Heather Whiteman Runs Him (*pro hac vice*)
Melody L. McCoy (*pro hac vice*)
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
Phone: (303) 447-8760
Fax: (303) 443-7776
heatherw@narf.org
mmccoy@narf.org

Dennis M. Bear Don't Walk (State Bar #12370)
CROW NATION EXECUTIVE BRANCH
Office of Legal Counsel
P.O. Box 340
Crow Agency, MT 59022
Phone: (406) 679-2723
Fax: (406) 638-2614
Dennis.BearDontWalk@crow-nsn.gov

Attorneys for Defendants Unknown Members of Crow Tribal Health Board, Hon. Chief Justice Joey Jayne, and Hon. Justices Leroy Not Afraid and Kari Covers Up

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

BIG HORN COUNTY ELECTRIC COOPERATIVE, INC., Plaintiff, v. ALDEN BIG MAN, UNKNOWN MEMBERS OF THE CROW TRIBAL HEALTH BOARD, HONORABLE CHIEF JUSTICE JOEY JAYNE, HONORABLE JUSTICE LEROY NOT AFRAID, and HONORABLE JUSTICE KARI COVERS UP, Justices of the Crow Court of Appeals, Defendants.	Case No. CV 17-00065-SPW-TJC **MEMORANDUM OF LAW IN SUPPORT OF TRIBAL DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF**

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1. **Exhibit 1**, Petitioner's Request for Stay, *Alden Big Man v. Big Horn Cty. Elec. Coop.*, Cause No. 1-118 (Crow Tribal Ct. Aug. 30, 2017)

2. **Exhibit 2,** Order (granting Big Man's Request for Stay), *Alden Big Man v. Big Horn Cty. Elec. Coop.*, Cause No. 1-118 (Crow Tribal Ct. Sep. 11, 2017)

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Big Horn County Electric Cooperative ("BHCEC") filed its Complaint in this action in May 2017, seeking declaratory and injunctive relief premised on federal court review of a decision by the Crow Tribal Court of Appeals ("Crow Appellate Court") that the Crow Tribal Court ("Crow Tribal Court") has jurisdiction to hear civil claims for money damages by a Crow Tribal citizen, Alden Big Man, against BHCEC arising under a section of the Crow Tribe Law and Order Code regulating certain aspects of utility services on the Crow Indian Reservation. BHCEC Compl. 15, ECF No. 1. BHCEC's Complaint names the following Defendants: Alden Big Man, Plaintiff in the underlying case against BHCEC brought and pending in Crow Tribal Court; members of the Crow Tribal Court of Appeals: Honorable Chief Justice Joey Jayne, Honorable Justice Leroy Not Afraid, and Honorable Justice Kari Covers Up; and Unknown Members of the Crow Tribal Health Board. *Id.* at 3-5.

BHCEC seeks the following relief: (1) "a declaratory judgment that the Crow Tribal Court does not have subject matter or personal jurisdiction over the Lawsuit [filed by Alden Big Man in Crow Tribal Court]" *Id.* at 14; (2) "a stay of proceedings in the Crow Tribal Court while this matter is pending and for an injunction prohibiting the Crow Tribal Court Plaintiff from prosecuting and

maintaining his claims against Plaintiff in the Lawsuit" *Id.*; (3) "an injunction prohibiting the Crow Tribal Court Judge, in his or her official capacity, from entertaining or adjudicating claims against Plaintiff in the Lawsuit" *Id.* at 15; and (4) "such other and further relief as the Court deems appropriate, just, and equitable." *Id.* BHCEC alleges in its Complaint that "Tribal Court remedies have been exhausted as the Crow Tribal Court of Appeals, by its Opinion, has defined the extent of the Tribal Court's jurisdiction and concluded the Tribal Court has subject matter jurisdiction in the Lawsuit to the injury of Big Horn in violation of federal law and of federal rights of Big Horn, and in excess of federal limitations upon the power of Defendants and of the Crow Tribe." *Id.* at 6.

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, Defendants the Honorable Chief Justice Joey Jayne, and the Honorable Justices Leroy Not Afraid and Kari Covers Up, and Unknown Members of Crow Tribal Health Board, ("Tribal Defendants") have moved this Court to dismiss the Complaint, primarily because, contrary to BHCEC's allegations, it has not exhausted its remedies in Crow Tribal Court.[1] Furthermore, Defendants Unknown Members of the Crow Tribal Health Board ("Tribal Health Board Defendants") have tribal official

[1] Although in its Opinion of April 15, 2017, the Crow Appellate Court remanded Big Man's case to the Crow Tribal Court, BHCEC's Complaint in this action names only the Crow Appellate Court Chief Justice and Associate Justices as Defendants; it does not name the Crow Tribal Court Judge or the Crow Tribal Court as Defendants. This calls into question the effectiveness of the relief sought through BHCEC's Complaint.

immunity which deprives this Court of jurisdiction over claims against the Tribal Health Board Defendants, but, in any event, BHCEC's Complaint fails to state a claim against these Defendants.

The well-established rule of exhaustion of tribal remedies requires dismissal of BHCEC's Complaint. As the Crow Appellate Court correctly recognized, Big Man presents a colorable claim of tribal jurisdiction over his claims against BHCEC that can be heard by the Crow Tribal Court, but there has not been full and proper exhaustion in the Crow Tribal Court of the tribal jurisdictional issue under applicable federal case law. Of paramount importance to analyzing issues of tribal jurisdiction over non-Indians in this Circuit is a determination of the status of the land on which the claims against the non-Indian arise. The land status on which Big Man's claims arise, as well as other factors relevant or potentially relevant to tribal jurisdiction over Big Man's claims, have not been addressed in the Crow Tribal Court or reviewed by the Crow Appellate Court. In this situation, full and proper exhaustion of tribal remedies is required before federal court review of the tribal jurisdiction question.

BHCEC's claims, if any, against the Tribal Health Board Defendants must be dismissed for lack of jurisdiction because these Defendants are immune from suit under the doctrine of tribal sovereign immunity. The U.S. Supreme Court and this Circuit have long recognized that the doctrine of sovereign immunity shields

tribal governments, such as the Crow Tribe, from suit absent a clear and express waiver, or a specific act of Congress. Tribal sovereign immunity extends to tribal officials acting within their official capacity. Accordingly, any claims against Tribal Health Board Defendants must be dismissed for lack of jurisdiction, as these Defendants are immune from suit and there is no applicable waiver of immunity.

Even if there were no official immunity from suit here, BHCEC's claims, if any, for relief against the Tribal Health Board Defendants should be dismissed pursuant to Rule 12(b)(6), for failure to state a claim on which relief can be granted. Rule 8(a) requires that a pleading be sufficient to put a defendant on notice of the claims alleged, and must at a minimum contain sufficient facts to provide such notice. In this case, where the Complaint lacks any allegation of any action or conduct taken by Tribal Health Board Defendants, this standard has not been met and accordingly, the claims, if any, against these Defendants must be dismissed.

STATEMENT OF THE CASE

The Crow Tribe is a federally-recognized Indian Tribe, occupying the Crow Indian Reservation ("Reservation").[2] *See, e.g.*, Indian Entities Recognized and

[2] The traditional name for the Crow Tribe, in its own language, is Apsaalooke, and tribal entities such as the Court of Appeals frequently use the traditional name of this particular indigenous tribal people. Apsaalooke and Crow are

Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5,019, 5,021 (Jan. 29, 2016) (list of federally recognized Tribes); *see also* Crow Tribe of Indians Constitution and Bylaws (2001) ("Crow Tribe Const."), https://www.ctlb.org/wp-content/uploads/2015/07/2001-constitution.pdf.

Among the federal services that the Crow Tribe receives is contract funding for its Crow Tribal Court system under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 45301 - 45310. The Crow Tribal Court system at present is established by Article X of the Tribe's Constitution and Bylaws and Title 3 of the Crow Law and Order Code ("CLOC"), and consists of trial and appellate courts.[3] Crow Tribe Const., Art. X (JUDICIAL BRANCH OF GOVERNMENT), https://www.ctlb.org/wp-content/uploads/2015/07/2001-constitution.pdf; CLOC, tit. 3 (ESTABLISHMENT OF CROW TRIBAL COURTS AND TRIBAL JURISDICTION), https://www.ctlb.org/wp-content/uploads/2015/07/title_03.pdf-1.pdf. The Crow Appellate Court is governed by Rules of Appellate Procedure set forth in Title 7 of CLOC. CLOC, tit. 7 (RULES OF APPELLATE PROCEDURE IN THE CROW COURT OF

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interchangeable and refer to the same indigenous tribal people, including its federally recognized tribal government.

[3] Prior to 2001, the Crow Tribal Court was established as a matter of Crow Tribal law under various resolutions of the Crow Tribe General Council, in conformity with applicable federal laws and regulations. See, e.g., *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, (1985).

APPEALS), https://www.ctlb.org/wp-content/uploads/2015/07/title_07.pdf-1.pdf.

The Crow Tribal Health Board is an instrumentality of the Crow Tribe, created by CLB10-01, a Resolution adopted unanimously by the Crow Tribe Legislative Branch on January 25, 2010, and signed into law by the Crow Tribe Executive Branch Chairman on February 17, 2010. Act Establishing a Crow Tribal Health Board and Establishing Authority, Duties, and Responsibilities of The Apsaalooke Nation Heath Board, Bill No. CLB10-01, Crow Tribal Leg., 2010 Jan. Sess., https://www.ctlb.org/wp-content/uploads/2015/09/CLB-10-01-Health-Board.pdf. Tribal Health Board Defendants are individuals who have been duly appointed and confirmed to the Crow Tribal Health Board as set forth in CLB10-01. *Id.*

Defendant Big Man is an enrolled citizen of the Crow Tribe who resides on the Reservation. Plaintiff BHCEC is a non-Indian company that provides electric energy utility services on the Reservation to virtually all Crow Tribal Citizens living on the Reservation within BHCEC's service area, to Crow Tribal Governmental facilities and business entities on the Reservation, as well as to others. *See generally*, Big Horn County Electric Home Page, http://www.bhcec.com (last visited Sep. 11, 2017). BHCEC is a rural nonprofit cooperative, incorporated under laws of the State of Montana, with its principal office located in Hardin, Montana, and other facilities and property located within

the boundaries of the Reservation. *Id.*

Big Man began receiving electrical utility services from BHCEC at his residence on the Reservation in February 1999, and was receiving such services in January 2012. Electric Service Application, ECF No. 1-6. On January 24, 2012, his residential electrical service was disconnected by BHCEC. Big Man Mot. Summ. J. 1, ECF No. 1-9. On May 2, 2012, Big Man filed an action against BHCEC in Crow Tribal Court. Big Man Compl., ECF No.1-2.

Big Man's claims against BHCEC are based on a provision in the CLOC. Big Man's Crow Tribal Court Complaint states in relevant part in its entirety as follows:

> Title 20 of the Crow Law and Order Code states that "During the period of November 1st to April 1st … no termination of residential service may take place." CLOC 20-1-110 TERMINATION OF SERVICE DURING WINTER MONTHS. Further, this statue (sic) provides that no termination may take place during these winter months "except with specific prior approval of the board." CLOC 20-1-110(2). Title 20 requires the utility to notify the customer in writing via personal service or certified mail ten days prior to the termination date. CLOC 20-1-105(2)(a). Also, the utility is required to give notice to the board of the proposed termination. CLOC 21-1-117.
>
> It is undisputed that BHCEC terminated Mr. Big Man's power on January 24, 2012. By doing this, BHCEC violated Crow law. Also, BHCEC failed to comply with notice requirements in Title 20. Mr. Big Man was given one notice of disconnect on January 24, 2012.

ECF No. 1-2, at 2 (CAUSE OF ACTION); *accord Id.* at 3 (REMEDIES (seeking monetary damages calculated solely on CLOC 20-1-120(4)).

Big Man filed a Motion and Brief for Summary Judgment on July 10, 2012, pursuant to Rule 19 of the Crow Rules of Civil Procedure, asserting that BHCEC had admitted to "the one material fact [necessary] to establish a violation of law" in its Answer to Big Man's Complaint. ECF No.1-9 at 1. On July 23, 2012, BHCEC filed its Response to Big Man's Motion for Summary Judgment, objecting first to Big Man's Motion, and further stating that "appellant [sic] courts rely upon tribal courts to fully develop the record in justification of assumption of jurisdiction over non-members," and urging dismissal on the grounds that the Crow Tribal Court lacked jurisdiction over BHCEC to enforce Title 20 of the CLOC. BHCEC Resp. 1-20, ECF No. 1-10. Big Man filed a Reply Brief on October 22, 2012, to which BHCEC filed a Response on December 6, 2012. Apsaalooke App. Ct. Op. 2, ECF No. 1-4.

On May 6, 2013, the Crow Tribal Court issued an Order denying Big Man's Motion for Summary Judgment and dismissing Big Man's claims. Order 9, ECF No. 1-7. The Crow Tribal Court issued an Order dismissing the case on May 24, 2013, ruling that it did not have subject matter jurisdiction over Big Man's claims under either: 1) the consensual relationship or 2) direct effect tests set out in *Montana v. United States*, 450 U.S. 544 (1981). ECF No. 1-7 at 8-9. Big Man appealed the dismissal to the Crow Appellate Court on May 28, 2013. *See* ECF No. 1-4 at 2.

The Crow Appellate Court received Big Man's Appellant Brief on June 27, 2013. Appellant Br., ECF No. 1-11. BHCEC filed its Respondent/Appellee's Brief on July 15, 2013. Appellee Br., ECF No. 1-12. A three-justice panel of the Crow Appellate Court, consisting of the Tribal Court Defendants in the instant action, heard oral argument on September 26, 2016. ECF No.1-4 at 2. The Crow Appellate Court issued its Opinion on April 15, 2017, reversing and remanding to the Crow Tribal Court with instructions. *See* Mandate attached to Apsaalooke App. Ct. Op., ECF No.1-4.

In its Opinion, the Crow Appellate Court agreed with the Crow Tribal Court that tribal jurisdiction over Big Man's claims against BHCEC may be determined under applicable U.S. Supreme Court case law, including *Montana v. United States.* ECF No. 1-4 at 24-35. The Crow Appellate Court, however, expressly reversed the Crow Tribal Court's conclusion regarding subject matter jurisdiction. "This Court rules that the Crow trial court has subject matter jurisdiction over this matter consistent with this opinion." *Id* at 35.

The meaning of the phrase "consistent with this opinion" is clear in the Crow Appellate Court's discussion of the proper jurisdictional analysis. *Id.* The Crow Appellate Court expressly and repeatedly stated that the Crow Tribal Court did not make any findings of fact to support its rulings. *Id.* at 18, 24, 26-27, 33. In the first instance, in keeping with the line of cases of this Circuit holding that the

status of the land on which a non-Indian's actions or conduct occurs can be determinative of tribal jurisdiction, the Crow Appellate Court expressly noted that "there is no record below establishing the land status of BHCEC within the Crow Indian Reservation," and the "Crow trial court erred when it did not inquire into BHCEC's land status within the … Reservation." *Id.*.

In the second instance, the Crow Appellate Court ruled that, even assuming *arguendo* that land status is not determinative of tribal jurisdiction over BHCEC, the Crow Tribal Court improperly applied the *Montana* tests for tribal jurisdiction. *Id.* at 27-32. The Crow Appellate Court expressly found that there were no, or insufficient, facts established in Crow Tribal Court pertaining to *Montana's* consensual relationship test, such as the number of tribal citizens that BHCEC serves on the Reservation, the number of years that BHCEC has served tribal citizens on the Reservation, or the contract or instrument by which it provides such services. *Id.* at 27-30.

Finally, in the third instance, the Crow Appellate Court reviewed the Crow Tribal Court's analysis of jurisdiction under the tribal-power-to-exclude-non-Indians cases. *Id.* at 31-35. Again, the Crow Appellate Court found the Crow Tribal Court to have erred under applicable U.S. Supreme Court and Court of Appeals for the Ninth Circuit case law by not making "findings on BHCEC's land status, date and initial entry conditions onto the Crow Indian Reservation," and not

establishing a record with respect to "what BHCEC should reasonably anticipate from [its] dealing with Crow Tribe cooperative members or the Crow Tribe." *Id.* at 33, 35.

The Crow Appellate Court found colorable jurisdiction and instructed the Crow Tribal Court to conduct the proper analysis of jurisdictional factors. Once that is done, the trial court is to look at the merits of Big Man's claims against BHCEC, assuming jurisdiction is finally established. *Id.* at 35.

BHCEC requests "a stay of proceedings in the Crow Tribal Court while this matter is pending." BHCEC Compl. 14, ECF No. 1. Big Man moved for a stay of proceedings before the Crow Tribal Court on August 30, 2017. (See attached Exhibit 1, Petitioner's Request for Stay.) The Crow Tribal Court issued a stay pending this Court's resolution of the scope of the Crow Tribal Court's jurisdiction on September 11, 2017, thereby rendering BHCEC's request for stay moot. (See attached Exhibit 2, Order granting Big Man's Request for Stay.) Additionally, BHCEC requests "an injunction prohibiting the Tribal Court Plaintiff from prosecuting and maintaining his claims against Plaintiff in the Lawsuit", ECF No. 1 at 14, as well as "an injunction prohibiting the Crow Tribal Court Judge, in his or her official capacity, from entertaining or adjudicating claims against Plaintiff in the Lawsuit." *Id.* at 15. Insofar as BHCEC already seeks a determination of the Crow Tribal Court's personal and subject matter jurisdiction in this matter, a

determination by this court regarding the scope of the Crow Tribal Court's jurisdiction would be dispositive of Mr. Big Man's and any Crow Tribal Court Judge's (including those not named in BHCEC's complaint) authority to pursue and adjudicate the issue. Requests for additional injunctive relief are superfluous and should be denied. *See generally*, *Id.* at 14-15.

ARGUMENT

I. STANDARDS FOR DISMISSAL UNDER RULE 12(b)

The Tribal Defendants have moved for dismissal pursuant to various sections of Rule 12(b). All of the Tribal Defendants – including the Crow Tribal Court Defendants and the Tribal Health Board Defendants – move for dismissal for failure to exhaust tribal remedies. Motions for failure to exhaust tribal remedies may be viewed as unenumerated Rule 12(b) motions, or Rule 12(b)(6) motions (failure to state a claim upon which relief can be granted). Additionally, the Tribal Health Board Defendants move for dismissal pursuant to Rule 12(b)(1), lack of jurisdiction, based on their immunity from suit as tribal officials. Finally, the Tribal Health Board Defendants also move for dismissal under Rule 12(b)(6), failure to state a claim upon which relief can be granted, based on non-compliance with Rule 8(a)(2). The applicable standards for each of these sections of Rule 12(b) for dismissal are discussed next.

A. Dismissal Under Rule 12(b) (unenumerated) and Rule 12(b)(6) for Failure to Exhaust Tribal Remedies

The Tribal Defendants' motion for dismissal for failure to exhaust tribal remedies is brought under Rule 12(b) unenumerated, or, alternatively, under Rule 12(b)(6) (failure to state a claim upon which relief can be granted). To date, neither this Circuit nor this Court have conclusively established precisely under which section of Rule 12(b) a motion to dismiss for failure to exhaust tribal remedies is properly brought. Recently, however, several district courts, including two in this Circuit, have concluded that such motions are best treated under Rule 12(b) as unenumerated motions. *See, e.g., Corp. of the Pres. Of the Church of Jesus Christ of Latter Day Saints v. RJ et al.*, 221 F. Supp. 3d 1317, n.16 (D. Utah 2016); *A.B. ex rel. Blaik v. Health Care Serv. Corp.*, No. CIV-14-990-D, 2015 WL 6160260, at *2 (W.D. Okla. Oct. 20, 2015); *Dish Network Corp. v. Tewa*, No. CV 12-8077-PCG-JAT, 2012 WL 5381437, at *2 (D. Ariz. Nov. 1, 2012); *see also Window Rock Sch. Dist. v. Reeves*, No. CV-12-08059-PCT-PGR, 2013 WL 1149706, at *2 (D. Ariz. March 19, 2013), *aff'd, Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894 (9th Cir. 2017) (defendants seek to dismiss action for failure to exhaust tribal remedies as an unenumerated Rule 12 motion). [4]

[4] Analogizing to federal court review of certain federal administrative agency proceedings, these courts reason that the exhaustion-of-tribal-remedies rule is based on principles of comity, rather than a lack of jurisdiction, but also does not fall squarely within the corners of Rule 12(b)(6), because there may be a claim for

With respect to the standard for a Rule 12(b) unenumerated motion for failure to exhaust tribal remedies, at least one court has stated as follows:

> On such a motion, "the court may look beyond the pleadings and decide disputed issues of fact." ….In deciding such a motion, the Court accepts as true all well-pled allegations, and, ... may look beyond the pleadings and decide disputed issues of fact. If the district court concludes the plaintiff has not exhausted non-judicial remedies, the proper remedy is dismissal of the claim without prejudice."

Latter Day Saints, 221 F. Supp. 3d at n.16 (citations omitted).

With respect to the standard under 12(b)(6) for dismissal for failure to exhaust tribal remedies, if it is apparent from the face of the pleadings that exhaustion has not occurred, dismissal is appropriate. *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir 2014) (*en banc*) ("where a failure to exhaust is clear from the face of the complaint, a defendant may successfully move to dismiss under Rule 12(b)(6) for failure to state a claim"); *see also Vaughn v. Hood*, 670 F. App'x 962 (9th Cir. 2016) (affirming district court's dismissal of action for failure to state a claim where failure to exhaust available administrative remedies was clear from the face of the complaint and its attachments). At least one federal district court has recently applied this standard in the context of dismissal for failure to exhaust tribal remedies. *Steward v. Mescalero Apache Tribal Ct.*, No. CIV 15-1178 JB/ SCY, 2016 WL 546840, at *2 (D.N.M. Jan. 30, 2016) (citation omitted) ("On the

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relief at another later point in time, after tribal remedies have been fully exhausted.

face of Steward's Petition, it is apparent he has not exhausted his tribal remedies, and the Court will dismiss Steward's Petition for failure to state a claim upon which relief can be granted").

B. Dismissal Under Rule 12(b)(1) for Lack of Jurisdiction Based on Tribal Official Immunity from Suit

The Tribal Health Board Defendants have moved for dismissal under Rule 12(b)(1) for lack of jurisdiction based on their official immunity from suit . "[T]he issue of tribal sovereign immunity is jurisdictional[.]" *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989). "[T]ribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007). "Absent express waiver, consent by the Tribe to suit, or congressional authorization for such a suit, a federal court is without jurisdiction to entertain claims advanced against the Tribe." *Evans v. McKay*, 869 F.2d 1341, 1345-46 (9th Cir. 1989) (citation omitted).

In general, "[w]hen a defendant submits a motion to dismiss under Federal Rule of Civil Procedure 12 (b)(1), the plaintiff bears the burden of establishing the propriety of the court's jurisdiction." *Erickson v. United States*, No. CV 13-00273-KAW, 2013 WL 2299624, at *1 (N.D. Cal May 24, 2013) (citation omitted). This general rule applies "[i]n the context of a Rule 12(b)(1) motion to dismiss on the basis of tribal sovereign immunity, 'the party asserting subject matter jurisdiction

has the burden of proving its existence,' i.e. that immunity does not bar the suit." *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (citations omitted). The requisite proof for jurisdiction against a tribe or tribal official is an express and unequivocal waiver of immunity by Congress or the Tribe. *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1016 (9th Cir. 2016).

C. Dismissal Under Rule 12(b)(6) for Failure to State a Claim Upon which Relief Can be Granted Based on Non-Compliance with Rule 8(a)(2)

The Tribal Health Board Defendants also have moved for dismissal under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, based on non-compliance with Rule 8(a)(2). Rule 8(a)(2) requires a short and plain statement of the claim showing that the pleader is entitled to relief. Failure to comply with Rule 8(a)(2) requires dismissal under Rule 12(b)(6). *See Signal Peak Energy, LLC v. E. Mont. Minerals, Inc.* 922 F. Supp. 2d. 1142, 1148 (D. Mont. 2013) (a complaint fails to state a claim upon which relief may be granted if a plaintiff fails to allege sufficient grounds for an asserted entitlement to relief); *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) ("A district court should grant a motion to dismiss if plaintiffs have not pled 'enough facts to state a claim to relief that is plausible on its face'") (citation omitted).

II. THIS COURT SHOULD DISMISS BHCEC'S COMPLAINT FOR FAILURE TO EXHAUST TRIBAL REMEDIES

A. Because Full Exhaustion of Tribal Remedies is Required and Has Not Occurred in This Case, Federal Court Review of Questions of Tribal Jurisdiction is Premature and the Case Should Be Dismissed

While issues of tribal jurisdiction under federal law generally present federal questions over which federal courts have jurisdiction under 28 U.S.C. § 1331, *National Farmers*, 471 U.S. at 850-53, before a federal court may review such issues, tribal remedies must be exhausted. *Id*. at 855-56; *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18-19 (1987); *Window Rock* , 861 F.3d 894; *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 846 (9th Cir. 2009), *cert. denied*, 558 U.S. 1024 (2009).

This Circuit has long recognized that "[t]he Supreme Court's policy of nurturing tribal self-government strongly discourages federal courts from assuming jurisdiction over unexhausted claims." *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998). Most recently, this Circuit again reaffirmed the Supreme Court's explanation of "the importance of exhaustion[.]" *Window Rock*, 861 F.3d at 898. This case falls squarely within the long line of cases where exhaustion is required but has not yet fully occurred, and this Court should dismiss BHCEC's Complaint on such grounds.

In announcing the exhaustion of tribal remedies rule, the Supreme Court

stated that the rule

> will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover, the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. 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, 471 U.S. at 856-57 (footnotes omitted).

In *Iowa Mutual*, the Court reiterated and elaborated on the rule set out in *National Farmers*, that

> proper respect for tribal legal institutions requires that they be given a "full opportunity" to consider the issues before them and "to rectify any errors." The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. … [E]xhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. . . . Until appellate review is complete, the … Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.

Iowa Mut., 480 U.S.at 16-17 (citation and footnotes omitted).

This Circuit has long adhered to a strict interpretation of the exhaustion rule. *E.g., Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991). Germane to the instant case, *Burlington Northern* involved a question of

tribal jurisdiction under a tribal ordinance regulating railroad services on a reservation "[t]hrough . . . [which] the Tribe reasserts its commitment to sovereign authority over Reservation affairs … [and] establishes governmental mechanisms for exercise of that authority." 940 F.2d at 1245. "Thus arises the necessity for … exhaustion of tribal remedies: the Crow Tribe must itself first interpret its own ordinance and define its own jurisdiction." *Id*. at 1246.

This Circuit also relied on the Supreme Court's "practical imperative of judicial efficiency" underlying the exhaustion rule. *Id*.

> Exhaustion … encourages more efficient procedures. This policy also compels exhaustion of tribal remedies before [a party] resorts to federal district court….[T]he Tribe itself is in the best position to develop the necessary factual record for disposition on the merits. Without that tribal record, the federal district court here faced an action based on an uninterpreted tribal ordinance and an obscure factual background.

Id.. The Circuit cautioned that federal district courts should not "labor[] without the benefit of tribal explanations and expertise." *Id.*

This Circuit also has spoken to the significance and rigors of the exhaustion rule, in a situation analogous to the instant case, where the party seeking federal court review of a tribal jurisdiction issue claimed that exhaustion had occurred already. *See Elliott*, 566 F.3d at 846-47 (plaintiff in federal court "argues that she already exhausted her tribal remedies"). The Circuit viewed full exhaustion as requiring that the highest tribal court within the tribal court system has "ruled on

the merits of the jurisdictional issue[.]" *Id.* at 847, *citing Iowa Mut.*, 480 U.S. at 12, 16-17. As in *Elliott* and under *Iowa Mutual*, the "initial determination" of jurisdiction by the Crow Appellate Court to which BHCEC refers, does not constitute exhaustion. BHCEC Compl. ¶ 10, ECF No. 1. Indeed, in remanding the matter to the Crow Tribal Court, the Crow Appellate Court expressly noted error where the Crow Tribal Court failed to develop a full factual record. ECF No. 1-4 at 24, 26-27, 30, 33, 35.

This Court similarly has expressly recognized the Supreme Court's directives that in instances of challenges to tribal jurisdiction, federal courts should abstain from proceeding "until that point when the parties have exhausted *all* remedies available to them under the laws of the …Tribe." *Glacier Elec. Coop. v. Williams*, 96 F. Supp. 2d 1089, 1093 (D. Mont. 1999) (emphasis in original). In *Glacier Electric*, this Court held that exhaustion would "allow the Tribal Court, or the Blackfeet Court of Appeals, to rectify errors, if any, that may have been made in the initial assertion of Tribal Court jurisdiction." *Id.; accord Elliott*, 566 F.3d at 847 (holding that initial determinations of jurisdiction that have not been fully evaluated through the tribal court system do not constitute exhaustion). BHCEC's specious argument that exhaustion has already occurred because there has been an initial determination by the Crow Appellate Court that the Crow Tribal Court has jurisdiction to hear Big Man's claims fails under authority such as *Elliott* and

Glacier Electric.

1. Tribal Court Jurisdiction Over Big Man's Claims Against BHCEC is Plausible or Colorable

An exhaustion of tribal remedies argument requires an analysis of "whether there is a colorable [or plausible] claim of tribal court jurisdiction." *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1093 (9th Cir. 2007). As the Crow Appellate Court correctly recognized, tribal court jurisdiction over Big Man's claims is plausible or colorable, under either of this Circuit's "long recognized two distinct frameworks" for determining tribal jurisdiction over non-Indians on a reservation. *Window Rock*, 861 F.3d at 898.

The first framework applies when the actions or conduct of the non-Indian giving rise to the claim of tribal jurisdiction occur on tribal land over which a tribe maintains the right to exclude non-Indians. *Id*. at 898-903.[5] The "right-to-exclude

[5] While "tribal land" is the term oft-used in this Circuit's tribal jurisdictional cases, also used is the term "Indian land," *see, e.g.*, *Window Rock*, 861 F.3d at 899, *citing New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983), and at 902, *citing Nevada v. Hicks*, 533 U.S. 353, 360 (2001); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 810 (9th Cir. 2011), *citing Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982), and *Water Wheel*, 642 F.3d at 812, *citing South Dakota v. Bourland*, 508 U.S. 679, 688-89 (1993); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1135 (9th Cir. 2006), *citing Hicks*, 533 U.S. at 360. Significantly, *Water Wheel* notes that *Mescalero* expressly refers to "reservation trust land" as land within a reservation owned by a tribe or its members, 642 F.3d at 812; *accord McDonald v. Means*, 309 F.3d 530, 536 (9th Cir. 2002) ("Tribes maintain considerable authority over the conduct of both tribal members and nonmembers on Indian land"). A recent case in this Court involved a trust allotment owned by a tribe. *Takeda Pharm. Am. v. Connelly*, CV 14-50-GF-

framework" essentially is a rule presuming tribal jurisdiction over non-Indians, which can be defeated only by an express treaty provision or act of Congress. Under the "right-to-exclude framework … tribes retain adjudicative authority over [private] nonmember conduct on tribal land – land over which the tribe has the right to exclude." *Id.* at 898. There is such jurisdiction "unless a treaty or federal statute provides otherwise—regardless of whether the *Montana*" tests are satisfied." *Id.* at 902. Absent such a treaty or statute, tribal court jurisdiction is plausible or colorable, at least for exhaustion purposes. *Id*. at 904-06; *accord Elliott*, 566 F.3d at 849-50; *see also Water Wheel*, 642 F.3d at 808-816.

The second framework applies when the non-Indian's actions or conduct occur on non-tribal land within a reservation, typically known as non-Indian fee land. *Window Rock*, 861 F.3d at 900-901, *citing Montana*, 450 U.S. at 563-67. The *Montana* non-Indian fee land framework essentially is a presumption against tribal jurisdiction, but that presumption can be overcome by meeting one of two tests set forth in *Montana*, known as the consensual relationship test and the direct effect test. *Window Rock*, 861 F.3d at 900-01; *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1303 (9th Cir. 2013), *citing Plains Commerce*

BMM, 2015 WL 10985374, at *2-3 (D. Mont. Apr. 24, 2015). The court there emphasized the need to examine land status initially and thoroughly in the tribal jurisdictional analysis. *Id*.; *accord City of Wolf Point v. Mail*, No. CV-10-72-GF-SHE, 2011 WL 2117270, at *2 (D. Mont. May 24, 2011) ("[w]hether the events alleged in the tribal court complaint occurred on Indian land or on non-Indian land [within the exterior boundaries of the reservation] is not settled").

Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 300 (2008). "Additionally, tribal laws may be fairly imposed on nonmembers [on non-Indian fee land] if the nonmember consents, either expressly or through his or her actions." *Grand Canyon Skywalk Dev., LLC v. 'SA' NYU WA Inc.*, 715 F.3d 1196, 1206 (9th Cir. 2013), *citing Plains Commerce Bank*, 554 U.S. at 337.

Hence, assuming *arguendo* that Big Man's claims arise on tribal land, and assuming *arguendo* that there is no applicable treaty provision or act of Congress that eliminates or diminishes the Crow Tribe's right to exclude non-members from that land, tribal court jurisdiction over Big Man's claims is presumptive, and the plausibility or colorability test is satisfied at least for purposes of requiring exhaustion As in *Window Rock*, it would be "at least plausible that the Tribe has adjudicative jurisdiction here" if BHCEC's actions or "conduct occurred on tribal land, where the [Tribe] has the right to exclude." 861 F.3d at 905. Similarly, as in *Elliott*, tribal court jurisdiction would be "plausible here" because the claims against BHCEC arise under tribal "regulations … [on] tribal lands" [that] stem from the tribe's 'landowner's right to occupy and exclude.'" 566 F.3d at 849-850.

Even assuming *arguendo* that Big Man's claims arise on non-Indian fee land, they give rise to a plausible or colorable claim of tribal court jurisdiction over them, at least for purposes of requiring exhaustion. While tribal jurisdiction over such claims is presumptively lacking, *see, e.g., Evans*, 736 F.3d at 1303, the

presumption can be overcome under one of the *Montana* tests – either a consensual relationship or a direct effect -- such that a plausible or colorable claim of tribal jurisdiction is presented that requires exhaustion. *Id.* at 1302-1303; *Elliott*, 566 F.3d at 850.

With respect to a consensual relationship, here, as in *Grand Canyon Skywalk*, BHCEC appears to have "voluntarily entered into" a long-term agreement or arrangement to provide utility services on the Reservation. 715 F. 3d at 1206. "Given the consensual nature of the relationship …the tribal court could conclude it has jurisdiction" over Big Man's claims against BHCEC arising from such a relationship. *Id.*; *see also Water Wheel*, 642 F.3d at 817 (corporation's long-term business lease with tribe for use of tribal land "established a consensual relationship" sufficient to support a plausible or colorable claim of tribal jurisdiction "to regulate corporation's activities under *Montana's*" consensual relationship test).

With respect to the *Montana* direct effect test, here, as in *Elliott*, Big Man's claims arise solely under tribal "regulations … intended to secure " the safety and well-being of tribal citizens. 566 F.3d at 850. The presumed potential economic benefit to BHCEC from its voluntary decision to provide utility services on the Reservation also supports a plausible or colorable claim of tribal jurisdiction under the *Montana* direct effect test. *Grand Canyon Skywalk*, 715 F.3d at 1206; *accord*

Water Wheel, 642 F.3d at 817 and 819.

2. No Exceptions to the Requirement to Exhaust Tribal Remedies Apply in this Case

As the Tribal Defendants have just shown, exhaustion of tribal remedies with respect to Big Man's claims against BHCEC is required under either land status tribal jurisdictional framework, unless an exception to the exhaustion rule applies. "In light of the importance of exhaustion," exhaustion is excused "in only four circumstances." *Window Rock*, 861 F.3d at 898. The four exceptions to exhaustion, as set forth by the Supreme Court, are: (1) when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) when the tribal court action is "patently violative of express jurisdictional prohibitions"; (3) when "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction"; and (4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay." *Elliott*, 566 F.3d at 847, *citing Hicks*, 533 U.S. at 369.

Assuming *arguendo* that BHCEC relies primarily if not exclusively on the fourth exception, the so-called plainly lacking exception, it is well-established in this Circuit that the plainly lacking exception does not apply when there is a colorable or plausible claim of tribal jurisdiction. *Window Rock*, 861 F.3d at 898; *Evans*, 736 F.3d at 1302; *Elliott*, 566 F.3d at 848; *accord St. Isidore Farm, LLC v.*

Coeur D'Alene Tribe of Indians, No. 2:13-CV-00274, 2013 WL 4782140, at *3 (D. Idaho Sept. 5, 2013) (to determine whether tribal jurisdiction is plainly lacking, a court determines whether jurisdiction is colorable or plausible, and if colorability or plausibility is found, the plainly lacking exception does not apply and exhaustion is required). As discussed *supra*, jurisdiction over Big Man's claims against BHCEC is colorable or plausible, so jurisdiction cannot be characterized as "plainly lacking."

B. There Has Not Been Full Exhaustion of Tribal Remedies When The Status of the Land on which the Claims Against BHCEC Arise has Not Been Established

Particularly in light of the very recent decision in *Window Rock* clarifying that the status of the land on which a non-Indian's actions or conduct occur in and of itself determines whether tribal jurisdiction is presumed or not presumed, it is readily apparent that full and proper exhaustion of tribal remedies has not yet occurred in the instant case, because the status of the land on which BHCEC's actions or conduct giving rise to Big Man's claims occurred has not been established in Crow Tribal Court and reviewed by the Crow Appellate Court. In any event, pre-*Window Rock* cases in this Court such as *Glacier Electric*, 96 F. Supp. 2d at 1093 and *City of Wolf Point*, 2011 WL 2117270, at *2, also hold that exhaustion is required where the status of the land on which claims against a non-Indian arose remains unclear on the tribal court record.

Glacier Electric is particularly analogous to the instant case because in *Glacier Electric.*, as here, a tribal appellate court had made a preliminary decision that it had jurisdiction over a tribal citizen's claims against a non-Indian, and the tribal court action was still pending when the non-Indian sought federal court review of that preliminary decision. 96 F. Supp. 2d at 1092. This Court nevertheless required exhaustion, expressly stating that the land status was not clear and needed to be established in tribal court before federal court review of the tribal jurisdictional issue. *Id*. at 1093-94. In response to the non-Indian's argument that the plainly lacking exception applied to excuse exhaustion, the Court in *Glacier Electric* disagreed, stating, "it is not clear at this juncture whether the cause of action arose on" non-Indian fee land or not. *Id.* at 1093.

Similarly, *City of Wolf Point*, holds that the lack of establishment of land status in and of itself defeats a plainly-lacking argument against exhaustion. 2011 WL 2117270, at *1. "The record before [this] Court … precludes any such sweeping abandonment of the exhaustion requirement." *Id.* "[T]he record in this case [is] sorely lacking in factual details that may, or may not, be significant to the question of tribal court jurisdiction." *Id*. In particular, "[w]hether the events alleged in the tribal court complaint occurred on Indian land or on non-Indian land … is not settled." *Id*. at *2. Where "numerous questions are raised by the

pleadings in the tribal court action that may bear directly upon whether that forum has jurisdiction over the matter before it [, t]hose questions cannot appropriately be addressed short of full and final resolution of all issues in that case." *Id.* "Further proceedings in this Court are premature absent exhaustion of tribal court remedies." *Id.; see also Allstate Indem. Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999) (requiring exhaustion, where parties disagreed whether tribal citizen's claims arose on tribal land, where an alleged tort occurred, or at a non-Indian company's off-reservation offices, where the company allegedly undertook activities on which the tribal citizen's claims also were based).

In sum, the Crow Appellate Court correctly remanded to the Crow Tribal Court for a determination of land status there in the first instance, with an opportunity for the Crow Appellate Court to review that determination. This Court should dismiss BHCEC's Complaint to allow that remand and review in the Crow Tribal Court system to occur before this Court can entertain review of this issue.

C. There Has Not Been Full Exhaustion of Tribal Remedies on Many Other Factors Relative or Potentially Relative to a Determination of Tribal Jurisdiction in This Case

Additionally and alternatively, in the instant case the Crow Appellate Court also correctly recognized the need for exhaustion due to the lack of a record on or establishment of factors by which tribal jurisdiction under the *Montana* tests can be determined. *See Glendale Colony v. Connell*, 46 F. Supp. 2d 1061, 1066 (D.

Mont. 1997) (requiring exhaustion due to the lack of a full and proper factual record in tribal court on the *Montana* test factors). As with application of the framework for determining tribal jurisdiction over non-Indians on tribal land, no exceptions to the exhaustion rule apply in this case to application of the non-Indian fee land framework for tribal jurisdiction.

It has simply not been established in Crow Tribal Court what is the status of the land on which BHCEC's actions or conduct that give rise to Big Man's claims against BHCEC occurred. In *Glendale Colony*, where it was established that the non-Indian's conduct at issue occurred on non-Indian fee land, this Court nevertheless rejected a plainly-lacking argument by a party seeking federal court review of tribal jurisdiction, due to the lack of a full and proper factual record in the pending tribal court proceeding. *Id.* at 1065. Even the existence in *Glendale Colony* of a record establishing both the non-Indian's residency and continuous on-going presence on the reservation as well as the non-Indian's permit to conduct business on the reservation, was not sufficient to overcome the need for further exhaustion. "Specifically, the court concludes a question exists as to whether the conduct at issue" meets *Montana's* direct effect test. *Id.* at 1065. "Given that uncertainty, the court concludes it would be illogical not to apply the exhaustion requirement, which is designed to allow tribal courts to address, in the first

instance, the extent of their jurisdiction." *Id*.[6] Here, the needed factual record to determine tribal jurisdiction under *Montana* is not nearly as developed as was the record in *Glendale Colony*; *a fortiori* requiring exhaustion here is even more appropriate than it was in *Glendale Colony*.

III. THIS COURT SHOULD DISMISS THE TRIBAL HEALTH BOARD DEFENDANTS BECAUSE THEY ARE IMMUNE FROM SUIT

Tribal sovereign immunity from suit "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986). Indian tribes generally are immune from suit unless "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *accord Bodi*, 832 F.3d at 1016 (9th Cir. 2016). Sovereign immunity waivers must be express; they cannot be implied. *Bodi* 832 F.3d at 1016; *accord Miller v. Wright*, 705 F.3d 919, 926 (9th Cir. 2013) (citations omitted) (congressional abrogations of tribal sovereign immunity "must be unequivocally expressed in explicit

[6] To the extent that BHCEC argues that exhaustion is not required or necessary because land status or any other facts relative to a determination of tribal jurisdiction not already established in Tribal Court in this case can be established in federal court in the first instance, such an argument fails under *Water Wheel*. In *Water Wheel*, a federal district court considered and relied on jurisdictional evidence which could have been but was not presented in tribal court. 642 F.3d at 817 n.9. The Court of Appeals expressly held that this was improper and in error, "[b]ecause the district court's review is akin to appellate review of the tribal court record[.]" *Id*. (citation omitted).

legislation" and "may not be implied"); *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996); (waivers by tribe must be unequivocal and explicit).

Moreover, in this Circuit, "[t]here is a strong presumption against [finding a] waiver of tribal sovereign immunity." *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001) (citation omitted). In addition, the burden to show that immunity has been waived is on the plaintiff. *Unkeowannulack v. Table Mountain Casino*, No. CV F 07-1341 AWI DLB, 2007 WL 4210775, at *7 (E.D. Cal. Nov. 28, 2007) (citations omitted) ("It was Plaintiff's burden to establish waiver of tribal sovereign immunity and that burden has not been met").

It is further well-established at least in this Circuit that tribal sovereign immunity from suit extends to protect tribal officials acting in their official capacities and within the scope of their authority. *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008); *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (2002); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985). "A suit against the Tribe and its officials 'in their official capacities is a suit against the tribe[.]'" *Miller*, 705 F.3d at 927-928 (citation omitted). "[A] plaintiff cannot circumvent tribal immunity 'by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity.'" *Cook*, 548 F.3d at 727.

The Crow Tribe is a sovereign with immunity from suit. "The Tribe

appears in the Federal Register as a recognized tribe." *Boricchio v. Chicken Ranch Casino,* No. 1:14-CV-818 AWI SMS, 2015 WL 3648698, at *3 (E.D. Cal. June 9, 2015). BHCEC does "not dispute that this is sufficient to establish the Tribe's entitlement to sovereign immunity" and makes no allegations otherwise. *Id.*; *see also Suarez v. Confederated Tribes & Bands of Yakima Indian Nation*, No. 91-36025, 1993 WL 210727, at *1 (9th Cir. June 16, 1993) (affirming dismissal by district court where plaintiff failed "sufficiently to plead the existence of evidence showing the [tribe] has waived its tribal sovereign immunity"); *Fontanez v. MHA Nation - Three Affiliated Tribes*, No. CV 11-148, 2012 WL 928281, at *1 (D. Mont. Mar. 19, 2012) (since plaintiff "does not suggest that the Tribes have renounced their sovereign immunity . . . [plaintiff] has not met his burden of establishing subject matter jurisdiction"). The Tribal Health Board Defendants are officials of the Crow Tribe. *See* Bill No. CLB 10-01. BHCEC makes no allegations that the Tribal Health Board Defendants were acting in any capacity other than officially. *See, e.g., Miller,* 2011 WL 4712245, at *4 (plaintiffs allege defendant tribal officials are not protected by sovereign immunity because they acted outside the scope of their authority). The Tribal Health Board Defendants are thus immune from suit unless BHCEC can meet its burden of showing a waiver.

Not only can BHCEC not meet its burden to show waiver of the Tribal Health Board Defendants' immunity from suit here, because there is no applicable waiver, it has not even alleged a waiver. *See, e.g.*, *Saroli v. Agua Caliente Band of Cahuilla Indians*, No. 10-CV-1748 BEN (NLS), 2010 WL 4788570, at *2 (S.D. Cal. Nov. 17, 2010) (example of instance where a plaintiff at least attempted to allege a waiver of tribal sovereign immunity). Because neither Congress nor the Crow Tribe has authorized this action and BHCEC has not and cannot allege a waiver of immunity, the Tribal Health Board Defendants must be dismissed. *See Allen v. Smith*, No. 12cv1668-WQH-KSC, 2013 WL 950735, at *13 (S.D. Cal. Mar. 11, 2013).

IV. THE TRIBAL HEALTH BOARD DEFENDANTS SHOULD BE DISMISSED BECAUSE BHCEC HAS FAILED TO STATE A CLAIM AGAINST THEM

While the Federal Rules of Civil Procedure generally adopt a flexible pleading policy, "failure to comply with Rule 8(a)(2) may result in dismissal of the complaint for failure to state a claim on which relief can be granted"). *Gillian v. Calif. Dep't of Corrs. & Rehab.*, No. 1:15-cv-00037-MJS, WL 4964836 (E.D. Calif. 2015). Rule 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." *Cole v. FBI*, 719 F. Supp. 2d 1229, 1241 (D. Mont. 2010); *accord Pfau v. Mortenson*, 858 F. Supp. 2d 1150, 1155 (D. Mont. 2012) ("Rule 8(a)(2) requires "a short and plain statement of the claim

showing that the pleader is entitled to relief in order to give a defendant a fair notice of what the claim is and the grounds upon which it is based"). "Allegations that only permit the court to infer 'the mere possibility of misconduct' do not constitute a short and plain statement of the claim showing that the pleader is entitled to relief as required by Rule (a)(2)." *Lynch v. Fed. Nat'l Mortg. Ass'n*, Civ. No. 16-00213 DKW-KSC, 2017 WL 3908663, at * 3 (D. Haw. Sep. 6, 2017) (citations omitted). Inferential allegations do not meet the requirements of Rule 8(a), *a fortiori* the absence of any allegations, as in this case, cannot meet such standards.

The very basic requirements of Rule 8(a)(2) have not been satisfied in BHCEC's Complaint, which wholly fails to assert any wrongful actions or conduct – or, indeed, any actions or conduct at all – taken by the Tribal Health Board Defendants. Because the Complaint is devoid of any allegations that Tribal Health Board Defendants did anything, or what basis there is for any relief against them, the Complaint fails to state a claim for which relief can be granted, and it should be dismissed pursuant to Rule 12(b)(6).

Indeed, the only place in the Complaint where there is a reference to the Tribal Health Board Defendants is in the listing of the Parties. Without any further allegations, this warrants the dismissal of any claims against the Tribal Health Board Defendants. *See, e.g.*, *Herrington v. Dr. Elliot-Blakesly*, No. 2:13-cv-0948, 2014 WL 1896683, at *5 (D. Or. May 9, 2014) ("Because the complaint does not

allege any wrongdoing on the part of any of these defendants, the court concludes that [plaintiff] fails to state a claim as against these … individuals"); *Ebinger v. Office(s) of Att'y. Gen. for British Created Native Hawaiian Monarchial Kingdom*, Civ. No. 09-00116 ACK-BMK, 2009 WL 2025250, at *2 (D. Haw. July 10, 2009) (citation omitted) ("Where a complaint alleges no specific act or conduct on the part of the defendant and the complaint is silent as to the defendant except for his name appearing in the caption, the complaint is properly dismissed").

CONCLUSION

For the reasons set forth above in support of their Motion to Dismiss under Rule 12(b), the Tribal Defendants request that their motion be granted.

Respectfully submitted this 12th day of September, 2017.

/s/ Heather D. Whiteman Runs Him

PRO HAC VICE COUNSEL FOR THE TRIBAL DEFENDANTS

/s/ Dennis M. Bear Don't Walk

LOCAL COUNSEL FOR THE TRIBAL DEFENDANTS

Attorneys for Defendants Unknown Members of Crow Tribal Health Board, Hon. Chief Justice Joey Jayne, and Hon. Justices Leroy Not Afraid and Kari Covers Up

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double spaced except for footnotes and for quoted and indented material. On September 5, 2017, the Tribal Defendants filed a motion for leave to file an oversized brief (ECF No. 26). In compliance with the Order (ECF No. 27) granting the Tribal Defendants motion to file an oversized brief, not to exceed 10,000 words, I certify that the word count calculated by Microsoft Word for Windows is 9,183 words, excluding the caption, certificates of service and compliance, table of contents, and table of authorities.

/s/ Heather D. Whiteman Runs Him

PRO HAC VICE COUNSEL FOR
THE TRIBAL DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September, 2017, a true and correct copy of the foregoing TRIBAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF was filed with the Clerk of the Court via the CM/ECF system which will cause notice to be served upon the following:

James E. Torske
TORSKE LAW OFFICE, P.L.L.C.
314 North Custer Avenue
Hardin, Montana, 59034
406-665-1902
torskelaw@tctwest.net

Michael G. Black
BLACK LAW OFFICE
44 North Last Chance Gulch, Suite 8
P.O. Box 1311
Helena, MT 59624-1311
Phone: 406-546-0017
blacklaw@blackfoot.net

/s/ Heather D. Whiteman Runs Him