UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Brendan LaBatte, Plaintiff, v. Karen Gangle, Prosecutor for the SWO; Gary Gaikowski, Chief of Police for SWO; Hon. Ruth Burns, Hon. Michael Swallow, Judges for SWO Tribal Court; All in Their Official Capacity, Defendants.	1:24-cv-1014 **Defendants' Memorandum of Law in Support of Motion to Dismiss**

INTRODUCTION

Brendan LaBatte is an enrolled member of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation ("SWO") who has sued every tribal government actor involved with charging him with driving under the influence in the SWO Tribal Court. LaBatte's complaint challenges the SWO's sovereign rights reserved under the 1867 Treaty, contests two Tribal Court Orders from 2005 and 2016 that do not pertain to him, and raises constitutional issues.

LaBatte's amended complaint suffers from numerous defects requiring dismissal.

- The sole tribal criminal charge LaBatte challenges—driving under the influence—has already been dismissed by the SWO Tribal Court. Thus, LaBatte's complaint is moot and this Court lacks subject matter jurisdiction.
- LaBatte failed to exhaust his tribal court remedies.
- LaBatte did not sue the real party in interest – the SWO. The SWO is a necessary party but cannot be joined because it enjoys sovereign immunity.
- The SWO Tribal Court Judges, prosecutor, and chief of police ("SWO Officials") share the SWO's sovereign immunity. In addition, some of the SWO Officials are entitled to absolute immunity.

- LaBatte's requested relief interferes with an intra-tribal dispute by interpreting and overruling tribal law, tribal actions such as two SWO Supreme Court decisions, and directing discretionary decisions.

- LaBatte fails to state a claim on which relief may be granted. His sole federal remedy under the Indian Civil Right Act, habeas corpus, fails because the SWO is not detaining or imprisoning LaBatte.

The Court should dismiss LaBatte's amended complaint and deny LaBatte's motion for a preliminary injunction.

FACTUAL BACKGROUND

In 2019, the SWO enacted a resolution providing that a tribal member should not be charged under tribal law if they have "been convicted and sentenced by the Federal or a State government for the same offense arising out of the same incident." (Doc. 1-3.)[1]

On October 15, 2022, a police officer for the Sisseton Police Department filed a written report that LaBatte was observed driving "head on with my vehicle," swerving "into a yard," traveling "through two yards, almost hit another vehicle" and continued driving. (Doc 1-4.) LaBatte pulled into a driveway, "took off on foot," and ran "towards Sisseton Housing," which resulted in a request to "Tribal units" to assist. LaBatte admits that Sisseton Housing is Indian Country. (Doc. 1, ¶ 20 n. 4.) LaBatte came back to his vehicle, tried to start it but failed, and "picked up a shooter and tried drinking it." The Sisseton police officer "grabbed Mr. LaBatte's right wrist" but LaBatte pushed off and fled. LaBatte ran towards Sisseton Housing again and

[1] Although LaBatte filed an amended complaint that referenced exhibits (Doc. 19), he did not file any exhibits with it. Defendants refer to the exhibits attached to the original complaint.

"went into a housing unit." "Just as Mr. LaBatte went into housing Tribal units arrived." LaBatte was observed "going into unit 3 in Sisseton housing" where he was arrested by SWO police. (*Id.*)

On October 17, 2022, LaBatte was charged by the SWO prosecutor for driving under the influence and resisting arrest. (Doc. 1-5.) On October 30, 2023, South Dakota charged LaBatte with simple assault against law enforcement officer. (Doc. 1-6.)

On January 23, 2024, LaBatte, through his former defense attorney, filed a motion to dismiss with the SWO Tribal Court. (Doc. 1-7.) On January 25, 2024, the SWO prosecutor filed a response opposing the motion to dismiss because, among other things, LaBatte had yet to be convicted or sentenced by any court. (Billion Decl. Ex. 1.) LaBatte never filed a reply brief.

On February 28, 2024, LaBatte pleaded guilty in Roberts County State Court to simple assault against law enforcement officer. (Doc. 1-6.) LaBatte's guilty plea provided that he would "be incarcerated in the South Dakota State Penitentiary for a period of two (2) years" with one year being suspended if LaBatte met several conditions. (*Id.*) Rather than inform the SWO Tribal Court or the Tribal Prosecutor of the resolution of his state court case, LaBatte filed the present suit.

On July 17, 2024, the Tribal Court dismissed LaBatte's DUI charge based on his incarceration by the State of South Dakota. (Doc. 19 at ¶ 36; Billion Decl. Ex. 2.)

THE SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION

Despite LaBatte's suggestions that the SWO may not exist as a governmental entity (see Doc. 19 at 3 n.3, 6 n.8; Doc. 20 at 1 n.1), the SWO is one of nine federally recognized Indian tribes located in the State of South Dakota. All three branches of the federal government recognize the SWO as an Indian tribe: Congress, Pub. L. No. 93-491, 88 Stat. 1468 (1974), Pub. L. No. 95-398, 92 Stat. 850 (1978), and Pub. L. No. 98-513, 98 Stat. 2411 (1984); the judicial

branch, *South Dakota v. U.S. Dept. of Interior*, 665 F.3d 986, 987 (8th Cir. 2012); *see Sioux Tribe v. United States*, 500 F.2d 458, 463 (Ct. Cl. 1974); and the executive branch, *Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 89 Fed. Reg. 944, Jan. 8, 2024.

In 1975, the Supreme Court addressed a single question in *DeCoteau v. District Court*: "whether the Lake Traverse Indian Reservation in South Dakota, created by an 1867 Treaty between the United States and the Sisseton and Wahpeton bands of Sioux Indians, was terminated and returned to the public domain, by the Act of March 3, 1891." *DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 426 (1975). The Supreme Court held that an 1891 federal allotment law "terminated the Lake Traverse Reservation, and that consequently the state courts have jurisdiction over conduct on non-Indian lands within the 1867 reservation borders." *Id.* at 428.

While *DeCoteau* was pending before the Supreme Court, Congress recognized the boundaries of the Lake Traverse Reservation and enacted Public Law 93-491 authorizing the Secretary of the Interior to acquire lands in trust "within the boundaries of the Lake Traverse Reservation" on behalf of the Tribe for several purposes. After *DeCoteau* was decided, in 1978 Congress amended Public Law 93-491 to broaden the 1974 Act to permit individual members to acquire new trust lands within the boundaries of the Lake Traverse Reservation and to provide the Tribe with a first right of purchase when trust lands within the Lake Traverse Reservation are subject to sale. Pub. L. No. 95-398. The 1978 Act and its legislative history demonstrate Congress's intent to recognize the boundaries of the Lake Traverse Reservation. In addition to the Act, there are also several references in the Senate and House Reports to the Lake Traverse Reservation boundaries. S. Rep. No. 95-983, at 2; H.R. Rep. No. 95-1511, at 2 (1978).

In 1984, Congress enacted additional legislation to protect and promote the Tribe's trust lands within the boundaries of the Lake Traverse Reservation. Pub. L. No. 98-513. Again, the title of the Act expressly refers to the Lake Traverse Reservation. The 1984 Act "shall govern the right to inherit trust or restricted land located with such States and within the original exterior boundaries of the Lake Traverse Indian Reservation as described in article III of the Treaty of February 19, 1867." Pub. L. No. 98-513.

DeCoteau recognized that the SWO's 1966 Constitution provided that: "The jurisdiction of the Sisseton-Wahpeton Sioux Tribe shall extend to lands lying in the territory within the original confines of the Lake Traverse Reservation as described in Article III of the Treaty of February 19, 1867." 420 U.S. at 443. Through its Constitution, the SWO and its members still recognize the boundaries of the Lake Traverse Reservation as the geographical home where the Tribe and its members have established their government and the Tribe's jurisdiction vis-à-vis its members.

LEGAL STANDARD

To survive a motion to dismiss, a complaint must plead facts sufficient to state a claim for relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plausible claim must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id*. (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common

sense." *McShane Constr. Co. v. Gotham Ins. Co*., 867 F.3d 923, 928 (8th Cir. 2017) (quoting *Iqbal*, 556 U.S. at 678-79).

In ruling on a Rule 12(b)(6) motion, the court may consider exhibits attached to the complaint, and other documents integral to a claim, such as contracts in a breach of contract action. *Zean v. Fairview Health Servs*., 858 F.3d 520, 526 (8th Cir. 2017). The court accepts as true only specifically pleaded facts, not legal conclusions or conclusory statements. *See, e.g., McShane*, 867 F.3d at 927. To the extent a properly considered document contradicts the complaint's allegations, the document controls. *Zean*, 858 F.2d at 527; *Chicago Dist. Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463, 466 (7th Cir. 2007).

"A Rule 12(b)(1) motion may either challenge a complaint on its face or the 'factual truthfulness' of its assertions." *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). A facial attack "is based on the complaint alone or on the undisputed facts in the record." *Harris v. P.A.M. Transp., Inc.*, 339 F.3d 635, 637 (8th Cir. 2003). In evaluating a facial challenge to the complaint under Rule 12(b)(1), the "district court may take judicial notice of public records and may thus consider them on a motion to dismiss." *Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003).

ARGUMENT

I. LABATTE'S LAWSUIT IS MOOT AND HE DOES NOT HAVE STANDING TO REPRESENT OTHER TRIBAL MEMBERS.

LaBatte is no longer charged by the SWO Officials with any crime that allegedly occurred on fee land. Yet LaBatte still seeks a declaration, and corresponding injunction, that the SWO Officials – *and even the SWO itself* -- lack "criminal jurisdiction over LaBatte and other tribal members on fee land" within the Lake Traverse Reservation. (Doc. 19, § A & B Prayer for Relief (emphasis added).) Because his DUI charge has been dismissed, LaBatte's claim is moot

and must be dismissed. Furthermore, LaBatte cannot maintain the present suit on behalf of other tribal members.

A. LaBatte's case is moot.

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 470-471 (1982). "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

"The Supreme Court has repeatedly described the mootness doctrine as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Nat'l Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 691 (8th Cir. 2003) (*quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000)); *McCarthy v. Ozark School Dist.*, 359 F.3d 1029, 1035 (8th Cir. 2004). LaBatte's sole complaint against the SWO Officials is that they lack criminal jurisdiction over him when his underlying criminal conduct occurs on fee land. But LaBatte is not currently charged by any of the SWO Officials with committing a crime on fee land. As of this date, LaBatte has not suffered an injury.

There currently exists no real or concrete dispute between LaBatte and the SWO Officials. The Court's Article III inquiry is whether "a real, substantial controversy [exists] between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (citations omitted). LaBatte presents a purely hypothetical dispute about the scope of the SWO's criminal jurisdiction, which is not concrete or definite. *See Zanders v. Swanson*, 573 F.3d 591, 593 (8th

Cir. 2009) ("The difference between an abstract question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test. The basic inquiry is whether the conflicting contentions of the parties present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract."). The SWO Officials are not asserting criminal jurisdiction on fee land against LaBatte because his DUI charge was dismissed and his general aversion to Tribal law is not a cognizable dispute with the SWO Officials. *See Valley Forge*, 454 U.S. at 471 ("The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process."). Any future dispute between LaBatte and the SWO about the SWO's criminal jurisdiction on fee land is purely hypothetical because it hinges on (1) LaBatte's potential future criminal conduct, including the offense committed and where it occurs, (2) potential state court charges, as well as the resolution of those charges, and (3) the SWO Officials' future discretionary decision making on whether to pursue any criminal charges. This Court should not issue an advisory opinion regarding the SWO's jurisdiction.

B. LaBatte does not have standing to assert the rights of third parties.

LaBatte purports to represent all SWO members by challenging the SWO's "policy and law . . . to prosecute SWO members on fee land." (Doc. 19, ¶¶ 1, 2, 5, 7, 31 & 33.) LaBatte seeks a corresponding order declaring that the SWO lacks criminal jurisdiction over "other tribal members on fee land" and enjoining the SWO Officials from proceeding against "any other tribal members." (Doc. 19, § A & B Prayer For Relief.) But LaBatte "generally must assert his own

legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

"Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. 249, 255 (1953); *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). "Thus, a general standing limitation imposed by federal courts is that a litigant will ordinarily not be permitted to assert the rights of absent third parties." *Flast v. Cohen*, 392 U.S. 83, 99 n.20 (1968). LaBatte lacks standing to file suit on behalf of all SWO members. Worse, as discussed above, LaBatte's claim is moot—and he cannot avoid dismissal by asserting claims on behalf of unspecified others with undetermined claims when his claim is nonjusticiable. Just as LaBatte may not obtain an advisory opinion for himself because his case is moot, LaBatte may not attempt to obtain an advisory opinion on behalf of third parties.

II. LABATTE'S COMPLAINT MUST BE DISMISSED BECAUSE HE FAILED TO EXHAUST HIS TRIBAL COURT REMEDIES.

LaBatte challenges the scope of the SWO's jurisdiction, but he never gave the SWO courts an opportunity to rule on the jurisdictional question.

As a prudential rule, "a federal court should stay its hand 'until after the Tribal Court has had a full opportunity to determine its own jurisdiction.'" *Strate v. A-1 Contractors*, 520 U.S. 438, 449 (1997); *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 699 (8th Cir. 2019). "Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'" *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987). "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." *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985).

The "proper respect for tribal legal institutions" "encompasses the development of the entire tribal court system, including appellate courts." *LaPlante*, 480 U.S. at 16-17. "Until appellate review is complete, [an Indian tribe's] Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene." *Gaming World Int'l v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 850-51 (8th Cir. 2003).

Here, it is undisputed that LaBatte has not exhausted his tribal court remedies. He did not present the issue to the Tribal trial court, let alone complete the appellate review process. Because he has failed to exhaust his tribal court remedies, LaBatte may not ask this Court to rule upon the question of tribal jurisdiction.

A plaintiff may be excused from exhausting tribal remedies in limited circumstances, including when exhaustion would be futile because of a lack of an adequate opportunity to challenge the tribal court's jurisdiction in tribal court. *See Nat'l Farmers Union*, 471 U.S. at 856 n.21 (explaining the three narrow exceptions to the tribal exhaustion doctrine). LaBatte's failure to exhaust his tribal court remedies is not excused here. He had an adequate opportunity to challenge the tribal court's jurisdiction in tribal court—he simply did not use it. Exhaustion is not futile simply because case law contrary to LaBatte's position exists. The two cases LaBatte mentions in his complaint were issued by the SWO's Supreme Court in 2005 and 2016. But these older decisions did not address the SWO Tribal Council Resolution enacted in 2019. There is no indication how a tribal court would address the issue in light of the 2019 Resolution, and that question should be left to tribal courts in the first instance. Thus, LaBatte's futility argument fails.

III. THE SWO IS AN INDISPENSABLE PARTY THAT CANNOT BE JOINED, REQUIRING DISMISSAL.

"Tribes are quasi-sovereign nations, and thus tribal governments and tribal officials acting in their official capacities are entitled to sovereign immunity unless that immunity is waived by the tribe or Congress." *LaRose v. United States Dep't of the Interior*, 659 F. Supp. 3d 996, 1001 (D. Minn. 2023).

"Rule 19(a) defines 'required party,' and Rule 19(b) provides factors to consider to determine whether dismissal is required when joinder of such a party cannot feasibly be accomplished." *Two Shields v. Wilkinson*, 790 F.3d 791, 794 (8th Cir. 2015). "As a general matter any party may move to dismiss an action under Rule 19(b). A court with proper jurisdiction may also consider *sua sponte* the absence of a required person and dismiss for failure to join." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 861 (2008).[2]

A. The SWO is a required party under Rule 19(a).

Rule 19(a) provides that a person is a required party to a lawsuit if either of the following two conditions are met:

> (1) in that person's absence, the court cannot accord complete relief among existing parties, or (2) the person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a). Dismissal of a lawsuit under Rule 19 is particularly appropriate when the required party is a sovereign entitled to immunity from suit. "A case may not proceed when a required-entity sovereign is not amenable to suit. These cases instruct us that where sovereign

[2] Rule 19 was amended in 2007 yet "the substance and operation of the Rule both pre- and post-2007 are unchanged." *Pimentel*, 553 U.S. at 856.

immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Pimentel*, 553 U.S. at 867; [3] *see Two Shields*, 790 F.3d at 798 (same).

An Indian tribe is a required party "to actions that might have the result of directly undermining authority they would otherwise exercise." *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 780 (9th Cir. 2005). LaBatte's suit attacks the SWO Supreme Court's decisions, Doc. 19, ¶ 5; the SWO's Code of Laws, *Id.* at ¶ 5 n.1; Tribal Council Resolutions, *Id.* at ¶ 6 n.2; the SWO's interpretation of its 1867 Treaty with the United States, *Id.* at ¶¶ 14 & 34; and the SWO's inherent sovereignty, *Id.* at ¶ 33. The presence of such sovereign rights caused the Supreme Court in *Pimentel* to order that "the action must be dismissed" rather than reverse and remand for further proceedings. *Pimentel*, 553 U.S. at 872. The SWO also claims significant sovereign interests in this lawsuit. First, the SWO has an interest that federal courts do not reverse or otherwise overrule final decisions issued by its own Supreme Court. Second, the SWO has an interest that its Code of Laws are enforced and that any challenge be brought in its own Tribal Court. Third, the SWO has an interest that the Tribal Council's Resolutions are enforced and that any challenge would be brought in its own Court. Fourth, the 1867 Treaty is not a grant of rights but a reservation of rights and the SWO has a sovereign interest in how it may govern under the rights reserved in that Treaty. Fifth, the SWO has a sovereign interest to ensure that its inherent sovereign authority is not attacked in its absence. Sixth, the SWO has a sovereign interest pertaining to a federal court order depriving it of jurisdiction over all of its members.

[3] "In considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries. As with tribal immunity, foreign sovereign immunity began as a judicial doctrine." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998). "Like foreign sovereign immunity, tribal immunity is a matter of federal law." *Id.*

Seventh, the SWO has a sovereign interest that it is entitled to sovereign immunity from suit. Thus, the SWO is a required party under Rule 19(a) because its sovereign interests cannot be adjudicated without it.[4]

1. In the SWO's absence, complete relief is not possible among the existing parties.

The SWO is a necessary party because complete relief is not possible among the existing parties. Fed. R. Civ. P. 19(a)(1)(A). LaBatte seeks a declaration that the "SWO does not have criminal jurisdiction over LaBatte *and other tribal members* on fee land" and also seeks an injunction against the SWO Officials "so that they do not proceed against LaBatte *or any other tribal members*." Doc. 19, Prayer for Relief, §§ (A) & (B) (emphasis added).

The SWO exercises these sovereign rights exclusively and LaBatte's strategy to name only a handful of SWO Officials "would not have complete relief, since judgment against the (officials) would not bind the (sovereign), which could assert its right to" exercise its criminal jurisdiction or refuse to exercise its criminal jurisdiction. *Pit River Home and Agric. Cooperative Assoc. v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994). "Judgment against [SWO] officials would not be binding" on the SWO, "which could continue to assert sovereign powers and management responsibility over the reservation." *Confederated Tribes of the Chehalis Indian Reservation*, 928 F.2d at 1498; *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 276 F.3d 1150, 1156 (9th Cir. 2002). Specifically, the grant of declaratory and injunctive relief against the SWO Officials would "be incomplete unless the Nation is bound by res judicata. The judgment will not bind the . . . Nation in the sense that it will directly order the

[4] Rule 19(c) require LaBatte to name a required party that he has not joined and set forth the reasons for not joining that party. Fed. R. Civ. P. 19(c). He did not identify the SWO or provide any reason for not joining the SWO.

Nation to perform, or refrain from performing, certain acts." *Peabody Western Coal Co.*, 400 F.3d at 780. "There can be no binding adjudication of a person's rights in the absence of that person." *Id.* (*quoting Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 122 (1968)).

For these reasons, the SWO is a required party under Rule 19(a)(1)(A). LaBatte's attempt to challenge the SWO's exercise of criminal jurisdiction under SWO law "cannot be tried behind its back." *Two Shields*, 790 F.3d at 796.

2. After exercising its criminal jurisdiction legally and successfully for decades, the SWO claims a preeminent interest in this lawsuit.

The SWO is also a required party under Rule 19(a)(1)(B). "Rule 19, by its plain language, does not require the absent party to actually *possess* an interest; it only requires the movant to show that the absent party *claims an interest* relating to the subject of the action." *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (9th Cir. 2001) (*quoting Davis v. United States*, 192 F.3d 951, 958 (10th Cir. 1999)). "Rule 19(a)(2) does not require a property right; it requires an interest that will be impaired by the litigation as a practical matter." *American Greyhound Racing Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002). Consistent with *Pimentel* and *Two Shields*, when the absent party is a sovereign, "Rule 19 excludes only those *claimed* interests that are patently frivolous." *Id.*

LaBatte's characterization of the SWO's interest as unlawful "inappropriately presupposes Plaintiffs' success on the merits." *Citizen Potawatomi Nation*, 248 F.3d at 998 (*quoting Davis*, 192 F.3d at 958). "[T]he underlying merits of the litigation are irrelevant under Fed. R. Civ. P. 19(a)." *Id.* "Such an approach is untenable because it would render the Rule 19 analysis an adjudication on the merits." *Davis*, 192 F.3d at 958. Thus, whether the SWO is a

required party does "not require a preliminary factual inquiry into the legality of the underlying statute." *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994).

An Indian tribe "undoubtedly has a legal interest in any adjudication of its governing authority over the reservation." *Quileute Indian Tribe*, 18 F.3d at 1458. "The relief sought in this case would prevent the absent tribes from exercising sovereignty over their reservations allotted to them by Congress. It is difficult to imagine a more intolerable burden on government functions." *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992). The SWO also has "an interest in preserving their sovereign immunity, with its concomitant right not to have their legal duties judicially determined without consent." *Shermoen*, 982 F.2d at 1317.

A disposition of this lawsuit will impair the SWO's sovereign interests, which cannot be done without the SWO's participation:

> The district court also opined that the tribes could have no legally protected interest in gaming that was not permitted by state law. But it was the district court's decision in this case that determined that casino-type gaming was not permitted by state law, and the tribes were entitled to be heard on that issue. We have rejected this kind of circularity in determining whether a party is necessary. It is the party's claim of a protectible interest that makes its presence necessary.

American Greyhound Racing Inc., 305 F.3d at 1024 (citations omitted). Moreover, even though "the tribes are not bound by this ruling under principles of res judicata or collateral estoppel because they are not parties . . . their interests may well be affected *as a practical matter* by the judgment that its operations are illegal." *Id*. at 1024. The "enforcement authorities may consider themselves compelled to act against the tribes," which is not mitigated by the tribes' ability to re-litigate the issue. *Id*. at 1024.

Furthermore, disposition of this lawsuit without the SWO's participation will subject the SWO and the existing parties to a substantial risk of multiple or inconsistent obligations. "Even

partial success by the plaintiffs could subject both the [sovereign parties] and the federal government to substantial risk of multiple or inconsistent legal obligations." *Confederated Tribes of the Chehalis Indian Reservation*, 928 F.2d at 1498. For example, other tribal criminal defendants—past, present, and future—could litigate this issue against other SWO officials or the SWO itself. In addition, the SWO could turn to its legislative, executive, or judicial branch and obtain a determination that Tribal law permits criminal jurisdiction on fee land is in full compliance with applicable law. Given the fact that such criminal jurisdiction has occurred for decades -- without incident and without any change in federal, state, or tribal law – the likelihood of multiple and inconsistent obligations is high.

For these reasons, the SWO is a required party under Rule 19(a).

B. The SWO Cannot be Joined so LaBatte's Lawsuit Should be Dismissed.

"A necessary person must be joined as a party if joinder is feasible." *Davis v. United States Department of the Interior*, 343 F.3d 1282 (10th Cir. 2003). "Indian tribes, however, are sovereign entities and are therefore immune from nonconsensual actions in state or federal court." *Confederated Tribes of the Chehalis Indian Reservation*, 928 F.2d at 1499. Sovereign immunity prevents an Indian tribe "from being joined involuntarily unless they waive their immunity. Any waiver must be unequivocal and may not be implied." *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996). Here, the SWO is entitled to immunity from suit.

LaBatte cannot obtain a judgment that would operate against an Indian tribe by only naming SWO Officials. This "argument strikes us as an attempted end run around tribal sovereign immunity." *Dawavendewa*, 276 F.3d at 1160. A plaintiff cannot "circumvent the barrier of sovereign immunity by merely substituting tribal officials in lieu of the Indian Tribe." *Id.*

"A party is indispensable if in equity and good conscience, the court should not allow the action to proceed in its absence. To make this determination, we must balance four factors." *Dawavendewa*, 276 F.3d at 1161. The Rule 19(b) "list of factors is not, however, exclusive." *Davis*, 343 F.3d at 1289. The "four factors are not rigid, technical tests, but rather guides to the overarching equity and good conscience determination." *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986). Even when the "factors were not clearly in favor of dismissal, the concern for the protection of tribal sovereignty warranted dismissal." *Kescoli*, 101 F.3d at 1311. "We have noted, however, that when the necessary party is immune from suit, there may be very little need for balancing the Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *Quileute Indian Tribe*, 18 F.3d at 1460; *Confederated Tribes of the Chehalis Indian Reservation*, 928 F.2d at 1499.

1. A judgment rendered in the SWO's absence will be prejudicial to the SWO and the SWO Officials.

"The first factor of Rule 19(b) is concerned with whether the nonparty would be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor." *United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249, 1251 (8th Cir. 1998). "The first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a): a protectible interest that will be impaired or impeded by the party's absence." *Wilbur v. Locke*, 423 F.3d 1101, 1114 (9th Cir. 2005); *Davis*, 343 F.3d at 1291; *American Greyhound Racing Inc.*, 305 F.3d at 1024-25; *Kescoli*, 101 F.3d at 1311.

With regard to the first factor, the Supreme Court determined that it is error to "not accord proper weight to the compelling claim of sovereign immunity." *Pimentel*, 553 U.S. at 869. The SWO will "suffer severe prejudice by not being a party to an action which could

deplete the (sovereign's) interests or jeopardize their authority to govern the lands in question." *Quileute Indian Tribe*, 18 F.3d at 1460.

2. The prejudice to the SWO cannot be lessened or avoided by protective provisions, shaping relief, nor any other measure.

LaBatte seeks declaratory and injunctive relief that the SWO's exercise of criminal jurisdiction is illegal on fee lands. For this reason alone, the prejudice to the SWO cannot be lessened or avoided:

> There is no middle ground – either the transactions violate statutory requirements and are void . . . or they comply with the law and are valid. The tribes are ultimately involved in these transactions and it would be impossible to fashion protective provisions to insulate them from the prejudice an adverse judgment would inflict.

United States ex rel. Hall v. Tribal Development Corp., 100 F.3d 476, 480 (7th Cir. 1996) (*quoting In re U.S. ex rel. Hall*, 825 F. Supp. 1422, 1429 (D. Minn. 1993) *aff'd* 27 F.3d 572 (8th Cir. 1994) *cert. denied* 513 U.S. 1155 (1995)).

The SWO's ability to intervene does not influence the prejudice factor. *Confederated Tribes of the Chehalis Indian Reservation*, 928 F.2d at 1500. The argument that an Indian tribe "could have intervened if it wished" has been rejected. *Wilbur*, 423 F.3d at 1114. "Since intervention would require a waiver of sovereign immunity, we cannot require the Council to intervene to minimize the potential prejudice." *Pit River Home and Agric. Cooperative Assoc.*, 30 F.3d at 1101.

An argument that "any prejudice to the Tribe is not legally cognizable" likewise goes "to the merits of their claim, rather than the potential harm to the Tribe if Defendants lose." *Davis*, 343 F.3d at 1292.

3. A judgment rendered in the SWO's absence will not be adequate.

The Rule's reference to an adequate judgment addresses the "public stake in settling disputes by wholes, whenever possible." *Pimentel*, 553 U.S. at 870 (quotations omitted); *see Davis*, 343 F.3d at 1292-93 ("The Supreme Court has explained that Rule 19(b)'s third factor is not intended to address the adequacy of the judgment from the plaintiff's point of view."). "Rather, the factor is intended to address the adequacy of the dispute's resolution. The concern underlying this factor is not the plaintiff's interest but that of the courts and the public in complete, consistent, and efficient settlement of controversies, that is the public stake in settling disputes by wholes, whenever possible." *Davis*, 343 F.3d at 1293. The public's interest "in settling the dispute as a whole" would not be served when the sovereign parties "would not be bound by the judgment in an action where they were not parties." *Pimentel*, 553 U.S. at 870. Further, "the ability to accord relief dwindles in importance when compared with the significance of the Tribe's interest in the contracts at issue here." *Tribal Development Corp.*, 100 F.3d at 480.

Here, the SWO will continue to be free to exercise, or not exercise, criminal jurisdiction under Tribal law as it has done for decades. Only the named SWO officials would be bound by a judgment entered against them. As a result, even a judgment in LaBatte's favor would not resolve the jurisdictional question as a whole.

4. LaBatte has an adequate remedy if the action is dismissed for nonjoinder.

As an initial matter, LaBatte needs no further relief because his DUI charge has already been dismissed. But even if that charge were still pending, LaBatte would have multiple options

to seek dismissal of his tribal criminal case. LaBatte could meet with the SWO prosecutor to discuss the exercise of her discretion. LaBatte could also exhaust his Tribal Court remedies.

Even if these remedies are deemed inadequate, then "[d]ismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity." *Pimentel*, 553 U.S. at 872. "A plaintiff's inability to seek relief, however, does not automatically preclude dismissal, particularly where that inability results from a tribe's exercise of its right to sovereign immunity." *United States ex rel. Hall*, 100 F.3d at 480-81.

The SWO's sovereign immunity outweighs LaBatte's pursuit of an adequate remedy:

> The fourth factor would ordinarily favor the plaintiffs; there is no adequate remedy available to them if this case is dismissed for lack of joinder of indispensable parties. But this result is a common consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims.

American Greyhound Racing Inc., 305 F.3d at 1025. "Our prior cases turn not on a disrespect for a plaintiff's right of access to the courts, but on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Wilbur*, 423 F.3d at 1116. Thus, there is a "strong policy favoring dismissal when a court cannot join a tribe because of sovereign immunity." *Citizen Potawatomi Nation*, 248 F.3d at 1001 *see Kickapoo Tribe v Babbitt*, 43 F.3d 1491, 1500 (D.C. Cir. 1995) (Gaming Compact makes the State of Kansas a required party, which is immune from suit, "thereby cabining the district court's discretion to consider factors under Rule 19(b).").

Because the SWO is a necessary party that cannot be joined due to sovereign immunity, the Court must dismiss LaBatte's complaint.

IV. THE SWO OFFICIALS ARE IMMUNE FROM SUIT.

Even if the SWO were not a required party, the named SWO Officials are immune from suit.

A. Tribal Court Judges Ruth Burns and Michael Swallow are entitled to absolute judicial immunity.

"Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Pierson v. Ray*, 386 U.S. 547, 553–54 (1967). "This immunity applies even when the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Id.* at 554. "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher*, 80 U.S. 335, 347 (1871); *Hamilton v. City of Hayti, Missouri*, 948 F.3d 921, 925 (8th Cir. 2020). "Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco*, 502 U.S. 9, 11 (1991); *Justice Network, Inc. v. Craighead County*, 931 F.3d 753, 759 (8th Cir. 2019).

LaBatte alleges that Chief Judge Burns and Judge Swallow are judges "for the SWO Tribal Court system" and share responsibility "to enforce the law and policy of SWO of having concurrent jurisdiction on fee lands." Doc. 19 at ¶ 8. But Judge Swallow has not taken any action relevant to LaBatte. The Complaint states no claim for relief against Judge Swallow whatsoever.

Chief Judge Burns dismissed the driving under the influence charge in question. This Court recently determined that a state court judge was entitled to absolute immunity from suit.

Neil Bergeson v. McNeece, Case No. 1:21-cv-01026-CBK, 2021 WL 5867744 (D.S.D. Dec. 10, 2021) (recognizing that Judge McNeece enjoyed absolute immunity for acts within his discretion as a state court judge).

It is not enough for LaBatte to argue that Chief Judge Burns or Judge Swallow exercised their judicial functions in a manner that exceeded the SWO Tribal Court's jurisdiction. "Because some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978). Chief Judge Burns and Judge Swallow are entitled to absolute judicial immunity.

B. SWO Prosecutor Karen Gangle enjoys absolute prosecutorial immunity.

A prosecutor is entitled to absolute immunity for the decision to bring an indictment, regardless of whether the prosecutor has probable cause. *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 n.5 (1993). When discussing the "outer limits of the prosecutor's absolutely immunity," the Supreme Court noted their "cases have confirmed the importance to the judicial process of protecting the prosecutor when serving as an advocate in judicial proceedings." *Kalina v. Fletcher*, 522 U.S. 118, 125 (1997). "To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of

the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Imbler v. Pachtman*, 424 U.S. 409, 427–28 (1976).

Karen Gangle is the SWO's chief prosecutor. Doc. 19, ¶ 6. Prosecutor Gangle initially charged LaBatte for a crime that may have occurred, in part, on fee land but later dismissed that charge. Because these actions were taken in her official capacity as a prosecutor, she is entitled to absolute immunity. This Court recently dismissed a similar lawsuit that included a state court judge and prosecuting attorney who were entitled to absolute immunity from suit. *Neil Bergeson v. South Dakota*, Case No. 1:21-cv-01026-CBK, 2021 WL 5771183 (D.S.D. Dec. 6, 2021).

C. Each SWO Official shares the SWO's sovereign immunity from suit.

LaBatte's Complaint specifies that each SWO Official is sued in their official capacity. The SWO Officials share in the SWO's immunity because "[a] suit against a governmental actor in his official capacity is treated as a suit against the government itself." *Brokinton v. City of Sherwood, Ark.*, 503 F.3d 667, 674 (8th Cir. 2007).

The starting point, then, is that "tribal officers are clothed with the Tribe's sovereign immunity," *Baker Elec. Co-op v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994), and "extends to tribal officials who act within the scope of the tribe's lawful authority." *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1131 (8th Cir. 2019) *see Miller v. Wright*, 705 F.3d 919, 927-28 (9th Cir. 2013) ("Tribal sovereign immunity extends to tribal officials when acting in their official capacity and within the scope of their authority."). Thus, "tribal officials are immunized from suits brought against them *because of* their official capacities -- that is, because the powers they possess in those capacities enable them to grant [LaBatte] relief on behalf of the tribe." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008).

LaBatte ignores that the SWO Officials are not taking any action against him at all for his criminal conduct on fee land. Regardless, "a plaintiff cannot circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 714, 727 (9th Cir. 2008). Here, the SWO Officials share in the SWO's sovereign immunity from suit.

D. LaBatte is not entitled to relief under *Ex parte Young*.

The *Ex parte Young* doctrine provides a narrow exception to the general rule that tribal government officials cannot be sued in their official capacity. *See Ex parte Young*, 209 U.S. 123 (1908). The exception "applies only to prospective relief, does not permit judgments against [tribal] officers declaring that they violated federal law in the past, and has no application in suits against [Indian tribes] and their agencies, which are barred regardless of the relief sought." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf*, 506 U.S. 139, 146 (1993).

Ex parte Young is inapplicable to LaBatte's claims involving the SWO Officials' actions taken under SWO law. *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F. Supp. 740, 746 (D.S.D. 1995). Further, the *Ex Parte Young* exception would not apply because LaBatte's Complaint fails to allege that any SWO Official is continuing to violate a federal law. *Cory v. White*, 457 U.S. 85, 91 (1982). And *Ex parte Young* does not apply when the judgment sought "implicates special sovereignty interests." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287 (1997).

LaBatte cannot proceed under *Ex parte Young* when the judgment "would 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." *Dawavendewa*, 276 F.3d at 1160 (*quoting Shermoen*, 982 F.2d at 1320). Here, the SWO Officials lack the authority to grant the relief requested by

LaBatte. The SWO Officials cannot independently or collectively overturn the SWO's interpretation of the 1867 Treaty, the SWO Supreme Court's decisions, the SWO Codes of Law, nor the Tribal Council Resolution.

V. FEDERAL COURTS LACK JURISDICTION TO DECLARE OR ENFORCE TRIBAL LAW.

Federal courts lack jurisdiction to resolve intra-tribal disputes. *See Runs After v. United States*, 766 F.2d 347, 352-53 (8th Cir. 1985) (holding that interpretation of tribal resolutions was a matter for tribal courts); *Sac and Fox Tribe of the Miss. in Iowa v. Bear*, 258 F. Supp. 2d 938, 944 (N.D. Iowa 2003) (rejecting an attempt to frame an alleged violation of tribal law as a RICO claim), *aff'd* 340 F.3d 749 (8th Cir. 2003). LaBatte has filed a lawsuit that "would necessarily require the district court to interpret the tribal constitution and tribal law. We believe the district court correctly held that resolution of such disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court." *Runs After*, 766 F.2d at 352.

"Because tribal governance disputes are controlled by tribal law, they fall within the exclusive jurisdiction of tribal institutions." *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi of Iowa*, 609 F.3d 927, 943 (8th Cir. 2010)*; see also Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983). "Jurisdiction to resolve internal tribal disputes [and] interpret tribal constitutions and laws … lies with Indian tribes and not in the district courts." *Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003).

"The Supreme Court has repeatedly recognized Congress's commitment to a policy of supporting tribal self-government and self-determination. Consistent with this policy, the Supreme Court has determined that tribal courts are best qualified to interpret and apply tribal law. Thus, in this Circuit, we defer to the tribal courts interpretation of tribal law." *Prescott v.*

Little Six, Inc., 387 F.3d 753, 756 (8th Cir. 2004) (internal citations omitted); *see also Runs After*, 766 F.2d at 352 ("[D]isputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court."); *Weeks Const., Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668, 673 (8th Cir. 1986) ("dispute arose on the reservation and raises questions of tribal law interpretation within the province of the tribal court.").

LaBatte's complaint involves a (now moot) dispute between a Tribal member and the SWO over Tribal law and the extent to Tribal jurisdiction under the Tribal Constitution. This is a question of tribal law exclusively committed to the SWO's jurisdiction.

VI. LABATTE FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

"As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). That exemption extends to the Tribal Court. *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (refusing to apply the 5th Amendment to actions of the Cherokee Nation criminal court).

Congress enacted the Indian Civil Rights Act ("ICRA") in 1968. 25 U.S.C. §§ 1301 *et. seq*. In extending constitutional-type limitations to tribal governments, however, Congress "selectively incorporated, and in some instances, modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of the tribal governments." *Martinez*, 436 U.S. at 62. For example, the ICRA's modification of the Equal Protection Clause "guarantees 'the equal protection of *its* [the tribe's] laws,' rather than of '*the* laws." *Id.* at 63 n.14 (emphasis in original).

"Congress' failure to provide remedies other than habeas corpus [in the ICRA] was a deliberate one." *Id.* at 61. Instead, "[t]ribal forums are available to vindicate rights created by the

ICRA." *Id.* at 65. "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." *Id.*

The "exclusive means for federal-court review" of a violation of ICRA is through a petition for habeas corpus. *Id.* at 67. ICRA "does not [expressly or] impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers." *Id.* at 51. LaBatte admits that he has been detained or imprisoned by the State of South Dakota (Doc. 19, ¶ 28), not the SWO. Because LaBatte is not detained or imprisoned by the SWO Officials, he did not—and cannot—bring a writ of habeas corpus against the SWO. *Runs After v. United States*, 766 F.2d 347, 353 (8th Cir. 1985). Thus, LaBatte has not been "detain[ed] by order of an Indian tribe" in a manner contemplated by 25 U.S.C. § 1303. *Moore v. Nelson*, 270 F.3d 789, 790 (9th Cir. 2001).

Finally, the SWO enjoys sovereign status. The SWO exercises sovereignty "over both their members and their territory," *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)), and the SWO retains its attributes except to the extent they have been yielded up by treaty, restricted by Congress, or implicitly divested as incompatible with tribes' status as domestic dependent nations. *Id.* Membership and territory provide independent bases for the SWO's exercise of tribal power. While they often overlap, member-based jurisdiction exists independent of territory. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.02[1][c], at 603 (Nell Jessup Newton *et al*. eds. 2012) ("COHEN").

"It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members." *Wheeler*, 435 U.S. at 322. Tribal membership is a political relationship. *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974). As in the international context, the scope of that

jurisdiction may be "more constrained" outside tribal territory than within, COHEN § 4.01[2][d], at 219, but there is nothing suspect about the overall principle.

> [N]on-territorially-based jurisdiction is analogous to the principle of international law recognizing a state's authority to prescribe law to regulate the conduct of its citizens outside of the state's territory. The more closely a matter is related to core tribal interests, the stronger the case is for recognition of jurisdiction based on membership in the tribe.

Id. at 219 & n.135 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW); *see Skiriotes v. Florida*, 313 U.S. 69, 77 (1941) (noting that "[i]f the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress").

For these and other reasons, the Sixth Circuit Court of Appeals held that Indian tribes possess the inherent sovereign authority to try and punish members "on the basis of tribal membership even if criminal conduct occurs beyond a tribe's Indian country." *Kelsey v. Pope*, 809 F.3d 849, 860 (6th Cir. 2016). While the *DeCoteau* holding provides South Dakota with jurisdiction on fee lands within the Lake Traverse Reservation, that same Reservation is not deemed extra-territorial to the SWO. The SWO's Constitution, which was adopted by its members and approved by the federal government, provides that the SWO's jurisdiction extends to the Lake Traverse Reservation. Art. I, SWO Constitution. Many members receive benefits from the SWO even though they live on fee lands within the Lake Traverse Reservation. Additionally, since *DeCoteau*, Congress treats the Lake Traverse Reservation as the SWO's home lands. Pub. L. No. 95-398, 92 Stat. 850 (1978); Pub. L. No. 98-513, 98 Stat. 2411 (1984). Consequently, by virtue of LaBatte's membership with the SWO, he has consented to be subject to SWO laws, including criminal laws, within the Lake Traverse Reservation.

Finally, LaBatte has simply failed to state a claim under either the Fourth Amendment or the Equal Protection Clause. The Amended Complaint does not establish an unreasonable seizure—taking the exhibits as true, LaBatte assaulted Tribal police in Tribal housing. (Doc. 1-5.) Those facts unquestionably establish the basis for his arrest. Furthermore, LaBatte's Amended Complaint does not specify any type of suspect classification that might sustain an Equal Protection claim.

CONCLUSION

This lawsuit must be dismissed. The Tribal DUI charge has been dismissed so LaBatte's complaint is moot. Even if the charge remained pending, numerous jurisdictional and legal defects require dismissal. The Court should dismiss LaBatte's complaint and deny his motion for a preliminary injunction.

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Respectfully submitted,

Robins Kaplan LLP
By: */s/ Timothy W. Billion*
Brendan V. Johnson (# 3263)
Timothy W. Billion (# 4641)
150 East 4th Place, Suite 704
Sioux Falls, SD 57104
Telephone: (605) 335-1300
Facsimile: (605) 740-7199
Email: BJohnson@RobinsKaplan.com
TBillion@RobinsKaplan.com

and

Greg Paulson (# 0250478)
Brodeen & Paulson PLLP
610 Searles Street
New Brighton, MN 55112
Telephone: (612) 226-5968
Email: Greg@BrodeenPaulson.com
Pro Hac Vice

and

Megan LaFromboise (# 4874)
Shaun Eastman (# 4055)
Sisseton-Wahpeton Oyate
Legal Department
P.O. Box 509
Veterans Memorial Drive
Agency Village, SD 57262
Telephone: (605) 698-3911
Email: MLaFromboise@SWO-NSN.GOV
ShaunE@SWO-NSN.GOV

Attorneys for Defendants