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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Christobal Munoz, Plaintiff, v. Barona Band of Mission Indians, Defendant.	Case No. 17CV2092-BAS-AGS REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF BARONA BAND OF MISSION INDIANS' MOTION TO DISMISS Rule 12(b)(1 and 6) Hearing Date: December 11, 2017 **NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT** Dept. 4B Hon. Cynthia Bashant

INTRODUCTION

Defendant, the Barona Band of Mission Indians, appearing specially for purposes of this motion only, hereby submits the following Reply Memorandum of Points and Authorities in Support of its Motion to Dismiss.

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ARGUMENT

I. THERE HAS BEEN NO WAIVER OF SOVEREIGN INMMUNITY BY EITHER CONGRESS OR BARONA

Plaintiff ignores both precedent and the facts of this case and alleges that "The Court has never been presented with a case where the Tribe claims that the Court, Casino and Tribe are all indivisible merely to eviscerate the rights of Plaintiffs" (Plaintiff's Opposition 6:6-7). This is false. There has been no attempt to deprive Plaintiff of his day in court. His case was decided by the Barona Tribal Court based on his failure to file within the applicable statute of limitations. Couching this as a violation of the Indian Civil Rights Act, he attempted to appeal the Tribal Court decision and is now seeking relief in federal court. If there is any harm to plaintiff, it is due to his failure to exercise his rights in a timely manner – not due to any alleged violation of the Indian Civil Rights Act.

Plaintiff cites *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 395 (E.D. Wis. 1995) for the proposition that tribal courts can be sued for violations of the Indian Civil Rights Act. While it is not controlling law, the *Barker* court, dismissing claims against both the tribe and its casino, went on to say, **"Nor can he sue the Tribal Court or the Legislature for ICRA violations in federal court."** [emphasis added]. *Id.*

Plaintiff further claims that the court has never analyzed a case in which tribal remedies are nonexistent. This is simply not true. In *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F2d 682 (10th Cir., 1980) the 10th Circuit Court of Appeals found that there was a waiver of sovereign immunity under the Indian Civil Rights Act based on a lack of available remedies; however, this case has been considered an anomaly, was later construed narrowly by the Tenth Circuit, and rejected entirely by the Ninth Circuit:

> Johnson argues that Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682, 685 (10th Cir.1980), affords him relief under the ICRA. However, except in habeas corpus actions, this circuit has not recognized relief under the Act against a tribe in a civil action. See Pink, 157 F.3d at 1189; Snow v. Quinault Indian Nation, 709 F.2d 1319, 1323 (9th Cir.1983); Trans-Canada Enters., Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474, 476-77 (9th Cir.1980). In addition, the Tenth Circuit has limited Dry Creek to extraordinary circumstances not present in this case. See Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166, 1170 (10th Cir.1992); White v. Pueblo of San Juan, 728 F.2d 1307, 1312 (10th Cir.1984).
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> *Johnson v. Gila River Indian Community*, 174 F.3d 1032, *FN2* (1999).

This is consistent with the Ninth Circuit's earlier decision that recognized habeas corpus as the only remedy available in federal court for violations of the Indian Civil Rights Act:

> Congress does have "plenary authority to limit, modify or eliminate the powers of local self-government which tribes otherwise possess." Santa Clara Pueblo, 436 U.S. at 56-57, 98 S.Ct. at 1675-1676. Congress has exercised that authority by enacting the Indian Civil Rights Act of 1968, 25 U.S.C. Secs. 1301-1341. Although Sec.

> 202(8) of the Act, 25 U.S.C. Sec. 1302(8), provides that no Indian tribe in exercising powers of self-government shall deprive any person of liberty or property without due process of law, we have recognized that the Santa Clara Pueblo holding "foreclosed any reading of the [Act] as authority for bringing civil actions in federal court to request ... forms of relief [other than habeas corpus]." Snow v. Quinault Indian Nation, 709 F.2d 1319, 1323 (9th Cir.1983), petition for cert. filed, 52 U.S.L.W. 3310 (U.S. Oct. 11, 1983) No. 83-595; accord Boe v. Fort Belknap Indian Community, 642 F.2d 276, 278-79 (9th Cir.1981); Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474, 477 (9th Cir.1980). Contra Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir.1980), cert. denied, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981).
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> *R. J. Williams Co. v. Fort Belknap Housing Authority*, 719 F2d 979 (9th Cir. 1983)

II. LACK OF A REMEDY DOES NOT WAIVE SOVEREIGN IMMUNITY

The lack of a remedy does not constitute a waiver of sovereign immunity.

The Second Circuit, citing Ninth Circuit precedent, stated the following:

> The Appellants' contention, that tribal immunity does not bar federal jurisdiction when no other forum is available for the resolution of claims, must fail. The lack of a forum does not automatically prevent dismissal of the claims asserted. Makah Indian Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990). "Sovereign immunity may leave a party with no forum for [that party's] claims." Id. (citing Lomayaktewa v. Hathaway, 520 F.2d 1324, 1326 (9th Cir. 1975), cert. denied, 425 U.S. 903, 96 S. Ct. 1492, 47 L. Ed. 2d 752 (1976)). The only branch with the ability to provide a forum for resolution of the issues involved here is Congress. Without a clear congressional mandate, however, we cannot grant the relief sought by Appellants.
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> *Fluent v. Salamenca Indian Lease Authority*, 928 F.2d 542 (2nd Cir, 1991)

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) is controlling in this matter. The *Santa Clara Pueblo* court stated:

> It is settled that a waiver of sovereign immunity "`cannot be implied but must be unequivocally expressed.'" United States v. Testan, 424 U.S. 392, 399 (1976), quoting, United States v. King, 395 U.S. 1, 4 (1969). Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. Moreover, since the respondent in a habeas corpus action is the individual custodian of the prisoner, see, e. g., 28 U.S.C. 2243, the provisions of 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.
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> *Santa Clara Pueblo*, 58.

The Court went on to say:

> Not only are we unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one. See National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, 414 U.S. 453 (1974); Cort v. Ash, supra
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> *Id.* at 61.

Clearly, neither Congress nor Barona has waived sovereign immunity in this matter and it should be dismissed.

CONCLUSION

Barona has not consented to this suit and Congress has not waived sovereign immunity for Indian Civil Rights Act violations, except for habeas corpus petitions.

Plaintiff is not seeking habeas corpus relief, the only remedy permitted under the Indian Civil Rights Act, but this case is not about an Indian Civil Rights Act violation. It is about a workers' compensation claim, for which a forum was provided.

For the reasons previously stated, the Barona Band of Mission Indians urges this Court to dismiss this action.

Dated: December 1, 2017

Respectfully submitted,

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