

THREE AFFILIATED TRIBES

IN DISTRICT COURT

FORT BERTHOLD RESERVATION

NEW TOWN, NORTH DAKOTA

Carol Good Bear, Terrance Fredericks, Todd
Hall, Patti Jo Hall, Kelly Hosie, Edward S. "Tyke"
Danks,

Plaintiffs,

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS

vs.

Three Affiliated Tribes Tribal Business Council,
Mark Fox, Chairman of TAT, Corey Spotted Bear,
Vice-Chair of TAT, Fred Fox, Executive Secretary
of TAT, Mervin Packineau, TAT Treasurer,
Robert White TAT Councilman, and
Monica Mayer, TAT Councilwoman

Defendants

Civil No. CV- 2023-0469

The Plaintiffs are enrolled members of the Three Affiliated Tribes who brought this suit against the Tribes' Business Council (hereinafter TBC) and the members of the TBC asserting a variety of alleged violations¹ of the Tribes' Constitution and Plaintiffs' rights allegedly protected under the Indian Civil Rights, 25 U.S.C §1302. Most of the complaint pertains to the Defendants allegedly spending tribal resources without full disclosure to tribal membership and a variety of other complaints pertaining to how the Defendants are administering tribal resources. The suit appears to seek declaratory relief, prospective injunctive relief, retrospective injunctive relief, and other equitable relief. It does not seek money damages. The complaint alleges jurisdiction under the Tribal Code and asserts that sovereign immunity would not bar the suit under the

¹ For a complaint predicated upon an alleged failure to provide the electorate information, this complaint is chockfull of financial and other governmental information the Plaintiffs have apparently gleaned from various sources. The complaint also contains some innuendo that is not of particular use to the Court.

Tribes' Constitution and under the Indian Civil Rights Act, 25 U.S.C. §1302.

On December 13, 2023 the Defendants filed a motion to dismiss claiming that: 1) the Defendants are immune from suit under the sovereign immunity doctrine and defense and pursuant to Title I, Section 1.4 of the TAT Tribal Code and neither the TAT Constitution nor the Indian Civil Rights Act waive that immunity; 2) the suit is barred under the political question doctrine and; 3) that the complaint does not present legally justiciable claims.

The Plaintiffs have responded with a memorandum in opposition to the motion claiming that the Tribal Constitution of the TAT, Article VI, §3(b), constitutes a clear and unequivocal waiver of immunity from this suit and that they have raised causes of action arising under the Indian Civil Rights Act that serve as an express federal abrogation of the Defendants' immunity from suit for the injunctive relief they seek.

Oral argument on the motion was held before the undersigned on the 28th day of March 2024 at 1:00 PM with the Plaintiffs appearing in person and with their attorney, Jack E. Zuger, and the Defendants appearing through their legal counsel, Timothy Q. Purdon. Both counsel presented spirited arguments that are much appreciated.

For the reasons stated herein this Court finds that the Plaintiffs have alleged certain causes of action arising under the Indian Civil Rights Act and that the TAT Constitution does expressly waive the TBC's immunity from suit, as well the immunity of the members of the TBC, for these causes of action and that the Plaintiffs have also raised causes of action against the individual TBC members under the Ex Parte Young, 209 U.S. 123 (1908) exception to governmental immunity recognized by the United States Supreme Court in Santa Clara Pueblo v. Martinez, 436 US 49, 58 (1978), and amplified in Michigan v. Bay Mills Indian Community, 134 S.Ct 670 (2013). Although the Court rejects the Plaintiffs' arguments that they have a

“communal” property interest in all tribal resources under the ICRA, the Plaintiffs have demonstrated that they do have a constitutional right to some notice of how tribal resources are being spent in order to exercise the constitutional right of referendum and such right is a ICRA protected right because it implicates a fundamental right preserved the Plaintiffs and other members under the TAT Constitution. The Court rejects the broader argument, however, that this Court is an available forum for tribal members to challenge political decisions made by the TBC Council on spending decisions provided such notice is provided as said decisions are ultimately political decisions that are left to the TBC and its members under the TAT Constitution and it would be violative of separation of powers for this Court to micro-manage those decisions.. Many of the prayers for relief of the Plaintiffs are therefore rejected as being outside the scope of the prospective injunctive relief the Court can grant should the Plaintiffs be able to demonstrate the violations they allege in their complaint.

FACTS PRESENTED

Because this matter is presented to the Court on the Defendants’ motion to dismiss the Court must construe the facts in a light most favorable to the Plaintiffs and assume that, if given the chance to, they could prove those facts. However, because the sovereign immunity defense is not only one shielding the sovereign from liability, but also from defending a lawsuit, the Court may reject allegations in the complaint that are speculative or not supported by fair inferences from the facts alleged.² Therefore, it must be demonstrated on the face of the complaint or on other matters presented to the Court that the sovereign immunity defense is either abrogated by federal law or there is a clear and unequivocal waiver under tribal law for the Court to permit this

² For example in their complaint the Plaintiffs make reference to former TBC members having been implicated by a federal criminal Defendant, Chacon, in criminal activity, thus insinuating that the present TBC members may have

suit to proceed. See Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040 (8th Cir. 2000).

The Plaintiffs point out in their complaint that Article VI, Section 5 of the TAT Constitution vests in the TBC the right to “make expenditures of tribal funds for public purposes of the Tribes”, but mandates that “all expenditures from the Tribal Business Council fund shall be by resolution, duly passed by the council to such effect, and the amounts so paid shall be matters of public record at all times.” They further aver in their complaint that this obligation of the TBC is tied to the right of referendum provided to the TAT members under Article VIII of the Constitution that ensures the right of tribal members to demand a referendum³ “on any proposed or enacted ordinance or resolution of the Council.” This would include expenditure resolutions. The Court reads these two provisions in *pari materia* as meaning that the TBC has the ultimate authority to expend tribal funds but must provide some public notice in the form of an ordinance or resolution, enacted as a matter of public record, authorizing that expenditure to enable the members of the Tribes to exercise their right to petition for a referendum election to overrule the TBC. This “right” of the membership is not defined under the Constitution as a “liberty or property” right, the terminology used under the Indian Civil Rights Act.⁴

engaged in such conduct. Nothing in the complaint supports such an inference and it is therefore not assumed as true for purposes of the pending motion.

³ This Court acknowledges that the right of referendum in the Constitution may be difficult to exercise because of the minimum number of eligible voters (30%) who must vote in the referendum and the differing interpretations of “eligible voters.” However, that does not detract from the fact that this is a right preserved under the TAT Constitution that can only be exercised if public notice is provided of resolutions being passed.

⁴ ICRA provides in relevant part at 25 U.S.C. §1302 that no Indian Tribe may (8) “deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.” This mirrors the 14th and 5th amendments to the US Constitution, although strangely a deprivation of life was left out of ICRA. There are other “rights” protected under the ICRA that may have some relevance here including the right of the people to petition the government for a redress of their grievances under subsection 1 of §1302.

The Plaintiffs further allege that Article I of the By-laws to the Constitution governing individual Executive members of the TBC further regulate how the membership is to be notified of public expenditures, specifically the requirement upon the Treasurer of the TBC to only expend monies of the Tribes upon receipt of a “resolution duly passed by the council” and the “amounts so paid shall be matters of public record at all times” and a duty on the Secretary of the Tribes to keep all records of resolutions duly passed by the council.”⁵

The Plaintiffs then go in in their complaint to allege numerous instances where the Defendants have allegedly violated these constitutional principles of public resolutions on expenditure decisions. They cite to an affidavit from Austin Gillette, former TBC member in various capacities, explaining how expenditures of public funds were handled when he served. They also cite to the Tribes’ official records website, <https://www.mhanation.com/tat-records-office>, and assert that the website corroborates their claims that the prior practice of the TBC to only authorize expenditures pursuant to a resolution discussed in a public setting and then accepted by the Treasurer who paid out the funds is being violated. They place particular fault on Defendant Packineau, Treasurer of the Tribes, who they claim has not provided a public report of TBC approved expenditures since 2019. They also use the Tribes’ official records website to chronicle the number of Tribal for-profit organizations created over the years and claim that the financial records of those organizations are never disclosed to tribal membership. They also assert that some financial reports are discussed only in closed sessions and are not reported out by resolutions so membership can see them. They also allege that the Tribes have failed to

⁵ It should be noted that the Tribes maintain a website of its official documents at <https://www.mhanation.com/tat-records-office>. It is not this Court’s duty at this juncture of the proceedings to review the same to determine if the Plaintiffs’ claims of failure to expend monies pursuant to resolution made public is corroborated by this site, except to note that if it is not Plaintiffs may have some explaining to do.

complete federal program audits and speculate that this has led to the BIA contract office issuing warning letters to the Tribes.

They also take umbrage at how the Tribes' "People's Fund" is being administered claiming that this money from the Tribes' oil revenues is being tapped for unauthorized purposes without supporting public resolutions, resulting in less funds paid out to membership.

The Plaintiffs also spend substantial time in their complaint referencing an individual named Javier Solis Chacon and an affidavit submitted by a FBI agent regarding criminal conduct he engaged in on the Fort Berthold reservation, apparently in an attempt to insinuate that the Defendants herein may have accepted bribes from him or that the Defendants have not been vigilant enough in collecting back the monies from the criminal defendants who were prosecuted based upon this individual's wrongdoing. These allegations in the complaint appear to be more veneer than substance and the Court is not sure how to assume as true insinuation and intrigue in assessing a complaint such as this one. The Court is not going to accept as true that the Defendants have committed criminal acts in ruling on this motion as that appears to be pure speculation and not part of a well-pleaded complaint that requires the Court to assess "factual" assertions in the complaint.

Other allegations in the complaint, however, go back to the underlying premise of spending without public resolution. They include the Chairman and the Tribes' CFO allegedly giving a misleading report to the Tribes' elders at a July 20, 2023, meeting that was replicated in a MHA Times story. The Plaintiffs point to discrepancies within that report itself as further evidence of allegations of failure to disclose all expenditures by the Tribes. The Plaintiffs also take issue with the Defendants' alleged failure to disclose outstanding debts of the Tribe and the

alleged failures of Treasurer Packineau in performing his duties, although they do not tie those alleged deficiencies into the constitutional requirement of resolutions in support of expenditures.

Another alleged practice of the Defendants that the Plaintiffs take issue with is their allegation that the Defendants have expended monies of the Tribes, not by resolution, but by the TBC ratifying actions of the Tribes' Executive Committee, which the Court assumes would be the Tribes' Chair, Vice-Chair, Treasurer and Secretary, although the complaint does not flesh that out, as well as "unilateral "Executive Actions" they claim Defendant Fox takes during TBC meetings, that are later ratified by the TBC without proper resolutions. They claim these actions permit the TBC to expend tribal resources during closed meetings of the Committee, and by fiat of the Chairman, which are not then supported by resolutions that clarify what is being approved. The Plaintiffs also seem to want to tie in the mandate in the Constitution to public resolutions for expenditure of tribal funds to some mandatory notice to membership before any such resolutions are passed and contend that such due process is violated when the Defendants debate matters in Executive session. They do not point to any particular part of the Constitution that seems to mandate some type of notice to the membership or to prohibit executive sessions of the TBC, but instead claim that the methods used frustrate their right to challenge decisions of the TBC that could be subject to the right of referendum.

The Plaintiffs take particular aim at the Tribes' alleged purchase of real property in Las Vegas without notice to the membership or appropriate resolutions to support the initial and subsequent expenditures of moneys on that purchase. Specifically, they allege that on April 5, 2023 the Defendants purchased 1.1 acres of real property in Las Vegas for \$10,250,000 along with a real property transfer tax that was not supported by a public resolution that would permit them to challenge the purchase and allege that they only learned of this after local and regional

news agencies reported about it. They further assert that membership is left in the dark about the source of the monies to make such large purchases and speculate that these purchases are “risky” and put critical tribal resources at risk.

In an effort to obtain the records they claim they are entitled to under the Tribes’ Constitution two of the Plaintiffs- Good Bear and Fredericks- wrote to Defendant Packineau asking for certain records and then wrote to the Chairman, Secretary and Treasurer for further information they claimed they were entitled to under the Tribes’ Constitution, all to no avail, and after getting no response Fredericks allegedly met in Executive Session with the Defendants to discuss the requests and he claims that Defendant Packineau crumpled up his written request and threw it into the garbage.

To further demonstrate the Defendants’ alleged interference with their constitutional right to challenge TBC decisions by referendum they allege that the Defendants have interfered with their right to obtain voter information to enable them to determine how many voters they need to obtain a referendum on a particular issue as well as how many voters would have to approve of the referendum by stonewalling them on their frequent requests for this information.

The complaint then detours into what legal causes of action the Plaintiffs claim they have against the Defendants, relying heavily upon a Fort Berthold District Court decision from 1993 where a Special District Court Judge of this Court held in Bordeaux v. Wilkinson, at al, 21 ILR 6131, 6132 (Ft. Berth. Tribal Court 1993) that the Tribes’ monies are communal property and that tribal members had the right to sue the TBC and its members for expending monies in a manner that some members disagreed with under the Constitutional waiver of sovereign immunity. They claim violations of Art. VI, Section 5(c), which they claim are justiciable claims under the communal property theory of Bordeaux, and tie those claims into their right to seek

referendums under Art. VIII of the Constitution. They then allege that they have justiciable claims for violations of the Tribes Bylaws governing Packineau and his duty to keep financial records for the Tribes and disclose them to tribal members on request and to avoid expending tribal funds without a valid public resolution. They then allege claims under the Tribes' charter that accurate financial records be maintained and provided to the Bureau of Indian Affairs.

The Plaintiffs also allege violations of the Indian Civil Rights Act, 25 U.S.C. §1302, by the individual Defendants claiming that again that they have a "communal" property right in the Tribes' revenues and income and that the Defendants' practices were depriving them of that property right without due process of law.

As relief they seek a writ of prohibition in the nature of a prospective injunctive order compelling the Defendants to comply with the Constitution, By-Laws and Charter with regard to the future expenditures of tribal funds, a writ of mandamus requiring Packineau to provide accurate financial information to the membership both for what has been expended in prior years as well as with regard to future expenditures, a writ of mandamus directed to Defendant Fred Fox to provide them with voter information so they can exercise the right of referendum under the Constitution, an order imposing a "constructive trust" upon all tribal assets to ensure that they are not expended in a way that violates the trust owed the membership, an accounting of monies spent in the past, declaratory relief, and attorney's fees. In their various prayers for relief, they also suggest other remedies they seek including selling the property purchased in Las Vegas and retuning the monies from the sale to tribal revenues to be held under a "constructive trust."

LEGAL ANALYSIS

The Defendants claim that this Court is barred from granting any of the relief being sought on the grounds of: 1) sovereign immunity; 2) the political question doctrine; and 3)

failure to state legally justiciable claims in this Court. They specifically assert that the Plaintiffs' complaint fails to demonstrate that these Plaintiffs have any "personal" property right to the Tribes' revenues and assets that is protected under the Indian Civil Rights Act and that the Northern Plains Inter-Tribal Court of Appeals decision in Francis v. Wilkinson, 20 ILR 6015 (N.Pls Inter-Tribal Court of Appeals 1993)⁶ is distinguishable from the property right asserted herein because the purported property right found in Francis- monies owed on an alleged breach of contract by the Tribes- is a personalized property right unlike the "communal" property right claimed by the Plaintiffs. The Defendants argue that this Court's decision in Bordeaux is not binding as it is an outlier decision issued by a special Associate Judge and that the decision of then Chief Judge Albert Jones⁷ in Good Iron v. Hall, 26 ILR 6029 (1998), holding that the TBC had the authority to disaffirm this Court's jurisdiction over a claim allegedly arising under the ICRA, is a more relevant precedent.

Defendants also contend that the actions taken by the Defendants of which the Plaintiffs heartily complain of in their complaint are "political decisions" vested solely in the TBC by the Tribes' Constitution and it is not the role of this Court to second-guess valid legislative actions taken by the Defendants under the authority vested them in the Tribes' Constitution. Because of that they claim that the causes of action raised in the complaint are not justiciable claims which

⁶ This decision was rendered by the Northern Plains Inter-Tribal Court of Appeals which was once the court of appeals for the Tribes, but the Tribes now have their own independent Appellate Court, the MHA Nation Supreme Court. The Court asked counsel if they were aware of whether the precedents of that prior appellate Court are still binding upon this Court, and neither were able to point this Court to any resolution when the new appellate Court was created to disaffirm those precedents or a decision of the MHA Supreme Court unmooring this Court from those precedents. It should be noted that there was an order denying reconsideration in Francis that limited the type of relief this Court can issue even if it finds an ICRA violation.

⁷ No relation to the undersigned. At hearing the Parties and the undersigned assumed that the undersigned was the Judge on this case but in actuality it was Chief Judge Albert Jones. The undersigned authored a decision at about the same time that ruled that this Court does have jurisdiction to determine whether laws of the Tribes violated the Indian Civil Rights Act, See Hall v. Lakeside Bank and Mark Fox v. Tex Hall, 26 ILR 6032 (1998), striking down some of the Election Code as violative of the TAT Constitution. The Court did the same in Gwinn v. MHA Election Board, discussed herein.

the Court has any authority to grant relief on.

The Plaintiffs respond with the argument that sovereign immunity has been clearly and unequivocally waived in the Tribes' Constitution at Art. VI, Section 3(b) because they have stated a cognizable claim of a deprivation of a right without due process of law by the TBC and its members. They also assert that federal law, the Indian Civil Rights Act, is a federal abrogation of the sovereign immunity of the individual members of the TBC for injunctive relief under the Ex Parte Young doctrine and the claims they make against the individual TBC members do raise alleged actions taken in excess of their authority and thus can be litigated in this Court.

This Court has recognized that the Tribes and the individual Defendants, as well as other tribal officials, are not subject to suit in this Court in a variety of contexts. See Johnson v. Fox, CIV 2019-0436 (dismissing claim of tribal member asserting that the RBC and its members had unlawfully deprived him of the right to obtain a business license with the Tribes). It must be remembered that the defense of sovereign immunity is a federal common law defense which the United States Supreme Court held in Santa Clara Pueblo v. Martinez, 436 US 49, 58 (1978) applies to suits against Indian tribes and their officials in federal court. The Supreme Court in Martinez did not directly address whether the common law defense is also available in tribal courts, implying that it was, but noted that an exception for injunctive or declaratory suits for ICRA violations may exist in tribal court, again under a common law exception to immunity recognized in Ex Parte Young, 209 U.S. 123 (1908). That exception was conjured up by the US Supreme Court to defeat the 11th amendment immunity of State officials against suits for injunctive or declaratory relief alleging violations of federal law.

There is no federal statute governing the availability of the sovereign immunity defense

for Tribes in federal or state courts and instead the Supreme Court has continued to interpret the common law in issuing several decisions subsequent to Santa Clara Pueblo. After Santa Clara Pueblo the US Supreme Court has been adamant in protecting the defense in federal and state courts even when the Tribe and its officials engaged in off-reservation business activities, The Supreme Court has acknowledged that “tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.” Kiowa Tribe of Okla. v. Manufacturing Technologies, 523 U.S. 751, 760 (1998). There are only two recognized instances in which a tribe might be subject to suit. These instances include occasions where 1) Congress has authorized the suit by abrogating the immunity; or 2) the tribe has waived its immunity. Kiowa Tribe of Okla. v. Manufacturing Technologies, 523 U.S. 751, 754 (1998). For a tribe to waive sovereign immunity, such a waiver must be “clear.” Oklahoma Tax Comm’n v. Citizen Band Potawatoni Tribe of Okla., 498 U.S. 505, 509 (1991). A waiver “cannot be implied but must be unequivocally expressed.” Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

IS THE MHA CONSTITUTION A CLEAR AND UNEQUOCIVAL WAIVER OF THE
IMMUNITY OF THE TBC AND THE TRIBAL OFFICIALS IN THIS CASE?

The Plaintiffs argue that the MHA Constitution, at Article VI, Section 3(b), contains an express wavier of immunity from suit in this case. That section states:

*SECTION 3 (b). The people of the Three Affiliated Tribes, in order to achieve a responsible and wise administration of this sovereignty delegated by this Constitution to the Tubal Business Council, hereby specifically grant to the Tribal Court the authority to enforce the provisions of the Indian Civil Rights Act, 25 U.S.C. 1301, et seq., including the **award of injunctive relief only** against the Tribal Business Council if it is determined through an adjudication that the Tribal Business Council in a specific instance violated that Act. (**Emphasis added**)*

A couple of observations about this section of the Constitution are important. First, it is

clearly a partial waiver of the Tribes' sovereign immunity to enforce the Indian Civil Rights Act and supersedes that part of the Tribal Code which seems to require the TBC to waive immunity from suit by resolution. See Title I, Chapter 1.4 stating that:

*Sovereign Immunity- Nothing contained in the **code** shall be construed as a waiver of sovereign immunity from suit of the Tribe, its officers, business or entities unless specifically waived. A waiver of immunity will not be implied, and any waiver must be expressly stated as to its terms and conditions.*

Title I, Chapter 1.4 would not control in a situation where the people have waived immunity in the Constitution as the Tribal Code cannot supersede the TA Constitution. See Gwinn v. Tribal Election Board, Case 2020-0374 (September 4, 2020, affirmed by MHA Supreme Court), striking down TAT Election Ordinance requiring candidates to reside in Segment for at least one year to run for office as violating Art. IV, Sec. 6 of the TAT Constitution that has a six-month residency requirement.

There are some limiting principles to the waiver however, as the waiver only applies to actions to enforce the Indian Civil Rights Act and permits injunctive relief “only” against the TBC. It is not clear whether the “only” in the Constitution refers to “injunctive relief” or to “the TBC.” If the latter the individual members of the RBC would retain immunity from suit unless there is some other clear waiver or an abrogation of their immunity under other tribal law or federal law. It should be noted that in Francis v. Wilkinson, 20 ILR 6015 (N.Pl. Inter-Tribal Court of Appeals 1993, reconsideration denied 1993) the Northern Plains Inter-Tribal Court of Appeals, in a decision that is still binding on the Court, seemed to initially ignore the import of the word “only” in the Constitution in both regards as it held that a suit for money damages for a breach of contract was a cognizable claim against the then Chairman of the Tribes, Wilbur Wilkinson, under the waiver of immunity in the TAT Constitution, despite the waiver only

applying to claims for injunctive relief against the TBC. This Court took that decision even further in Bordeaux v. Wilkinson by holding that the decision in Francis meant that the waiver also applied to suits for “monetary damages against Tribal Officials found to be acting outside the scope of their tribal authority.” Bordeaux at 6132. It is not clear how the Bordeaux Court read the Francis case this broadly. Francis involved a suit brought by the Tribal Comptroller for money damages after he was terminated by the TBC with a contract that provided for one-year severance pay. After he was denied the severance, he sued the TBC and individual members of the TBC for his severance pay. This Court dismissed the suit on sovereign immunity grounds finding that the right to contractual damages was not a property right under the ICRA. The NPICA reversed and explicitly held that in certain circumstances, citing Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), a claim to compensatory damages such as severance pay could constitute a property right under the 14th amendment and under the circumstances in Francis’ termination, he did have a valid property right and could sue for his severance. The Court used the following language in Roth as the litmus test for determining whether a person has a right under the ICRA:

"To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id at 577.

The fact that the Francis court initially seemed to ignore the fact that the waiver only permitted injunctive relief, not monetary relief, must have been the basis for the Bordeaux court finding that the decision also allowed for suits for money damages against the TBC members. Francis did not expressly find that however, so the Court finds that the Constitutional waiver only pertains to suits for injunctive relief to remedy future violations of the ICRA. The Francis Court actually clarified that on reconsideration when it expressly held as such.

The Francis decision is still binding precedent in this Court. It permitted the suit to proceed against the TBC and the members of the TBC. This Court thus finds that the “only” language in Article VI, Section 3(b) does not restrict suits against the members of the TBC, but only restricts the type of relief the Court can grant, although again the Francis Court does not clearly articulate why the claim for severance in that case was one seeking injunctive relief unless the Court was holding that an injunction against denying Francis his severance pay was injunctive relief.⁸ Francis was actually the subject of a rehearing request by the Tribes and in the order denying reconsideration the Court clearly limited the scope of judicial relief to future injunctive relief:

The Tribal Court has authority to hear this case on its merits, but the only relief that the Court can impose against the Tribal Council is injunctive relief. Suffice it to say that relief may not be adequate and the doors may well be closed for any orderly redress in Tribal Court for alleged wrongs of the defendants against the plaintiff. However, this Court and the Trial Court must abide by the legal constraints placed upon it by the Tribal Constitution and Tribal Business Council.

Bordeaux is not a binding precedent on this Court as it was a trial-level decision, although this Court always strives to reconcile the decisions of this Court with decisions of other Judges, current and past. The property right in that case was described as a “communal” property right and the Plaintiffs herein seize upon the language in that decision to argue that they have a “communal property right” to the Tribes’ resources that they are seeking to vindicate with this lawsuit. They argue that when the TBC spends tribal resources their rights are implicated because those resources are community property and thus, they have an argument that

⁸ If the ruling in Francis is that any claim for monetary relief against the TBC for breach of contract is a property right it is unclear to this Court why there is such an emphasis in contracts entered into between parties and the Tribes to address the waiver of immunity language. See Dog Eagle v. Tribes, CIV 2020-0172 (contract between Tribes and in-house attorney containing waiver of immunity language is not a valid waiver due to the DOI not approving of the contract).

community property is being taken without due process of law when the Defendants expend tribal resources in the ways they describe in their complaint.

A close examination of Bordeaux however reveals that the “property” right found therein is more nuanced than the broad concept of communal property, which makes for a good Kumbaya moment but would render any tribal expenditure of monies a potential property deprivation and would turn this Court into some type of super-legislative body with veto power over TBC decisions, thus flipping the Constitution on its head. The NPITCA warned of this in the Francis decision in its reconsideration order when Judge Foughty wrote:

Nor can it be said that the Tribal Court by implication acts as a check on the tribal governing authority. The general authority given to Tribal Court in this case is given by the Tribal Business Council and Article VI Section 3 and Section 3 (b) Constitution and By Laws of Three Affiliated Tribes of The Fort Berthold Reservation both sections are cited in full.

Judge McLees clearly limited the “communal property” claims to challenges to monies expended by the TBC without resolutions when he held that “(w)ithout a resolution from the tribal business council approving compensation paid to its members, it is doubtful whether a mechanism (i.e. referendum) exists for tribal members to challenge the propriety of the actions taken by the council- without resolution there is no official record of action taken by the tribal business council.” The “taking” was therefore not of the actual monies spent on the bonuses to TBC members, but of the membership’s right to challenge the bonuses by referendum.

The legal issue is therefore whether the Plaintiffs in this case have cited to a “right” protected under the Indian Civil Rights Act that they have been allegedly deprived of without due process of law. That right must be one they have “a legitimate claim of entitlement to” under Francis using the Roth decision as a basis for determining that issue.

The seminal case for determining whether a person has a “property right” protected under

the 14th amendment due process clause, which appears to be the model used by Congress in drafting the Indian Civil Rights Act, is Board of Regents v. Roth, where the Supreme Court held that the following standard determines if a property interest is involved:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

On the same day that Roth was issued, the Supreme Court decided the similar -- but distinctly disparate -- circumstances of Perry v. Sindermann, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). There, the plaintiff was also a nontenured professor at a state junior college whose one-year contract was not renewed. Unlike its determination in Roth, the Court concluded that the plaintiff had alleged a property interest, deserving of constitutional protection, because his employer had guidelines and "binding understandings" which implicated a right to contract renewal. In reliance upon Roth, the Court restated the attributes of a property interest, which is worthy of constitutional protection, as follows:

We have made clear in Roth, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

The Court rejects the notion of communal property rights that is somewhat endorsed in the Bordeaux decision. Although that concept sounds "tribal" in nature it would open the

floodgates to endless litigation over how the Tribes spend money as there are always going to be tribal members who disagree with how the TBC spends tribal funds. This Court should not be the ultimate arbiter of whether tribal expenditures serve the common good of the membership as those are political decisions the membership elects leaders to make.

The Defendants are correct in that the Court in Francis seemed to endorse the notion of a individualized “personal” property right as being protected under the Indian Civil Rights Act and not the “communal” right the Plaintiffs argue for. However, the Plaintiffs herein point out that there are rights reserved to them in the TAT Constitution to challenge decisions of the TBC through the referendum process, but that right cannot be exercised unless the Defendants expend monies pursuant to public resolutions that would trigger the right of referendum. Is the right of referendum to challenge spending decisions of the Defendants therefore a property right under the Indian Civil Rights Act or is it merely a constitutional right reserved the Plaintiffs under the TAT Constitution? The right to seek a referendum certainly appears to be one the Plaintiffs are “legitimately entitled” to and one constitutionally protected, but is the source of that protection the TAT Constitution or the Indian Civil Rights Act? It should be remembered that the waiver of immunity contained at Article VI, Section 3(b) does not grant this Court jurisdiction to entertain claims of violations of the TAT Constitution, but only the Indian Civil Rights Act. Is there anything in the Indian Civil Rights Act that buttresses the Plaintiff’s claim of entitlement to public notice of financial expenditures sufficient to allow them to exercise the right of referendum? The Court thinks so in 25 U.S.C. §1302(1) guaranteeing to the membership the right to petition for a redress of their grievances against tribal government. This is essentially what a referendum is- the right of the people to overturn the decisions of their elected leaders. Merely because that right is one that is extremely difficult to execute because of the limitations

regarding numbers of eligible voters, etc does not render it unenforceable.

This Court therefore finds that the Plaintiffs have alleged a potential violation of their rights under the Indian Civil Rights Act to proper notice of official governmental acts to expend tribal resources in order to exercise their constitutional right of referendum.

Having found a right under the ICRA that is allegedly being taken by the Defendants the other argument for immunity of the individual Defendants must also fail because the United States Supreme Court has essentially ruled that ICRA is a federal abrogation of sovereign immunity in Tribal Courts in Michigan v. Bay Mills Indian Community, 134 S.Ct 670 (2013) in actions involving claims for prospective injunctive relief against tribal officials who are allegedly exceeding their powers.

In Santa Clara, the Supreme Court, in holding that habeas corpus was the only remedy available in federal court to challenge violations of the Indian Civil Rights Act, strongly suggested in dicta that under the Ex Parte Young doctrine remedies may be available in tribal forums for violations of the ICRA that did not result in detention. Tribal Courts were split on this issue after Santa Clara, but the United States Supreme Court's most recent jurisprudence in Michigan v. Bay Mills Indian Community, supra, may have cleared this up. In Bay Mills the Supreme Court in a 5-4 decision upheld the defense of sovereign immunity for an Indian tribe that was allegedly involved in Class III gaming off "Indian lands" in violation of the Indian Gaming Regulatory Act. The Court ruled that IGRA only permitted states to sue Indian Tribes for "Indian lands" gaming and thus the suit against the Tribe could not be countenanced. However, the Court discussed numerous other manners in which the State could have sued the Tribe including suits against tribal officials utilizing the Ex Parte Young exception.

“As this Court has stated before, analogizing to Ex parte Young, 209 U. S. 123 (1908), tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct. See Santa Clara Pueblo, 436 U. S., at 59.”

Slip opinion at 13

Because Santa Clara Pueblo held that such suits against tribal officials cannot be brought in federal courts because the exclusive remedy in federal court for a violation of the Indian Civil Rights Act is habeas corpus under 25 U.S.C. §1303, the Bay Mills Court must be holding that these suits can be brought in tribal courts.

However, because the Bay Mills Court cites to Santa Clara Pueblo this Court finds that the unlawful conduct referenced in Bay Mills must be conduct that contravenes the Indian Civil Rights Act. The Indian Civil Rights Act is therefore another basis for finding that immunity does not bar some of the causes of action cited by the Plaintiffs in their complaint.

POLITICAL QUESTION DOCTRINE AND NON-JUSTICIABILITY CLAIMS

Having found a waiver of immunity in the TAT Constitution and an abrogation of immunity for claims for injunctive relief, similar to the Ex Parte Young exception, does not resolve the motion to dismiss however as the Defendants also claim that the Court exercising jurisdiction over the Plaintiffs' claims would violate the political question doctrine and that many of the causes of action asserted present non-justiciable claims. The political question doctrine is one which limits judicial authority to intervene into matters that are exclusively delegated to a coordinate branch of government to resolve. The political question doctrine applies "where there is 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . .'" Nixon v. United States, 506 U.S. 224, 228, 122 L.Ed. 2d 1, 113 S. Ct. 732 (1993) (emphasis added) (quoting Baker v. Carr, 369 U.S. 186, 217, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962)). The

policy behind the political question doctrine derives from the need to maintain separation of powers between coequal branches of government. Elrod v. Burns, 427 U.S. 347, 351, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) (citing Baker, 369 U.S. at 217). "It is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the political question Baker, 369 U.S. at 210.

Numerous tribal courts have adhered to this doctrine including Moran v. Confederated Salish and Kootenai Court of Appeals, Montana Oct 23, 19951995 Mont. Salish & Kootenai Tribe LEXIS 2; Delgado v. Oneida Bus. Commission, Oneida Appeals Commission Trial Court Jun 07, 20002000 Oneida Trial LEXIS 17; Chapman v. Little River Band of Ottawa Indians, Little River Band of Ottawa Indians Tribal Court Dec 15, 20082008 MI Ottawa Trib. LEXIS 2; Benjamin v. Weyaus, Mille Lacs Band of Ojibwe Court of Appeals Oct 14, 20082008 Mille Lacs Band Ojibwe App. LEXIS 1; In re Saunoke, Cherokee Nation Supreme Court Dec 19, 2018, 2018 Cherokee Nation Supreme LEXIS 12.

If a complaint presents issues exclusively reserved to the TBC under the Tribal Constitution or other governing law those issues may not be justiciable in a court of law as the Court may be intruding upon the prerogative of the legislative and executive branches of government. Several of the claims of the Plaintiffs relate to issues that are not subject to judicial scrutiny under this doctrine. For example, they take issue with the TBC ratifying Executive Committee decisions and with alleged deficiencies in accounting methods used by the Defendants. If the TBC's actions result in a public resolution that is clear enough to be subject to a referendum election it is not the Court's prerogative to dictate how that resolution gets hammered out. Similarly, the Plaintiffs complain that the Defendants discuss important issues to the membership in Executive sessions where the public is not permitted to be present. This does

not present a justiciable claim under the political question doctrine because the TBC has exclusive control over how to debate and discuss issues of importance to the Tribe, provided there is some public resolution of the matter. Nor do the allegations of the Plaintiffs related to inadequate accounting methods and audits relate to their ICRA claim. The Court is not dismissing their concerns but simply noting that not every concern raises an ICRA claim that is justiciable in this Court. If the Court were to lay out its best-case scenario for how the Defendants should operate as a government it would in essence be dictating to the Defendants how to do what they are exclusively vested with the authority to do under the Constitution.

Some of the claims of the Plaintiffs as laid out herein are simply not justiciable under the political question doctrine as they ask this Court to substitute their and its opinions for how the Defendants should operate the government. Exemplary government is not an ICRA right.

WHAT CAUSES OF ACTION AND CLAIMS FOR RELIEF THUS SURVIVE SOVEREIGN IMMUNITY?

The TAT Constitution and the Ex Parte Young doctrine only permit this Court to order prospective injunctive relief upon a finding of an ICRA violation in order to avoid future violations. This was the holding of the Francis court on reconsideration where the Court noted that merely because Francis had alleged a cause of action under the ICRA did not mean the Court could fashion a remedy for him. The Court noted that this may restrict the remedies available to this Court to vindicate the exercise of an ICRA right. Specifically, the Constitutional waiver does not refer to declaratory relief, which the Plaintiffs request a lot of in their complaint. That does not mean that the Court cannot factor in alleged actions taken in the past in contravention of the TAT Constitution and the Indian Civil Rights Act in determining whether future violations are possible, but that does not mean this Court can strike them down

and in effect render their continuing legality suspect. This Court must therefore examine the relief being sought by the Plaintiffs to determine whether the type of relief being request fits within the parameters of the constitutional waiver and federal abrogation of sovereign immunity.

The first cause of action cited by the Plaintiffs is a violation of the TAT Constitutional right to a public resolution so they may exercise the referendum rights preserved them under the TAT Constitution. Their prayer for relief attempts to pigeon-hole prior actions of the Defendants, however, and ask the Court to declare those actions void. That is beyond the scope of the wavier of immunity under the TAT Constitution, however. This Court cannot declare prior expenditures not supported by a public resolution as illegal as such would be granting retrospective relief. That does not mean that the Court cannot factor those allegations into a determination of whether the Plaintiffs can demonstrate grounds for prospective injunctive relief under the TAT Construction and the Ex Parte Young doctrine as Plaintiffs do have to demonstrate that Defendants may engage in conduct in the future that is violative of the ICRA and thus should receive some injunctive relief. Paragraphs 106-110 and 117-118 of Count 1, insofar as they seek an injunction preventing future spending decisions without public resolutions, survives the motion to dismiss. Paragraphs 111-116 are barred by sovereign immunity as they seek an order declaring prior actions of the Defendants illegal. Paragraph 119 seeks an order from this Court compelling the Defendants to provide voter information to the Plaintiffs. This relief is not related to the ICRA violation found by the Court and thus is not a proper exercise of prospective injunctive relief. This relief being sought is not governed by any existing law and is thus a political question as the Court has discussed herein.

The only paragraph in Count II of the complaint that seeks prospective injunctive relief is paragraph 135. Paragraphs 120-134 seek declaratory relief as to prior actions of the Treasurer,

which this Court cannot grant. Paragraphs 136 and 137 are political questions not tied to the ICRA right found herein and are thus beyond the scope of the immunity waiver.

The third cause of action raises issues not related to the ICRA right found herein and are thus not within the Court's jurisdiction to grant relief on. Even if they were tied into the referendum right, they do not seek prospective injunctive relief and are thus barred by sovereign immunity.

Paragraph 151 of the fourth cause of action (ICRA violation) survives the motion to dismiss; the other claims pertain to requests for declaratory rulings and retrospective relief and do not fall within the waiver.

The fifth cause of action relates to prospective injunctive relief and survives the sovereign immunity defense.

The sixth cause of action for mandamus relief is not related to prospective injunctive relief, but instead seeks an order compelling action to be taken. Sovereign immunity bars such relief.

The seventh cause of action for mandamus relief again is not in the form of injunctive relief and also includes requests for relief barred by the political question doctrine as nothing in the Constitution compels the release of the information being sought.

The eighth cause of action seeks an order placing a constructive trust on tribal funds and accounting. Both of these claims seek affirmative relief and not injunctive relief and are thus barred by sovereign immunity.

The ninth cause of action seeks declaratory judgments not permitted under the waiver of sovereign immunity in the TAT constitution. The issue of attorney's fees is not before the Court at this time.

Insofar as the prayers for relief mirror the alleged causes of action the Court reiterates that it can only grant relief as to future actions and not invalidate what has happened in the past, except to the extent the Court may consider what has occurred to determine if the Plaintiffs are entitled to future injunctive relief.

WHEREFORE it is hereby

ORDERED, ADJUDGED AND DECREED that insofar as the complaint in this case seeks prospective injunctive relief to enjoin the Defendants from violating the Plaintiffs' rights under Article VIII of the TAT Constitution by failing to adhere to Article VI, Section 5 of the TAT the motion to dismiss on sovereign immunity and political question grounds is DENIED and it is further

ORDERED, ADJUDGED AND DECREED that insofar as the complaint in this case seeks relief other than prospective injunctive relief to preserve the Plaintiffs' rights under Article VIII of the TAT Constitution the complaint is dismissed on sovereign immunity and political question grounds.

This Court must now determine whether the allegations of the Plaintiffs in the causes of action that survive this order are true. The Court asks that counsel confer and attempt to reach a stipulation as to a scheduling order for discovery, dispositive motions such as summary judgment, and for trial, if necessary. Counsel shall submit the same within 30 days, absent either side appealing this order, and if a stipulation cannot be reached each counsel shall submit a proposed scheduling order.

Dated this 9th day of May 2024.

BY THE COURT:

BY: B. J. Jones

OFFICE OF CLERK OF COURTS FORT BERTHOLD DISTRICT COURT
I hereby certify that I have compared the
within instrument with the original Case No. 00-2023-0469
Now on file in my office, and that it is a true
copy of the same, and the above is true copy of the filing
thereon.
Dated at New Town, North Dakota this 10TH
day of MAY, 2024
Charmaine Jones
Clerk of Court

B.J. Jones
Associate Judge

**THREE AFFILIATED TRIBES
FORT BERTHOLD RESERVATION**

**DISTRICT COURT
NEW TOWN, NORTH DAKOTA**

Carol Good Bear et al.

)

)

vs.

)

)

Mark Naaman Fox et al.

)

Affidavit of Service By Mail
CV-2023-0469

I, Chalsey Snyder, being first duly sworn on oath, does depose and say that he/she is a citizen of the United States, Over the age of Twenty-one, and not a party to the above- entitled matter:

On this 10th, day of May, 2024, this affiant deposited in the mailing department of the United States Post Office at New Town, North Dakota, a true and correct copy of the following documents filed in the above captioned action:

Order Granting In Part and Denying In Part Defendant's Motion to Dismiss

The copy of the document was securely enclosed in an envelope with postage prepaid; addressed as follows:

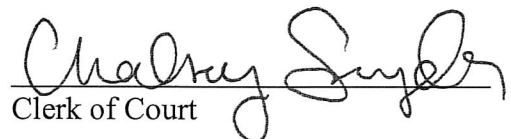
Timothy Q. Purdon
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Bismarck, ND 58503

Jack E. Zuger
30 E. 7th St. NW
St. Paul, MN 55101

Timothy W. Billion
150 East 4th Place, Suite 704
Sioux Falls, SD 57104

To the best of your affiant's knowledge, information, and belief, such address as given above was the actual post office address of the party intended to be served.

On this 10th, May, 2024


Clerk of Court