

Docket No. 15-36003

In the
United States Court of Appeals
for the
Ninth Circuit

GLENN EAGLEMAN, et al.

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

*Appeal from a Decision of the United States District Court for the District of Montana (Great Falls),
Case No. 4:14-cv-00073-BMM · Honorable Brian M. Morris*

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. STATEMENT OF JURISDICTION	1
II. STATEMENT OF THE ISSUES PRESENTED	1
III. STATEMENT OF THE CASE	1
IV. STATEMENT OF THE FACTS	3
V. SUMMARY OF ARGUMENT	5
VI. ARGUMENT	6
A. Standard of Review	6
B. The “Sue and Be Sued” Clause in the Tribal Ordinance 3-63 Is an Express Waiver of Tribal Sovereign Immunity	6
1. Rocky Boy’s Chippewa-Cree Tribe May Waive the Sovereign Immunity of Tribal Entities or Corporations	7
2. Section 2 (a) of Tribal Ordinance 3-63 Is an Express Waiver	9
3. Other Courts Have Found a Clear Waiver in a “Sue and Be Sued” Clause	14
4. The United States Supreme Court Has Provided Guidance That a “Sue and Be Sued” Clause Is a Clear Waiver in the Courts of the Sovereign	17
C. Susan Hay and Thella Billy Are Not Shielded by Tribal Immunity as Individuals	19
VII. CONCLUSION	22

CERTIFICATE OF COMPLIANCE.....	23
STATEMENT OF RELATED CASES	24
ADDENDUM	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

FEDERAL CASE LAW

<i>Allen v. Gold Country Casino</i> , 464 F.3d 1044 (9 th Cir. 2006)	7
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	6
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	6
<i>Brunette v. Dann</i> , 417 F. Supp. 1382 (D. Idaho 1976)	17
<i>Burrell v. Leonard Armijo, et al</i> , 456 F.3d 1159 (10 th Cir. 2006)	21
<i>C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.</i> , 532 U.S. 411 (2001).....	7, 17
<i>Dillon v. Yankton Sioux Housing Authority</i> , 144 F.3d 581 (8 th Cir 1998)	5, 7, 13
<i>Enterprise Electric Co. v. Blackfeet Tribe of Indians</i> , 353 F. Supp. 991 (D. Mont. 1973)	17
<i>Franchise Tax Board of California v. U.S. Postal Service</i> , 467 U.S. 512 (1984).....	9, 14
<i>Garcia v. Akwesasne Housing Authority</i> , 268 F.3d 76 (2nd Cir. 2001)	17, 18
<i>Hardin v. White Mountain Apache Tribe</i> , 779 F.2d 476 (9 th Cir. 1981)	19
<i>Imperial Granite v. Pala Band</i> , 940 F.2d 1269 (9 th Cir. 1991)	19, 21
<i>Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.</i> , 523 U.S. 751 (1998).....	7

<i>Lineen v. Gila River Indian Cmty.</i> 276 F.3d 489 (9 th Cir. 2002)	6
<i>Maryland Casualty Company v. Citizens National Bank of West Hollywood</i> , 361 F.2d 517 (5 th Cir. 1966)	11
<i>Marceau v. Blackfeet Housing Authority</i> , 455 F.3d 974 (9 th Cir. 2006) (<i>Marceau I</i>).....	5, 7, 12, 13, 15
<i>Marceau v. Blackfeet Housing Authority</i> , 540 F.3d 916 (9 th Cir. 2008) (<i>Marceau III</i>)	7, 12
<i>Maxwell v. County of San Diego</i> , 708 F.3d 1075 (2013)	5, 7, 19, 20, 21
<i>Namekagon Development Co. v. Bois Forte Reservation Housing Authority</i> , 395 F. Supp. 23 (D. Minn. 1974), <i>aff'd</i> , 517 F.2d 508 (8 th Cir.1975).....	5, 7, 13
<i>Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.</i> , 498 U. S. 505 (1991)	17
<i>Parker Drilling Company v. Metlaka Indian Community</i> , 451 F.Supp. 1127 (D. Alaska 1978).....	17
<i>R. J. Williams Company v. Fort Belknap Housing Authority</i> , 719 F.2d 979 (9 th Cir. 1983)	15
<i>R. C. Hedreen Co. v. Crow Tribal Housing Authority</i> , 521 F. Supp. 599 (D. Mont. 1981)	16
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978).....	9
<i>Tenneco Oil Co. v. Sac and Fox Tribe of Indians</i> , 725 F.2d 572 (10 th Cir. 1984)	19
<i>Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.</i> , 797 F.2d 668 (8 th Cir. 1986)	13
<i>White Mountain Apache Tribe v. Smith Plumbing Co.</i> , 856 F.2d 1301 (9 th Cir. 1988)	16

<i>U. S. v. Yakima Tribal,</i> 806 F.2d 883 (9 th Cir. 1986)	19
--	----

FEDERAL STATUTES

<i>Indian Reorganization Act, 48 Stat. 984 (1934)</i> codified as 25 U.S.C. §§ 461-494.....	8, 13
--	-------

<i>Native American Housing Assistance and Self Determination Act of 1996,</i> 25 U.S.C. §§ 4101 et seq, as amended	20
---	----

28 U.S.C. § 1331	1, 3, 4
------------------------	---------

28 U.S.C. § 1291	1
------------------------	---

FEDERAL REGULATIONS

24 C. F. R. 1000.136	20
----------------------------	----

24 C. F. R. 1000.136(a).....	20
------------------------------	----

24 C. F. R. 1000.136(b)	20
-------------------------------	----

24 C. F. R. 805.108-109	15
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TRIBAL CASE LAW

<i>Davis v. Turtle Mountain Hous. Auth., 17 Indian L. Rptr. 6035</i>	15
--	----

<i>Deroche, et al. v. Blackfeet Indian Housing Authority,</i> 17 Indian Law Repr., 6036	15
--	----

<i>Indian Construction Services v. Navajo Housing Authority,</i> No. WR-CV-35-88 (Navajo 08/22/1989).....	15
--	----

<i>Navajo Housing Authority v. Howard Dana and Associates,</i> 5 Nav. R. 157 (Nav. Sup. Ct. 07/03/1987)	14
--	----

<i>Phillips v. Navajo Housing Authority, No. SC-CV-13-05</i> (Navajo 12/08/2005).....	14
--	----

TRIBAL LEGISLATION

<i>Constitution and Bylaws of the Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (approved November 3, 1935)</i>	<i>8</i>
<i>Rocky Boy's Tribal Ordinance 3-63 (enacted May 28, 1963).....</i>	<i>8, 10, 14, 15, 22</i>

STATE CASE LAW

<i>Smith Plumbing Co. v. Aetna Casualty & Surety Co., 149 Ariz. 524 (1986)</i>	<i>16</i>
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I. STATEMENT OF JURISDICTION

This case began on the Rocky Boy's Chippewa Cree Reservation in the Great Falls Division of the United States District Court of Montana under federal question jurisdiction, 28 U.S.C. § 1331. This Court has jurisdiction over the final order issued by the Montana District Court under 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES PRESENTED

(1) Does the "Sue and Be Sued" clause in the tribal ordinance establishing the Chippewa Cree Housing Authority (CCHA) waive the tribal sovereign immunity of CCHA in tribal court?

(2) Did the District Court properly hold that Defendants Susan Hay and Thela Billie, employees of Defendant tribal entities, enjoy tribal sovereign immunity for acts outside the scope of their employment?

III. STATEMENT OF THE CASE

On April 24, 2009, Plaintiff-Appellants ("Eaglemans") sued Chippewa Cree Housing Authority ("CCHA"¹) and several other entities, and individuals, in Rocky Boy's Chippewa Cree Tribal Court for personal injuries suffered in a house explosion on the reservation on April 26, 2007.² Glenn Eagleman ("Glenn") leased

¹ In the underlying tribal case, Chippewa Cree Housing Authority was designated CCH to avoid confusion with the Chippewa Cree Health Authority, also a defendant, which was designated as CCHA therein.

² Rocky Boy's Reservation Tribal Court, 2009-CV-TT-675 (April 24, 2009).

or leased-to-buy the house from CCHA.³ Other tribal court defendants were named because of their involvement in the construction of the house, refusal to provide emergency medical care, or demolition and failure to properly dispose of the debris after the explosion. All Plaintiffs are Indians: two are citizens of the Rocky Boy's Reservation. The tribal court dismissed on motion by the Defendants. Eaglemans appealed to the tribal appellate court on July 8, 2009. On October 7, 2011, the tribal appellate court affirmed. Eaglemans attempted to negotiate and also exhausted all tribal remedies with the Rocky Boy's Chippewa Cree Reservation Business Committee, the highest authority on the reservation.⁴

On May 13, 2015, Eaglemans filed their Second Amended Complaint in Montana District Court against all tribal court defendants, the tribal appellate court and the Business Committee (Rocky Boy's Defendants), claiming jurisdiction

³ At the district court hearing the housing authority produced a copy of a lease contract between CCHA and Glenn Eagleman. (Docket 41, Minute Entry, Low Rent Dwelling Lease Agreement, Exhibit A) Glenn regards that contract as genuine, but it may not be the only contract, since the modular house was placed on Glenn's sub-assigned land on the reserve. (TR:49-50) The contract was drafted for an apartment rental. Other tribal entities were involved in siting the single family home, and installing the foundation, septic system, and utilities. (ER2:77-80)

⁴ Eaglemans' claims against one private individual were remanded to Rocky Boy's tribal court by the tribal appellate court on October 14, 2011, because the individual had no immunity. (ER2:70) That matter is currently inactive. Eaglemans filed a separate bad faith case against CCHA's insurer, which remains in Rocky Boy's tribal court pending the outcome of this case. (ER2:65)

under 28 U. S. C. § 1331.⁵ CCHA moved to dismiss and the rest of Rocky Boy's Defendants concurred. After briefing and a hearing, the District Court found CCHA to be an arm of the tribe, and held that employees of tribal government entities were shielded by tribal sovereign immunity. It further held that when the Rocky Boy's Business Committee enacted Tribal Ordinance 3-63, establishing the CCHA, it did not waive the sovereign immunity of the CCHA from suit when it included a "sue and be sued" clause in the ordinance. The District Court granted the motion to dismiss on December 2, 2015, and Eaglemans filed this appeal of the Order on December 30, 2015.

IV. STATEMENT OF THE FACTS

On April 24, 2009, Plaintiff-Appellants (Eaglemans) sued Chippewa Cree Housing Authority (CCHA) and several other entities and individuals in their individual or official capacity in Rocky Boy's Chippewa Cree Tribal Court for personal injuries suffered in a house explosion April 26, 2007 on the tribal reserve on April 24, 2009. (ER2:64 and 69) Glenn Eagleman leased or leased-to-buy the house from CCHA. (ER2:65 and 70) Other defendants were either involved in the construction of the house or its maintenance before the explosion. (ER2:64) All

⁵ "Federal question. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Plaintiffs are Indians, and two are citizens of the Rocky Boy's Reservation.

(ER2:68) The tribal court dismissed on motion by the Defendants. (ER2:69)

Eaglemans appealed to the tribal appellate court on July 8, 2009. (ER2:69)

On October 7, 2011, the tribal appellate court upheld the dismissal. (ER2:70)

Eaglemans next appealed to the Rocky Boy's Chippewa Cree Reservation

Business Committee for relief and simultaneously exhausted all possible tribal remedies. (ER2:70-71)

On May 13, 2015, Eaglemans filed their Second Amended Complaint in Montana District Court against all former defendants plus the tribal appellate court and the Business Committee ("Rocky Boy's Defendants" collectively), claiming federal question jurisdiction under 28 U.S.C. §§ 1331. (ER2:63-64 and 67-68)

Defendant CCHA moved to dismiss for lack of subject matter jurisdiction and failure to state a claim, and Rocky Boy's Defendants joined the motion. (ER2:60)

After briefing and a hearing on the motion the District Court found that: (1) CCHA is an arm of the tribe and therefore entitled to tribal sovereign immunity (ER1:4-6), and; (2) Susan Hay and Thela Billy, employees of CCHA, are entitled to tribal sovereign immunity even though sued in their individual capacities (ER1:6-9), and; (3) the Rocky Boy's Business Committee did not waive CCHA's sovereign immunity by including a "sue and be sued" clause in Tribal Ordinance 3-63, establishing the CCHA. (ER1:9-12)

The District Court granted the Motion to Dismiss on December 2, 2015, on grounds of tribal sovereign immunity. (ER1:12) Plaintiffs filed their notice of appeal on December 30, 2015. (ER2:14-15)

V. SUMMARY OF ARGUMENT

The District Court erred when in deciding whether CCHA had sovereign immunity to Eagleman's claims, it applied the *Dillon* case line instead of the *Namekagon* case line from another appellate circuit, and did not rely on 9th Circuit decisions and experience. Eagleman's argument is consistent with this court's opinion in *Marceau I*. Logic, plain meaning, and context support an alternate interpretation, and the Supreme Court has provided guidance.

The District Court erred when it decided that Susan Hay and Thella Billy were shielded by tribal sovereign immunity as employees of CCHA. The Court incorrectly applied *Maxwell* to this decision. The Court either mistakenly confused the allegations against Hay and Billy with those against Una Ford, or misapprehended the amount of Eagleman's claims, which inclined the Court to adopt *Maxwell* and the basis for decision, without taking into consideration the net financial effect on tribal resources, which would include mandatory insurance coverage. The better analogy for decision was to be found in *Burrell*, as the facts there more closely resemble the allegations against Hay and Billy.

This Court should reverse the Judgment of the District Court (1) that the sue and be sued clause in Rocky Boy's Chippewa Cree Tribal Ordinance 3-63 did not waive the tribal sovereign immunity of CCHA, and (2) that the named tribal officials were shielded by tribal sovereign immunity, and (3) remand this case to the District Court for re-decision.

VI. ARGUMENT

A. Standard of Review

Questions of tribal and sovereign immunity and subject matter jurisdiction are reviewed de novo. *Lineen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face”. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009)(citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (internal quotation marks omitted).

B. The “Sue and Be Sued” Clause in Tribal Ordinance 3-63 Is an Express Waiver of Tribal Sovereign Immunity.

The District Court erred in deciding that CCHA's sovereign immunity to suit had not been waived because it relied upon a line of 8th Circuit cases which were wrongly decided. (ER1:10-12) CCHA and Rocky Boy's Defendants perpetuate the erroneous waiver requirement of a contract with CCHA. This provides CCHA, and likely other defendants, with a claim to immunity from suit in tribal court to which

they are not entitled. Adherence to the *Dillon* case line also leaves injured parties without a remedy in any court.

The two case lines, *Dillon* and *Namekagon*, are discussed below in section two. This Court discredited the *Dillon* case line and chose the *Namekagon* case line as the basis for decision on the “sue and be sued” clause issue in *Marceau I*. *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974 (9th Cir. 2006) withdrawn on other grounds in *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916 (9th Cir. 2008), (*Marceau III*). But first, the structure and logic of the CCHA “sue and be sued” clause here must be addressed.

1. Rocky Boy’s Chippewa-Cree Tribe May Waive the Sovereign Immunity of Tribal Entities or Corporations.

A tribe is generally immune from suit under tribal sovereign immunity but may waive its immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *see also C&L Enters., Inc. V. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). Tribal entities also share in tribal immunity from suit. That immunity may also be waived. *Kiowa Tribe*, 523 U.S. at 756, *see also Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). A self-governing tribe may create Section 17 entities, which are public corporations carrying out public enterprises, governmental or commercial, and may have the express or inherent authority to sue or be sued.

Indian Reorganization Act, 48 Stat. 984 (1934) codified as 25 U.S.C. §§ 461-494.

The Rocky Boy's Reservation became a self-governing tribe under the

Constitution and Bylaws of the Chippewa Cree Indians of the Rocky Boy's

Reservation on November 23, 1935, and incorporated in 1936. See Addendum.

On May 28, 1963, the Business Committee of the Chippewa Cree Tribe, Rocky Boy's Reservation, enacted Ordinance 3-63, establishing the Chippewa Cree Housing Authority. Article V, section 2 (a) states:

The Council ⁶ hereby gives its irrevocable consent to allowing the Authority 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; but the Tribe shall not be liable for the debts or obligations of the Authority, except insofar as expressly authorized by this ordinance.

(ER2:94-95)⁷

⁶ Business Committee and Council are apparently used interchangeably by the Rocky Boy's Tribe.

⁷ "A copy of the ordinance duly certified by the Secretary of the Council shall be admissible in evidence in any suit, action or proceeding." [*Preamble to Ordinance 3-63*. (ER2:89) Eaglemans obtained their copy of the ordinance from an unofficial source, but believe that the exhibit is a correct, albeit poor, copy of the document. Requests for documents sent to the Business Committee, the tribal court, and to CCHA by ordinary and certified mail, return receipt, for the establishment ordinances of defendant tribal entities, and other documents, were not answered. (TR:40) A better copy of the Ordinance is Exhibit L to Defendants Brf.in Suppt. of Mtn to Dismiss (Docket 16-12). Page references will differ.

2. Section 2 (a) of Tribal Ordinance 3-63 Is an Express Waiver.

The standard for a waiver of sovereign immunity is one of unequivocal expression. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). However, valid waivers need not use the word “waiver”, or follow a “ritualistic formula.” *Franchise Tax Board of California v. U.S. Postal Svc.*, 467 U.S. 512, 521 (1984). Clearly, the Postal Service was both incorporated by the federal government, and an arm of the government. Because Congress established the U.S. Postal Service as a commercial entity, the Court found a “sue and be sued” clause to be an unequivocal waiver of sovereign immunity. *Id.* 517 - 521.

This court may interpret the ordinance by the tribal standard:

The following principles of construction will apply to all of the CODE unless a different construction is obviously intended: (2) Words shall be given their plain meaning and technical words should be given their usually understood meaning where no other meaning is specified. (4) This Code shall be construed as a whole to give effect to all its parts in a logical, consistent manner.

Law and Order Code, Title I, Chapter 5. Principles of Construction, Section 5.1(2) and (4).⁸ See Addendum. The plain meaning of the “sue and be sued” language in the ordinance is a waiver of sovereign immunity that allows CCHA to be sued on its contracts “and other claims and obligations.” A conjunction joins the

first two of three independent clauses of Section 2(a). The Business Committee allowed CCHA to be sued “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 immunity . . .” (emphasis added). (ER2:94-95)

The district court accepted CCHA’s argument that the entire paragraph of Section 2(a) of the CCHA enabling ordinance waives the immunity of CCHA to suit only if there is a waiver in a contract. (ER1:10-12) CCHA reads the conjunctive construction to be dependent, that the Business Committee allowed suit only if CCHA had first waived immunity in contract. That construction is illogical. Its activities were not limited solely to contracts. Ordinance 3-63 at art. V, 2 (h). (ER2:94-95) CCHA could not be sued upon *any* claim or obligation arising out of its activities if it first had to contract relative to any activity. If so, then the additional words, “other claims and obligations” have no meaning or are surplusage. Since the words were written they must be given meaning.

The logical construction is that in the first clause the Business Committee made CCHA capable of suing and being sued in its own right in tribal court. The second clause gave CCHA the additional authority to waive immunity in order to facilitate acceptance of its contracts in the business world in which it was to operate. The additional authority allowed CCHA to agree to waive its immunity to suit in other courts, or in another forum such as arbitration, as any business may.

The third clause qualified the extent of any waiver, protecting exclusively tribal resources.

The wording before “and hereby” gives consent to sue and be sued, the wording after “and hereby” is a separate specific authority to waive immunity. If the Business Committee had not intended that CCHA could be sued, all the wording between the first “hereby” in the paragraph and the second “hereby” could have been left out. Since it was not left out, the court must give meaning to it. And the logical construction is that the Business Committee meant that the CCHA could be sued by others without any additional waiver by CCHA in a contract.

A “sue and be sued” clause waives immunity by itself, without an affirmative requirement to contract. In *Maryland Casualty* the Seminole Tribe of Florida had placed the following clause in a corporate charter:

Sec. 9. To sue or be sued; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the said corporation or the United States to the levy of any judgement, lien or attachment upon the property of the Seminole Tribe of Florida, Inc., other than income or chattels especially pledged or assigned.

Maryland Casualty Co. v. Citizens National Bank of West Hollywood, 361 F.2d 517, 521 (5th Cir. 1966). Note that there is no second clause adding an authority to waive immunity by contract. Yet the “sue and be sued” clause, by itself, was found to be a waiver of immunity. The waiver was qualified as to the ability of any claimant to levy against the resources of the tribe. The claimant could sue, and

entirely prevail in their suit, and yet collect only the amounts pledged by the tribe. Ordinance 3-63 similarly allows suit against CCHA, and similarly qualifies the waiver by exempting tribal assets. Articles. V, 2 (a) and VII, 6. (ER2:94-95 and 102-103) Therefore CCHA stands in the place of most business corporations, and it may be liable in tort for its actions.

The construction that would accomplish CCHA's interpretation would require something like only if, instead of, and hereby. The second hereby expressly begins a separate, additional grant of authority. Each phrase stands alone. The first part of the clause is the greater grant, the second is the lesser, the natural order of syntax. See also the 9th Circuit Court's discussion of construction of an identical tribal ordinance in *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974, 981, (9th Cir. 2006), (*Marceau I*), *holding vacated in Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 921 (9th Cir. 2008) (*Marceau III*).

Marceau I is not controlling authority, but highly persuasive. In *Marceau III*, the court did not disavow its holding in *Marceau I*, but admitted error in not having required the plaintiffs to exhaust their tribal remedies. The court vacated its holding because it could not reach the issue of a waiver of sovereign immunity before tribal remedies had been exhausted. *Marceau III* at 921. However, the district court in *Marceau* was ordered to retain jurisdiction on the issue pending exhaustion. *Id.*

Marceau I discussed the two lines of conflicting Eighth Circuit cases, the plain meaning of the ordinance, and the Indian Reorganization Act's basis for establishing the Blackfeet housing authority as a Section 17 organization. 25 U.S.C. §§ 461- 494, as amended. *Marceau I* at 970 - 984. The relevant part of *Marceau I* is summarized below.

The *Namekagon* case line stands for a “sue and be sued” clause as a clear waiver. *Marceau I* at 979, citing *Namekagon Development Co. v. Bois Forte Reservation Housing Authority*, 395 F. Supp. 23 (D. Minn. 1974), *aff'd.*, 517 F.2d 508 (8th Cir.1975). The *Dillon* case line says a “sue and be sued” clause is not a clear waiver and that a waiver must be found elsewhere. *Id.* at 980, citing *Dillon v. Yankton Sioux Housing Authority*, 144 F.3d 581 (8th Cir.1998).

The Marceau I court discussed the two lines of cases and found the *Namekagon* case line to be persuasive. *Id.* 979. For example, in *Dillon* the plaintiff plead that the “sue and be sued” clause opened the Housing Authority to liability. *Dillon*, 144 F.3d. at 581. The *Dillon* court misread *Weeks* on the “sue and be sued” clause, and mistakenly decided the case based on the lack of a waiver in plaintiff's employment contract. *See Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir.1986). The logic of the *Namekagon* case line that was adopted by the *Marceau I* court has been followed in this Circuit.

3. Other Courts Have Found a Clear Waiver in a “Sue and Be Sued” Clause.

Article V, 2.(c) - (n) of Chippewa Cree Tribal Ordinance No. 3-63 includes a long list of commercial activities (ER2:94-98) that the corporation may engage in for the purpose of alleviating a shortage of safe and sanitary housing and increasing employment. (ER2:90-92) Here, as in *Franchise Tax Board of California*, above, the legislative body chartered a corporation clearly intended to be exist and act like a commercial entity. The Business Committee intended to enact a waiver because it was needed in order to create an effective housing corporation able to engage in commercial business activities. Many tribal housing authorities have similar waivers that have been tested in court.

The Navajo Supreme Court found the following “sue and be sued” clause to be a waiver:

The Navajo Tribe gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim, or obligation arising out of its activities, the Authority to agree by contract to waive any immunity from suit which the Navajo Housing Authority might otherwise have.

Navajo Housing Authority v. Howard Dana and Associates, 5 Nav. R. 157 (Nav. Sup. Ct. 07/03/1987). Cited in *Phillips v. Navajo Housing Authority*, No. SC-CV-13-05 (Navajo 12/08/2005), 2005.NANN.0000016, ¶¶ 23-24 (2005) www.versuslaw.com.

The Navajo Housing Authority waiver is less clear than the language in Ordinance 3-63 and perhaps could be construed as only permission to waive in relation to contract activities. But in 1989, the Navaho Supreme Court affirmed the waiver, stating, “NHA’s waiver of sovereign immunity is unconditional. It does not rely on contract provisions or compliance with any contract terms. The Motion to Dismiss cannot be upheld on this basis.” *Indian Construction Services v. Navajo Housing Authority*, No. WR-CV-35-88 (Navajo 08/22/1989), 1989.

NANN.0000028, ¶22 (1989) www.versuslaw.com.⁹

In *R.J. Williams*, an earlier Ninth Circuit panel came to the same conclusion in dicta about a nearly identical clause in a Montana district tribal ordinance:

Any sovereign immunity the Housing Authority had, however, was waived through operation of Fort Belknap Ord. No. 2-77, art. V, Sec. 2 (1977), a “sue and be sued” clause in the ordinance establishing the Housing Authority. See also 24 C.F.R. Secs. 805.108-.109 & app. I, art. V, Sec.2.

R. J. Williams Company v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983), fn 2. The Blackfeet Tribal Court of Appeals also cited *Namekagon* in finding a waiver in a similar tribal ordinance. *Deroche, et al. v. Blackfeet Indian Housing Authority*, 17 Indian Law Repr., 6036, 6032, *see also Davis v. Turtle Mountain Hous. Auth.*, 17 Indian L. Rptr. 6035, both cited in *Marceau I* at 979.

⁹ The Navajo Nation later restored immunity to their housing authority by legislation. *Phillips v. Navajo Housing Authority* at ¶¶ 14-26.

According to William Vetter, assistant professor, Wayne State University,

“The sue and be sued clause appears to be both operative and permissive, i.e., it gives tribal consent for suits by and against the Authority and gives the Authority permission to waive sovereign immunity in any contract. The court’s treatment of that provision has been inconsistent.

In *R. C. Hedreen Co. v. Crow Tribal Housing Authority*, the U.S. District court for Montana apparently assumed that the provision was self-executing, or the Housing Authority did not contend that an express contract waiver was required. [*R. C. Hedreen Co. v. Crow Tribal Housing Authority*, 521 F. Supp. 599 (D. Mont. 1981).] In contrast, in *Smith Plumbing Co. v. Aetna Casualty & Surety Co.*, [149 Ariz. 524, (1986)] the tribal Housing Authority apparently did not waive, or require a waiver of, immunity for itself or a separate, subordinate tribal enterprise which it engaged as general contractor. .

. . “

William V. Vetter, Essay: Doing Business with the Indians and the Three “S”es:

Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction, 36

Ariz. L. Rev. 169, 180-182, (1994). There was no assumption in *Smith Plumbing*

or the collateral federal case, *White Mountain*, that the “sue and be sued” provision

in the tribal ordinance was self-executing. *White Mountain Apache Tribe v. Smith*

Plumbing Co., 856 F.2d 1301 (9th Cir. 1988). But see the footnote in *Smith*

Plumbing citing another Arizona Supreme Court case that describes the “sue and

be sued” clause as an explicit waiver of sovereign immunity. *Smith Plumbing*, 149

Ariz. at 532.

An old Alaska district court case describes the “sue and be sued” clause as a waiver of sovereign immunity by Indian tribes, and cites to a list of six cases, including two more in this Circuit not yet discussed. *Parker Drilling Company v. Metlaka Indian Community*, 451 F.Supp. 1127, 1136-37 (D. Alaska 1978), (citing, among others, *Brunette v. Dann*, 417 F. Supp. 1382, 1385 (D. Idaho 1976), *Enterprise Electric Co. v. Blackfeet Tribe of Indians*, 353 F. Supp. 991 (D. Mont. 1973)). The *Parker Drilling* court also dismisses the permissive interpretation to the “sue and be sued” clause, in part through an analysis of intent similar to *Marceau I. Id.*

4. The United States Supreme Court Has Provided Guidance That a “Sue and Be Sued” Clause Is a Clear Waiver in the Courts of the Sovereign.

A tribe’s relinquishment of its’ immunity must be "clear." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U. S. 505, 509 (1991). In *Garcia* the plaintiff claimed that a "sue and be sued" clause in the AHA's (Akweasne Housing Authority) enabling tribal ordinance allowed liability. *Garcia v. Akweasne Housing Authority*, 268 F.3d 76, 86-87 (2nd Cir. 2001). The Second Circuit found guidance in the foot notes of *C & L Enterprises, Inc. V. Citizen Band Potawatomi Indian Tribe of Oklahoma. C & L Enters.*, 532 U.S. 411 (2001). “ The 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.” *Garcia v Akwesasne*, 268 F.3d at 86-87, citing to *C & L Enters.*, 532 U.S. at 423, fn.3. See also fn.4. The Supreme Court did not reach the issue, but it left the footnotes dangling where another court, in this case the Second Circuit, could take the analysis further.

The Second Circuit stated that courts 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. *Id.* 86, citations omitted. 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. *Id.* 87, citations omitted. Applying the principles here, the 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.

When the Second Circuit applied this guidance, it concluded that the additional authority granted to the AHA--to waive by contract "any immunity from suit which it might otherwise have"--describes the power to waive the agency's immunity in courts outside the reservation. *Id.* 87. That additional authority to contract does not prevent suit in the courts of the sovereign. *Id.*

Here, the Chippewa Cree Rocky Boy’s Tribe is the sovereign. The Rocky Boy’s Chippewa Cree Tribe expressly and unequivocally waived the sovereign

immunity of CCHA in the “sue and be sued” clause of its corporate charter. CCHA may be sued in the courts of its’ sovereign. It may not be sued elsewhere based on the bare “sue and be sued” clause. However, the Tribe granted CCHA the additional authority to waive immunity in state and federal courts, or to agree to arbitration. The District Court erred when it based its decision on the faulty case law offered by Defendants, and left Eaglemans with no remedy for their injuries.

C. Susan Hay and Thella Billy Are Not Shielded by Tribal Immunity as Individuals.

While the Ninth Circuit has held that tribal immunity extends to tribal officials, even this holding more favorable to tribal officials does not exempt Donna Hay and Thella Billy from suit for acts outside the scope of their authority. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1981). Officers and employees of a tribe have tribal immunity for their official acts, but lose that immunity when acting outside their authority. *Imperial Granite v. Pala Band*, 940 F.2d 1269, 1271 (9th Cir 1991). However, when officials act within their official capacity and scope of their authority, they are immune, even if they act in error. *U. S. v. Yakima Tribal*, 806 F.2d 883, 860 (9th Cir. 1986); *see also Tenneco Oil Co. v. Sac and Fox Tribe of Indians*, 725 F.2d 572, 574-75 (10th Cir. 1984).

The District Court applied the circumstances in *Maxwell*. But that was a mistake in apprehending the Eaglemans claim to be twenty million dollars

(\$20,000,000.00), and therefore to reach or affect the resources of the tribe.

(ER1: 9) *Maxwell v County of San Diego*, 708 F.3d 1075,1087-90 (2013). In fact, the complaint in Rocky Boy’s tribal court asks for two million dollars (\$2,000,000.00), plus interest, attorney fees, and punitive damages.

(ER2:88) And, the District Court did not consider the entire context of the complaint in the tribal court below, which included insurance.

The Tribe or CCHA must have waived immunity, at least to the limits of insurance coverage, in order to comply with the regulation and receive funds. (ER2:33-34) Under the Native American Housing Assistance and Self Determination Act of 1996 regulations (25 U.S.C. 4101 et seq.), CCHA was required to provide adequate insurance to indemnify CCHA against “loss from fire, weather, and liability claims for all housing units owned or operated by” CCHA, or in private housing when “repayment of all or part of the assistance is part of the assistance agreement.” (Emphasis added.) 24 C.F.R. 1000.136 (a) and (b). Therefore, CCHA has insurance coverage for this type of liability.

The District Court erred when it used the financial effect of a claim on the tribe as a basis for decision, when the actual financial effect on the tribe cannot be determined, and based its calculation on a mistaken dollar claim amount.

Eaglemans referenced the diversion of dedicated insurance proceeds as part of their claim against Donna Hay and Thela Billy. (ER2:33-34 and 64) The District Court did not discuss Una Ford in its opinion. (ER1:6-9) Una Ford was the Health Center employee who refused medical care to Celesia Eagleman and Theresa Small at the clinic. (ER2:80-81) The *Maxwell* case applies more closely to the Eagleman's complaint against Una Ford, the employee of the Health Clinic, (ER2:65) while *Burrell* applies to the allegations against Donna Hay and Thela Billy. *Burrell v. Leonard Armijo, et al*, 456 F.3d 1159 (10th Cir. 2006).

The *Burrell* plaintiffs alleged that the Pueblo and Pueblo officials committed fraud and theft through uses of their official powers and other acts outside their authority. *Burrell v. Leonard Armijo, et al*, 456 F.3d 1159, 1162-63 (10th Cir. 2006). The District court upheld the Pueblo court's dismissal of all plaintiffs' claims against the tribe under tribal sovereign immunity but the 10th Circuit remanded the claims against individual officials for re-decision. *Id.* 1174. Plaintiffs had sufficiently pled that the officials had acted outside their official authority and were not entitled to sovereign immunity. *Id.*

Imperial Granite applies here. Eaglemans alleged the liability of individuals employed by tribal corporate entities only for acts outside their official duties, and for which they could be personally liable. Eaglemans allege Thela Billy illegally authorized a contract for over \$5,000 without bid, an act beyond her authority.

(ER2:82) Eaglemans alleged Donna Hay misrepresented whether insurance covered the house and that the insurance money was not used to replace Glenn's house. (ER2: 83-85) Eaglemans allege that both acted for personal gain or advantage. (ER2:86) These allegations raise fact questions that require further proceedings in tribal court. As a plaintiffs' allegations must be taken as true, the district court erred in finding that the employees CCHA's tribal immunity for acts outside the scope of their employment.

VII. CONCLUSION

Appellants waive Oral Argument and request that this Court reverse those portions of the Opinion and Judgment of the District Court (1) that the sue and be sued clause in Rocky Boy's Chippewa Cree Tribal Ordinance 3-63 did not waive the tribal sovereign immunity of CCHA, and (2) that the named tribal officials were shielded by tribal sovereign immunity, and (3) remand this case to the District Court for re-decision, together with such other and further relief to Eaglemans as this Court deems just and proper.

In the alternative, the judgment appealed from should be reversed, and the Eaglemans granted leave to amend to cure any perceived deficiencies in the district court complaint, together with such other and further relief to them as this Court deems just and proper.

Dated: June 8, 2016

Respectfully Submitted,

s/ Mark Mackin

Mark Mackin

*Attorney for Appellants,
Glenn Eagleman, Theresa Small
and Celesia Eagleman*

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 5,006 words.

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the Ninth Circuit Rules, Appellants state that there are no known related cases pending in this court.

ADDENDUM

THE LAW AND ORDER CODE
OF THE
CHIPPEWA-CREE TRIBE
OF THE ROCKY BOY'S RESERVATION
MONTANA

(FEBRUARY 4, 1987)___

GENERAL PROVISIONS

Chapter 1. ESTABLISHING AUTHORITY AND COURTS

1.1 Constitutional Authority.

The Code of the Rocky Boy's Reservation is adopted pursuant to the authority vested in the Business Committee under Article VI, Section (1) of the Constitution of the Chippewa-Cree Indians of the Rocky Boy's Reservation.

1.2 Prior Inconsistent Ordinances and Resolutions Repealed.

Any and all Code provisions or ordinances inconsistent with, or in conflict with, or contrary to the spirit and purpose of this Code are hereby repealed and have no effect.

1.3 Amendments, Modifications, and Additions to the Code.

The Code may be amended by ordinances. The adoptions of Tribal ordinances which effect modifications, additions or deletions to this Code shall be codified and incorporated in a manner consistent with the numbering and organization of this Code.

1.4 Availability of Code.

Copies of this Code and any amendments shall be kept available for public inspection during regular business hours at the office of the Clerk of the Court. Copies will be made available at cost to anyone who requests the Code.

1.5 Authority to Make and Enforce Administrative Rules.

The Business Committee may appoint sub-committees to establish rules in areas such as court and resource administration. Rules made by each sub-committee will not be in effect until: (1) they have been posted in a public place and made available upon request for at least thirty (30) days; and (2) any comments made on the proposed rules are considered by the sub-committee.

Copies of all rules, whether proposed or in effect, shall be available for public inspection during regular business hours at the office of the Clerk of the Court, and the offices of the Business Committee.

1.6 Creation and Establishment of the Tribal Court.

The Rocky Boy's Tribal Court is established pursuant to Article XII and Article VI, Section 1(p) of the Constitution of the Chippewa-Cree Indians of the Rocky Boy's Reservation.

1.7 Composition of the Chippewa-Cree Appellate Court.

Upon the enactment of this Title, the Rocky Boy's Tribal Court shall provide, by Court rule, an appellate court for the review of the decisions of the Rocky Boy's Tribal Court.

1.8 Powers of the Court.

The Tribal Court shall be a court of general civil and criminal jurisdiction and shall hear appeals from administrative bodies as provided by the Code or Ordinances of the Chippewa-Cree Tribe.

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.

Chapter 2.

JURISDICTION

2.1 Criminal Subject Matter Jurisdiction.

Jurisdiction of the Judicial Branch shall extend to any and all offenses which affect or concern the Tribe or its members when occurring 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.

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.

2.3 Personal Jurisdiction.

(1) The Court's criminal jurisdiction shall extend to any Indian, including Canadian Indians, who commits an offense enumerated within the Code of Offenses within the exterior boundaries of the Rocky Boy's Reservation.

(2) The Court's civil jurisdiction shall extend to any person within the exterior boundaries of the Rocky Boy's Reservation, and to persons who are parties in causes arising out of contacts with the reservation in matters in which the Court has subject matter jurisdiction.

Chapter 3.

SOVEREIGNTY

3.1 Adoption By Reference Not a Waiver of Sovereign Power.

The adoption by the Business Committee of any law by reference into this Code shall not constitute a waiver or cession of any sovereign power or jurisdiction of the Tribe or in any way diminish such sovereign power or jurisdiction. The effect of adoption by reference shall be the addition of the adopted law to the law of the Chippewa-Cree Tribe.

3.2 Application of the Law of Other Jurisdictions.

Application of the law of other jurisdictions by the Tribal Court under the choice of law section of this Code shall not constitute a waiver or cession of any sovereign power or jurisdiction of the Tribe or in any way diminish such sovereign power.

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-Cree Constitution and By-Laws, or as specifically waived by a resolution or ordinance of the Business Committee.

Chapter 4.

LIMITATIONS ON ACTIONS

4.1 Civil Actions.

Unless otherwise specifically provided in the Code, the following limitations on the bringing of civil actions will apply:

(1) Any authorized action against the Tribe or its officers or employees arising from the performance of their official duties must be commenced within one (1) year of the date the cause of action arose; and

(2) Any other action must be commenced within three (3) years of the date the cause of action arose; except that any cause of action based on fraud or mistake must be commenced within three (3) years of the date the aggrieved party discovered or reasonably should have discovered the facts constituting the fraud or mistake.

4.2 Criminal Actions.

(1) A prosecution for any offense must be commenced within two (2) years of the occurrence of the offense.

(2) The period of limitations does not run during any period in which the offender is not physically located on the reservation or when a prosecution has been initiated in another jurisdiction against the offender for the same conduct.

Chapter 5.

PRINCIPLES OF CONSTRUCTION

5.1 When Applied.

The following principles of construction will apply to all of the Code unless a different construction is obviously intended:

(1) Masculine words shall include the feminine, feminine words shall include the masculine, singular words shall include the plural and plural words shall include the singular.

(2) Words shall be given their plain meaning and technical words shall be given their usually understood meaning where no other meaning is specified.

(3) Whenever a term is defined for a specific part of this Code, that definition shall apply to all parts of this Code unless a contrary meaning is clearly indicated.

(4) This Code shall be construed as a whole to give effect to all its parts in a logical, consistent manner.

(5) If any provisions of this Code or the application of any provision to any person or circumstance is held invalid, the remainder of this Code shall not be affected. The provisions of this Code are declared to be severable.

(6) Any typographical errors or omissions shall be ignored whenever the intended meaning of the provisions containing the error or omission is otherwise reasonably certain to the Court.

(7) In the resolution of any other issues of construction due regard shall be given to the underlying principles and purposes of this Code.

Chapter 6. CONTEMPT OF COURT

6.1 Power to Impose Penalty.

The Tribal Court and Court of Appeals have the power to penalize or punish anyone for contempt of the Court's judgment, orders or decrees and for conduct in or near the Court which shows disrespect for the Court.

6.2 Indirect Contempt.

Indirect contempt is the knowing failure to comply with an order of Court to do, or not do, something for the benefit of a party, or is an interference with the process of the Court.

Indirect contempt includes but is not limited to:

(1) Disobedience of a subpoena, judgment or other order of the Court;

(2) Falsely presenting oneself as an officer, attorney or counsel of the Court;

(3) Detaining a witness, party to an action, or officer of the Court while the witness, party or officer is going to, remaining at or returning from a judicial proceeding;

(4) Any other interference with the process or proceeding of the Court; and

(5) Neglect or violation of duty by a person appointed or elected to perform a judicial service.

6.3 Direct Contempt.

Direct contempt is a disrespectful act done in the presence of the Court or near to the Court, which offends the dignity of the Court. Direct contempt includes but is not limited to the following:

(1) Disorderly, contemptuous or insulting behavior directed toward the Court during the course of a judicial proceeding;

(2) Conduct or speech which tends to interrupt the course of a trial or other judicial proceeding;

(3) Conduct which deceives the Court; and

(4) Disobedience of the Court during the course of a judicial proceeding.

UNITED STATES
DEPARTMENT OF THE INTERIOR

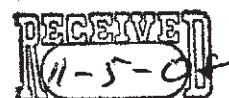
OFFICE OF INDIAN AFFAIRS



CONSTITUTION AND BYLAWS OF THE
CHIPPEWA CREE INDIANS OF THE
ROCKY BOY'S RESERVATION
MONTANA



APPROVED NOVEMBER 23, 1935



**CONSTITUTION AND BYLAWS OF THE CHIPPEWA CREE INDIANS OF THE ROCKY
BOY'S RESERVATION, MONTANA**

PREAMBLE

We, the original and adopted members of the Rocky Boy's Band of Chippewas enrolled upon the Rocky Boy's Reservation in the State of Montana, in order to exercise our rights to self-government, to administer all tribal affairs to the best advantage of the individual members, and to preserve and increase our tribal resources, do ordain and establish this Constitution of the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana.

ARTICLE I - - - TERRITORY

The jurisdiction of the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana, shall extend to the territory within the Rocky Boy's Reservation as established by Act of September 7, 1916 (39 Stat. 739), amending the Act of February 11, 1915 (38 State. 807), in the State of Montana, and to such lands as have been or may hereafter be acquired and added to the Reservation by law.

ARTICLE II - - - MEMBERSHIP

SECTION 1. The membership of the Chippewa Cree Tribe shall consist as follows:

- (a) All members of the Rocky Boy's Band of Chippewas enrolled as of June 1, 1934.
- (b) All children born to any member of the Chippewa Cree Tribe of the Rocky Boy's Reservation who is a resident of the reservation at the time of the birth of said children.
- (c) All children of one-half or more Indian blood born to a non-resident member of the Tribe.

SECTION 2. Any Indian, one-half blood or more and a resident of Montana, not a member of any other reservation, may become a member of this organization provided that two-thirds or more of the eligible voters cast their ballots at such election, and provided further that two-thirds of those voting at such election vote in favor of such adoption. All elections to membership shall be confirmed by the Secretary of the Interior.

ARTICLE III - - - ORGANIZATION OF GOVERNING BODY

SECTION 1. The governing body of the Chippewa Cree Tribe shall be known as the "Business Committee."

SECTION 2. The Business Committee shall consist of eight (8) members and a Chairman all of whom shall be elected on an at-large basis. The Chairman shall file for that particular office.

SECTION 3. During the first regular meeting following certification of those committee members elected at the biennial election, the Business Committee shall elect from within its own membership a Vice-Chairman and such officers and committees as it may deem necessary. The services of a Tribal Secretary-Treasurer shall be available to the committee. Such tribal employees shall be hired on the basis of an employment contract.

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2016, 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.

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.

s/ Kirstin E. Largent