IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

HALCÓN OPERATING CO., INC., Plaintiff, vs. REZ ROCK N WATER, LLC; FRANK WHITE CALFE; Honorable MARY SEAWORTH, in her official capacity as Associate Judge of the Fort Berthold District Court; and FORT BERTHOLD DISTRICT COURT of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, Defendants.	)	**MOTION TO DISMISS AND MEMORANDUM IN SUPPORT** Case No. 1:17-CV-00202-CSM Magistrate Judge Charles S. Miller, Jr.

Defendants Fort Berthold District Court and the Honorable Mary Seaworth move to dismiss this matter under Federal Rule of Civil Procedure 12(b)(1), (2), (4), and (6), on the following grounds:

1. This Court lacks subject matter jurisdiction because the complaint does not state a federal question.

2. This Court lacks jurisdiction because Plaintiff has failed to exhaust tribal court remedies.

3. This Court lacks jurisdiction as to Defendants Mary Seaworth, Associate Judge, and Fort Berthold District Court because Plaintiff has not pled a waiver of sovereign immunity.

4. This Court lacks jurisdiction because the Fort Berthold District Court, as an arm of the Three Affiliated Tribes of the Fort Berthold Indian Reservation ("Tribe"), and Mary Seaworth, as an officer of the Tribe, have not waived their sovereign immunity applicable to this matter.

INTRODUCTION

Plaintiff, confusing subject matter jurisdiction and substantive law, asserts to this Court that this Court should interfere in an ongoing case in the Court of the Mandan, Hidatsa, and Arikara Tribes ("MHA" or "the Tribe"). The dispute in the MHA Court is whether or not a dispute between Halcon and a member of the Three Affiliated Tribes and his company, regarding an on-Reservation matter, should be arbitrated in Texas. Halcon contends arbitration in that distant forum should be compelled, and it then posits that the MHA Court will not agree. Based upon its position on the merits of the tribal court suit and its prognostication regarding what the Tribe's Court will, in the future, decide on the merits, it alleges it can then run into a federal court and have the federal court preemptively decide whether arbitration is required. It is simply, unquestionably, wrong for multiple independent reasons.

First, Plaintiff has not presented any federal question to this Court. Its only alleged basis for jurisdiction is that the MHA Court lacks jurisdiction, but the MHA Court plainly has subject matter jurisdiction. Reasonable legal minds can disagree regarding how the MHA Court should decide the merits of the case, but there is no basis for asserting the Tribe's Court lacks such jurisdiction to decide the merits. Second, Halcon is required to exhaust tribal court remedies before it can file suit in this Court. Third, Halcon has not pled a waiver of tribal sovereign immunity. And fourth, even if Halcon had met its pleading requirement, this Court would be required to dismiss the complaint based upon the Tribe's factual challenge that it has sovereign immunity and that its judge has judicial immunity.

DISCUSSION OF LAW

I. MOTION TO DISMISS STANDARD.

A. MOTION TO DISMISS UNDER FRCP 12(B)(1)

A motion to dismiss pursuant to Federal Rule of Civil Procedure (FRCP) 12(b)(1) challenges a court's subject matter jurisdiction. It is fundamental that a case must be dismissed for lack of jurisdiction unless the plaintiff meets its burden to establish subject matter jurisdiction. *Kokkenen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998); *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990).

In considering a motion to dismiss under FRCP 12(b)(1), the Court is not limited to the facts pled in the complaint, but can and should weigh evidence and determine facts in order to satisfy itself as to its power to hear the case. *Osborn*, 918 F.2d 724; *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

B. MOTION TO DISMISS UNDER FRCP 12(B)(6)

A motion to dismiss pursuant to a FRCP 12(b)(6) is a challenge to the basis upon which a plaintiff seeks relief and a plaintiff is required to provide "more than labels, conclusions, and formulaic recitations of the elements of a cause of action" in order to survive such challenge. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

DISCUSSION OF LAW

II. THIS COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION.

The threshold issue in every federal case is whether the federal court has subject matter jurisdiction. A plaintiff is required to plead and to prove jurisdiction. Plaintiff's sole allegation of jurisdiction is that it stated a federal question because "tribal authority is controlled by federal law." Compl. ¶5. The actual legal rule is that a federal district court has jurisdiction, akin to an appellate court, over one, and only one issue: is the Tribal Court exceeding a federally imposed limitation on adjudicatory jurisdiction?

This limitation on the scope of federal court jurisdiction over proceedings in a tribal forum is well established. Although the exact legal underpinning for such federal jurisdiction is murky,[1] the Supreme Court has clearly and repeatedly held that the federal courts do have jurisdiction, and it has just as clearly stated the limitation on that jurisdiction. Federal Court jurisdiction is strictly limited to review of whether a tribal forum is exceeding a federally imposed limitation on tribal subject matter jurisdiction. *E.g., Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987)*; *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). Unless the tribal forum is exceeding a federally imposed limitation, there is no federal jurisdiction. *Id.*

Although, as discussed below, the "exhaustion doctrine" directs that the federal court not interfere in a tribal court's exercise of jurisdiction unless it is incredibly clear that the tribe is exceeding federally imposed limitations, i.e. unless as a matter of federal law, the tribal exercise of jurisdiction is "patently violative of" such limitations, the Tribe does not even need to turn to that doctrine because here it is, simply, clear that the Tribe in fact does have jurisdiction.

[1] There is no act of Congress applicable here which gives the federal courts any jurisdiction to review a tribal court or other tribal forums decisions, nor is there any constitutional provisions which would appear to give the federal courts such jurisdiction. The Supreme Court's decisions that the federal courts do have jurisdiction appears to stem from alleged rights of conquest.

In its complaint, Plaintiff makes a conclusory statement that the Tribe's Court is exceeding its jurisdiction; but its complaint does not support that conclusory allegation. Instead, Plaintiff's challenge is a legally barred attempt to prevent the Tribe's Court from deciding merits issues regarding whether there is a valid agreement to arbitrate, and alternatively, whether the tribal court complaint contains claims which are outside the scope of any allegedly valid agreement to arbitrate. These merits issues are squarely and properly presented to the Tribe's Court in a complaint over which the Tribe's Court has jurisdiction.

The Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., does not confer any subject matter jurisdiction on a federal court. *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983). Where an arbitration provision is included in a contract that affects interstate commerce, the FAA often provides the substantive legal standard for compelling arbitration and for confirming awards. 9 U.S.C. § 2. In such matters, the FAA preempts any conflicting state substantive law, but it does not preempt the field. *Perry v. Thomas*, 482 U.S. 483 (1987). The Tribe assumes, *arguendo*, that the FAA similarly provides the substantive legal standard in tribal courts.

But, contrary to the theme of Plaintiff's suit, the FAA does not bar the jurisdiction of a non-federal court. In fact, actions to compel or bar arbitration, and actions to confirm or reject an arbitration award often must be brought in non-federal courts, because they cannot be brought in a federal court. The well-settled law is that the non-federal court has jurisdiction over such suits regarding arbitration. Zhaodong Jiang, *Federal Arbitration Law and State Court Proceedings*, 23 Loy. L.A. L. Rev. 473, 502–03 (1990); e.g. *Freeman v. Duluth Clinic, Inc.*, 334 N.W.2d 626 (Minn. 1983). That jurisdiction is either exclusive of or concurrent with federal jurisdiction to the same extent that it would be in a matter where the contract does not provide for arbitration. 9

U.S.C. §§3, 4. In general, this means that a federal court would have concurrent jurisdiction if the contract involved interstate commerce and there were complete diversity (which does not exist here) or if there were an independent federal question (which also does not exist here).

The Tribe's Court has jurisdiction to decide whether the arbitration provision is valid and to decide if any tribal court claims are outside the scope of arbitration. Ergo, there is no federal question presented.

III. THIS CASE MUST BE DISMISSED BECAUSE PLAINTIFF FAILED TO EXHAUST TRIBAL REMEDIES.

A. EXHAUSTION OF TRIBAL COURT REMEDIES IS REQUIRED IF THERE IS A COLORABLE CLAIM OF TRIBAL COURT JURISDICTION.

Even if Plaintiff could argue that the MHA Court lacks jurisdiction, it would be required to first present that issue to the Tribe's Court and exhaust tribal court remedies.

Tribes have the following indisputable jurisdiction over non-Indians:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana v. United States, 450 U.S. 544, 565-66 (1981). "A tribe's sovereign power to regulate reservation resources continues to exist unless divested by Congress." *Id.* (citing *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)); *see also Felix S. Cohen's Handbook of Federal Indian Law* 230-32 (1982 ed.). The general rule is that a federal district court cannot proceed with a suit challenging a tribe's jurisdiction until the would-be federal court plaintiff has fully and finally exhausted tribal remedies:

> Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal

> bases for the challenge….Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).

It is settled law that civil jurisdiction over tribal-related activities on tribal land presumptively lies in the tribal system, *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1299 (8th Cir. 1994), and "exhaustion is required before such a claim may be entertained by a federal court." *Nat'l Farmers Union*, 471 U.S. at 857 (emphasis added); s*ee also Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("Federal policy . . . directs a federal court to stay its hand.") (emphasis added); *Krempel v. Prairie Island Indian Community*, 125 F.3d 621 (8th Cir. 1997); *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991) ("[P]roper respect . . . requires" tribal remedy exhaustion.) (emphasis added) (citing *LaPlante*).

Not only is exhaustion of tribal remedies mandated by Supreme Court precedent, but it is also decreed by the clear weight of authority from the Eighth Circuit Court of Appeals. In *Duncan Energy*, the Court held that *National Farmers Union* and *LaPlante* required exhaustion of tribal remedies before a case may be considered by a federal district court. 27 F.3d at 1300. In so holding, the court cited *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993) (recognizing tribal court authority under tribal constitution to exercise jurisdiction over non-Indian operators of liquor establishments on fee-patented land in cities within reservation, and therefore tribal remedies must be exhausted prior to the exercise of jurisdiction by a federal district court); *United States ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273, 1276 (8th Cir. 1987) ("A federal court should stay its hand until tribal remedies are exhausted and the tribal court has had a full opportunity to determine its own jurisdiction."); *N.W. S.D. Prod. Credit Ass'n v.*

Smith, 784 F.2d 323 (8th Cir. 1986) (holding that tribal court is the appropriate forum to decide the reach of tribal jurisdictional in the first instance).

In fact, most circuits considering this issue have concluded that *National Farmers Union* and *LaPlante* "established an inflexible bar to considering the merits of a petition by the federal court, and therefore requiring that a petition be dismissed when it appears that there has been a failure to exhaust [tribal remedies]," *Smith v. Moffet*, 947 F.2d 442, 445 (10th Cir. 1991), and that the "'requirement of exhaustion of tribal remedies is not discretionary, it is mandatory.' *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991). If deference is called for, the district court may not relieve the parties from exhausting tribal remedies." *Crawford v. Genuine Auto Parts, Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992) (emphasis added). Finally, disputes arising on the reservation, as this one did, that raise questions of tribal law and jurisdiction, as this one does, must first be addressed in the tribal court. *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986).

The tribal exhaustion requirement applies even in cases where tribal jurisdiction is not clearly established. Instead, in cases where even a "colorable question" of tribal jurisdiction exists, principles of comity require that the federal court abstain and require the plaintiff to exhaust tribal remedies. *Norton v. Ute Indian Tribe*, 862 F.3d 1236 (10th Cir. 2017). *Stock West Corp. v. Taylor*, 964 F.2d 912, 920-21 (9th Cir. 1992).

The Court in *National Farmers Union* went on to explain that:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

Nat'l Farmers Union Ins. Cos., 471 U.S. at 855-56. While not foreclosing the possibility that the issue of a tribal court's jurisdiction over non-Indians could become a federal question at some

point, the *National Farmers Union* court decreed that the "careful examination" described above is the prerequisite to that federal question being presented. There is no tribal court action exceeding federally imposed limits on tribal court jurisdiction, there is no record for purposes of federal review, and there is no federal question upon which to base jurisdiction at this time.

The exhaustion rule, is based upon "the Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mutual Ins. Co.*, 480 U.S. at 14; *id.* at 19 ("tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development"); *Duncan Energy Co.*, 27 F.3d at 1299; *Weeks Constr., Inc.*, 797 F.2d 668.

B. THIS COURT IS REQUIRED TO LET THE MHA COURT DEVELOP THE FACTUAL RECORD USED TO DETERMINE WHETHER THE MHA COURT HAS JURISDICTION.

One of the primary purposes of exhaustion is to permit the tribal law-applying entities to develop the factual record from which legal conclusions concerning jurisdiction can flow. *Iowa Mut. Ins. Co.*, 480 U.S. at 19. Once a Tribe has created a factual record and issued a final ruling based upon it, a party can seek federal review of the final tribal court decision on the federal law issues related to jurisdiction. "[O]n review, the district court must first examine the Tribal Court's determination of its own jurisdiction. . . . [I]n making its analysis, the district court should review the Tribal Court's findings of fact under a deferential, clearly erroneous standard." *Duncan Energy Co.*, 27 F.3d at 1300 (citing *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990)) (emphasis added).

The first federal appellate court to reach the issue, the Ninth Circuit, explained that "the *Farmers Union* Court contemplated that tribal courts would develop the factual record in order to serve the "orderly administration of justice in the federal court." *FMC*, 905 F.2d at 1313. All federal courts which have reached the issue, including the Eighth Circuit Court, have adopted the

Ninth Circuit's analysis on this issue of law. *Duncan Energy Co.*, 27 F.3d at 1300 (citing *FMC*); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996) (citing *FMC*).

The Tribal Court complaint (attached hereto as **Ex. 1**) alleges many allegations of fact which, if ultimately proven, would far more than colorably support tribal court jurisdiction. The complaint alleges:

- That Halcon entered into multiple consensual relationships relevant to this matter, including an agreement to comply with the MHA TERO law, business licenses, mineral development agreements, and other agreements. It also entered into oral and written contracts with Rez Rocks.
- The TERO law that Halcon agreed to comply with includes within it a provision allowing TERO to determine whether a master service agreement arbitration provision is lawful.
- Claims against Halcon for fraud, false representation; and facts in support.
- A claim of breach of a contract other than the master service contract, and facts in support
- Equitable claims off-the-contract for unjust enrichment, and facts in support.
- A tort claim for harm to Rez Rocks' relationship with other businesses.[2]

[2] Arguably, as an issue of MHA civil procedure, the tort claim would be subject to a motion to dismiss for failure to state a claim because the complaint does not include a sufficient factual basis, although, as in federal court, the tribal court plaintiff could cure that type of defect through amendment of the complaint, and more importantly for current purposes, any defect in stating a claim would not be reviewable under the federal court's very limited authority to review whether a tribal court has exceeded a federally imposed limitation on tribal court jurisdiction.

The facts necessary to determine whether or not the Tribe has jurisdiction have not been developed. The complaint easily contains a colorable claim of MHA Court jurisdiction, and until the factual record in that Court is developed, the federal court cannot proceed.

C. THERE IS OBVIOUSLY A COLORABLE CLAIM FOR MHA JURISDICTION UNDER THE FACTS ALLEGED IN THE TRIBAL COURT COMPLAINT.

The only possible federal question is whether the Tribe has exceeded its lawful jurisdiction based upon the *Montana* test. Under *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990), the Tribe challenges Plaintiff's claim of jurisdiction both on the pleadings and, if Plaintiff were to survive that challenge, then on the facts.

There are two "*Montana* exceptions." The first *Montana* exception applies where a party has entered into a consensual relationship with the Tribe or its members. *Montana*, 450 U.S. at 565-66. Here, the Tribal Court complaint alleges multiple consensual relationships with both the Tribe and with a member. It alleges multiple claims stemming from these multiple agreements. In its complaint in this Court, Halcon does not deny that it has entered into any of these consensual relationships, and it affirmatively admits that it has entered into the master service agreement. The Tribe's Court therefore obviously has a colorable claim of jurisdiction at this point. In fact, it appears to the Tribe that Halcon will not even have a good faith argument to the contrary.

The second *Montana* exception applies where the alleged "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66. The Tribal Court complaint also presents facts which establish a colorable basis for jurisdiction under the second *Montana* exception. The complaint expressly alleges that Halcon is violating the Tribe's TERO laws, and it links several of its claims to those TERO violations. While the Tribal Court complaint does not provide allegations linking TERO

to the factors under the second *Montana* exception, the TERO provisions themselves provide that link. **Ex. 2**. There is a colorable claim under the second *Montana* exception.

IV. THE COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFF HAS NOT PLED A WAIVER OF SOVEREIGN IMMUNITY AND BECAUSE THE MHA COURT AND ITS JUDGE ARE CLOAKED WITH SOVEREIGN IMMUNITY.

Tribal sovereign immunity is a matter of subject matter jurisdiction which can be challenged in a motion to dismiss for lack of subject matter jurisdiction. FRCP 12(b)(1). *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (citing *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995)). It is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation; rather, it presents a pure jurisdictional question. Waivers of tribal sovereign immunity are strictly construed, and there is a strong presumption against them. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). This immunity is so powerful that courts have held there can be no "waiver of tribal immunity based on policy concerns, or perceived inequities arising from the assertion of immunity, or the unique context of a case." *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F. 2d 416, 419 (9th Cir. 1989), *overruled on other grounds, C & L Enters., Inc.* 532 U.S. 411, 418 (2001) (citations omitted).

Indian tribes enjoys the same immunity from suit enjoyed by other sovereign powers and are "subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Okla. Tax Comm. v. Citizen Band of Potawatomi Indian Tribe*, 498 US. 505, 509 (1991). "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose," and "to relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (citations omitted). 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)). *See also Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1243 (8th Cir. 1995); *Sac and Fox Nation v. Hon. Orvan J. Hanson, Jr. et al.*, 47 F.3d 1061 (10th Cir. 1995).

A suit is against the sovereign if "the judgment 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 government from action, or to compel it to act.'" *Coggeshall Develop. Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir. 1989). A suit will fail, as one against the sovereign, even if it is claimed the officer acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *Johnson v. Matthews*, 539 F.2d 1111, 1124 (8th Cir. 1976).

A lawsuit against officials acting within their official capacity is nothing more than a claim against the entity. *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985); *Epps v. Duke Univ., Inc*. 447 S.E.2d 444, 447; *Mullis v. Sechrest*, 495 S.E.2d 721, 725 (1998). Immunity from suit for a tribe also applies to tribal officials. *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002), *cert. den.*, 236 U.S. 939 (2002).

Tribal sovereign immunity extends to individual officers of a tribe named as parties:

> It is clear that a plaintiff may not avoid the operation of tribal immunity by suing tribal officials; "the interest in preserving the inherent right of self-government in Indian tribes is equally strong when suit is brought against individual officers of the tribal organization as when brought against the tribe itself." Accordingly, a tribe's immunity generally immunizes tribal officials from claims made against them in their official capacities…. The general bar against official-capacity claims, however, does not mean that tribal officials are immunized from individual capacity suits arising of actions they took in their official capacities, as the district court

> held…. Rather, it means that tribal officials are immunized from suits brought against them because of their official capacities – that is because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe.

Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1296 (10th Cir. 2008) (footnote and citations omitted).

The analysis requires a court to "ask whether the sovereign 'is the real and substantial party in interest.'" *Id.* (quoting *Frazier v. Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001)). Such answer "turns on the relief sought by the plaintiffs." *Id.* at 1297. The rule is "relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Id.* (quoting *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984)).

The Supreme Court has expressly rejected the application of equitable considerations in the context of tribal sovereign immunity. *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 893 (1986) ("the perceived inequity of not allowing suit against an Indian tribe 'simply must be accepted in view of the overriding federal and tribal interests in these circumstances'") thus "the requirements that a waiver of tribal immunity be 'clear' and unequivocally expressed' is not a requirement that may be flexibly applied or even disregarded based upon the parties or the specific facts involved." *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998).

Halcon needs, and is seeking, relief against the Tribe. Whether alleged as a claim against the Tribe, its Court, or its judge in her official capacity, that is a claim against the sovereign, for which Halcon would have to plead and prove a waiver of the Tribe's sovereign immunity. It has not met its burden to plead a waiver, nor has it met its burden to prove a waiver, and its suit therefore must be dismissed.

CONCLUSION

For all of the reasons stated above, this Court must dismiss Halcon's suit.

Respectfully submitted this 8th day of November, 2017.

/s/ Jeffrey S. Rasmussen
Jeffrey S. Rasmussen
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, CO 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: jrasmussen@ndnlaw.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2017, a copy of the foregoing **MOTION TO DISMISS AND MEMORANDUM IN SUPPORT** was filed electronically with the Clerk of Court through the ECF filing system, which will send notification of such filing to all parties of record as follows:

Joshua B. Cook
Paul J. Forster
CROWLEY FLECK PLLP
100 West Broadway, Suite 250
PO Box 2798
Bismarck, ND 58502-2798
Email: jcook@crowleyfleck.com
pforster@crowleyfleck.com

Counsel for Plaintiff

/s/ Ashley Klinglesmith
Ashley Klinglesmith
Legal Assistant