ORAL ARGUMENT NOT YET SCHEDULED

No. 19-5099

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

YANKTON SIOUX TRIBE,

Plaintiff-Appellee,

v.

DAVID LONGLY BERNHARDT, SECRETARY OF INTERIOR
AND STEVEN T. MNUCHIN, SECRETARY OF TREASURY,

Defendant-Appellees,

HERMAN, MERMELSTEIN & HOROWITZ, P.A.,

Proposed Intervenor-Appellant.

On Appeal From the United States District Court
For the District of Columbia

APPELLANT'S BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

The following parties, intervenors or amici have appeared in the District Court and in this Court:

Yankton Sioux Tribe, Plaintiff-Appellee

David Longly Bernhardt, Secretary of the Interior; Steven T. Mnuchin, Secretary of the Treasury, Defendants-Appellees

Herman, Mermelstein & Horowitz, P.A. n/k/a Herman Law, Proposed Intervenor-Appellant

B. Rulings Under Review

Oral Order denying Motion to Intervene, issued March 8, 2019, by Judge Thomas F. Hogan, the transcript of which may be found in the Joint Appendix at pp. A193-199. There is no official citation.

C. Related Cases

There are no related cases.

CORPORATATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Appellant, Herman, Mermelstein & Horowtiz, P.A., n/k/a Herman Law, hereby submits the following corporate disclosure statement:

It is a Florida professional association. It has no parent corporation, and no publicly held company has 10% or greater ownership in this entity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF JURISDICTION

This action was brought in the District Court by Yankton Sioux Tribe, a federally recognized Indian Tribe, alleging breach of trust, and naming as Defendants the U.S. Secretary of the Interior and Secretary of the Treasury. The District Court's jurisdiction is based on 28 U.S.C. §§ 1331 and 1362. The District Court rejected jurisdiction of the Motion to Intervene of Appellant Herman, Mermelstein & Horowitz, P.A., n/k/a Herman Law ("Herman Law") on grounds of tribal sovereign immunity, which is the subject of this appeal.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 as the District Court issued an order denying Herman Law's Motion to Intervene. An order denying a motion to intervene is a final, appealable order. *Tootle v. Sec'y of the Navy*, 446 F.3d 167, 712 (D.C. Cir. 2006); *Alternative Research & Dev. Foundation v. Veneman*, 262 F.3d 406, 409-10 (D.C. Cir. 2001). A dismissal for lack of subject matter jurisdiction is likewise appealable pursuant to 28 U.S.C. § 1291. *Brown v. Turner*, 659 F.2d 1199, 1200 (D.C. Cir. 1981).

The District Court issued an oral order denying Herman Law's Motion to Intervene at hearing on March 8, 2019. Herman Law timely filed its Notice of Appeal on April 4, 2019.

STATEMENT OF THE ISSUES

1. Whether Yankton Sioux Tribe's sovereign immunity forecloses the Tribe's former attorneys in the action, Herman Law, from intervening pursuant to Fed. R. Civ. P. 24 to protect its attorneys' charging lien.

2. Whether intervention in the pending action to protect the attorneys' equitable lien interest in settlement funds constitutes a "suit" barred by tribal sovereign immunity absent a waiver.

STATEMENT OF THE CASE

A. Relevant Facts

Herman Law is a law firm based in Florida. (*See* R: 90-1, Amended Art. of Incorporation). It was hired by the Yankton Sioux Tribe, through the Yankton Sioux Tribal Business and Claims Committee, to represent the Tribe in breach of trust claims against the United States. The Tribe and Herman Law entered into a certain Contingency Fee Retainer Agreement dated April 22, 2003. (A056).[1] At that time, in the early and mid-2000's, numerous Indian tribes were filing actions in federal courts or bringing informal claims alleging the Government's breach of its trust obligations.[2] To facilitate these claims, Congress enacted legislation extending the statute of

[1] "Axxx" in this Brief refers to the filed Joint Appendix with the page number. ("R:xx") refers to an ECF record entry that is not included in the Joint Appendix.

[2] *See* A024-026, Complaint ¶¶ 18-22, setting forth recently enacted laws concerning the Government's trust duties, including the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4044.

limitations for tribal breach of trust claims, the purpose of which was "[t]o encourage the negotiated settlement of tribal claims." 107 P.L. 153, 116 Stat. 79.

Herman Law filed the Complaint in this action on behalf of Yankton Sioux Tribe, on July 28, 2003. (A006). The litigation in its early years focused on settlement negotiations, and on September 29, 2006 the district court administratively terminated the case subject to reinstatement while settlement discussions proceeded. (R:31). When the Parties reported that settlement negotiations had broken down, the Court reinstated the litigation by Order of May 7, 2007. (R:38; *see also* R:37, Status Report of Yankton Sioux Tribe). Litigation of the case proceeded until mid-2011, when Herman Law on behalf of the Tribe participated in the Settlement Consortium of 75 tribes, each of which engaged in active settlement negotiations with the Government to resolve tribal breach of trust claims. (*See* R:65, Parties' Joint Stipulation Regarding Confidentiality of Settlement Discussions and Communications, and A042-051, Order Approving Joint Stipulation).

Negotiations thereafter took place. Herman Law, with the participation of officials of the Tribe, negotiated a settlement with the Government consisting principally of a lump sum payment. This settlement was presented by the Tribe's Business and Claims Committee to the Tribe's General Council and approved by referendum vote on February 22, 2012. (A138-141). The Tribe, however, after bringing about delays in completing the settlement, terminated Herman Law at a

meeting of the Tribal Business and Claims Committee on May 21, 2012.[3] (*See* R:74, Herman Law's Reply Memorandum, p. 5, n. 4). In doing so, the Tribe indicated that the termination was to avoid paying Herman Law the attorneys' fees it had earned based on the Tribe's sovereign immunity. (*Id.*; s*ee also* A097).

B. Procedural History – Motion to Intervene

Herman Law filed a Motion to Intervene for the purpose of protecting its attorneys' charging lien on August 7, 2012. (R:69)[4] At a status conference on October 10, 2018, the district authorized and issued a schedule for supplemental memoranda and scheduled a hearing on the Motion. (R:85). Yankton Sioux Tribe opposed Herman Law's intervention and the United States took no position. (A13 -15; *see also* A124). The hearing was rescheduled for March 8, 2019. At that hearing, the district court issued an oral decision and order denying the Motion to Intervene. (A193-199). This appeal ensued.

[3] Subsequent to Herman Law's termination, the Tribe and its new attorneys engaged in no activity in the district court and did nothing to advance settlement discussions with the Government for a period of approximately six years. (*See* A123-125, transcript of June 7, 2018 status conference). It was not until after Herman Law alerted the district court to the pendency of this action and the district court conducted a status conference that the Parties apparently recommenced settlement discussions. (*See* R:109, Status Report). A settlement presently has been agreed upon by the Tribe and is being presented to the interested government agencies. (*Id.*)

[4] In the same Motion, Herman Law requested permission to withdraw as counsel of record for the Tribe based on its termination, which was granted by the District Court. (R:78).

C. The District Court's Ruling on Appeal

The District Court denied the Motion to Intervene, holding that, while the Motion satisfied the requirements of intervention under Fed.R.Civ.P. 24(a), the Court could not "take jurisdiction as to the intervenor request because Rule 82 specifically provides that, '[t]hese rules do not extend or limit the jurisdiction of the district courts … .' " (A194, lines 11-14). The district court explained, "the problem we're facing here is the sovereign immunity granted to the Indian nations as separate nations, and that has to be respected." (A194, line 24 to A195, line 2). The district court further noted that Herman Law would otherwise be entitled to an attorneys' charging lien under applicable law, and that such a lien is allowed in proceedings in the district court. Nonetheless, according to the district court, "[t]he problem is, … assuming what is alleged is true, that the Tribe is entitled to sovereign immunity." (A196, lines 1-3). Herman Law appeals the district court's holding that the Tribe's sovereign immunity bars Herman Law's assertion of a charging lien in the pending action absent a waiver.[5]

[5] The district court also held that there was no waiver of sovereign immunity in this case. (A195-199). Herman Law takes the position that the assertion of its lien interest in the pending litigation is not a suit against the Tribe, and therefore the Tribe's sovereign immunity is not implicated in the first instance. *See* discussion *infra* pp. 8-12. Herman Law does not challenge in this appeal the district court's holding concerning the lack of an express waiver in the Tribe's formation documents. (*See* A196-197).

SUMMARY OF ARGUMENT

Tribal sovereign immunity bars a "suit" against an Indian tribe absent a waiver. Herman Law, in asserting an attorneys' lien, does not bring a suit against Yankton Sioux Tribe. Cases in which attorneys have been barred by sovereign immunity from asserting an attorneys' lien interest are readily distinguishable, as they involved independent suits brought by attorneys against a sovereign. There is no authority to support the proposition that intervention in a pending action to protect an attorneys' lien by the plaintiff's former attorneys is itself a "suit" barred by sovereign immunity.

Indeed, the nature of intervention to assert an attorneys' charging lien demonstrates the contrary, as this lien arises by operation of law and springs into existence upon the parties' entry into a contingency fee agreement and the attorneys' filing of litigation. It attaches to settlement funds created through the litigation proceedings. The attorneys essentially seek only to protect an existing and established interest in a portion of the settlement that the former client relinquished at the time of the fee agreement and filing of the underlying action. In asserting such a lien in the pending action, the attorneys make no claim against funds in the sovereign's treasury or its public fisc. Herman Law's attorneys' lien, asserted in this manner, is entwined in the pending action and incidental to the affirmative claims brought by the Tribe. It

is analogous to claims of setoff or recoupment in pending litigation that do not implicate sovereign immunity.

Accordingly, under a reasoned analysis based on the applicable case law, Herman Law's intervention in the pending action it brought on Yankton Sioux Tribe's behalf is not itself a "suit" subject to tribal sovereign immunity. The District Court's holding that this intervention is barred by sovereign immunity represents a significant expansion of tribal sovereign immunity without basis.

ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*

The District Court denied Herman Law's Motion to Intervene as a matter of law on the basis of lack of subject matter jurisdiction. (A: 193-199). In so holding, the District Court expressly declined to consider submissions concerning the facts and circumstances of Herman Law's representation of Yankton Sioux Tribe in the District Court action and assertion of an attorneys' charging lien. (A199, lines 4 to 16). Its determination was thus based on a pure issue of law. The standard of review in these circumstances is *de novo*. *Fund for Animals, Inc. v. Norton*, 322 F. 3d 728, 732 (D.C. Cir. 2003) (addressing the standard of review for denial of a motion to intervene, noting that it depends upon the kind of determination being reviewed, and that "some [determinations] are pure issues of law and hence reviewed de novo"). Additionally,

determination of subject matter jurisdiction by the District Court is reviewed *de novo*.[6] *AFGE v. Trump*, 929 F. 3d 748, 754 (D.C. Cir. 2019).

II. TRIBAL SOVEREIGN IMMUNITY EXTENDS NO FURTHER THAN SUITS BROUGHT AGAINST THE TRIBE OR ITS OFFICIALS

A. Herman Law's Intervention to Protect Its Attorneys' Charging Lien is Not a Suit Subject to Sovereign Immunity

It is well established that, "[a]s sovereigns, Indian tribes enjoy immunity from suits." *Vann v. Kempthorne*, 534 F.3d 741, 746 (D.C. Cir. 2008). The term "suits" in the pertinent case law has referred to independent actions filed in the courts seeking judgments against sovereign tribes. *See, e.g., Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 118 S. Ct. 1700 (1998). In *Kiowa Tribe*, the issue was the application of tribal sovereign immunity to an independent suit against the tribe for collection on a defaulted promissory note. *Id.* at 754. The Court addressed an argument on policy grounds to limit the doctrine of tribal sovereign immunity to non-commercial activities or conduct on reservations. *Id.* at 758. It declined to make changes in the prevailing

[6] The District Court determined that tribal sovereign immunity presented a preliminary question of subject matter jurisdiction, relying upon Fed. R. Civ. P. 82 and *United States v. Certain Land Situated in the City of Detroit*, 361 F. 3d 305, 307 (11th Cir. 2004). (A195). However, intervention as of right under Fed. R. Civ. P. 24(a) generally falls within the district court's supplemental jurisdiction, and indeed, 28 U.S.C. § 1367(a) states that "supplemental jurisdiction shall include claims that involve the … intervention of additional parties." *See also Int'l Paper Co. v. Jay*, 887 F. 2d 338, 346 (1st Cir. 1989); A 195 (discussing concurring opinion in *Certain Lands Situated in Detroit*). In any event, the District Court treated tribal sovereign immunity as a dispositive issue on Herman Law's intervention for purposes of asserting an attorneys' lien in the District Court action, and accordingly this issue is ripe for disposition in this appeal.

law, deferring to Congress which "is in a position to weigh and accommodate the competing policy concerns and reliance interests." *Id*. at 759. The Court noted that "[t]o date, our cases have sustained tribal immunity *from suit*." *Id.* at 754 (emphasis added). The Court thus maintained the rule that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id*. at 760. *See also Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100, 1101 (8th Cir. 2011) ("[i]t is well established that Indian Tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers").

Likewise, in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S. Ct. 905 (1991), the Court stated the rule of tribal sovereign immunity applicable to suits against the Tribe:

> Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. *Suits against Indian tribes* are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.

Id. at 509 (citations omitted) (emphasis added); *see also Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 785, 134 S. Ct. 2024 (2014) (holding that tribal sovereign immunity barred a suit brought by the State of Michigan against a tribe for opening a casino outside Indian lands).

Herman Law formerly represented the Yankton Sioux Tribe in the District Court action, and sought to intervene in the action after it was discharged by the Tribe. This

intervention is pursuant to Fed. R. Civ. P. 24(a), to protect Herman Law's attorneys' charging lien interest, that arose at the time Herman Law was retained and filed the action on behalf of the Tribe.[7] In its oral ruling, the District Court noted that Herman Law has a right to assert a charging lien, and but for tribal immunity would be entitled to intervene in the pending action to protect its lien. (A195, lines 18 to 25) (citing *Martens v. Hadley Mem. Hosp.*, 753 F. Supp. 371 (D.D.C. 1990)).[8] In denying intervention as a matter of law, however, the District Court incorrectly applied tribal sovereign immunity where Herman Law had not brought a suit against the Tribe to trigger such immunity.

Tribal immunity "flows from a tribe's sovereign status in much the same way as it does for the States and for the federal government." *Vann*, 534 F.3d at 746 (noting further that "[t]he States also count the Eleventh Amendment as a source of sovereign immunity"). As to the States, the Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States … ." U.S. Const., amend. XI.[9] Under the Eleventh Amendment, it is well established that "not all legal actions

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[7] See *infra* § B.

[8] In *Martens*, the Court held that the discharged attorney "has established an attorneys' charging lien and may properly intervene in the underlying case to protect his interest." 753 F. Supp. at 372.

[9] *See also Mayes v. Cherokee Nation (In re Mayes*), 294 B.R. 145, 149-50 (10th Cir. BAP 2003) ("we find the case law defining and interpreting 'suit' as contained in the

are suits" for purposes of immunity. *Chandler v. Oklahoma Tax Comm'n (In re Chandler)*, 251 B.R. 872, 875 (10th Cir. BAP 2000). Eleventh Amendment immunity is applied to "prevent federal-court judgments that must be paid out of State's treasury," and "to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Id*. (quoting *Hess v. Port Authority Trans-Hudson Corp*., 513 U.S. 30, 48 (1994), and *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc*., 506 U.S. 139, 146 (1993)).

This principle has been applied generally in cases determining the scope of sovereign immunity. *See Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 714, 69 S. Ct. 1457 (1949) (holding that sovereign immunity may preclude a suit against a government official, setting forth "the proposition that a suit will not be permitted where the relief sought would 'expend itself on the public treasury or domain, or interfere with the public administration' ") (citing *Land v. Dollar*, 330 U.S. 731, 738 (1947)). "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' " *Dugan v. Rank*, 372 U.S. 609, 620, 83 S. Ct. 999

Eleventh Amendment instructive and persuasive in the context of matters against Indian tribes in bankruptcy"); *Bonnet v. Harvest (US) Holdings, Inc*., 741 F.3d 1155, 1159 (10th Cir. 2014) (noting that "tribal immunity is similar, although not identical, to immunity afforded to states under the Eleventh Amendment," and that "[t]he scope of tribal immunity, however, is more limited") (citation omitted).

(1963). This rule and principle is reflected in cases of tribal immunity. *See Alltel Communications*, 675 F.3d at 1102 (quoting *Dugan*, 372 U.S. at 620).

Applying this principle, Herman Law's intervention in the District Court to protect its attorney's charging lien is not a "suit" against a sovereign.[10] It implicates neither the coercive power of the court nor the possibility of a judgment that would be paid from the Yankton Sioux Tribe's treasury. The only claims in the District Court action are those affirmatively brought by Yankton Sioux Tribe. (A018-028, Complaint). The Tribe is thus in the case of its own volition as party plaintiff seeking a recovery for itself; it is not in the case because of any coercive process by Herman Law. Indeed, the Tribe is present and in a position to gain a substantial recovery because of the efforts of Herman Law during the years it represented the Tribe through the February, 2012 settlement.[11] The right and interest that Herman Law seeks to protect in the District Court proceeding does not implicate any payment from or diminution of the Yankton Sioux Tribe's treasury.

[10] It is further noted that Herman Law's attorneys' charging lien and its intervention to protect that lien do not implicate the United States' immunity, as Herman Law seeks only action from the District Court and not to compel or restrain the United States. *See* A052-054, proposed Complaint in Intervention. *See also Larson*, 337 U.S. at 704 (noting that sovereign immunity applies if the effect of a judgment is "to restrain the Government from acting, or to compel it to act").

[11] *See* discussion *supra* pp. 3-4.

B. Herman Law's Attorneys' Lien Interest Arose by Operation of Law When the Pending Action Was Filed

The contingency fee retainer agreement between the Tribe and Herman Law gave Herman Law "an interest in the cause of action."[12] *Continental Casualty Co. v. Kelly*, 106 F.2d 841, 843 (D.C. App. 1939). At the time Yankton Sioux Tribe entered into the contingency fee agreement, there was "a distinct appropriation of the fund by the client and an agreement that the attorneys should be paid out of it."[13] *Id.*; *accord Falcone v. Hall*, 235 F.2d 860, 862 (D.C. Cir. 1956) (holding that attorney working on contingency fee contract has an interest in the cause of action, as well as the judgment into which the cause of action merges). The attorneys' charging lien runs "by operation of law against funds obtained as a result of the attorney's work on the client's behalf." *Peterson v. Islamic Republic of Iran*, 724 Fed. Appx. 1, 3 (D.C. Cir. 2018). This interest arises where "there exist[s] between the client and his attorney an agreement from which the conclusion *may be reached* that they contracted with the understanding that the attorney's charges were to be paid out of the judgment recovered." *Elam v. Monarch Life Ins. Co.*, 598 A.2d 1167, 1169 (D.C. App. 1991) (emphasis in original).

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[12] District of Columbia law governs an attorney's charging lien interest asserted in the federal courts of the District of Columbia. *Peterson v. Islamic Republic of Iran*, 724 Fed. Appx. 1, 3 (D.C. Cir. 2018). *See also Butler Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 178 (2d Cir. 2001) (holding that New York law applies to charging lien in the federal courts in New York).

[13] The attorney's lien is inchoate prior to recovery, but "relates back and takes effect from the time of the commencement of the suit. …" *Continental Casualty*, 106 F.2d at 843.

Implicit in a contingency fee agreement is "the attorney's understanding that he would look to the fund recovered for payment and not to the personal resources [of the client]." *Elam*, 598 A.2d at 1170; *see also Butler, Fitzgerald & Potter*, 250 F.3d at 178 (holding under New York law that an attorney's charging lien gives the attorney "an equitable ownership interest in the client's cause of action"). "[A] lien so created attaches when the fund comes into existence, whether by judgment or by settlement." *Elam*, 598 A.2d at 1168. The fund that will be created in this case under a settlement of the District Court action will be pursuant to court order and within the equitable control of the district court.[14] *Elam*, 598 A.2d at 1172 ("no claim is made that the settlement fund is not within the equitable control of the court").

Accordingly, as a result of the contingency fee agreement between Herman Law and the Yankton Sioux Tribe, a 25% interest in the Tribe's claims was appropriated to Herman Law as of the date the action was brought in District court July 28, 2003. (*See* A056, Contingency Fee Retainer Agreement). Yankton Sioux Tribe at that time divested itself of that interest in favor of Herman Law for the purpose of prosecuting its breach of trust and accounting claims. Herman Law is thus not bringing a "suit" against the Yankton Sioux Tribe, in that its attorneys' charging lien would not result in any payment from or diminution of the Yankton Sioux Tribe's treasury. Put another

[14] Cases that have settled within the protocol of the Settlement Consortium have resulted in the submission of a conformed stipulation and order to the presiding district court judge. (*See, e.g.*, A:098-114, Joint Stipulation of Settlement and [Proposed] Order – Te-moak Tribe).

way, Yankton Sioux Tribe does not have an interest in the portion of the monetary settlement obtained through this action that represents Herman Law's attorney's fees, and thus Herman Law cannot by its attorneys' lien dispossess the Tribe of any such interest. At the same time, Herman Law has the right to protect its preexisting and established lien interest in the recovery through Rule 24 intervention.

The District Court noted that the "problem" giving rise to Herman Law's Motion to Intervene was the lack of an immunity waiver clause in its Contingency Fee Retainer Agreement with the Tribe.[15] (*See* A056). This view is misguided, as the Agreement reflects that Herman Law never had any intent to bring a suit against the Tribe. Rather, Herman Law "looked to the fund recovered as the source of the attorney's payment." *Elam*, 598 A.2d at 1170. It is entitled to do so under applicable law. In this light, there should be no reason for a law firm to include immunity waiver language in its retainer agreement because upon discharge without cause, it may rely on those rights which exist by operation of law in pending litigation to assert its attorneys' charging lien and thereby protect its interests without implicating sovereign immunity.

C. *Watters* is Distinguishable as an Independent Suit for Money Judgment Against a Sovereign to Collect Attorneys' Fees

[15] A195, lines 11 – 17: "It is a problem, I think, unfortunately for Herman Law, that may have stemmed from the drafting of the original fee agreement with the Tribe. I think there's a lesson when you negotiate with an independent nation … that you have alternative dispute resolution mechanisms in the plea [sic] agreement or a waiver of sovereign immunity, which did not happen."

In *Watters v. WMATA*, 295 F. 3d 36 (D.C. Cir. 2002), the D.C. Circuit Court of Appeals addressed the issue of sovereign immunity in the context of an attorneys' lien claim, but under plainly distinguishable circumstances. There, the attorney plaintiff affirmatively brought a lawsuit against a government entity, WMATA, because it had paid a settlement to his former client allegedly in derogation of his attorney's lien. *Id*. at 38-39. It was an *independent suit* for *breach* of an attorney's lien by a third party. That lawsuit commenced by the attorney sought a money judgment against the sovereign entity, WMATA, alleging that WMATA had paid a settlement to his former client and her new attorney in contravention of his attorney's lien. *Id*. Importantly, *Watters* does not stand for the broad proposition that a party's former attorney asserting or protecting an attorney's lien in pending litigation is barred by sovereign immunity. The critical distinction between the action in *Watters* and intervention in the instant case is made clear in *Watters'* discussion of the grounds for its holding:

> Our conclusion that WMATA is immune from the imposition or enforcement of an attorney's lien is bolstered by the same considerations that have led the courts to hold that public funds are generally immune from equitable liens and garnishments unless expressly permitted by statute. … "The policy behind the rule is manifest: the day-to-day fiscal integrity of local government could not be maintained *if judgment creditors could seize funds that have been earmarked for other purposes.*" … *A lien of the kind Watters seeks to enforce would have the same impact on the public fisc*.

295 F.3d at 41 (emphasis added) (citations omitted). *Watters* thus applies the same principle discussed above, in which the test is whether the relief sought would expend

itself on the sovereign's treasury. *See Dugan*, 372 U.S. at 620. Herman Law, unlike the attorney in *Watters*, has not brought suit seeking a money judgment for collection of its attorney's fees against the Tribe.

In *Knight v. United States*, 982 F.2d 1573 (Fed. Cir. 1993), a case cited in *Watters*, the Court reversed a judgment of the district court where a law firm brought an independent suit seeking a money judgment for collection of attorneys' fees. *Id*. at 1579. In *Knight*, the plaintiff law firm sued the United States after its claim for statutory attorney's fees was denied. *Id*. at 1576. In holding that the suit was barred by sovereign immunity, the Court made clear that, critical to its holding, an independent "naked" suit to enforce lien rights is barred by sovereign immunity:

> This is a claim solely by [law firm] Foster Pepper against the government to enforce asserted lien rights. As such, there must be a waiver of sovereign immunity specifically applicable to the Alaska fee lien statute permitting the action to be brought. In other words, Foster Pepper's independent claim in the suit must have its own consensual base . . . In sum, *this "naked" claim of Foster Pepper for fee collection*, premised entirely upon the Alaska fee lien statute, is [subject to sovereign immunity].

Id. at 1578-79 (emphasis added). Here, in contrast, Herman Law has by operation of law a vested interest in a recovery obtained through the pending litigation in the district court. Unlike the attorney in *Watters*, Herman Law does not bring a "suit" seeking a money judgment in collection of attorneys' fees, nor does it otherwise make any claim against the public fisc of the Yankton Sioux Tribe.

In holding that Herman Law's intervention in the pending action to protect its attorneys' lien interest is barred by sovereign immunity, the District Court erroneously applied an overly broad scope of tribal sovereign immunity, expanding it beyond an independent suit against a tribe. (A194 – 196). The mere fact that Herman Law's lien arises from a contract, consisting of its contingency fee agreement, does not make Herman Law's intervention to protect its attorneys' lien itself a "suit" subject to immunity. Herman Law seeks to assert an interest that is a connate part of pending litigation brought affirmatively by the Tribe. Any other litigant similarly situated, that retained a law firm on a contingency fee basis to bring litigation, would be subject to this right. This lien interest arose in equity by operation of law, at the time that the action was filed in District Court.[16] Accordingly, the sweeping inclusion of Herman Law's attorneys' lien and intervention in pending litigation within the scope of sovereign immunity is contrary to a reasoned analysis of the case law which limits sovereign immunity to "suits"[17] against the Tribe or its officials.

D. Herman Law's Attorneys' Lien Interest is Analogous to Offset or Recoupment

It has been held in instances where an Indian tribe affirmatively brings claims in federal court that it may be subject to theories of offset or recoupment from the proceeds of its claim in the litigation. *Guidiville Rancheria of Cal. v. United States*,

[16] *See* discussion *supra* pp. 13-15.
[17] *See* discussion *supra* pp. 8-12.

case no. 12-cv-1326 YGR, 2015 U.S. Dist. LEXIS 109057 (N.D. Cal. Aug. 18, 2015). "Offsets and claims for 'recoupment' which might otherwise be characterized as compulsory counterclaims, can be asserted in response to a lawsuit filed by a tribe, but such claims cannot seek relief beyond the breadth of the tribe's claims without running afoul of tribal immunity." *Id*. at *15. Such offsets, which would affect only the extent of the sovereign tribe's positive recovery, do not affirmatively reduce the public fisc or treasury of the tribe and therefore are not barred by sovereign immunity. *Id*. at *17. The Court, noting that tribal sovereign immunity is coextensive with that of the United States, compared these circumstances to those where the United States brings suit and faces claims asserted by the defendant in recoupment:

> The United States Supreme Court has long recognized that when the United States brings suit, it waives its sovereign immunity as to all claims asserted by the defendant in recoupment, *i.e*., claims arising from the same facts and seeking relief in the same kind and measure as the sovereign's claims. The waiver of sovereign immunity under these circumstances is based on the notion that recoupment rights arise out of an identity between the claim in recoupment and "some feature of the transaction upon which the [sovereign's] action is grounded."

Id. at *18 (citing and quoting *Bull v. United States*, 295 U.S. 247, 260-63, 55 S. Ct. 695 (1935). Here, Herman Law's lien interest in attorneys' fees are part and parcel of the Tribe's claim in the District Court action. Indeed, Herman Law's attorneys' lien interest is derivative of Yankton Sioux Tribe's claim and may only attach to a portion of a settlement or other positive recovery of the Tribe. It is, accordingly, at least

analogous to a claim of recoupment and consistent with the principle reflected in a recoupment falling outside the scope of sovereign immunity, *i.e.*, it is not potentially a charge against the sovereign's public treasury.

Additionally, in *Guidiville*, the defendant moved for an award of attorney's fees and costs as prevailing party pursuant to a contract action brought against it by the Indian tribe. *Id*. at *6. The Court held that claims for attorney's fees were inherent to the lawsuit and thus not precluded by sovereign immunity:

> [B]y asserting a claim for attorneys' fees under [the contract], [the Tribe] expressly consented to this Court's jurisdiction to decide the issue of attorneys' fees *against* the Tribe as well. … While the Tribe's mere participation in litigation does not waive sovereign immunity for all counterclaims, … the claim for attorneys' fees here is not a counterclaim or other affirmative claim on the treasury of the Tribe. Rather, the Tribe's *liability* to the City for attorneys' fees is directly reciprocal of, and arising from, the Tribe's *claim* against the City for attorneys' fees on the contract.

Id. at *16 – 17 (emphasis in original).

Likewise, in *Elem Indian Colony of Pomo Indians of the Sulphur Bank Racheria v. Ceiba Legal, LLP*, 230 F. Supp. 3d 1146 (N.D. Cal. 2017), the Court held that an award of attorney's fees against the plaintiff tribe under the Lanham Act was not subject to sovereign immunity as it was concomitant to the claim brought by the sovereign tribe in the case:

> Plaintiff chose to assert claims under the Lanham Act. In doing so, it committed to the practical consequences of those claims**,** including "the risk that its position would not

> be accepted, and that the Tribe itself would be bound by an order it deemed adverse."

Id. at 1150 (quoting *United States v. State of Oregon*, 657 F. 2d 10-09, 1015 (9th Cir. 1981)).

The foregoing cases stand for the proposition that where a sovereign tribe has affirmatively brought claims in federal court, it may be bound to determinations of attorneys' fees, among other things, that are part of those court proceedings, notwithstanding its sovereign status. Even when the tribe may perceive such determinations as adverse to its interests, they are not rendered in "suits" against the tribe and therefore not barred by sovereign immunity. These cases are readily distinguishable from those such as *Watters* and *Knight* where law firms brought independent actions for collection of attorneys' fees seeking money judgments against sovereign entities that would necessarily reduce the public treasury if successful. Attorneys representing plaintiffs in lawsuits on a contingency fee basis, including those brought for a sovereign tribe, are entitled to be compensated and to a charging lien which attaches when the lawsuit results in a fund to benefit the plaintiff.[18] Like the rights arising under the Lanham Act in *Elem Indian Colony* or the contract in *Guidiville*, these rights which are brought within the confines of a pending action filed and litigated affirmatively by the sovereign are not "suits" barred by sovereign immunity.

[18] *See* discussion *supra* pp. 13-14.

CONCLUSION

Based on the foregoing, intervention for Herman Law to protect its attorneys' charging lien interest in the pending District Court action, where it formerly represented Plaintiff-Appellee Yankton Sioux Tribe, is not a "suit" subject to tribal sovereign immunity. Because tribal immunity is not implicated, Herman Law's Motion to Intervene in the District Court should have been granted. Appellant Herman Law respectfully requests that the District Court's denial of its Motion to Intervene be reversed and this matter remanded for further proceedings.

Dated October 2, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: October 2, 2019 By: */s/ Stuart Mermelstein*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the ECF system on this 2nd day of October, 2019 on all counsel of record.

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