UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

MAZASKA OWECASO OTIPI FINANCIAL, INC.,

Plaintiff,

Case No. 5:25-cv-05013-CCT

vs.

LILLIAN "TONI" MONTILEAUX,

Defendant.

OGLALA SIOUX TRIBE'S *AMICUS CURIAE* BRIEF IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER FILED BY MAZASKA OWECASO OTIPI FINANCIAL, INC.

COMES NOW the Oglala Sioux Tribe, without waiving its sovereign immunity or consenting to suit, and submits this *Amicus* Brief in Opposition to the Motion for Temporary Restraining Order filed by Mazaska Owecaso Otipi Financial, Inc.

INTEREST OF *AMICUS CURIAE*

The Oglala Sioux Tribe ("Tribe") is a federally recognized Indian tribe that reserved its original, inherent right to self-government through the Fort Laramie Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851), and the Fort Laramie Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868). The Tribe is a constituent tribe of the Great Sioux Nation, and its reservation is within the territory "set apart for the absolute and undisturbed use and occupation" of the Great Sioux Nation, as a "permanent home," in the Fort Laramie Treaty of 1868. Arts. II, VI, XV.

The Tribe has an interest in preserving and protecting its inherent, sovereign governmental authority over its members and its territory, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982); *United States v. Mazurie*, 419 U.S. 544, 557 (1975), including the Tribe's authority to regulate and adjudicate disputes arising out of the activities of nonmembers on trust land and the

on-reservation contracts and commercial dealings of nonmembers with the Tribe and its members, *Montana v. United States*, 450 U.S. 544, 565-566 (1981).

BACKGROUND

A. The Oglala Sioux Tribe

"The [Oglala Sioux] Tribe has roughly 51,000 enrolled tribal members and is headquartered on the Pine Ridge Indian Reservation (the "Reservation"), which encompasses approximately 3.1 million acres in southwestern South Dakota." *Oglala Sioux Tribe v. United States*, 674 F. Supp. 3d 635, 641–42 (D.S.D. 2023). The boundaries of the Reservation were established by the Act of March 2, 1889, 25 Stat. 889.

The Tribe "exercise[s] 'inherent sovereign authority'" and "remain[s] a 'separate sovereign[] pre-existing the [United States] Constitution.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (first quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991), then quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). It has the right "to make [its] own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

The Tribe organized under Section 16 of the Indian Reorganization Act, 48 Stat. 984 (Jun. 18, 1934), *codified as amended at* 25 U.S.C. § 5123, by adopting a federally-approved Constitution and By-Laws. *See* O.S.T. Const. & By-Laws (Jan. 6, 1936), *as amended* Dec. 24, 1969, Dec. 3, 1985, Jul. 11, 1997, and Dec. 18, 2008. A copy of the Tribe's Constitution is attached to the Declaration of Stacy Two Lance (Apr. 30, 2025) (attached hereto as **Exhibit A**) at pages 4-56.

B. The Tribe's Regulation of On-Reservation Businesses

The Oglala Sioux Tribal Council is the governing body of the Tribe. *See* O.S.T. Const., Art. III, § 1 (Two Lance Decl. at 6). The Tribe's Constitution vests authority in the Tribal Council

to enact laws managing the economic affairs of the Tribe, levying taxes, regulating the conduct of trade and the use and disposition of property on the Reservation, governing the conduct of persons on the Reservation, and protecting and promoting the health and general welfare of the Tribe and its members, among other things. O.S.T. Const., Art. IV, § 1(f), (h), (k), (m), (w) (Two Lance Decl. at pp. 8-9).

The Tribal Council has exercised its constitutional authority to regulate businesses on the Reservation, through licensing, taxation, and other means. *See*, *e.g.*, O.S.T. Ord. No. 92-13 (Nov. 9, 1992) (Two Lance Decl. at pp. 57-61), *as amended by* O.S.T. Ord. No. 17-17 (Jun. 6, 2017) (Two Lance Decl. 103-108) (tribal business license laws); O.S.T. Law and Order Code, ch. 44 (tribal business code), *quoted in part in Mazaska Owecaso Otipi Financial, Inc. v. Montileaux*, Case No. CIV-2022-0388, Decision on Appeal at p. 5 (O.S.T. Supreme Ct. May 30, 2024) (Doc. 1-4 at p. 5). *See also* Declaration of Robert Palmier (Apr. 30, 2025) (attached hereto as **Exhibit B**) at p. 1 (discussing tribal business license and tax laws).

The Tribe's laws impose fees on persons and entities, including nonmembers, doing business on the Reservation and require all such persons and entities to have an Oglala Sioux Tribal Business License. *See* O.S.T. Ord. No. 92-13 at p. 2 (Two Lance Decl. at p. 58); O.S.T. Ord. No. 17-17 at p. 1 (§ 1) (Two Lance Decl. at p. 103). The Tribe's laws require businesses to report and remit tribal taxes to the Tribe. *See* O.S.T. Ord. No. 92-13 at p. 3 (Two Lance Decl. at p. 59).

The Tribe's Revenue Department collects the Tribe's business license fees and taxes from persons and entities that conduct business on the Reservation, including nonmembers. Palmier Decl. at p. 1.[1]

[1] Some of the Tribe's taxes are collected pursuant to comprehensive tax collection agreements the Tribe has entered with the State of South Dakota. *See* South Dakota Dept. of Revenue, "Tribal" (Jul. 2023), *available at https://dor.sd.gov/media/5cnnz2ww/tribal.pdf* (last visited May 6, 2025).

The Revenue Department has the authority, under tribal law, to close a business operating on the Reservation without a business license. O.S.T. Ord. No. 17-17 at p. 2 (§ 3) (Two Lance Decl. at p. 104). The Revenue Department also has the authority to revoke a business license and to close a business that fails to pay tribal taxes. O.S.T. Ord. No. 17-17 at p. 3 (§ 4) (Two Lance Decl. at p. 105).

The Tribal Council has enacted laws specifically regulating the extension of credit and leasehold mortgages on the Reservation. *See* O.S.T. Ord. No. 19-38 (Two Lance Decl. at pp. 109-135) (tribal credit laws); O.S.T. Ord. No. 96-15 (Sep. 17, 1996) (Two Lance Decl. at pp. 62-80), *as amended by* O.S.T. Ord. No. 98-10 (Apr. 29, 1998) (Two Lance Decl. at pp. 81-97) (tribal leasehold mortgage laws).

C. The Tribal Courts and Their Jurisdiction over On-Reservation Businesses

"Tribal courts play a vital role in tribal self-government," and "the Federal Government has consistently encouraged their development." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987). Congress has declared that:

> tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments;
>
> Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands; and
>
> enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency.

Indian Tribal Justice Technical and Legal Assistance Act, Pub. L. 106-559, 114 Stat. 2778, § 2(5)-(7) (Dec. 21, 2000), *codified at* 25 U.S.C. § 3651(5)-(7). *Accord*, Indian Tribal Justice Act, Pub. L. 103-176, 107 Stat. 2004, § 2 (Dec. 3, 1993), *codified at* 25 U.S.C. § 3601.

Pursuant to its Constitution, the Tribe has established a tribal judiciary, consisting of the Oglala Sioux Tribal (Inferior) Court and the Oglala Sioux Tribe Supreme Court. O.S.T. Const., Art. IV, § 1(k) (Two Lance Decl. at p. 9).[2] The judicial power of the Tribe is vested in these Tribal Courts, which provide for the maintenance of law and order and the administration of justice on the Pine Ridge Indian Reservation. O.S.T. Const., Art. V, § 1 (Two Lance Decl. at p. 10). The principle of separation of powers is enshrined in the Tribe's Constitution. *Id.*

The Tribe's Constitution secures the right of all persons "to petition for a redress of grievances." O.S.T. Const., Art. XII, § (a) (Two Lance Decl. at p. 17). This includes the right to access the Tribal Courts. *See BE & K Const. Co. v. NLRB,* 536 U.S. 516, 524–25 (2002) (holding that First Amendment's petition clause secures the right to access the courts, which is "one of the most precious of the liberties safeguarded by the Bill of Rights"). The Tribe's Constitution also secures the right of all persons to "equal protection of [the Tribe's] laws … and due process of law," O.S.T. Const., Art. XII, § (h) (Two Lance Decl. at p. 18), and these constitutional guarantees provide further support for the right of all persons to access the Tribal Courts, *see Christopher v. Harbury,* 536 U.S. 403, 415 n. 12 (2002).

The Tribal Courts follow rules of civil procedure, appellate procedure, and evidence similar to the federal rules. South Dakota authorizes its courts to give comity to the decisions of the Tribal Courts. *See* S.D.C.L. § 1-1-25; *Gesinger v. Gesinger*, 531 N.W.2d 17 (S.D. 1995); *One Feather v. O.S.T. Pub. Safety Comm'n*, 482 N.W.2d 48, 49 (S.D. 1992).

The Tribe's courts have the inherent authority to adjudicate civil disputes arising on the Reservation, *see*, *e.g.*, *Iowa Mut. Ins. Co.*, 480 U.S., at 18-19; *Williams,* 358 U.S. at 223, including

[2] The Oglala Sioux Tribal (Inferior) Court is referred to as the "Tribal Court," and the Oglala Sioux Tribe Supreme Court is referred to as the "Tribal Supreme Court." Collectively, these courts are referred to as the "Tribal Courts."

civil disputes arising out of the activities of nonmember businesses "who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," *Montana v. United States*, 450 U.S. 544, 565-566 (1981) (citations omitted), and the conduct of nonmember businesses that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *id*. at 566 (citations omitted). *See Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (noting that "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts") (internal citation omitted).

D. Mazaska and Its Consensual Relationships with the Tribe and Its Members

Mazaska Owecaso Otipi Financial, Inc. ("Mazaska") is a Native Community Development Financial Institution ("CDFI"). *See* Mazaska, "About Owecaso Otipi Financial," *available at* https://www.mazaskacdfi.org/ (last visited May 2, 2025) (attached to Declaration of Steven Gunn (May 4, 2025), attached hereto as **Exhibit C**, at p. 3). *See also* Mazaska CDFI Awardee File (Doc. 13-5 at p. 1).

Mazaska is organized as a non-profit corporation under the laws of the State of South Dakota. *See* Mazaska Certificate and Articles of Incorporation (Doc. 1-3 at pp. 137-146; Doc. 1-1 at pp. 14-21). It appears that all of the officers and directors of Mazaska are members of the Tribe. *Montileaux v. Mazaska Owecaso Otipi Financial, Inc.*, Case No. CIV-21-0388, Order and Memorandum Decision at p. 5 (O.S.T. Tr. Ct. Aug. 10, 2022) (Doc. 1-2 at p. 5).

The principal office of Mazaska is in Pine Ridge, South Dakota, on the Reservation. *See* Mazaska Annual Report (Aug. 2, 2023) (Doc. 1-3 at p. 145-146). Specifically, Mazaska's office is located on approximately 0.110 acres of tribal trust land within Tract TR 11514 that is leased by the Tribe to Mazaska. *See* O.S.T. Res. No. 12-20XB (Mar. 16, 2012) (Two Lance Decl. at pp.

136-137) (authorizing lease of tribal trust land within Tract TR 11514 to Mazaska for 25 years at the rate of $100 per year); Title Status Report ("TSR") for Tract TR 11514 at p. 4 (Gunn Decl. at p. 35) (showing Business Lease No. 5U15141236 to Mazaska beginning Jan. 1, 2012, and expiring Dec. 31, 2036, for 0.110 acres within Tract TR 11514); Business Lease No. 5U15141236 (Feb. 16, 2002) (Gunn Decl. at pp. 40-52). Tract TR 11514 is held in trust by the United States for the Tribe, whose ownership interest is 100%. TSR for Tract TR 11514. at p. 3 (Gunn. Decl. at p. 34).

The purpose of the Tribe's lease of tribal trust land to Mazaska is to provide office space for Mazaska so it can provide lending services to tribal members on the Reservation. *See* O.S.T. Res. No. 12-20XB at p. 1 (Two Lance Decl. at p. 136); Business Lease No. 5U15141236 at p. 3 (Feb. 16, 2002) (Gunn Decl. at p. 42). The lease is governed by federal and tribal law. 25 C.F.R. § 162.014(a)(1),(2).

Mazaska states that its "mission is to create safe and affordable housing opportunities on the Pine Ridge Indian Reservation by providing loans, training, and financial insight to empower our native people to build assets and create wealth." *See* Mazaska, "About Owecaso Otipi Financial" (Gunn Decl. at p. 3). Mazaska "serves members of the Oglala Sioux Tribe living on, or in communities adjacent to, the Pine Ridge Indian Reservation," among others. *Id*.

For over two decades, Mazaska has provided loans to members of the Tribe who live on or near the Reservation. *See* Gunn Decl. at p. 3; Mazaska Articles of Incorporation at pp. 1-2 (Doc. 1-1 at pp. 16-17; Doc. 1-3 at pp. 139-140). *See also* Pl. Compl. (Doc. 1) at p. 5. Mazaska's loan documents expressly state that they are governed by the laws of the Tribe and that the Tribe's courts have "sole and exclusive jurisdiction with respect to all controversies or claims relating to or arising out of" the loans. *See* Note (May 11, 2011) at p. 3 (Doc. 1-1 at p. 64).

The Tribe has "established a partnership with Mazaska." O.S.T. Res. No. 12-20XB at p. 1 (Two Lance Decl. at p. 136). The Tribe has pledged financial support for Mazaska's activities. *See* O.S.T. Res. No. 17-63XB (Jun. 22, 2017) (Two Lance Decl. at pp. 138-139) (pledging $100,000 to support Mazaska).

Mazaska has paid Oglala Sioux Tribal Business License fees to the Tribe's Revenue Department in the amount of $16,000. *See* Palmier Decl. at p. 1. *See also id*. at p. 3 (Revenue Department invoice) and p. 4 (Mazaska check).

In all of these ways, Mazaska has entered consensual relationships with the Tribe and its members through contracts, commercial dealings, and other arrangements.

E. Montileaux's Homesite on the Reservation

Lillian "Toni" Montileaux ("Montileaux") is a tribal member who resides on trust land on the Reservation. Her homesite is on two separate tracts of trust land: Tract T [Tribal] 1373-N, which is tribal trust land owned by the Tribe, and Tract 1373-F, which is individual Indian allotted trust land owned by Montileaux and her mother, Annie. *See* Map (Gunn Decl. at p. 4). *See also* Map (Doc. 1-3 at p. 151) (showing approximate location of Montileaux home).

Montileaux leases 2.5 acres within Tract T 1373-N from the Tribe. *See* Residential Lease No. 2T1373N520 (May 26, 2015) (Gunn Decl. at p. 5); Doc. 1-3 at pp. 152. Montileaux's lease runs through 2040. Modification (May 26, 2025) (Gunn Decl. at p. 11); Doc. 1-3 at p. 156.

The Title Status Report ("TSR") for Tract T 1373-N shows that the tract consists of 5.0 acres of land that is held in trust by the United States for the benefit of the Oglala Sioux Tribe. TSR for T 1373-N (Apr. 30, 2025) (Gunn Decl. at pp. 12-17).

A TSR is a report issued by the Land Titles and Records Office ("LTRO") within the Bureau of Indian Affairs ("BIA") after a title examination of the BIA's repository of title

documents for Indian land, which is the "record of title." 25 C.F.R. § 150.2. "All title documents for Indian land must be recorded in the record of title." 25 C.F.R. § 150.201(a). "Title document means any document that affects the title to or encumbers Indian land, including … encumbrances[,] such as mortgages…" 25 C.F.R. § 150.2. The LTRO is responsible for recording title documents (including mortgages), maintaining the record of title, and providing copies of title documents and TSR's for all land held in trust by the United States for Indian tribes and individual Indians. *Id*. A TSR shows the proper legal description of a tract, the current ownership, and any encumbrances, including mortgages. *Id*.

The TSR for Tract T 1373-N lists all encumbrances by "title documents that have been approved by a properly delegated Federal official," and no mortgage to Mazaska is listed. TSR for T 1373-N at p. 1, 4-5 (Decl. at p. 12, 15-16). Montileaux's Residential Lease No. 2T1373N520 for 2.5 acres is listed as an encumbrance. TSR for T 1373-N at p. 5 (Gunn Decl. at p. 17).

Montileaux reports that her home is located on Tract 1373-F. *See* Montileaux Memo. of Law in Support of Mot. to Dismiss (Mar. 19, 2025) at p. 2; Doc. 13-1 at p. 2. *See also* Map (Doc. 1-3 at p. 151) (showing approximate location of Montileaux home).

Montileaux leases 2.5 acres within Tract 1373-F. Residential Lease No. 21373F1034 at p. 1 (Gunn. Decl. at p. 18); Doc. 1-3 at p. 162. The 2.5 acres Montileaux leases are described as NW1/4 SW1/4 NE1/4 NE1/4 of Section 18, Township 39 North, Range 41 West, Tract Number 1373-F. *Id*. Montileaux's lease runs through 2035 and may be extended. Residential Lease No. 21373F1034 at p. 2 (Gunn. Decl. at p. 19); Doc. 1-3 at p. 163.

The TSR for Tract 1373-F shows that the tract consists of 10.0 acres of land that is held in trust by the United States for the benefit of the Montileaux and her mother, Annie L. H. Montileaux. TSR for 1373-F (May 1, 2025) (Gunn Decl. at pp. 27-31). The legal description is

N/2 S/2 NE/4 NE/4 of Section 18, Township 39 North, Range 41 West. TSR for 1373-F at p. 2 (Gunn Decl. at p. 28).[3] Montileaux owns an undivided 25% interest in the tract and her mother own an undivided 75% interest in the tract. TSR for 1373-F at p. 3 (Gunn Decl. at p. 29). "Ownership is in unity ..." TSR for 1373-F at p. 1 (Gunn Decl. at p. 27).

The TSR for Tract 1373-F lists all encumbrances by "title documents that have been approved by a properly delegated Federal official," and no mortgage to Mazaska is listed. TSR for 1373-F at pp. 1, 4 (Gunn Decl. at pp. 27, 30). Montileaux's Residential Lease No. 2173F1034 for 2.5 acres is listed as an encumbrance. TSR for 1373-F at p. 5 (Gunn Decl. at p. 31). *See also* Doc. 1-3 at pp. 157-161.

F. Montileaux's Loan with Mazaska

Montileaux and Mazaska entered three loans in relation to Montileaux's home on the Reservation. *See* First Note (Jul. 7, 2010) (Doc. 1-3 at pp. 54-56); Second Note (Dec. 1, 2010) (Doc. 1-3 at pp. 68-71); Third Note (May 11, 2011) (Doc. 1-3 at pp. 39-42). Each of these loans was purportedly secured by a mortgage. *See* First Mortgage (Jul. 7, 2010) (Doc. 1-3 at pp. 43-53); Second Mortgage (Dec. 1, 2010) (Doc. 1-3 at pp. 57-67); Third Mortgage (May 11, 2011) (Doc. 1-1 at pp. 52-61; Doc. 1-3 at pp. 29-38).

All three loans were balloon loans, meaning monthly payments were based on an amortization schedule longer than the term of the loan and the final (balloon) payment represented the remaining balance due and owing at maturity of the loan. It appears the second loan refinanced the first, and the third loan refinanced the second. All three loans were made within a period of approximately ten months. The principal balance rose from $51,634 on the first loan to $66,370.25

[3] The legal description in the TSR is N/2 SE/4 NE/4 NE/4 S18-T39N-R41W and N/2 SE/4 NE/4 NE/4 S18-T39N-R41W, which is the same as N/2 S/2 NE/4 NE/4 S18-T39N-R41W.

on the third loan. *See* Doc. 1-3 at pp. 39, 54. The interest rate was fixed at 7.50% on all three loans. *Id.* at 39, 54, 68.

Montileaux's claims against Mazaska arise out of the third loan ("Third Loan"), which she made with Mazaska on May 11, 2011. Montileaux alleges that Mazaska "breached its contractual obligations" under the Third Loan by, among other things, failing to properly account for, or apply, Montileaux's payments and "unilaterally extending the maturity date" on the loan. *See* Montileaux Tribal Ct. Compl. at p. 8 (Oct. 31, 2021) (Doc. 1-1 at p. 8). Montileaux further alleged that by breaching its contractual obligations, Mazaska breached the covenant of good faith and fair dealing. *Id.*

The Third Loan provides that it shall be governed by "the laws of the Tribe … and applicable federal law," and "[t]he courts of the Tribe shall have sole and exclusive jurisdiction with respect to all controversies or claims arising out of this Note." Third Note (May 11, 2011) at p. 3 (Doc. 1-3 at pp. 41). The first and second loans contained the same provisions. *See* First Note (Jul. 7, 2010) at p. 2 (Doc. 1-3 at pp. 38); Second Note (Dec. 1, 2010) at p. 3 (Doc. 1-3 at pp. 70).

G. Montileaux's Purported Leasehold Mortgage with Mazaska

Mazaska claims that the Third Loan is secured by a leasehold mortgage. *See* Pl. Compl. (Doc. 1) at pp. 5-6, 8. The mortgage in question is the Third Mortgage, which was made on May 11, 2011. *See* Doc. 1-1 at pp. 52-61; Doc. 1-3 at p. 29-38. The Third Mortgage states that it is governed, in part, by tribal law. *Id.* at p. 6 (Doc. 1-1 at p. 57; Doc. 1-3 at p. 34).

The Third Mortgage appears to encumber the same allotted trust land that Montileaux leases within Tract 1373-F, namely NW1/4 SW1/4 NE1/4 NE1/4 of Section 18, Township 39

North, Range 41 West, Oglala Lakota County, South Dakota. *Id*. at p. 29. *Cf*., Residential Lease No. 21373F1034 at p. 1 (Gunn. Decl. at p. 18); Doc. 1-3 at p. 162.[4]

There are two problems with Mazaska's claim that it has a leasehold mortgage: first, the Third Mortgage is a land mortgage, not a leasehold mortgage; and second, the Third Mortgage is void because there is no evidence in the record that it was approved by all landowners or by the Secretary of the Interior, as required by federal law. *See* 25 U.S.C. § 2135(a), *formerly* 25 U.S.C. § 483a.

The Third Mortgage is a land mortgage, not a "a leasehold mortgage" as Mazaska asserts. A leasehold mortgage is a "mortgage, deed of trust, or other instrument that pledges a lessee's leasehold interest as security for a debt or other obligation owed by the lessee to a lender or other mortgagee." 25 C.F.R. § 162.003. The Third Mortgage does not pledge Montileaux's interest in any lease. Instead, it purports to "mortgage, grant and convey" to Mazaska, "with power of sale," certain allotted trust land within Tract 1373-F, together with all fixtures on that land. Third Mortgage at p. 1 (Doc. 1-3 at p. 29). The mortgage states that:

> Borrower [Montileaux] does hereby mortgage, grant and convey to Lender [Mazaska], with power of sale, the following described property located in [Oglala Lakota] County, South Dakota, which has the address of: NWI/4 SWI/4 NEI/4 NEI/4, S18-39-41, [Oglala Lakota] County, South Dakota (Property Address) 10 acres … TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property.

[4] The land descriptions in the Third Mortgage and Residential Lease No. 21373F1034 are both NW1/4 SW1/4 NE1/4 NE1/4 of Section 18, Township 39 North, Range 41 West. However, the Third Mortgage incorrectly states that this land consists of 10 acres, whereas Residential Lease No. 21373F1034 correctly states that this land consists of 2.5 acres. A standard section in the Public Land Survey System ("PLSS") is one square mile, or 640 acres. A "quarter quarter quarter quarter section" in the PLSS is 1/16 of a section, or 2.5 acres.

Id. The Third Mortgage purports to "mortgage, grant and convey" the land itself, not a leasehold interest in the land.

The Third Mortgage is void. There is no evidence in the record that it was not approved by all individual Indian owners of Tract 1373-F or the Secretary of the Interior. Federal law provides:

> The individual Indian owners of any land which either is held by the United States in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to approval by the Secretary of the Interior, to execute a mortgage or deed of trust to such land …

25 U.S.C. § 5135(a), *formerly* 25 U.S.C. § 483a. *See also* 25 C.F.R. § 152.34 (providing that individual Indian owners of trust land may execute mortgages to their land only "with the approval of the Secretary," and "[p]rior to approval of such mortgage …, the Secretary shall secure appraisal information as he deems advisable"); *Nw. S. Dakota Prod. Credit Ass'n v. Smith*, 784 F.2d 323, 326 (8th Cir. 1986) (construing 25 U.S.C. § 483a and noting that it "requires federal approval by the Secretary of the Interior of trust land mortgages") (cleaned up).

There is no evidence in the record that the Third Mortgage was approved by Montileaux's mother, Annie, or the Secretary of the Interior, as required by federal law. If the mortgage had been approved by the Secretary, it would have been recorded in the record of title in the LTRO, and it would appear on the TSR for Tract 1373-F. No mortgage to Mazaska appears on the TSR for Tract 1373-F.

Even if the Third Mortgage were a leasehold mortgage, it would still have to meet the landowner consent requirements in federal law and it would still have to be approved by the Secretary of the Interior. *See* 25 C.F.R. § 162.357.[5] Leasehold mortgages must be recorded in the

[5] Residential Lease No. 21373F1034 provides that "Lessee [Montileaux] may not execute a mortgage, declaration of trust or other security instrument pledging Lessee's interest in this Lease or any improvements of the Leased Premises without the prior written consent of Lessor [Montileaux and her mother, Annie] and the approval of the Secretary." Residential Lease No.

record of title in the LTRO with jurisdiction over the leased land, 25 C.F.R. § 162.343(a), and they appear on the TSR for the leased land. No leasehold mortgage to Mazaska appears on the TSR for Tract 1373-F.

In the absence of the required landowner consent and Secretarial approval, the Third Mortgage is void.

The Third Mortgage does not appear to affect Tract T 1373-N, which is tribal trust land owned 100% by the Tribe. *See* TSR for Tract T 1373-N at p. 3 (Gunn Decl. at p. 14). If the mortgage did affect Tract T 1373-N, it would have to be approved by the Tribe and the United States, pursuant to 25 U.S.C. § 177. Without those approvals, the mortgage would be void.

PROCEDURAL HISTORY

A. The Tribal Court Proceedings

In November 2021, Montileaux sued Mazaska in the Oglala Sioux Tribal (Inferior) Court. *See* Montileaux Tribal Ct. Compl. (Nov. 30, 2021) (Doc. 1-1 at pp. 1-122). Her complaint asserts common law causes of action for breach of contract and breach of the covenant of good faith and fair dealing in relation to the Third Loan. *Id*. at pp. 7-8 (Doc. 1-1 at pp. 7-8).

Mazaska answered the complaint and asserted various affirmative defenses, none of which challenged the jurisdiction of the Tribal Court. *See Montileaux v. Mazaska Owecaso Otipi Financial, Inc.*, Case No. CIV-21-0388, Order and Memorandum Decision at p. 2 (O.S.T. Tr. Ct. Aug. 10, 2022) (Doc. 1-2 at p. 2). Thereafter, Mazaska filed a Motion to Dismiss in which it challenged the jurisdiction of the Tribal Court. *Id*. at p. 3 (Doc. 1-2 at p. 3).

21373F1034 at p. 3 (Gunn Decl. at p. 20). There is no exception to the requirement of approval by the Secretary of the Interior. *Id.*

The Tribal Court denied Mazaska's motion to dismiss. *Id*. at p. 14 (Doc. 1-2 at p. 14). The court held that Mazaska is a non-Indian "citizen of the State of South Dakota" because it is incorporated under state law. *Id*. at p. 6 (Doc. 1-2 at p. 6). The court held that it has jurisdiction over Montileaux's claims against Mazaska under *Montana v. United States*, 450 U.S. 544, 565-566 (1981), because, among other things, the claims relate to and arise out of consensual relationships Mazaska entered into with Montileaux. *Id*. at pp. 9-10 (Doc. 1-2 at pp. 9-10). Those consensual relationships include one or more promissory notes in which Mazaska consented to the sole and exclusive jurisdiction of the Tribal Court over all controversies or claims relating to or arising out of the note. *Id*.

The Tribal Supreme Court affirmed the decision of the Tribal Court. *See Mazaska Owecaso Otipi Financial, Inc. v. Montileaux*, Case No. CIV-2022-0388, Decision on Appeal at pp. 1, 7 (O.S.T. Supreme Ct. May 30, 2024) (Doc. 1-4 at pp. 1, 7). The Tribal Supreme Court held that the Tribe has jurisdiction over Montileaux's claims against Mazaska under on the "consensual relationship" prong in *Montana*. *Id*. at pp. 4-5 (Doc. 1-4 at pp. 4-5). The Tribal Supreme Court also held that the Tribe has jurisdiction over Mazaska's activities on tribal land, which includes tribal trust land and individual Indian trust land. *See id*. at pp. 5-6 (Doc. 1-4 at pp. 5-6). The Tribal Supreme Court rejected Mazaska's argument that the Real Estate Settlement Procedures Act ("RESPA") divests the Tribal Court of jurisdiction.

B. Mazaska's Claims in This Court.

Mazaska filed this suit to challenge the jurisdiction of the Tribal Courts over Mazaska's contracts and commercial dealings with Montileaux. Mazaska claims, among other things, that Montileaux's claims arise under RESPA, not tribal law, and that RESPA divests the Tribal Courts of jurisdiction. Mazaska contends that the Tribal Court is not a "court of competent jurisdiction,"

within the meaning of 12 U.S.C. § 2614, which provides that RESPA claims "may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred."

Mazaska seeks removal of the Tribal Court action to this Court. *See* Pl. Compl. (Doc. 1) at pp. 6-8 (count 1). Mazaska also seeks an injunction precluding further judicial proceedings in the Tribal Court (count 2). *See* Pl. Compl. (Doc. 1) at pp. 6-9.

Through its Motion for Temporary Restraining Order, Mazaska seeks an order "temporarily restraining further legal proceedings, including filings by Lillian Montileaux, in the Oglala Sioux Tribe Tribal Court in the matter of *Lillian "Toni" Montileaux v. Mazaska Owecaso Otipi Financial*, tribal court no. CIV 21-0388 and appeal number CIV. APP. No. CIV-2022-0388." Pl. Mot. for Restraining Order at p. 1 (Doc. 17 at p. 1).

For the reasons set forth herein, the Tribe opposes Mazaska's motion.

SUMMARY OF ARGUMENT

This case involves a challenge to the jurisdiction of the Oglala Sioux Tribal Courts to hear and decide a garden-variety breach-of-contract action arising out of the on-reservation contracts and commercial dealings of a nonmember business with a tribal member. The nonmember business, Mazaska, operates on on-reservation tribal trust land, and the tribal member, Montileaux, resides on on-reservation trust land. The contract at issue is a loan made by Mazaska to Montileaux that is purportedly secured by a leasehold mortgage affecting trust land within Montileaux's homesite. The loan provides that, the courts of the Tribe shall have sole and exclusive jurisdiction with respect to all controversies or claims arising out of this loan.

The Tribe has the inherent authority to regulate and adjudicate disputes arising on trust land on the Reservation. Even on non-Indian fee land on the Reservation, the Tribe has the inherent

authority to regulate and adjudicate disputes involving the activities on nonmembers who enter into consensual relationships with the Tribe and its members through contracts and commercial dealings, and the conduct of nonmembers that threatens or has a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe.

Mazaska attempts to avoid the Tribe's jurisdiction by arguing that Montileaux's claims arise under RESPA and they are beyond the jurisdiction of the Tribal Courts. But, RESPA only applies to federally related mortgage loans, and there is no evidence in the record that Mazaska's purported mortgage with Montileaux was approved by all landowners and the Secretary of the Interior, as required by federal law. Without such approvals, the mortgage is void, and without a mortgage, the underlying loan is not subject to RESPA. That said, even if the mortgage were valid, and even if RESPA did apply to Montileaux's loan, the Tribal Courts would still have jurisdiction to hear and decide her claims against Mazaska.

Mazaska is not entitled to a temporary restraining order, since there is no likelihood that it will prevail on the merits. Mazaska seeks to enjoin further judicial proceedings in the Tribal Court. *See* Pl. Compl. (Doc. 1) at pp. 6-9. But, Mazaska has not sued the Tribe or the Tribal Courts. Neither the Tribe nor its courts can be bound by a restraining order in this action since they are not parties and they are not within the scope of Fed. R. Civ. P. 65(d)(2). Mazaska also seeks removal of the Tribal Court action to this Court. *See* Pl. Compl. (Doc. 1) at pp. 6-8. But, no law authorizes the removal of the Tribal Court action to this Court.

ARGUMENT

I. THE TRIBAL COURTS HAVE JURISDICTION OVER MAZASKA'S ON-RESERVATION CONDUCT.

In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court held that, as a "general proposition," that "the inherent sovereign powers of an Indian tribe do not extend to the

activities of nonmembers of the tribe." *Id*. at 565. The Court was careful to note, however, that there are recognized exceptions to this general proposition:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. [1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565–66 (citations omitted). These exceptions are referred to as the "*Montana* exceptions."

The Court has clarified that, "*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself … A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another …" *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001).

Further, with respect to both *Montana* exceptions, the Court clarified that, "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (cleaned up; citation omitted).

The Tribe submits that the Tribal Courts have jurisdiction over Mazaska's conduct under both of the *Montana* exceptions.

A. The Tribal Courts Have Jurisdiction Under *Montana*'s "Consensual Relationships" Exception.

There is no dispute that Mazaska has entered consensual relationships with Montileaux, a member of the Tribe, through contracts and commercial dealings, including the Third Loan. *See* Background § F, *supra*. Nor is there a dispute that the Tribal Court action has a direct nexus to

Mazaska's consensual relationships with Montileaux, including the Third Loan. *Id. See also* Procedural History § A, *supra.*

Mazaska also has entered consensual relationships with the Tribe. Mazaska leases trust land from the Tribe for use as office space to provide lending services to tribal members; Mazaska has paid business license fees to the Tribe's Revenue Department for the privilege of conducting business on the Reservation; Mazaska and the Tribe have a partnership; and the Tribe has pledged has pledged financial support for Mazaska's activities. *See* Background § D, *supra*. These contracts are directly related to Mazaska's lending services to tribal members like Montileaux.

The Tribe has the authority to regulate the activities of nonmembers, like Mazaska, who extend credit to tribal members on the Reservation. It follows that the Tribal Courts have jurisdiction to adjudicate disputes arising out of such activities. Indeed, the Tribal Courts play an important role in regulating on-reservation lending transactions involving tribal members by, among other things, enforcing the Tribe's common law of contracts and good faith and fair dealing.

Tribal common law has much in common with state common law. *See* Cohen's Handbook of Federal Indian law § 5.02 (2025). "Historically, common law liability has formed the bedrock of state regulation, and common law tort claims have been described as 'a critical component of the States' traditional ability to protect the health and safety of their citizens.' *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 86 (2d Cir. 2006), *aff'd sub nom. Warner-Lambert Co., LLC v. Kent*, 552 U.S. 440 (2008) (quoting *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 544 (1992) (Blackmun, J., concurring in part and dissenting in part)).

Mazaska asserts that, even if it has entered consensual relationships with Montileaux, the Tribal Courts have no authority to adjudicate Montileaux's claims, because the Tribe has not

enacted any laws that regulate Mazaska or its on-reservation activities. *See*, *e.g.*, Pl. Br. in Support of Mot. for TRO (Doc. 18) at p. 7.

This argument misstates the law and the facts. As for the law, the Supreme Court has held that tribal courts have civil jurisdiction to adjudicate disputes arising out of nonmember activities that "tribes possess authority to regulate." *Strate*, 520 U.S. at 453. What is important for the *Montana* analysis is not whether a tribe has enacted laws to regulate a nonmember's activities, but whether it possesses the authority to do so. There is no question in this case that the Tribe has the authority to regulate the activities of Mazaska that have a nexus to Mazaska's consensual relationships with Montileaux and the Tribe.

As for the facts, the Tribe has enacted laws to license, regulate, and tax on-reservation businesses, including lenders like Mazaska. *See* Background § B, *supra*. The Tribe also has enacted laws regulating the extension of credit and leasehold mortgages on the Reservation. *Id*. Mazaska has paid business license fees to the Tribe. *See* Background § D, *supra*. The Tribal Courts have also developed the Tribe's common law, which is a part of the Tribe's regulatory regime.

The Tribal Courts have jurisdiction over Mazaska contracts and commercial dealings with Montileaux under the *Montana*'s "consensual relationships" exception. (Mazaska's arguments about the preemptive effect of RESPA are without merit. They are dealt with in Argument § II, *infra.*)

B. The Tribal Court Has Jurisdiction Under *Montana*'s "Direct Effects" Exception.

The Supreme Court has held that, "certain forms of nonmember behavior" may "sufficiently affect the tribe as to justify tribal oversight." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 335 (2008). The unlawful and injurious conduct of nonmembers on tribal trust land meets that bar.

Mazaska's conduct in this case took place at its office in Pine Ridge, which is located on land that is held in trust by the United States for the Tribe. *See* Background § D, *supra*. The Tribe leases its trust land to Mazaska for office space so Mazaska can provide lending services to tribal members. *Id*.

It is alleged that Mazaska engaged in conduct on the Tribe's trust land that poses a threat to core tribal interests. Specifically, it is alleged that Mazaska: made a loan to a tribal member on the Reservation; refuses to account for, or properly apply, payments made by the tribal member on the loan; unilaterally extended the repayment period of the loan; secured rights in and to the tribal member's individual Indian trust land on the Reservation through a purported mortgage that was not approved by all landowners or the Secretary of the Interior; reserves the right to foreclose on that mortgage if further loan payments are not made; and asserts that it is not subject to any tribal laws or regulations. *See* Montileaux Tribal Ct. Compl. (Nov. 30, 2021) (Doc. 1-1 at pp. 1-122); Pl. Br. in Support of Mot. for TRO (Doc. 18) at p. 7.

To deny the Tribe the authority to regulate nonmember conduct such as this – on the Tribe's own trust land – would threaten the Tribe's ability to govern itself, protect its lands, and protect its economic security and health and welfare. *Cf*., *United States v. Cooley*, 593 U.S. 345, 350–51 (2021) (affirming tribal authority to search and detain nonmembers suspected of committing crimes on reservation, under *Montana*'s "direct effects" exception, and noting that to deny tribes such authority "would make it difficult for tribes to protect themselves against ongoing threats" to their health and welfare).

The Pine Ridge Indian Reservation is the "permanent home" of the Oglala Sioux Tribe and its members. *See* Fort Laramie Treaty of 1868 at Arts. II, VI, XV. Governing nonmember conduct on tribal trust land within the Tribe's "permanent home" is essential to the political integrity of the

Tribe, and governing nonmember conduct that threatens individual Indian trust land is essential to the economic security and health and welfare of the Tribe.

The Tribe has the right to regulate Mazaska's activities on tribal trust land. Mazaska's "presence and conduct on Indian lands is conditioned by the limitations the Tribe may choose to impose." *Merrion*, 455 U.S. at 147. Those limitations are set forth in the Tribe's laws, including its common law, and the Tribe's authority to impose those limitations stems from the Tribe's inherent powers of self-government and its right to exclude Mazaska from the Tribe's land. *See Merrion*, 455 U.S. at 137-149.

> Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation. When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power to tax or to place other conditions on the non-Indian's conduct or continued presence on the reservation. A nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power.

Id. at 144–45 (citation omitted).

The Supreme Court has affirmed tribal authority over nonmember conduct on tribal land over which a tribe can "assert a landowner's right to occupy and exclude." *Nevada v. Hicks,* 533 U.S. 353, 359 (2001). For example, in *Montana*, the Court held that "general principles of retained inherent sovereignty" did not authorize the Crow Tribe's "regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe," *id*. 564-565, but the Court "readily agree[d]" that the Tribe had the authority to regulate nonmember conduct on "land belonging to the Tribe or held by the United States in trust for the Tribe." 450 U.S. at 557. In *Merrion*, the Court

affirmed the Jicarilla Apache Tribe's authority to regulate, through taxation, nonmember activity on tribal trust land. 555 U.S. at 149.

In *Hicks*, the Supreme Court stated that the ownership status of tribal land "may sometimes be a dispositive factor" in determining "whether regulation of the activities of nonmembers is necessary to protect tribal self-government or to control internal relations." 533 U.S. at 360 (internal citation and quotation marks omitted). The *Hicks* Court held that tribal land ownership was insufficient to support tribal jurisdiction over state officers, *id*. at 374, but the Court noted that, "[o]ur holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law," *id*. at 358 n.2. *Accord*, *South Dakota v. Cummings*, 679 N.W.2d 484 (S.D. 2004) ("the question in *Hicks* was whether the tribal court had jurisdiction over state officers acting in their individual or official capacity on tribal lands. *Hicks* should be construed to address that question only").

The Supreme Court has consistently recognized the "critical importance of land status" to questions of tribal jurisdiction. *Plains Commerce Bank*. 554 U.S. at 338. A "tribe's traditional and undisputed power to exclude persons from tribal land ... gives it the power to set conditions on entry to that land." *Id*. at 335 (internal citation and quotation marks omitted). For the Oglala Sioux Tribe, those conditions are reflected in tribal law, including the tribal common law.

In *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927 (8th Cir. 2010), the court affirmed a tribal court's jurisdiction under *Montana's* "direct effects" exception over common law tort claims arising out of nonmembers' "entry and conduct upon tribal land." *Id.* at *940*. The court held that when nonmember conduct on tribal trust land "threaten[s] the political integrity, the economic security, and the health welfare of the Tribe, as well as its rights as a landowner, the tribal courts may exercise jurisdiction over the claims that

arise out of that conduct." *Id*. (internal citations and quotation marks omitted). The court stated: "Tribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner." *Id*. *Accord, Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 811–814 (9th Cir. 2011) (Indian tribe's sovereign power to exclude nonmembers from tribal land includes authority to regulate nonmember conduct on tribal land and adjudicatory authority to enforce tribal regulations).

In this case, the Tribal Courts have the authority to adjudicate common law causes of action stemming from Mazaska's conduct on tribal trust land, including Mazaska's extension of credit to Montileaux, its acquisition of a purported mortgage on Montileaux's individual Indian trust land without the required approval of all landowners or the Secretary of the Interior; and its conduct in servicing and enforcing the loan and purported mortgage. This conduct imperils the Tribe's interests, including its interest in governing its own land and protecting the individual Indian trust land of its tribal members. To deny the Tribe's authority in these areas would threaten the Tribe's political integrity, economic security, and health and welfare.

II. THE REAL ESTATE SETTLEMENT PROCEDURES ACT DOES NOT DIVEST THE TRIBE'S JURISDICTION OVER MAZASKA'S CONDUCT.

Mazaska attempts to avoid the Tribe's jurisdiction by arguing that Montileaux's claims arise under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, *et seq*., and, as such, they are beyond the jurisdiction of the Tribal Courts. *See*, *e.g.*, Pl. Br. in Support of Mot. for TRO (Doc. 18) at pp. 2, 7, 8, 9, 11. This argument is without merit.

A. RESPA Does Not Apply Without a Valid Mortgage.

RESPA applies to "federally related mortgage loans." *See*, *e.g.*, 12 U.S.C. § 2605. RESPA defines the term "federally related mortgage loan" to mean a loan that "is secured by a first or

subordinate lien on residential real property" and that meets other criteria. 12 U.S.C. § 2602(1). *See also* 12 C.F.R. § 1024.2.

There is no evidence in the record that Mazaska's purported mortgage with Montileaux was approved by all landowners and the Secretary of the Interior, as required by 25 U.S.C. § 5135(a), *formerly* 25 U.S.C. § 483a, and 25 C.F.R. § 152.34. *See* Background § G, *supra*. Without such approvals, the mortgage is void, and without a mortgage, the underlying loan is not a "federally related mortgage loan" subject to RESPA.

When a statute requires governmental approval of Indian agreements, the "agreements simply are invalid absent the requisite approval." *Quantum Expl., Inc. v. Clark*, 780 F.2d 1457, 1459 (9th Cir. 1986). *See Wells Fargo Bank v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 702 (7th Cir. 2011) (trust indenture with tribal casino development corporation was "void in its entirety" for failure to obtain federal approval under 25 U.S.C. §§ 2710(d)(9) and 2711(a)(1)); *Winnebago Business Committee v. Koberstein*, 762 F.2d 613, 615, 621 (7th Cir. 1985) (contract with tribe was "null and void" for failure to obtain federal approval as required by 25 U.S.C. § 81); *Black Hills Inst. of Geological Research v. S.D. Sch. Of Mines and Tech.*, 12 F.3d 737, 742-44 (8th Cir. 1993) (contract with individual Indian was void for failure to obtain federal approval as required by 25 U.S.C. §§ 464 and 483 (now 25 U.S.C. §§ 5107 and 2134)).

Agreements that purport to convey interests in Indian lands are void if they are made in violation of the approval requirements imposed by Congress. Those requirements are designed to protect Indian land owners, and the courts "have always been quick to vindicate the Congressional policy for the protection of the Indian ward, and to that end to void any conveyance of restricted land not in strict conformity with authorizing legislation." *Goddard v. Frazier*, 156 F.2d 938, 941 (10th Cir. 1946). *Accord, Begay v. Albers*, 721 F.2d 1274, 1280 (10th Cir. 1983).

In *Oneida County v. Oneida Indian Nation*, 470 U.S. 226 (1985), the Supreme Court held that a land sale agreement between the Oneida Indian Nation and the State of New York was invalid for lack of federal approval in violation of the Trade and Intercourse Act of 1793. *Id*. at 233. *See also id*. at 240 ("extinguishment of Indian title require[s] the consent of the United States) (internation citation and quotation marks omitted). *Accord, Tiger v. W. Inv. Co.,* 221 U.S. 286, 316 (1911) (affirming the authority of Congress to restrict the alienation of Indian allotted lands without the approval of the Secretary of Interior).

Similarly, in *Bunch v. Cole*, 263 U.S. 250 (1923), the Court held that purported leases of individual Cherokee trust allotments were void because they were made in violation of a congressional requirement that such leases be approved by the Secretary of the Interior. *Id*. at 254. The Court held that, the leases "were not merely voidable at the election of the allottee, but absolutely void and not susceptible of ratification by him." *Id*. *Accord, Smith v. Acting Billings Area Director*, 17 IBIA 231 (1989) (any lease of Indian trust or restricted land that is not approved by the Secretary or his authorized representative is void ab initio, has no force or effect, and grants no rights to either the attempted lessor or lessee.)

The courts have strictly construed the approval requirements in federal law for mortgages encumbering individual Indian trust land. In *Am. Gen. Fin., Inc. v. Kent*, No. CIV-08-648-F, 2008 WL 4447065 (W.D. Okla. Sept. 26, 2008), the court held that when the Secretary of the Interior does not approve a mortgage encumbering individual Indian trust land, as required by 25 U.S.C. § 483a (now 25 U.S.C. § 5135) and 25 C.F.R. § 152.34, the mortgage has no force or effect. *Id*. at *2. The court stated: "The mortgage did not have the necessary approval and was, consequently, invalid." *Id*.

Unless and until Mazaska can show the Third Mortgage satisfied all approval requirements in federal law, it cannot claim that its Third Loan to Montileaux is a "federally related mortgage loan" that is subject to RESPA. Nor can Mazaska claim that the Tribal Courts' jurisdiction over Montileaux's claims is preempted or otherwise divested by RESPA. The Tribal Court has jurisdiction over those claims, which arise under tribal law, not RESPA.

B. RESPA Does Not Bar Tribal Court Jurisdiction Over Montileaux's Claims.

Even if the Third Mortgage were valid, and even if RESPA did apply to Montileaux's Third Loan and Third Mortgage, the Tribal Courts would still have jurisdiction to hear and decide her claims against Mazaska. This is true for several reasons.

1. Montileaux Seeks Relief Under Tribal Law, Not RESPA.

Montileaux's Tribal Court complaint seeks relief for breach of contract under tribal common law. The complaint does not mention, or seek relief under, RESPA.[6]

A plaintiff has the right to determine the relief he or she seeks. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). When relief is available under both federal and state law, the well pleaded complaint rule provides "that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims

[6] The reference in the Tribal Court complaint to Section 2 of the Third Mortgage does not transform Montileaux's common law claims into RESPA claims. Section 2 imposes extensive, detailed obligations on Mazaska's collection and holding in escrow of funds for taxes and insurance. Third Mortgage at pp. 2-3 (Doc. 1-1 at pp. 53-54; Doc. 1-3 at pp. 30-31). It does so by its express terms, not by incorporating RESPA. The lone reference in Section 2 to RESPA states that Mazaska may not collect and hold in escrow funds in excess of the maximum amount that a lender for a federally related mortgage loan may collect or hold under RESPA. *Id.* It does not state that Mazaska is, in fact, a lender for a federally related mortgage loan or that RESPA applies to the mortgage or that any action to enforce the express requirements of Section 2 of the Third Mortgage must be brought under RESPA. To the contrary, the Third Mortgage states that it "shall be governed by federal law, *and tribal law*, and the laws of the State in which the Property is located." Third Mortgage at p. 6 (Doc. 1-1 at p. 57; Doc. 1-3 at p. 34) (emphasis added).

based on federal law, choose to have the cause heard in state court." *Id*. In *Caterpillar*, the plaintiffs brought breach of contract claims under state law. *Id*. at 399. The fact that the plaintiffs also could have asserted claims under the Labor Management Relations Act did not prevent them suing exclusively under state contract law. *Id*.

The same principles apply in the RESPA context. If a plaintiff seeks relief under local law, and not under RESPA, there is no federal question and removal to federal court is not permitted. *See Brewer v. Compass Bank*, No. 4:14-CV-705-ALM-CAN, 2015 WL 7752130, at *3 (E.D. Tex. Nov. 6, 2015) (where RESPA was only "tangentially mentioned" in plaintiff's pleading and "[a]t no point did [plaintiff] cite violations of RESPA as an independent cause of action, nor did she pray for any relief based on RESPA," court allowed suit to remain in state court); *See also Am. Home Shield of Texas v. Texas*, No. CIV.A. H-10-0808, 2010 WL 1903594, at *6 (S.D. Tex. May 10, 2010) (holding that where plaintiffs sought relief under state law, not RESPA, the fact that the alleged activity also could violate RESPA did not establish federal question jurisdiction).

2. RESPA Does Not Pre-empt the Field or Abrogate Tribal Self-Government.

The Supreme Court recognizes that "complete pre-emption" is an exception to the well pleaded complaint rule. *See Caterpillar*, 482 U.S. at 393. If the pre-emptive force of a statute is so "extraordinary," it "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id*. That is not the case here, since local law is only preempted by RESPA when the two are in direct conflict.

The "complete pre-emption" doctrine, also known as "field preemption," does not apply RESPA. The official interpretation of the RESPA regulations states:

> State laws that are inconsistent with the requirements of RESPA or Regulation X may be preempted by RESPA or Regulation X. State laws that give greater protection to consumers are not inconsistent with and are not preempted by RESPA or Regulation X. In addition, nothing in RESPA or Regulation X should be

> construed to preempt the entire field of regulation of the practices covered by RESPA or Regulation X, including the regulations in Subpart C with respect to mortgage servicers or mortgage servicing.

Consumer Financial Protection Bureau, "Comment for 1024.5 Coverage of RESPA," *available at* https://www.consumerfinance.gov/rules-policy/regulations/1024/5/ (last visited May 6, 2025).

Congress' intent in enacting RESPA was not to preempt the field, but to give consumers additional protections against abusive real estate practices. Tribal laws on breach of contract claims are consistent with RESPA. In *Washington Mutual Bank v. Superior Court*, 89 Cal. Rptr. 2d 560, 567 (Cal. Ct. App. 1999), the court rejected a claim that RESPA preempted state common law and statutory claims. The court upheld a consumer's right to sue under state law for wrongs that may also violate RESPA. *Id.* The court found that private state causes of action are not inconsistent with the federal disclosure requirements, but were complementary to the federal requirements and, in fact, promoted full compliance with federal law. *Id*. Additionally, the court stated "no state law shall be determined to be inconsistent if it provides greater protection to the consumer." *Id.* "Indeed, courts are reluctant to find that state provisions are inconsistent with federal law unless the state law directly conflicts with the federal law, undermines the federal law, or makes it impossible to comply with both federal and state law." *Id.*

In this case, tribal law provides a private right of action for breach of contract that is not inconsistent with RESPA. To the contrary, tribal law complements RESPA by offering additional protection for consumers.

Nothing in the text of legislative history of RESPA evidences congressional intent to preempt tribal law or tribal self-government, including the right of tribal courts to hear and decide contract disputes under tribal law. *See Williams,* 358 U.S. at 223. "[R]espect for Indian sovereignty means that federal regulatory schemes do not apply to Tribal governments exercising their

sovereign authority absent express congressional authorization." *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010). *See also* *Scalia v. Red Lake Nation Fisheries, Inc.*, 982 F.3d 533, 535 (8th Cir. 2020) ("For a statute of general applicability to apply to Indian self-government, this court looks for either an 'explicit statement of Congress' or 'evidence of congressional intent to abrogate … in the legislative history of a statute'") (quoting *United States v. Dion*, 476 U.S. 734, 739-740 (1986)).

Just as "Congress does not cavalierly pre-empt state-law causes of action," *Medtronic, Inc.* v. *Lohr* 518 U.S. 470, 485 (1996), it does not cavalierly pre-empt tribal-law causes of action. "[I]mplied preemption of [tribal] sovereign authority does not suffice." *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002) (citing *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 18 (1987), for the proposition that "... the proper inference from silence ... is that the sovereign power ... remains intact").

In short, nothing in RESPA bars the Tribal Courts from exercising jurisdiction over Montileaux's common law contract claims.

CONCLUSION

For the reasons set forth herein, the Court should deny Mazaska's Motion for Restraining Order.

Dated: June 26, 2025

Respectfully submitted,
/s/ Steven J. Gunn

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2025, I electronically transmitted the foregoing document to the Clerk of Court using the Electronic Case Filing (ECF) System for filing and for electronic service on all parties and counsel of record who are registered users of the ECF System.

/s/ Steven J. Gunn
STEVEN J. GUNN