.App.R. 32(a)(7)(B) because:

This brief contains 10,798 words, excluding the parts of the brief exempted be Fed.R.App.P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because:

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BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By: */s/ Evan M.T. Thompson*
Evan M.T. Thompson

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 8, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

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Addendum 1

CCLOC, Title I, Chptr. 1, § 1.9:

Choice of Law.

The Tribal Court and appellate court, in all actions, shall apply the laws, ordinances, customs, and traditions of the Chippewa-Cree Tribe. In the absence of Tribal law in civil matters the Court may apply laws and regulations of the United States or the State of Montana. Where doubt arises as to customs and traditions of the Tribe, the Tribal Court may request the advice of recognized Tribal elders.

Addendum 2

CCLOC Title I, Chptr. 2, § 2.2

Civil Subject Matter Jurisdiction.

Jurisdiction of the Court shall extend to all civil actions arising in whole or in part within the exterior boundaries of the reservation or on any other land or property owned or controlled by the Tribe or adjacent, dependent Indian communities.

Addendum 3

CCLOC Title I, Chptr. 3, § 3.3:

Sovereign Immunity.

The Tribe shall be immune from suit in any civil action, and its officers and employees immune from suit for any liability arising from the performance of their official duties, except as required by federal law or the Chippewa-Constituion and By-Laws, or as specifically waived by a resolution or ordinance of the Business Committee.

Addendum 4

Ordinance 3-63, § V(2)(a).

The Council hereby gives its irrevocable consent to allowing [CCHA] to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinanceand hereby authorizes [CCHA] to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be liable for the debts or obligations of [CCHA], except insofar as expressly authorized by this ordinance.

Addendum 5

Mont. Code Ann. § 39-2-701:

Indemnification of employee.
(1) An employer shall indemnify an employee, except as prescribed in subsection (2), for all that the employee necessarily expends or loses in direct consequence of the discharge of duties as an employee or of the employee's obedience to the directions of the employer, even though unlawful, unless the employee at the time of obeying the directions believed them to be unlawful.
(2) An employer is not bound to indemnify an employee for losses suffered by the employee in consequence of the ordinary risks of the business in which the employee is employed.
(3) An employer shall in all cases indemnify an employee for losses caused by the employer's want of ordinary care.

Addendum 6

Mont. Code Ann. § 2-9-305:

Immunization, defense, and indemnification of employees.
(1) It is the purpose of this section to provide for the immunization, defense, and indemnification of public officers and employees civilly sued for their actions taken within the course and scope of their employment.
(2) In any noncriminal action brought against any employee of a state, county, city, town, or other governmental entity for a negligent act, error, or omission, including alleged violations of civil rights pursuant to 42 U.S.C. 1983, or other actionable conduct of the employee committed while acting within the course and scope of the employee's office or employment, the governmental entity employer, except as provided in subsection (6), shall defend the action on behalf of the employee and indemnify the employee.
(3) Upon receiving service of a summons and complaint in a noncriminal action against an employee, the employee shall give written notice to the employee's supervisor requesting that a defense to the action be provided by the governmental entity employer. If the employee is an elected state official or other employee who does not have a supervisor, the employee shall give notice of the action to the legal officer or agency of the governmental entity defending the entity in legal actions of that type. Except as provided in subsection (6), the employer shall offer a defense to the action on behalf of the employee. The defense may consist of a defense provided directly by the employer. The employer shall notify the employee, within 15 days after receipt of notice, whether a direct defense will be provided. If the employer refuses or is unable to provide a direct defense, the defendant employee may retain other counsel. Except as provided in subsection (6), the employer shall pay all expenses relating to the retained defense and pay any judgment for damages entered in the action that may be otherwise payable under this section.
(4) In any noncriminal action in which a governmental entity employee is a party defendant, the employee must be indemnified by the employer for any money judgments or legal expenses, including attorney fees either incurred by the employee or awarded to the claimant, or both, to which the employee may be subject as a result of the suit unless the employee's conduct falls within the exclusions provided in subsection (6).
(5) Recovery against a governmental entity under the provisions of parts 1 through 3 of this chapter constitutes a complete bar to any action or recovery of damages by the claimant, by reason of the same subject matter, against the employee whose negligence or wrongful act, error, omission, or other actionable conduct gave rise to the claim. In an action against a governmental entity, the employee whose conduct gave rise to the suit is immune from liability by reasons of the same

subject matter if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of the employee's employment, unless the claim constitutes an exclusion provided in subsections (6)(b) through (6)(d).

(6) In a noncriminal action in which a governmental entity employee is a party defendant, the employee may not be defended or indemnified by the employer for any money judgments or legal expenses, including attorney fees, to which the employee may be subject as a result of the suit if a judicial determination is made that:

(a) the conduct upon which the claim is based constitutes oppression, fraud, or malice or for any other reason does not arise out of the course and scope of the employee's employment;

(b) the conduct of the employee constitutes a criminal offense as defined in Title 45, chapters 4 through 7;

(c) the employee compromised or settled the claim without the consent of the government entity employer; or

(d) the employee failed or refused to cooperate reasonably in the defense of the case.

(7) If a judicial determination has not been made applying the exclusions provided in subsection (6), the governmental entity employer may determine whether those exclusions apply. However, if there is a dispute as to whether the exclusions of subsection (6) apply and the governmental entity employer concludes that it should clarify its obligation to the employee arising under this section by commencing a declaratory judgment action or other legal action, the employer is obligated to provide a defense or assume the cost of the defense of the employee until a final judgment is rendered in that action holding that the employer did not have an obligation to defend the employee. The governmental entity employer does not have an obligation to provide a defense to the employee in a declaratory judgment action or other legal action brought against the employee by the employer under this subsection.

Addendum 7

Eagleshield v. Standing Rock Housing Authority, Case No. SOC-12-710, Order Granting Motion to Dismiss, p. 4 (Standing Rock Sioux Tribal Court 2014):

STANDING ROCK SIOUX TRIBAL COURT
STANDING ROCK SIOUX INDIAN RESERVATION

BRANDON J. EAGLESHIELD, Plaintiff, v. STANDING ROCK HOUSING AUTHORITY, Defendant.	Case No. SOC-12-710 **PROPOSED ORDER GRANTING DEFENDANT STANDING ROCK HOUSING AUTHORITY's MOTION TO DISMISS**

Defendant, Standing Rock Housing Authority ("SRHA"), moves to dismiss this action on the grounds that it is a tribal entity afforded sovereign immunity from suit. For the reasons stated, the Court must dismiss the action, as it is barred by sovereign immunity.

The Plaintiff, an enrolled member of the Tribe, filed this action claiming that he is entitled to damages due to an alleged wrongful termination by SRHA.

The Defendant moves the Court to dismiss the Complaint, pursuant to Standing Rock Sioux Tribal Code of Justice ("SRSTC"), Title I, Rule 1 and Fed. R. Civ. P. 12(b)(1) and (6), on sovereign immunity grounds and for failure to state a claim upon which relief can be granted. Plaintiff did not respond to the Motion to Dismiss. Briefing is now closed on the Motion to Dismiss.

//

The Court has reviewed the briefing, and the file, and concludes that Defendant is immune from suit because Plaintiff has failed to meet its burden to establish a waiver of sovereign immunity. A brief discussion of the law is appropriate.

The Court acknowledges that tribal sovereign immunity is a fundamental concept and applies in federal, state and tribal courts. *Ingrassia v. Chicken Ranch Bingo and Casino*, 676 F. Supp. 2d 953, 957, 93 U.S.P.Q.2d 1307 (E.D. Cal. 2009) (citing *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir.1983)). The issue of sovereign immunity bears directly on whether a court has subject matter jurisdiction. *See, e.g., Smith v. Babbitt*, 875 F.Supp. 1353, 1366 (D.Minn. 1995); *Amerind Risk Mgt. Corp. v. Malaterre*, 633 F.3d 680, 686 (8th Cir. 2011) cert. denied, 132 S. Ct. 1094, 181 L. Ed. 2d 977, 80 BNA USLW 3423, 80 BNA USLW 3425, 80 BNA USLW 3247 (U.S. 2012) ("[S]overeign immunity is a 'threshold jurisdictional matter' and a 'jurisdictional prerequisite.'). Once a court determines that it lacks subject matter jurisdiction, it must dismiss the action. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506, 126 S. Ct. 1235, 1240 (2006).

"There is a strong presumption against waiver of tribal sovereign immunity." *Ingrassia*, 676 F. Supp. 2d at 956 (citing *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001). If it is alleged that there has been a waiver of sovereign immunity, the plaintiff bears the burden of showing a waiver of tribal sovereign immunity. *Ingrassia*, 676 F. Supp. 2d at 956-957 (citing *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 2007 WL 2701995, *2, 2007 U.S. Dist. LEXIS 67422, *7 (D.Colo.2007)); *Dontigney v. Conn. BIAC*, 2006 WL 2331079, *3, 2006 U.S. Dist. LEXIS 55625, *10 (D.Conn.2006); *Morgan v. Coushatta Tribe of Indians of La.*, 214 F.R.D. 202, 205 (E.D.Tex.2001). Here, Plaintiff bears the heavy burden of proving – by a preponderance of the evidence – that jurisdiction in this Court does in fact exist. *See, e.g., Makarova v. United States*, 201 F.3d 110, 113 (2nd Cir. 2000).

Having set forth a general background, the Court must first determine whether SRHA is an entity protected by sovereign immunity. It is well established that Indian housing authorities, like SRHA, are tribal governmental entities and agencies immune from suit. *See, e.g., Weeks*

Construction, Inc. v. Oglala Sioux Housing Authority, 797 F.2d 668, 670 (8th Cir. 1986) (a housing authority, established pursuant to the tribe's powers of self-government, is a tribal agency); *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583 (8th Cir. 1998) (determining that the tribal housing authority was a tribal, governmental agency, rather than a separate corporate entity created by the tribe). An agency or arm of the tribal government enjoys the sovereign immunity of the tribe itself and that immunity must be clearly waived by the agency if an action is to be maintained. *Lineen v. Gila River Indian Comm.*, 276 F.3d 489, 492 (9th Cir. 2002). Furthermore, SRHA's sovereign immunity is expressly preserved by the statutes of the Standing Rock Sioux Tribe. SRSTC Title XVII, § 17-102.

From this, it is apparent that SRHA is an agency of the Tribe subject to the protection of sovereign immunity. Having concluded that Defendant is an entity protected by sovereign immunity, the Court will now address whether SRHA is entitled to such protection or whether there has been a waiver of this protection. Based on the following, this Court concludes that no such waiver is present.

Standing Rock Sioux Tribal Code Title XVII, § 17-102, expressly preserves the vital principle that SRHA enjoys sovereign immunity as it authorizes this Court's jurisdiction only where SRHA "has expressly consented to be sued or is authorized to be sued as provided by the Code of Justice, Title I, Chapter 1, § 1-109(b)."[1] *See,* Tribal Resolution 203-08 §§ 17-102, 17-107 (05/2008 rev.). Tribal Resolution 203-08 § 17-107 further provides that SRHA may only waive its sovereign immunity by expressing such waiver through written instrument. *See,* SRSTC Title XVII, §§ 17-102, 17-107 (05/2008 rev.).

The Tribe's statutory requirement that a waiver must be expressed in writing is consistent with United States Supreme Court cases interpreting the doctrine of sovereign immunity. *C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001); *Kiowa*

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[1]SRSTC Title I, Chapter 1, § 1-109(b) is inapplicable as it provides for actions where the plaintiff is *only* seeking declaratory and equitable relief and where service of process has been made under Section 2-102(c) and proof of such service has been received by the Court. (emphasis added). Here, Plaintiff seeks money damages and there is no indication that proof of service has been received by the Court.

Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751(1998); *Santa Clara Pueblo*, 436 U.S. at 58. "A waiver of sovereign immunity *may not be implied*, but *must be unequivocally expressed* by either the Tribe or Congress." *Amerind Risk*, 633 F.3d at 685 (citing *Rupp v. Omaha Indian Tribe,* 45 F.3d 1241, 1244 (8th Cir.1995) (emphasis added)); *see also, Dillon,* 144 F.3d at 583-584 ("Sue and be sued" clause in tribal ordinance did not constitute a waiver of sovereign immunity); *Santa Clara Pueblo,* 436 U.S. at 59, 98 S. Ct. at 1677, 56 L. Ed. 2d 106 (1978) (In the absence of any unequivocal expression of contrary legislative intent, no waiver of tribal sovereign immunity can be found).

This Court has previously determined that absent written waiver or congressional action, SRHA enjoys sovereign immunity as an arm, or tribal agency, of the Standing Rock Sioux Tribal Government. *See Alkire v. Standing Rock Housing Authority*, File # COMP 11-087, Memorandum Opinion, Order for Judgment, and Judgment of Dismissal (June 30, 2011); *Whitemountain v. Standing Rock Housing Authority*, SOC-12-678, Memorandum Opinion (April 19, 2013). In *Alkire,* this Court held that pursuant to SRSTC Title XVII, which specifically states that SHRA is a tribal entity, SRHA is entitled to sovereign immunity under the reasoning set forth in *Dillon v. Yankton Sioux Tribal Housing Authority, supra. Alkire*, at pp. 1-2 (citing Tribal Resolution No. 203-08 § 17-101; *Dillon,* 144 F.3d at 583). In making its determination, this Court further held that the "sue and be sued" clause contained in SRSTC Title XVII, § 17-107 does not act as a waiver of sovereign immunity, but rather empowers SRHA to make a determination, on a case-by-case basis as to whether it will, or will not, consent to suit. *Alkire*, at pp. 2-3 (citing SRSTC Title XVII, § 17-107 (a), (b) & (c)); *Dillon,* 144 F.3d at 583).

This Court went further in its decision, holding that the mere purchase of insurance is not a waiver of sovereign immunity. *Alkire*, at pp. 3-4 (citing *Seminole Tribe of Florida v. McCor,* 903 So.2d 353, 359 (Fla.2d DCA 2005) ("[T]he purchase of insurance may simply be a measure to provide protection for the Tribe's assets against the possibility that the Tribe's immunity will be abrogated or ignored."); *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977); *Miccosukee Tribe of Indians v. Napoleoni*, 890 So.2d 1152 (Fla. 1st DCA 2004). This Court stated that "insurance

simply limits the total exposure, *if* the Authority has expressly agreed in writing [to waive its sovereign immunity]." *Alkire*, at p. 3 (emphasis in original).

In addition to the holding from *Alkire,* this Court has more recently recognized the fact that SRHA enjoys tribal sovereign immunity in *Whitemountain v. Standing Rock Housing Authority. See, Whitemountain v. Standing Rock Housing Authority*, SOC-12-678, Memorandum Opinion (April 19, 2013). In that case, the Court again determined that the Plaintiff could not pursue her claims in the absence of a waiver of sovereign immunity. *Id.*

From the foregoing, it becomes apparent that there are only two ways that Defendant can be divested of their sovereign immunity: 1) Congress can unequivocally and expressly waive tribal immunity; or 2) SRHA can expressly waive its immunity in writing. Tribal Resolution 203-08 §§ 17-102, 17-107 (05/2008 rev.); *Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S. Ct. at 1677 (emphasis added). The Court is not aware of any unequivocal expression of waiver of sovereign immunity by Congress which would even arguably apply to the present matter. Moreover, Plaintiff has not met his burden of demonstrating, by a preponderance of the evidence, that a written waiver of sovereign immunity by Defendant has occurred.

Therefore, this Court must conclude that this action, as to Defendant Standing Rock Housing Authority, is barred by sovereign immunity. Because Defendant enjoys sovereign immunity, this Court lacks subject matter jurisdiction over this cause of action. Given the Court's ruling on this point, it is unnecessary to address any remaining issues raised by the Motion to Dismiss.

WHEREFORE, DEFENDANT'S MOTION TO DISMISS IS GRANTED AND PLAINTIFF'S CLAIMS ARE DISMISSED WITH PREJUDICE.

Dated this 15th day of May, 2014.

William J. Delmore, Chief Judge

cc: Evan M.T. Thompson, Esq.
Brandon J. Eagleshield

I, Verna Gore Clerk of Court of the Standing Rock Sioux Tribal Court, do hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears on file and of record in my said office. Dated this 16th day of May 2014

Verna Gore
Clerk, Standing Rock Sioux Tribal Court