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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

RONALD OERTWICH, **Plaintiff,** v. **TRADITIONAL VILLAGE OF TOGIAK** (a/k/a NATIVE VILLAGE OF TOGIAK, a/k/a TRADITIONAL COUNCIL OF TOGIAK, a/k/a COMMUNITY OF TOGIAK); **STATE OF ALASKA DEPARTMENT OF PUBLIC SAFETY**; **JIMMY COOPCHIAK**, in his individual and official capacity; **TEODORO PAUK**, in his individual and official capacities; **LEROY NANALOOK**, in his individual and official capacity; **ROGER WASSILLIE**, in his individual and official capacity; **ANECIA KRITZ**, in her individual and official capacity; **ESTHER THOMPSON**, in her individual and official capacity; **JOHN NICK**, in his individual and official capacity; **WILLIE WASSILLIE**, in his individual and official capacity; **HERBERT LOCKUK JR.**, in his individual and official capacity; **WILLIE ECHUCK JR.**, in his individual and official capacity; **CRAIG LOGUSAK**, in his individual and official capacity; **PAUL MARKOFF**; **PETER LOCKUK SR.**; **BOBBY COOPCHIAK**. **Defendants.**	)	Case No.: 3:19-CV-00082-JWS

OPPOSITION TO MOTION TO DISMISS BY DEFENDANT TRIBE AND INDIVIDUAL TRIBAL DEFENDANTS

COMES NOW Plaintiff Ronald Oertwich, by and through counsel, and hereby opposes the motion to dismiss his complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6) ("*Motion to Dismiss*") filed by the Traditional Village of Togiak ("Tribe" or "TVT") and Jimmy Coopchiak, Teodoro Pauk, Leroy Nanalook, Anecia Kritz, Esther Thompson, John Nick, Willie Wassillie, Herbert Lockuk Jr., William Echuck,[1] Craig Logusak, Paul Markoff, Peter Lockuk Sr., and Bobby Coopchiak ("individual tribal defendants).

I. THE TRIBE'S SOVEREIGN IMMUNITY IS NOT ABSOLUTE.

A. The U.S. Supreme Court has recognized at least two exceptions to tribal sovereign immunity

As a starting point, the Tribe does not dispute any facts essential to Mr. Oertwich's claims against it. The Tribe admits that it ordered his banishment from "the Traditional Village of Togiak" pursuant to its Tribal Code.[2] The Tribe admits that when Mr. Oertwich returned to Togiak – in defiance of the tribal banishment order – the Tribe found him "guilty of trespassing," "detain[ed] [him] until he could be removed from the community" and "escorted [him] to the airport for immediate transportation out of Togiak."[3] The Tribe makes no apology, contending that all of these acts were within its powers as a sovereign.[4]

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[1] Undersigned counsel apologizes if he misidentified William Echuck as Willie Echuck, Jr. The Tribe acknowledges that one William Echuck was a jail guard during the events in question. *Eningowuk Aff.* at 2, ¶4. This is the person Mr. Oertwich intended to name as a defendant so he will refer to this defendant as "William Echuck" in all future pleadings.
[2] *Eningowuk Aff.* Ex. 1 at 1 ("The Community Members of the Native Village of Togiak determined Ronald Oertwich guilty of possession of prohibited controlled substances, and **Hereby Order** permanent banishment from the Native Village of Togiak Tribe according to Togiak Tribal Code Chapter 6-2-G."); *Id.* at 2, ¶5
[3] *Eningowuk Aff.* Ex. 2 at 1; *Id.* at 2, ¶5
[4] *Eningowuk Aff.* at 2, ¶5

The Tribe apparently has no compunction that "a tribe has no power to enforce tribal criminal law as to non-Indians, even when they are on tribal land,"[5] or that Indians and Alaska Natives acting outside of tribal land are subject to state and federal law, including tort law.[6] Likewise, although a tribe may exclude a non-Indian from land over which it is sovereign,[7] the Tribe is undoubtedly aware that Togiak is a second-class city in Alaska, not a sovereign nation.[8] The Tribe's *Motion to Dismiss* does not bother to assert ownership of - or sovereignty over - any of the land from which Mr. Oertwich is banished. Presumably the Tribe believes these issues are unimportant because they believe their immunity is absolute and protects them from suit no matter what. In support of their position, the Tribe cites cases involving cigarette taxes,[9] bingo parlors,[10] and debt collection,[11] all with parties who entered voluntary transaction with tribes.

Mr. Oertwich recognizes that general immunity from suit is fundamental to tribal self-governance. However, he is not alone in believing that tribes are not immune from suit "no matter what." Even in the comparatively benign context of cigarette taxes and bingo parlors, the U.S. Supreme Court has recognized the risks associated with – and thus recognized exceptions to – absolute immunity for tribes.

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[5] *United States v. Cooley*, citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).
[6] *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)
[7] *Id.* citing *Duro v. Reina*, 495 U.S. 676, 696–97 (1990)
[8] *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) (holding that the 1971 Alaska Native Claims Settlement Act converted ownership of Alaska's tribal lands to fee simple ownership, which does not convey sovereignty).
[9] *Chemehuevi Indian Tribe v. California State Bd. Of Equalization*, 757 F.2d 1047 (9th Cir.), rev.d on other grounds, 474 U.S. 9 (1985).
[10] *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989)
[11] *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998)

Beginning with the 1991 case *Oklahoma Tax Commission v. Citizen Band, Potawatomi Indian Tribe of Oklahoma*, the Court held that a tribe's immunity did not bar the state from taxing the sale of cigarettes to non-Indians, even when the sales occurred on the tribe's reservation.[12] Justice Stevens's concurrence noted that "the Court today recognizes that a tribe's sovereign immunity from actions seeking money damages *does not necessarily extend to actions seeking equitable relief*."[13]

In 1998, the Court held in *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.* that "[t]ribes enjoy immunity from suits *on contracts*," but in analyzing the history of tribal sovereign immunity, acknowledged it is a purely judicially-created doctrine that "developed almost by accident," with no congressional statute or treaty defining the doctrine or what limits it may have.[14] The *Kiowa* court further opined:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. [citations omitted] In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or *who have no choice in the matter, as in the case of tort victims.*[15]

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[12] 498 U.S. 505 (1991)
[13] *Id.* at 516, italics added.
[14] 523 U.S. at 756
[15] Id. at 758-60, italics added

Six years later, in the 2014 casino gaming regulation case of *Michigan v. Bay Mills Indian Cmty.*, the Supreme Court noted:

> We have never [] specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a "special justification" for abandoning precedent is not before us.[16]

In the 2018 case of *Upper Skagit Tribe v. Lundgren* the Supreme Court was asked to decide whether a Washington tribe was immune from a quiet title suit after it claimed ownership of real property. The majority opinion discussed the application of the "immovable-property exception" to tribal sovereign immunity, ultimately remanding the case to the state court.[17] In his concurrence, Chief Justice Roberts voiced grave concern that a tribe's unchecked sovereign immunity could lead to unjust results, opining that "[t]he correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right."[18] The Chief Justice agreed with the majority's decision to remand the matter for further analysis of the immovable-property exception, but, citing footnote 8 of *Bay Mills,* cautioned: "But if it turns out that the rule does not extend to tribal assertions of rights in non-trust, non-reservation property, the applicability of sovereign immunity in such circumstances would, in my view, need to be addressed in a future

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[16] 579 U.S. 782 at ____, n.8
[17] 584 U.S. ____ (2018) (Roberts, C.J., concurring).
[18] *Id.*

case."[19] Unsurprisingly, upon remand the Upper Skagit Tribe immediately quitclaimed their interest in the disputed land and the case was dismissed as moot.[20]

Justice Thomas's dissent in *Upper Skagit Tribe* detailed the roots of the immovable property rule:

> The immovable-property exception is a corollary of the ancient principle of *lex rei sitae*. Sometimes called *lex situs* or *lex loci rei sitae*, the principle provides that "land is governed by the law of the place where it is situated." F. Wharton, Conflict of Laws §273, p. 607 (G. Parmele ed., 3d ed. 1905). It reflects the fact that a sovereign "cannot suffer its own laws . . . to be changed" by another sovereign. H. Wheaton, Elements of International Law §81, p. 114 (1866). As then-Judge Scalia explained, it is "self-evident" that "[a] territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Asociacion de Reclamantes v. United Mexican States*, 735 F. 2d 1517, 1521 (CADC 1984). And because "land is so indissolubly connected with the territory of a State," a State "cannot permit" a foreign sovereign to displace its jurisdiction by purchasing land and then claiming "immunity." Competence of Courts in Regard to Foreign States, 26 Am. J. Int'l L. Supp. 451, 578 (1932) (Competence of Courts). An assertion of immunity by a foreign sovereign over real property is an attack on the sovereignty of "the State of the situs." *Id.*[21]

Justice Thomas, who thought the case should be decided, not remand, concluded by noting that permitting tribal sovereign immunity to bar suits over disputed land would create "a

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[19] *Id.*
[20] The state court docket for this case, No. 91622-5, is available online at dw.courts.wa.gov
[21] 584 U.S. ____ (2018) (Thomas, J. dissenting).

sweeping and absolute immunity that no other sovereign has ever enjoyed – not a State, not a foreign nation, and not even the United States."[22]

Finally, in 2019, in *Poarch Band of Creek Indians, et. al. v. Wilkes*, the Supreme Court was asked to hear a tribe's petition for a writ of certiorari after the Alabama Supreme Court barred the tribe's claim of sovereign immunity for a near-fatal highway collision caused by an intoxicated employee of a tribal casino.[23] The Alabama Supreme Court found that the tribe's attempt to evade tort liability by asserting sovereign immunity "presents precisely that scenario" contemplated in footnote 8 of *Bay Mills*, and concluded:

> In light of the fact that the Supreme Court of the United States has expressly acknowledged that it has never applied tribal sovereign immunity in a situation such as this, we decline to extend the doctrine beyond the circumstances to which that Court itself has applied it; accordingly, we hold that the doctrine of tribal sovereign immunity affords the tribal defendants no protection from the claims asserted by Wilkes and Russell.[24]

In its conclusion, the Alabama Supreme Court brazenly stated "we are mindful that 'tribal immunity is a matter of federal law and is not subject to diminution by the States,'"[25] "that our holding is contrary to the holdings of several of the United States Courts of Appeals that have considered this issue," "but the Supreme Court of the United States has expressly acknowledged that it has not ruled on the issue whether the doctrine of tribal sovereign

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[22] *Id.*
[23] United States Supreme Court Docket No. 17-1175.
[24] *Wilkes v. PCI Gaming Auth.*, No. 1151312, 2017 WL 4385738 *4 (Ala. Sept. 29, 2017), *cert. denied* sub nom. *Porch Band of Creek Indians v. Wilkes*, No. 17-1175, 2019 WL 2570656 (U.S. June 24, 2019).
[25] *Id.* citing *Kiowa*, 523 U.S. at 756

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immunity has a field of operation with regard to tort claims, and this Court is not bound by decisions of lower federal courts."[26]

One can scarcely imagine any greater opportunity for the Supreme Court to disabuse the Alabama court, align the federal circuits, and eliminate the tort-victim exception to tribal sovereign immunity once and for all. Instead, the Supreme Court left the Alabama high court's decision intact and denied the tribe's petition for a writ of *certiorari* on June 24, 2019.

Following this arc of caselaw, this Court must deny the Tribe's *Motion to Dismiss* because two exceptions to tribal sovereign immunity apply herein. First, the immovable-property exception applies because the Tribe is asserting the right to control land which it does not own, and over which it is not the sovereign.[27] Even if, arguendo, the tribe owns some of the land upon which events occurred, the Alaska Native Claims Settlement Act converted that ownership to fee simple, meaning the Tribe is no longer sovereign over that land.[28] If the Tribe thinks the events of this case took place within the borders of a sovereign nation belonging to the Traditional Village of Togiak, as opposed to within the second-class city of Togiak, it is free to make that argument during the litigation of this case. But it would be improper to dismiss any claims against the Tribe under Rule 12(b)(1)

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[26] *Id.*

[27] Counsel hopes the Court does not expect a parcel-by-parcel analysis of property ownership of the area where the events occurred (at least not at this early stage of the case). But as an example, the tribe certainly does not own Mr. Oertwich's home or the land it sits upon. Nevertheless, the Tribe has unapologetically claimed the right to banish him from his house.

[28] *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998)

or (6) based upon sovereign immunity where the Tribe's right to control the land at issue is in dispute.[29]

Second, the tort-victim exception applies. Mr. Oertwich is a non-Indian who was not engaged in commerce or any other voluntarily transaction with the Tribe during the events at issue. He is not subject to the Tribe's criminal jurisdiction.[30] He had no opportunity to negotiate any waiver of tribal immunity, nor could he since it is the Tribe's policy to not waive immunity.[31] He has no other remedy for his injury, and is not obligated to exhaust any tribal court remedies.[32] As such, the Tribe's sovereign immunity does not immunize it from suit for its tortious conduct and the *Motion to Dismiss* should be denied.

B. Waiver

The Tribe's *Motion to Dismiss* does not dispute Mr. Oertwich's assertion that since 2006 the U.S. Department of Justice ("USDOJ") has awarded the TVT at least $2,262,320 in grants intended to develop its tribal court, juvenile justice programs and police force, including a 2016 grant of $750,000 to improve its tribal justice system, and that Tribe's acceptance of these USDOJ grants was conditioned upon agreeing that it would comply with federal law, including the Indian Civil Rights Act and the Civil Rights Act of 1964.[33] The Tribe's written agreement to be subject to federal law in its use of these grants was an "unequivocal express[ion]" of waiver of its sovereign immunity.[34]

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[29] *Upper Skagit Tribe v. Lundgren*, 584 U.S. ____ (2018)
[30] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).
[31] *Eningowuk Aff.* at 4, ¶10
[32] *Nevada v. Hicks*, 533 U.S. 353, 369 (2001)
[33] *Complaint* at 4 ¶¶ 27-28
[34] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

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II. THE INDIVIDUAL TRIBAL DEFENDANTS ARE NOT IMMUNE

The exceptions described above likewise subject the individual tribal defendants to suit in their official capacities. Each is also subject to suit in his individual capacity, as sovereign immunity does not attach to individual capacity suits against tribal members.[35]

Individual suits are also authorized by the *Ex Parte Young* doctrine.[36] Given that the Tribe had no jurisdiction to subject Mr. Oertwich to its criminal laws, sovereign immunity does not bar this Court from granting prospective injunctive relief prohibiting the Tribe and its officers and members from any future attempt to search, seize, jail, banish or otherwise subject him to the Tribe's law. Were it otherwise, the Tribe would be free to do whatever it wants to whomever it wants (and, apparently, wherever it wants, since the Traditional Village of Togiak's sovereign nation has no boundary).

Finally, individual defendant Teodoro Pauk bears mention, as Mr. Oertwich is suing him both as a tribal official and as mayor of the city Togiak. Counsel for the Tribe and individual tribal defendants has made no argument that Mr. Pauk is not subject to suit in his official capacity as mayor of Togiak.

III. CONCLUSION

For the foregoing reasons, Plaintiff moves this honorable Court to deny the Tribe's *Motion to Dismiss.*

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[35] *Lewis v. Clarke*, 581 U.S. ____(2017)
[36] 209 U.S. 123 (1908)

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Respectfully submitted this 22nd day of July 2019.

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Certificate of Service:
I certify that on July 22, 2019 a true and correct copy of the foregoing document was served electronically via the Court's CM/ECF electronically on the following counsel of record:

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