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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MONTANA**
**GREAT FALLS DIVISION**

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| RONALD J. WALKER,<br><br>Plaintiff,<br><br>v.<br><br>JESSICA WINDY BOY, ROCKY BOY HEALTH CLINIC, and CHIPPEWA CREE TRIBE,<br><br>Defendants. | Case No. 4:19-CV-00043-BMM-JTJ<br><br>**DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, FAILURE TO EXHAUST TRIBAL REMEDIES, AND INAPPLICABILITY OF FEDERAL STATUTES** |

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Defendants, Jessica Windy Boy ("Windy Boy"), Rocky Boy Health Center ("Center")[1], and Chippewa-Cree Tribe ("Tribe"), through counsel, having moved to dismiss this action pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(h)(3), and 12(b)(6) hereby submit this Brief in Support. The primary basis for dismissal is (1) the Court lacks subject matter jurisdiction, (2) Plaintiff failed to exhaust all tribal court remedies, and (3) the federal statutes generally referenced in the Complaint are not applicable for purposes of federal jurisdiction and/or cannot afford Plaintiff relief.[2] For these reasons, the Court must, as required by law, dismiss this case.

## BACKGROUND

Plaintiff is a tribal member of the Fort Belknap Indian Reservation who resides and worked within the Chippewa-Cree Rocky Boy's Reservation ("Reservation") boundaries. *See* Doc. #1, p. 1; Aff. of Windy Boy, ¶ 18 (Aug. 1,

[1] Rocky Boy Health Center was served with a copy of the Complaint. The Center is unaware of any entity operating under the name "Rocky Boy Health Clinic."

[2] Defendants reserve the right to file an additional motion to dismiss, if necessary, on the basis that Defendants enjoy sovereign immunity which bars Plaintiff's claims. "Subject matter jurisdiction and sovereign immunity, though often construed as a single concept, are quite different." *Alone v. C. Brunsch, Inc.*, 2019 S.D. 41, ¶¶ 23-24. Where both subject matter jurisdiction and sovereign immunity are raised, a court must first decide whether it has subject matter jurisdiction. *Alone*, ¶ 24; *Eagleman v. Rocky Boys Chippewa-Cree Tribal Bus. Comm. or Council*, 699 F. App'x 599, 601 (9th Cir. 2017 (unpublished)). If a court concludes it has jurisdiction, it may then proceed to determine whether subject matter jurisdiction is divested by sovereign immunity. *Id.* If the court determines it lacks subject matter jurisdiction, it must end its inquiry and dismiss the action. *Id.*

2019) (attached as Exhibit A); Walker Tribal ID (attached as Exhibit A-6). Upon information and belief, Plaintiff is married to a member of the Tribe.

The Center is an entity created, owned, and operated by the Tribe and is an arm of the Tribe's government. *See* Ex. A, ¶ 4; *see also* RBHC By-Laws (Feb. 25, 1976) (attached as Exhibit A-1). Windy Boy is a tribal official, the CEO for the Center. Doc. #1, p. 2, 5. Windy Boy resides and works within the Reservation and is a tribal member of the Fort Belknap Indian Reservation. Ex. A, ¶ 1.

The Center has been "delegated the full authority of the Chippewa-Cree Tribal Business Committee ["Tribal Council"] to manage tribal health matters." Ex. A, ¶ 5; Ex. A-1, Art. 4, § 4.02(a). The Center is "responsible for comprehensive health planning and development needs of the Chippewa-Cree Indians." Ex. A, ¶ 5; Ex. A-1, Art. 4, § 4.02(c). The detailed purposes of the Center include, among other things, (1) "to serve as the principal health organization and administrative office for comprehensive health planning, evaluation, development, and man-power training for the [Tribe];" (2) "to provide long range comprehensive health planning, evaluation, and development appropriate to the evolution of an exemplary health system and health facilities for the Reservation;" (3) "to serve as a central clearing house for all health planning and development;" (4) to coordinate with Tribal, Federal, and State agencies to improve the health of the Reservation; (5) to collect and manage health

information and data regarding health on the Reservation; and (6) "foster and protect the highest quality health and wellbeing of the Reservation, develop standards and priorities to achieve this purpose, zealously protect, defend, and advocate for the very best health interests of the reservation, assist local communities, contribute to, promote, and develop the very best and most improved health of their community members." Ex. A, ¶ 5; Ex. A-1, Art. 7, § 7.02.

The Tribal Council, the governing body for the Tribe, has the exclusive power to appoint members to the Center's Board of Directors. Ex. A, ¶ 6; Ex. A-1, Art. 2, § 2.01. The Chairman of the Tribal Council is at all times an ex officio member of the Board of Directors. Ex. A, ¶ 6; Ex. A-1, Art. 2, § 2.02. The Board of Directors is currently comprised exclusively of Tribal Council members. Ex. A, ¶ 7. The Center is required to submit, at a minimum, annual reports to the Tribal Council and the Tribal Council has the right to inspect the books, records, and property of the Center. Ex. A, ¶ 8; Ex. A-1, Art. 4, § 4.02(g); Art. 5, § 5.03.

The Center operates exclusively within the exterior boundaries of the Reservation. Ex. A, ¶ 15. Its physical location is on real property held in trust by the U.S. government for the benefit of the Tribe. *Id.*

The Center provides services to the Tribe's members as well as to non-member Indians. Ex. A, ¶ 11. The Center has no non-Indian clientele. Ex. A, ¶

12. In hiring employees, the Center gives preference first to the Tribe's members and then to non-member Indians. Ex. A, ¶ 13.

Plaintiff entered a consensual relationship with the Center when he accepted employment as a Project Coordinator/Data Manager on January 28, 2019. Doc. #1, p. 5; Ex. A, ¶ 18; Windy Boy letter to Plaintiff (executed by Plaintiff Jan. 28, 2019) (attached as Exhibit A-5). Plaintiff was given hiring preference as he is an enrolled tribal member. Ex. A, ¶ 18; Ex. A-6.

Following a meeting with administration for the Center, Plaintiff admits he voluntarily resigned from employment with the Center. *See* Doc. #1, pp. 5-6; Doc. #1-1, pp. 6, 14; Doc. # 6-1. Plaintiff's resignation was less than two weeks after accepting the position. Ex. A, ¶ 19; Personnel Action Form (Feb. 8, 2019) (attached hereto as Exhibit A-7). In his resignation letter, Plaintiff attributes his resignation to (1) differences of opinion with Windy Boy's management style; (2) professional criticism of Plaintiff by Windy Boy; (3) admonishing Plaintiff for his decision to excuse himself from a meeting; and (4) unspecified issues regarding communications or non-communications by the Center's managing officials. *See* Doc. # 6-3.

Plaintiff did not file a grievance, or initiate any administrative process consistent with the Center's personnel policies, as a result of his voluntary resignation or for any other alleged actions or omissions of the Center or its

officials that are at issue in this lawsuit. Ex. A, ¶ 20. To initiate a grievance, Plaintiff must submit a grievance in writing to his supervisor. *Id.* Plaintiff did not file any lawsuit in Chippewa-Cree Tribal Court ("Tribal Court") regarding the alleged actions or omissions at issue to avail himself of the remedies available in the Tribal Court and under the Tribe's laws. Ex. A, ¶ 21.

Plaintiff alleges in this action that Windy Boy retaliated against him "**for no reason**." *See* Doc. #1, p. 6 (emphasis added). Plaintiff further admits he does not know what Windy Boy's motives were regarding alleged harassment, admonishment, and humiliation of Plaintiff. *See* Doc. #1-1, p. 6. Plaintiff alleges his resignation was a result of the "**management style**" of the Center's administration. *Id* (emphasis added); *see also* Doc. #1, p. 6; Doc. #1-1, pp. 6-15. In prior communications regarding his resignation, Plaintiff does not allege any discrimination whatsoever. *See* Doc. #1-1, pp. 6-15; Doc. #6-3.

Plaintiff does not allege he is disabled and he never informed the Center of any disability. *See* Doc. #1; Ex. A, ¶ 24. While, Plaintiff has checked a box to indicate he was discriminated against for being "male," he does not allege any facts to support any allegation of gender discrimination. *See* Doc. #1, generally & p. 4 (emphasis added); Doc. #1-1, pp. 6-15. Other than checking a box indicating he is a male, Plaintiff does not allege any acts or omissions which were

discriminatory in nature. *See* Doc. #1. Plaintiff does not allege any discriminatory or retaliatory conduct in his resignation letter. Doc. #6-3.

Plaintiff's only apparent basis for alleged federal question jurisdiction under 28 U.S.C. § 1331 in this intratribal employment dispute is that he has checked boxes on his form Complaint indicating the following Federal Acts may be at issue: (1) Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 200e-17; (2) Americans with Disabilities Act of 1990, 42 U.S.C. §§12112 to 12117; and (3) the Rehabilitation Act, §§ 501 and 505. *See* Doc. # 1, p. 5. Plaintiff does not explain how these federal laws are implicated in this employment matter in which Plaintiff voluntarily resigned from employment due to differences of opinion with the CEO of the Center.

Since June 30, 1994, the Tribe has operated the Center through a 638 Compact with the United States and associated Annual Funding Agreements.[3] Ex. A, ¶ 9; Compact of Self Governance (June 30, 1994) (attached as Exhibit A-2); Annual Funding Agreement (for 2017-2019) (Mar. 9. 2017) (attached as Exhibit A-3). Within the Compact, the United States disclaimed jurisdiction over disputes between tribal members, or other persons, regarding personnel management and provided that "[s]uch disputes shall be heard and decided in the Tribe's court

[3] Defendants reserve the right to file an additional motion to dismiss on the basis of Federal Tort Claims Act exclusivity, if necessary.

system after exhaustion of Tribal administrative remedies." Ex. A, ¶ 10; Ex. A-2, Art. I, § 4.

On these facts, this case should be dismissed because: (1) this Court lacks subject matter jurisdiction over this tribal employment dispute; (2) Plaintiff failed to exhaust tribal remedies; and (3) the federal statutes identified in the Complaint do not apply to Indian tribes and/or Plaintiff's own admissions demonstrate they are not implicated.

## STANDARD OF REVIEW

Subject matter jurisdiction is a court's power to hear a case, and thus, it "can never be forfeited or waived." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513-514, 126 S. Ct. 1235, 1244, 163 L. Ed. 2d 1097 (2006). Objections to a court's subject matter jurisdiction may be raised by any party or the court on its own initiative at any stage in the litigation, even after trial and entry of judgment. *Id.* "When a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety." *Id.* A dismissal for lack of subject matter jurisdiction is a question of law which is reviewed de novo. *Hyatt v. Yee*, 871 F.3d 1067, 1073 (9th Cir. 2017).

"A federal court is presumed to lack subject matter jurisdiction until the contrary affirmatively appears." *S.M. v. W. Contra Costa Cty. Unified Sch. Dist.*, No. C 06-6653 CW, 2007 WL 108456, at *1 (N.D. Cal. Jan. 10, 2007) (citing

*Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir.1989)). The Plaintiff bears the burden of establishing jurisdiction by evidence of competent proof. *Thomson v. Gaskill*, 315 U.S. 442, 446, 62 S. Ct. 673, 86 L. Ed. 951 (1942). He must carry this burden by a preponderance of the evidence. *Superior MRI Services, Inc. v. Alliance Healthcare Services, Inc.*, 778 F.3d 502, 504 (5th Cir. 2015).

## ARGUMENT

### I. THIS COURT LACKS SUBJECT MATTER JURISDICTION.

Federal Rule of Civil Procedure 12(h)(3) provides, "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." This Court, as a court of limited jurisdiction, must have some basis to entertain subject matter jurisdiction in the form of a grant of authority by both constitutional requirements and federal statute. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S. Ct. 2396, 2403 (1978).

Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S. Ct. 1670, 1675 (1978). Tribes have power to make their own substantive law in internal matters, and to enforce that law in their own forums. *Id.* (internal citations omitted). "Tribal courts have repeatedly been recognized as appropriate forums for the ***exclusive adjudication*** of disputes

affecting important personal and property interests of both Indians and non-Indians." *Burrell v. Armijo,* 456 F.3d 1159, 1167 (10th Cir. 2006) (*citing Santa Clara Pueblo,* 436 U.S. at 65–66) (emphasis added); *see also Montana v. United States,* 450 U.S. 544, 566, 101 S.Ct. 1245 (1981) (Indian tribes possess inherent authority to exercise civil jurisdiction, even over nonmembers); *Enlow v. Moore,* 134 F.3d 993, 996 (10th Cir. 1998) ("[C]ivil jurisdiction over non-Indians on reservation lands 'presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.'"). Additionally, the Tribe expressly retained exclusive civil jurisdiction over "**all civil actions** arising in whole or [in] part within the exterior boundaries of the Reservation." *See* Chippewa-Cree Law and Order Code ("CCLOC"), Title I, Chapter 2, § 2.1 (cited sections attached as Exhibit B) (emphasis added).

The Tribe has a fully functional tribal court and appellate Court with established Rules of Civil Procedure. *See* Ex. B, Title I, Chapter 1, §§ 1.6, 1.7. In addition to the Tribal Court system, the Tribe has an administrative process for handling employee grievances, which the Center applies in employment matters.

While Plaintiff has potential tribal remedies available to him, he failed to avail himself of the administrative and/or Tribal Court processes. The Tribe's established statutory, judicial, and administrative framework allows Plaintiff to

pursue his claims against the tribal Defendants within the Tribe's jurisdiction. Because the Tribe's jurisdiction is exclusive, this matter should be dismissed.

**A. The United States Expressly Provided for Tribal Jurisdiction in its Compact with the Tribe.**

The United States compacted with the Tribe for the provision of health services. Ex. A, ¶ 10. The Center operates under the Compact. *Id.* Within the Compact, the United States disclaimed jurisdiction over disputes between tribal members, or other persons, regarding personnel management and provided that "[s]uch disputes shall be heard and decided in the Tribe's court system after exhaustion of Tribal administrative remedies." Ex. A, ¶ 10; Ex. A-2, Art. I, § 4.

This employment matter arises from personnel management. Doc. #1. As such, the United States has provided that jurisdiction for this matter is exclusive in Tribal Court. On this basis alone, the Court should dismiss this matter.

**B. Indian Tribes Have Civil Jurisdiction Over Nonmember Indians Residing Within Their Borders.**

Generally, a tribe may exercise both criminal and civil jurisdiction over nonmember Indians for conduct occurring within its borders. *See United States v. Enas*, 255 F.3d 662 (2001) (en banc), *cert. denied*, 534 U.S. 1115, 122 S.Ct. 925, 151 L.Ed.2d 888 (2002); *McDonald v. Means*, 309 F.3d 530, 535-36, 540 (9th Cir. 2002) (tribal court properly exercised "civil jurisdiction over a defendant whom it could prosecute criminally."). In *McDonad v. Means*, the Court determined the

Northern Cheyenne Tribe could exercise civil jurisdiction over claims made against individual members of the Oglala Sioux Tribe by a Northern Cheyenne tribal member regarding conduct that occurred on a tribal road within the Northern Cheyenne Reservation. *McDonald*, 309 F.3d at 535-36, 540.

Tribal court subject matter jurisdiction over Indians is first and foremost a matter of internal tribal law. *See Fisher v. Dist. Court of Sixteenth Judicial Dist. of Montana, in & for Rosebud Cnty.*, 424 U.S. 382, 386, 96 S. Ct. 943, 946 (1976) (Where litigation involves only Indians, courts may not infringe on right of reservation Indians to make their own laws and be ruled by them); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153-54 (1980). Tribal members involved in disputes are directed to the remedies available to them in tribal courts and from the officials of the tribe. *Santa Clara Pueblo*, 436 U.S. at 98 S. Ct. 1670; *see also E.E.O.C. v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1081 (9th Cir. 2001) (Intratribal disputes should be resolved internally within the tribe); *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1012 (10th Cir. 2007) (Federal court action was only available where non-Indians had been denied any remedy in tribal forum). As the *Santa Clara Pueblo* Court stated:

> [S]ubject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves, may "undermine the authority of the tribal court . . . and hence . . . infringe on the right of the Indians to govern themselves." *A fortiori*, resolution in a foreign

> forum of intratribal disputes of a more "public" character…cannot help but unsettle a tribal government's ability to maintain authority.

*Santa Clara Pueblo*, 436 U.S. at 59-60, 98 S. Ct. at 1677-78 (citations omitted).

Here, Defendants are an Indian Tribe, tribal governmental agency, and tribal official. Plaintiff is a nonmember Indian complaining of conduct that occurred within the Reservation during the course of his employment with the tribal agency. On these facts alone, it is clear that Tribal Court jurisdiction is exclusive over this dispute among Indians arising on the Reservation.

Any determination other than dismissal would infringe upon the rights of the Tribe to make its own laws and be ruled by them. However, even if Plaintiff were treated as a non-Indian for purposes of jurisdiction, he entered into a contractual relationship with the Tribe, thereby consenting to civil jurisdiction in Tribal Court.

### C. Tribal Court Jurisdiction is Exclusive because Plaintiff Entered a Consensual Relationship with the Tribe as an Employee.

In *Montana v. United States*, *supra*, the United States Supreme Court recognized two situations in which a Tribal Court may exercise jurisdiction over non-Indians. The following scenario applies here:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. **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**….

*Montana*, 450 U.S. at 565-566, 101 S.Ct. at 1258 (emphasis added). By entering an employment relationship with the Center, Plaintiff entered a consensual relationship with the Tribe, to work for the Tribe, to be paid by the Tribe, and to receive benefits of that employment. Under the first *Montana* exception, the Tribe plainly has exclusive civil jurisdiction to decide Plaintiff's claims, which arise from of his tribal employment.

The first *Montana* exception was also illustrated in *Smith v. Salish Kootenai College*, 434 F.3d 1127 (2006). In *Smith*, the non-Indian plaintiff sued the tribal college in tribal court for personal injuries. *Id.* The Court noted that the claim for negligence, among other claims, arose out of the Tribal College's actions on its campus. *Id.* Since the plaintiff voluntarily filed his claim in Tribal Court, the plaintiff was held to have entered a consensual relationship with the tribe within the meaning of *Montana*. The Court stated:

> So long as the Indians "remain a 'separate people, with the power of regulating their internal and social relations,' … [making] their own substantive law in internal matters, and … enforce[ing] that law in their own forums," tribal courts will be critical to Indian self-governance."
> …
> The Tribes have a strong interest in regulating the conduct of their members; it is part of what it means to be a tribal member. The Tribes plainly have an interest in compensating persons injured by their own….

*Smith*, p. 1140-1141.

When Plaintiff accepted employment with the Center, he entered into a consensual relationship with the Tribe. Employment with the Tribe is certainly

one of the "other arrangements" contemplated by under *Montana* which mandates Tribal Court jurisdiction. Indeed, if the Tribe cannot adjudicate employment-related issues, especially employment with a tribal governmental agency, then Tribal sovereignty is likewise threatened. Tribes have a basic, inherent power to hire, discipline, and fire employees who work for them and to have any lawsuits arising from such employment relationships litigated in tribal courts. Since Plaintiff was indisputably an employee of the Tribe, the Tribal Court unquestionably has exclusive jurisdiction to hear Plaintiff's claims that arise from his tribal employment. Plaintiff has consented to the exclusive jurisdiction of the Tribal Court by his employment. As such, this Court lacks subject matter jurisdiction. Dismissal remains appropriate and warranted.

Moreover, because the Tribe has an established legal code, functioning Tribal Court, and Appellate Court, exercise of jurisdiction by this Court would infringe on the Tribe's right to make its own laws and be ruled by them. The tribal Defendants should not be forced to defend themselves in this foreign jurisdiction where the Tribe has established laws under which Plaintiff may pursue his claims. Again, this matter should be dismissed for lack of subject matter jurisdiction. Any other result would contradict established federal law and policy promoting tribal self-government.

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## II. THE FEDERAL STATUTES REFERENCED GENERALLY BY PLAINTIFF DO NOT APPLY TO INDIAN TRIBES OR ARE NOT IMPLICATED.

Federal question jurisdiction is not established in this matter. *Santa Clara Pueblo*, *supra*, provides a road map for determining whether to apply federal statutes to Indian tribes. In *Santa Clara Pueblo*, the Court noted that Congress statutorily provided a private right of action for habeas corpus relief in the Indian Civil Rights Act while at the same time remaining silent as to granting a private right of action for the enforcement of civil rights. The Court stated:

> Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in § 1303, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent….
> Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government.

*Santa Clara Pueblo*, 436 U.S. at 60, 64, 98 S.Ct. at 1678, 1680. "**The proper inference from silence...is that the sovereign power...remains intact**." *Merrion v. Jicarilla Apache Tribe*, 455 U.S., at 149, n. 14, 102 S.Ct., at 908, n. 14.

In other words, the Court should not read into a federal statute that which is plainly not there. This cautionary instruction is applicable here. This Court should "tread lightly" in determining whether it should exercise its jurisdiction in this

case, because doing so would place itself at odds with the clearly expressed intent of Congress to promote tribal self-government.

As stated by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm*:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations ...." *Farris*, 624 F.2d at 893-94. In any of these three situations, Congress must expressly apply a statute to Indians before we will hold that it reaches them.

*Donovan*, 751 F.2d 1113, 1116 (9th Cir. 1985).

Where a federal law is silent with regard to application to tribes, "rules of statutory construction require that ambiguous provisions be construed 'liberally in favor of the Indians.'" *E.E.O.C.*, 260 F.3d at 1080 (citing *Montana*, 471 U.S. at 766, 105 S.Ct. 2399). This is especially true where, as here, the federal legislation is being construed with application to an arm of tribal government. *E.E.O.C.*, 260 F.3d at 1080. "Courts conducting 'self-governance' analysis have distinguished ... essentially governmental functions from commercial activities undertaken by tribes and have classified actual tribal governmental entities as aspects of 'self-government.'" *E.E.O.C.*, 260 F.3d at 1080 (citations omitted). Where an employment matter involves only tribal members and/or nonmember Indians, this factor too weighs against the application of federal law. *E.E.O.C.*, 260 F.3d at

1081. The intramural nature of employment disputes "is underscored by the fact that the Tribe has an established internal process for adjudicating such matters." *E.E.O.C.*, 260 F.3d at 1081 (citing *EEOC v. Fond du Lac Heavy Equip. & Constr. Co., Inc.*, 986 F.2d 246, 249 (8th Cir.1993) ("[D]isputes regarding this issue should be allowed to be resolved internally within the tribe.")).

The foundation for Plaintiff's claims is an employment related dispute involving his employment with the Tribe's governmental agency. Plaintiff alleges he was discriminated and retaliated against because he is male and that he is entitled to relief under three separate Federal Acts: (1) Civil Rights Act of 1964; (2) Americans with Disabilities Act of 1990; and (3) the Rehabilitation Act. *See* Doc. #1, p. 5. Tribal employment matters are "purely intramural matters" touching on the tribe's "exclusive rights of self-governance." *E.E.O.C*, 260 F.3d at 1079. To exert federal control and supervision in tribal intramural employment discrimination matters "dilutes the sovereignty of the tribe." *Id.* "Disputes regarding [employment discrimination] should be allowed to be resolved internally within the tribe." *Id.*

This conclusion is "further bolstered by general acceptance of the notion that the term 'tribal self-government,' or a similar term, encompasses a tribe's ability to make at least certain employment decisions without interference from other sovereigns." *E.E.O.C.*, 260 F.3d at 1081 (citing *Penobscot Nation v. Fellencer*,

164 F.3d 706, 709–11 (1st Cir.), *cert. denied,* 527 U.S. 1022, 119 S.Ct. 2367, 144 L.Ed.2d 771 (1999) (tribe not subject to state anti-discrimination statute in discharging a non-Indian from position as nurse in tribe-run health center); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir.1998) (Indian had no cause of action under Title VII against a tribal non-profit entity which "served as an arm of the sovereign tribes, acting as more than a mere business"); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 494–96 (7th Cir.1993) ("it has been traditional to leave the administration of Indian affairs for the most part to the Indians themselves;" U.S. Department of Labor had sought to investigate tribal commission for alleged violations of the Fair Labor Standards Act).

The *E.E.O.C.* Court concluded that "regulation of the employment relationship between the [Tribal] Housing Authority and [its employee] does 'touch exclusive rights of self-governance in purely intramural matters." *E.E.O.C.*, 260 F.3d at 1081 (citing *Donovan,* 751 F.2d at 1116). With regard to tribal employment matters touching exclusive rights of self-governance, "federal laws are '**applicable to Indian tribes only if Congress explicitly so indicated**.'" *E.E.O.C.*, 260 F.3d at 1081 (emphasis added); see also *Coeur d'Alene*, 751 F.2d at 1116 (if any of the exceptions applies, "Congress must *expressly* apply a statute to Indians before we will hold that it reaches them" (emphasis in original)).

Simply, the referenced federal laws are not applicable to the Tribe and/or are limited in scope to disability discrimination, as opposed to gender discrimination. Because these federal laws are not implicated they do not provide valid basis for federal question jurisdiction.

**A. Civil Rights Act and Americans with Disabilities Act Are Expressly Inapplicable to Indian Tribes.**

The Civil Rights Act of 1964 and Americans with Disabilities Act of 1990 ("ADA") **expressly exclude** Indian tribes from their operation. *See* 42 U.S.C. § 2000e(b) (term "employer" does not include "an Indian tribe); 42 U.S.C. § 12111(5)(B)(i) (same). The inapplicability of the Civil Rights Act to Indian tribes is further evidenced by the subsequently enacted Indian Civil Rights Act of 1968, 25 U.S.C. Secs. 1301 et seq., which specifically provides for applicability to tribes and which Congress would have no need to enact if the Civil Rights Act applied to tribes. Federal courts have interpreted the Civil Rights Act and ADA to not apply to Indian tribes. *Pauma v. Nat'l Labor Relations Bd.*, 888 F.3d 1066, 1074 (9th Cir. 2018), cert. denied sub nom. *Casino Pauma v. N.L.R.B.*, 139 S. Ct. 2614 (2019) ("Title VII of the Civil Rights Act of 1964 and Title I of the Americans with Disabilities Act, do define the word 'employer' to exclude Indian tribes"); *In Re San Manuel Indian Bingo & Casino*, 341 NLRB 1055, 1058 (2004) (term "employer" does not include "an Indian tribe"); *Vulgamore v. Tuba City Reg'l Healthcare Corp.*, No. CV-11-8087-PCT-DGC, 2011 WL 3555723, at *2 (D. Ariz.

Aug. 11, 2011) ("The language of the ADA itself leaves no doubt that Congress exempted Indian tribes and tribal entities from Title I coverage when it specified that "[t]he term 'employer does not include ... a corporation wholly owned by ... an Indian tribe.")

Congress could have provided that the Civil Rights Act and ADA apply to Indian tribes. It did not do so. In fact, it expressly provided these laws do not apply to tribes. As a matter of statutory construction, this Court should not insert language which is not in the statute or deviate from established case law confirming these laws do not apply to Indian tribes. Instead, the Court should recognize Congress's directive, and interpreting case law, and dismiss this matter.

Plaintiff is attempting to eviscerate the Tribe's sovereignty by denying its jurisdiction over its own employees involving purely internal tribal employment matters. In reality, this case is, jurisdictionally, a purely tribal matter. This conclusion is further supported by the *E.E.O.C.*'s prior dismissal of Plaintiff's discrimination claim under the Civil Rights Act and ADA, where it dismissed Plaintiff's charge of discrimination because it was against a "Tribal Entity." *See* Doc. 1-1, p.1. Since the Civil Rights Act and ADA expressly do not apply to Indian tribes, the Court has no § 1331 federal question jurisdiction. Plaintiff's Complaint must be dismissed.

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**B. The Rehabilitation Act is Inapplicable and Plaintiff Failed to State a Claim Upon Which Relief Can be Granted Under the Act.**

Plaintiff generally references Sections 501 and 505 of the Rehabilitation Act in his Complaint, suggesting he is entitled to relief thereunder. A cursory review of the cited Rehabilitation Act sections demonstrates Plaintiff is not so entitled because (1) the Act only permits a lawsuit *against an agency* of an Indian Tribe where the agency has an agreement with the designated State agency to conduct a vocational rehabilitation program, and (2) the Act provides protections for people with disabilities and Plaintiff does not allege any disability.

Generally, "the Rehabilitation Act prohibits federal agencies from discriminating against **disabled persons** in employment matters, such as hiring, placement, or advancement." *Jackson v. Napolitano*, No. CV-09-1822-PHX-LOA, 2010 WL 94110, at *4 (D. Ariz. Jan. 5, 2010) (citing 29 U.S.C. §§ 701 *et seq*) (emphasis added). "The Rehabilitation Act…provides the **exclusive remedy for federal employees to assert claims of handicap discrimination**." *Jackson,* *4 (citations omitted).

Section 501 of the Act prohibits **federal agencies** from discriminating against job applicants and employees **based on disability**. *See* 29 U.S.C. § 791. Section 501 does not apply to Indian tribes. *Id.* Section 505 simply provides remedies for claims brought under the Act. *See* 29 U.S.C. § 794a.

"The Rehabilitation Act allows suits **against a *local agency*** of an Indian tribe, but **only where the [tribal] agency 'has an agreement with the designated State agency to conduct a vocational rehabilitation program**[.]'" *Vulgamore v. Tuba City Reg'l Healthcare Corp.*, No. CV-11-8087-PCT-DGC, 2011 WL 3555723, at *2 (D. Ariz. Aug. 11, 2011) (citing 29 U.S.C. § 705(24) (emphasis added)). Furthermore, the Rehabilitation Act appears to only prohibit discrimination by a local tribal agency arising from a plaintiff's contacts with a vocational rehabilitation program established under the Act. *Vulgamore,* * 1; 29 U.S.C. § 704(a).

The Rehabilitation Act is inapplicable here. The Center has not entered into any agreement with a State agency for the development of a vocational rehab program. Ex. A, ¶ 23. Similar to the Plaintiff in *Vulgamore*, Plaintiff does not allege otherwise. *Vulgamore,* * 1; Doc. #1. In the absence of such agreement, the Act expressly does not apply to the Center or create a private right of action for the actions or omissions alleged by Plaintiff. This further demonstrates a lack of federal question jurisdiction in this Court.

Moreover, "[t]o state a *prima facie* case under the Rehabilitation Act, a plaintiff must demonstrate that (1) [he] is a **person with a disability**, (2) who is otherwise qualified for employment, and (3) suffered **discrimination because of**

**[his] disability**." *Jackson*, *4 (citing *Walton v. U.S. Marshals Service*, 492 F.3d 998, 1005 (9th Cir.2007)).

Plaintiff failed to state a claim upon which relief can be granted under the Act because he has not alleged he has a disability or suffered discrimination because of any disability. Doc. #1. This conclusion also applies to the ADA, as it is meant to afford relief to persons with disabilities. *See* 42 U.S. Code § 12101, et. seq. Being "male" is not a disability. Plaintiff has **never alleged** or informed Defendants of any disabling condition**,** and to Defendants' knowledge**,** he is not disabled. Because the Rehabilitation Act is not applicable and Plaintiff cannot be granted relief under the Act, any claims pursued under the Rehabilitation Act should be dismissed.

## III. PLAINTIFF FAILED TO EXHAUST ALL AVAILABLE TRIBAL REMEDIES.

Plaintiff completely avoided the remedies available to him within the Tribe's jurisdiction and has instead filed his employment action directly in Federal District Court. Plaintiff failed to initiate any administrative or court proceedings within the Tribe's jurisdiction, let alone exhaust, all available tribal remedies. This matter is not only premature, it violates the U.S. Supreme Court's common law requirement that Plaintiff first exhaust all tribal remedies, including appeal before the Tribal Appellate Court.

Challenge of a tribe's jurisdiction must be made initially in tribal court, pursuant to the doctrine requiring exhaustion of tribal court remedies. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987); *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). Exhaustion of **all** tribal remedies is required before a federal court may entertain a claim that an Indian tribal court exceeded the lawful limits of its jurisdiction. *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004). The rule requiring exhaustion of tribal remedies is imposed to preserve and strengthen Native American cultures by ensuring tribal institutions are not denied the opportunity to resolve tribal disputes or make tribal policy. *St. Marks v. Chippewa–Cree Tribe of Rocky Boy Reservation, Mont.*, 545 F.2d 1188, 1189 (9th Cir.1976). Furthermore, federal courts' exercise of jurisdiction over reservation affairs impairs the authority of tribal courts. *Alvarez v. Tracy*, 773 F.3d 1011, 1014-15 (9th Cir. 2014) (citation omitted). "As such, [t]he Supreme Court's policy of nurturing tribal self-government strongly discourages federal courts from assuming jurisdiction over unexhausted claims." *Id.* Thus, "the court is required to 'stay its hand' until [a] party has exhausted **all** available tribal remedies." *Id.* (emphasis added).

In *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, a school district and its insurer sought an injunction preventing an injured student

from executing on a default judgment obtained in Crow Tribal Court against the school district. *Nat'l Farmers*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). The Court granted injunctive relief, holding the Tribe had no jurisdiction over a non-Indian. *Id.* The Ninth Circuit reversed and the Supreme Court granted certiorari. *Id.*

The Supreme Court held that when a non-Indian Plaintiff files a claim against a Tribe in Federal District Court by invoking § 1331 federal question jurisdiction, the plaintiff must necessarily contend that "federal law has curtailed the powers of the Tribe and thus afforded them the basis for the relief they seek in the federal forum." *Nat'l Farmers*, 471 U.S. at 852. The Court went on to hold that the Tribal Court is the appropriate forum to first decide whether it may exercise jurisdiction in a civil matter, stating:

> **We believe that examination [whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians] should be conducted in the first instance in the Tribal Court itself.** Our cases have often recognized that 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. 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.

*Nat'l Farmers*, 471 U.S. at 856-857 (emphasis added). Ultimately, the Court held "**exhaustion is required before…a claim may be entertained by a federal court.**" *Id.* (emphasis added).

The Supreme Court expanded the exhaustion requirement in *Iowa Mut. Ins. Co. v. LaPlante*. The *Iowa Mutual* Court held that exhaustion of tribal remedies requires that "tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Iowa Mut.*, 480 U.S. at 16-17, 107 S.Ct. at 977. The Court observed that even with regard to activities of non-Indians on reservation land, "**Civil jurisdiction over such activities presumptively lies in the tribal courts** unless affirmatively limited by a specific treaty provision or federal statute. *Iowa Mut.*, 480 U.S. at 18, 107 S.Ct. at 977–78 (emphasis added).

Plaintiff has effectively challenged the jurisdiction of the Tribe by refusing to file this claim in Tribal Court or pursuing available administrative remedies. Plaintiff has wholly circumvented the Tribe's jurisdiction over its own employment-related matters. Since federal courts are required to stay their hands and allow tribal courts to determine their jurisdiction first, as a matter of comity, this Court should dismiss this action for failure to exhaust tribal court remedies. Plaintiff's pursuits in this federal forum are inappropriate and fly in the face of the clear federal policy which seeks to promote Indian self-determination and self-

government. Failure to dismiss this matter detrimentally impacts the Tribe's sovereignty.

Consistent with the Court's observation in *Alvarez, supra*, had Plaintiff pursued the full extent of his tribal remedies, "it is possible that a tribal court would have granted relief, and we would not be here today." *See Alvarez*, 773 F.3d at 1022. Plaintiff's action in this forum is premature and the Court may not reach his claims until Plaintiff exhausts all available tribal remedies.

The Supreme Court predicted that "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Iowa Mut. Ins. Co,* 480 U.S. at 16, 107 S.Ct. at 976. That is exactly what is happening here. This Court should stay its hand and dismiss this case as a matter of comity with the Tribal Court due to Plaintiff's failure to exhaust all available tribal remedies.

## CONCLUSION

For the reasons stated herein, Defendants respectfully request the Court grant this Motion to Dismiss.

DATED this 16th day of August, 2019.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By */s/ Evan M.T. Thompson*
Evan M.T. Thompson

*Attorneys for Defendants*

## CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this ***Brief in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction, Failure to Exhaust Tribal Remedies, and Inapplicability of Federal Statutes***, is double spaced, is a proportionately spaced 14 point typeface, and contains 6,490 words.

*/s/ Evan M.T. Thompson*
BROWNING, KALECZYC, BERRY & HOVEN, P.C.

## CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of August, 2019, a true copy of the foregoing was mailed by first-class mail, postage prepaid to the following parties:

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