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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

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CHRISTIAN LUIZ

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Plaintiff,

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vs.

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NORTHERN CIRCLE INDIAN HOUSING
AUTHORITY, et al.

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Defendants.

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) Case No.: 18-CV-04712-RMI
)
) **DEFENDANTS' MOTION TO DISMISS**
) **FOR LACK OF SUBJECT MATTER**
) **JURISDICTION AND FAILURE TO**
) **STATE A CLAIM**
)
) Date: 10/30/18
) Time: 10:00 a.m.
) Location: Eureka-McKinleyville Courthouse
)
) Hon. Robert M. Illman
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1 **NOTICE OF MOTION AND MOTION TO DISMISS**

2 TO PLAINTIFF AND HIS ATTORNEY OF RECORD:

3 You are hereby notified that on October 30, 2018 at 10:00 a.m., in the Eureka-
4 McKinleyville Courthouse, 3140 Boeing Ave., McKinleyville, CA 95519, Defendants will specially
5 appear and move to dismiss this lawsuit pursuant to Federal Rules of Civil Procedure 12(b)(1) and
6 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be
7 granted. This action is barred by tribal sovereign immunity. In addition, Plaintiff cannot seek a writ
8 of habeas corpus because he is not detained. Defendants will ask this Court to dismiss this matter
9 with prejudice.

10 This Motion is based on this notice of motion and motion, the memorandum of points and
11 authorities in support, the declaration of Darlene Tooley in support, the records and pleadings in this
12 action, and such other and further matters this Court may consider.

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14 **MEMORANDUM OF POINTS AND AUTHORITIES**
15 **IN SUPPORT OF MOTION TO DISMISS**

16 I. STATEMENT OF ISSUES TO BE DECIDED

- 17 1. Whether this Court should dismiss this matter for lack of subject matter jurisdiction
18 because the Defendants enjoy tribal sovereign immunity?
19 2. Whether this Court should dismiss this matter for failure to state a claim upon which
20 relief can be granted because Plaintiff is not detained for habeas corpus relief?
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22 II. INTRODUCTION

23 This is a tribal workers' compensation case. Having lost in the tribal forum, Plaintiff
24 Christian Luiz now wants this Court to intercede, reverse the decision of the tribal hearing officer,
25 and remand this matter to a state administrative forum to reargue the case under the guise of a writ
26 for habeas corpus. This he cannot do. This Court lacks subject matter jurisdiction because the tribal
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1 employer is immune from suit. Also, Plaintiff has failed to state a claim for habeas corpus relief
2 because he is not detained. This Court should dismiss this matter with prejudice.

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4 III. BACKGROUND

5 The following facts are not in dispute and are set forth in the Declaration of Darlene Tooley
6 filed herewith. Defendant Northern Circle Indian Housing Authority is a tribally designated housing
7 entity established in 1979 to access, construct, and manage low-income housing for member tribes.
8 It is organized for the governmental purposes of qualifying for funding under the Native American
9 Housing Assistance and Self-Determination Act (“NAHASDA”) to provide housing.

10 The member tribes established the Housing Authority by a tribal ordinance adopted by each
11 tribe. The Housing Authority is currently governed by a Board of Commissioners appointed by the
12 member tribes. Each member tribe appoints two commissioners. The Housing Authority is located
13 on trust land on the Pinoleville Rancheria near Ukiah, CA. There are currently seven member tribes.

14 The Housing Authority enjoys the sovereign immunity of its member tribes. The IRS
15 determined that the Housing Authority qualifies as a political subdivision of its member tribes,
16 based, in part, on a determination by the Bureau of Indian Affairs that the Housing Authority
17 exercises sovereign governmental powers on behalf of its member tribes.

18 Plaintiff Luiz was a non-native employee of the Housing Authority. He worked 18 years as
19 an IT professional for the Housing Authority before his claimed injuries earlier this year. He filed a
20 claim for workers’ compensation benefits with the Housing Authority for an injury to his neck and
21 shoulder that turned out to be a large disc herniation. The cause was unknown. The claim
22 administrator denied the claim under the plan because injuries such as this arising from an obscure
23 or unknown cause were excluded from coverage.

24 Luiz then appealed to a tribal hearing officer. After review of the documentary evidence, the
25 hearing officer affirmed the denial because the alleged injury was excluded from coverage under the
26 plan. The hearing officer found no credible evidence that anything about Luiz’s work activity was
27 the cause of the Luiz’s large cervical disc herniation. Plaintiff Luiz then filed an Application for
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1 Adjudication of Claim with the California Workers' Compensation Appeals Board. The Housing
2 Authority filed a petition to dismiss based on sovereign immunity. That motion is scheduled to be
3 heard on October 11, 2018.

4 5 IV. LEGAL ARGUMENT

6 A. *This Court Lacks Subject Matter Jurisdiction Based on Tribal Sovereign Immunity*

7 "Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be
8 challenged by a motion to dismiss under Fed. R. Civ. P. 12(b)(1)." Miner Elec., Inc. v. Muscogee
9 (Creek) Nation, 505 F.3d 1007, 1009 (10th Cir. 2007). As a court of limited jurisdiction, the federal
10 court is presumed to lack subject matter jurisdiction unless the party asserting jurisdiction
11 establishes otherwise. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). When
12 a defendant moves to dismiss a case for lack of subject matter jurisdiction, the plaintiff has the
13 burden of proving by a preponderance of the evidence that the court possesses jurisdiction. Leite v.
14 Crane Co., 749 F.3d 1117, 1121 (9th Cir. 2014). "In deciding a Rule 12(b)(1) motion to dismiss, the
15 court may rely on and refer to evidence outside the pleadings." Gristede's Foods, Inc. v.
16 Unkechauge Nation, 660 F. Supp. 2d 442, 446 (E.D.N.Y. 2009).

17 Generally, a federal court lacks jurisdiction over an Indian tribe because of tribal sovereign
18 immunity. Alvarado v. Table Mt. Rancheria, 509 F.3d 1008, 1015-16 (9th Cir. 2007). "Indian tribes
19 have long been recognized as possessing the common-law immunity from suit traditionally enjoyed
20 by sovereign powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). "Tribal sovereign
21 immunity is not dependent on a distinction between on-reservation and off-reservation conduct nor
22 is it dependent upon a distinction between the governmental and commercial activities." Ingrassia v.
23 Chicken Ranch Bingo & Casino, 676 F. Supp.2d 953, 957 (E.D. Cal. 2009). For example, tribal
24 sovereign immunity extends to "suits on contracts, whether those contracts involve governmental or
25 commercial activities and whether they were made on or off a reservation." Kiowa Tribe of
26 Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 760 (1998).

1 A tribe's sovereign immunity will extend both to tribal governing bodies and to tribal
2 agencies which act as arms of the tribe. Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th
3 Cir. 2006). "It extends to agencies and subdivisions of the tribe, and has generally been held to
4 apply to housing authorities formed by tribes." Marceau v. Blackfeet Hous. Auth., 455 F.3d 974,
5 978 (9th Cir. 2006) (vacated in part on different grounds). It has long been the rule that a tribal
6 housing authority enjoys the sovereign immunity of its tribe. See, e.g., Ninigret Dev. Corp. v.
7 Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 29 (1st Cir. 2000) (housing authority as
8 arm of tribe enjoys the full extent of the tribe's sovereign immunity); Dillon v. Yankton Sioux Tribe
9 Hous. Auth., 144 F.3d 581, 583-84 (8th Cir. 1998) (housing authority as agency of tribe enjoys
10 sovereign immunity); Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 670-71 (8th
11 Cir. 1986) (tribal housing authority possesses attributes of tribal sovereignty and is immune from
12 suit).

13 Tribal immunity also protects tribal insurers from lawsuit. See Koscielak v. Stockbridge-
14 Munsee Cmty., 811 N.W.2d 451, 458 (Wis. Ct. App. 2012) (insurer not obligated to pay if tribe not
15 obligated to pay because of sovereign immunity); Gallegos v. Pueblo of Tesuque, 46 P.3d 668, 686
16 (N.M. 2002) (lawsuit against tribe's insurer dismissed because tribe necessary and indispensable
17 party that cannot be joined because of sovereign immunity). The federal courts have already held
18 that the Housing Authority's workers' compensation insurer – AMERIND Risk – is also immune
19 from suit. See Amerind Risk Mgmt. Corp. v. Malaterre, 633 F.3d 680, 688 (8th Cir. 2011) (holding
20 that AMERIND Risk is entitled to sovereign immunity).

21 So, "[s]uits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver
22 by the tribe or congressional abrogation." Oklahoma Tax Comm'n v. Citizen Band Potawatomi
23 Indian Tribe, 498 U.S. 505, 509 (1991). Waiver of sovereign immunity may not be implied but must
24 be expressed unequivocally. Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1056 (9th Cir.
25 2003); Kescoli v. Babbitt, 101 F.3d 1304, 1310 (9th Cir. 1996). "There is a strong presumption
26 against waiver of tribal sovereign immunity." Demontiney v. United States, 255 F.3d 801, 811 (9th
27 Cir. 2001). "The plaintiff bears the burden of showing a waiver of tribal sovereign immunity."
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1 Ingrassia, 676 F. Supp.2d at 956-57. If there is no express and unequivocal waiver of immunity by
2 the tribe or abrogation of tribal immunity by Congress, the tribe cannot be sued. Stock West Corp.
3 v. Lujan, 982 F.2d 1389, 1398 (9th Cir. 1993).

4 Here, this Court has no jurisdiction. Defendants enjoy sovereign immunity from suit. The
5 Housing Authority is a governmental entity of its member tribes created under tribal law by tribal
6 ordinance adopted by each member tribe. Each member tribe intended for the Housing Authority to
7 share in its immunity and operate as a political subdivision as determined by the IRS. Also, the
8 member tribes exercise exclusive control over the Housing Authority through the Board of
9 Commissioners. The Housing Authority is organized for the governmental purposes of qualifying
10 for funding under the Native American Housing Assistance and Self-Determination Act to provide
11 housing. As such, it enjoys the sovereign immunity of its member tribes.

12 Plaintiff concedes this point and admits under penalty of perjury in his Petition for Writ of
13 Habeas Corpus that Defendants Northern Circle Indian Housing Authority and its insurer,
14 AMERIND Risk/Berkeley Risk Administrators, enjoy sovereign immunity from suit. (See Petition
15 for Writ of Habeas Corpus (“Petition”) at 1:23-26 and 3:2-3). Luiz has not alleged (and cannot
16 prove) any waiver of that immunity. Therefore, this Court lacks jurisdiction.

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18 B. *Plaintiff Fails to State a Claim Under the Indian Civil Rights Act*

19 To circumvent sovereign immunity, Plaintiff seeks habeas corpus relief under the Indian
20 Civil Rights Act (“ICRA”) contending he has been denied due process and equal protection of the
21 laws. (See Petition at 3:8-12). But Plaintiff cannot seek such relief because he is not detained.

22 Although the ICRA lists a number of substantive rights afforded to individuals that might
23 restrict the power of tribal governments, the ICRA does not establish or imply a federal civil cause
24 of action to remedy violations except for writ of habeas corpus. Shenandoah v. Halbritter, 366 F.3d
25 89, 91 (2d Cir. 2004). “The only express remedial provision available to a party seeking relief in
26 federal courts for an alleged violation of the ICRA is through application for habeas corpus relief
27 under 25 U.S.C. § 1303.” Snow v. Quinault Indian Nation, 709 F.2d 1319, 1323 (9th Cir. 1983).

1 “ICRA only provides a basis for an individual to bring a habeas corpus civil claim.” Pink v.
 2 Modoc Indian Health Project, 157 F.3d 1185, 1189 (9th Cir. 1998). “ICRA provides no private right
 3 of action against a tribe or tribal officials and may only be enforced in tribal court or by means of a
 4 petition for habeas corpus in federal court.” Pitre v. Shenandoah, 633 F. App'x 44, 45 (2d Cir.
 5 2016). “The only avenue available to a party who seeks relief in the federal courts for an alleged
 6 violation of the ICRA is through an application for habeas corpus relief under 25 U.S.C. § 1303.”
 7 Boe v. Fort Belknap Indian Cmty. of Fort Belknap Reservation, 642 F.2d 276, 278-79 (9th Cir.
 8 1981).

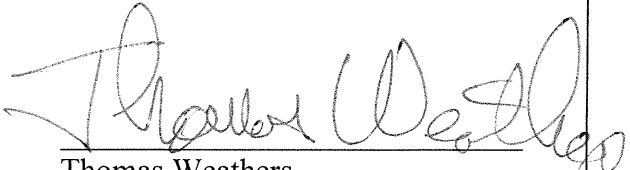
9 Section 1303 provides that the “privilege of the writ of habeas corpus shall be available to
 10 any person, in a court of the United States, to test the legality of his detention by order of an Indian
 11 tribe.” 25 U.S.C.S. § 1303. “The term ‘detention’ in the statute must be interpreted similarly to the
 12 ‘in custody’ requirement in other habeas contexts.” Jeffredo v. Macarro, 599 F.3d 913, 918 (9th Cir.
 13 2010). However, “[a]t the time Congress enacted the ICRA, ‘detention’ was generally understood to
 14 have a meaning distinct from and, indeed, narrower than ‘custody.’” Tavares v. Whitehouse, 851
 15 F.3d 863, 871 (9th Cir. 2017). “Specifically, ‘detention’ was commonly defined to require physical
 16 confinement.” Id.

17 Here, Luiz has not alleged that he has been detained because he is not detained. He never
 18 was in custody and never physically confined. This is not a tribal criminal matter; this is a tribal
 19 civil workers’ compensation matter. Luiz disputes the decision of the tribal hearing officer denying
 20 him benefits. Habeas corpus does not apply to this matter. Plaintiff has failed to state a claim upon
 21 which relief may be granted.

22 IV. CONCLUSION

23 Based on the foregoing, this Court should dismiss this matter with prejudice for lack of
 24 jurisdiction and failure to state a claim.

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 26 Date: 9/25/18


 Thomas Weathers

Attorney for Defendants