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January 12, 2024

VIA EMAIL AND U.S. MAIL

Fort Berthold District Court
P.O. Box 969
New Town, ND 58763
deputyclerks@mhanation.com

RE: *Carol Good Bear, et al. vs. Mark N. Fox, et al.*
Case No.: CV-2023-0469

Dear District Court:

Enclosed for filing in the above matter, please find the following:

1. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss;
and
2. Certificate of Service.

Thank you.

Very truly yours,



Jack E. Zuger

JEZ/jh
Enclosures
4892-6955-6890

cc: Timothy Q. Purdon (w/enc.) (via email)
Timothy W. Billion (w/enc.) (via email)



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, and Edward S. “Tyke” Danks,

Plaintiffs,

vs.

Mark N. Fox, as Three Affiliated Tribes’ Tribal Chairman, Cory Spotted Bear, as Three Affiliated Tribes’ Vice-Chairman, Fred Fox, as Three Affiliated Tribes’ Executive Secretary, Mervin Packineau, as Three Affiliated Tribes’ Treasurer, Robert White, as Three Affiliated Tribes’ Councilman, Sherry Turner-Lone Fight, as Three Affiliated Tribes’ Councilwoman, Monica Mayer, as Three Affiliated Tribes’ Councilwoman, and The Three Affiliated Tribes’ Tribal Business Council,

Defendants.

Case No. CV-2023-0469

**PLAINTIFFS’ MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS’
MOTION TO DISMISS**

[¶1] Plaintiffs Carol Good Bear, Terrance Fredericks, Todd Hall, Patti Jo Hall, Kelly Hosie, and Edward S. “Tyke” Danks submit this memorandum of law in opposition to Defendants’ motion to dismiss.

INTRODUCTION

[¶2] Plaintiffs, as enrolled members of the Three Affiliated Tribes (the “Tribe”), filed suit in this Court seeking to hold their elected officials and the Tribal Business Council accountable for failures of financial openness and oversight in the expenditure of tribal funds. Defendants attempt to avoid accountability by claiming enrolled members of the Tribe have no right to enforce Defendants’ compliance with mandatory provisions of the Tribe’s governing documents, and that

this Court has no jurisdiction to hear Plaintiffs' claims. However, the Constitution and Bylaws of the Three Affiliated Tribes of The Fort Berthold Reservation (the "Constitution") plainly provide for the exact remedy Plaintiffs seek. Because the Constitution unequivocally does not immunize Defendants from any and all accountability in the exercise of their duties, and because this Court is the appropriate forum for pursuing such accountability under the provisions of the Indian Civil Rights Act (the "ICRA"), Defendants' motion must be denied.

STATEMENT OF FACTS

[¶3] Defendants are each elected officials of the Tribe. [Complaint, ¶¶ 8–14]. As elected officials tasked with the proper administration of the Tribe and its financial resources, Defendants must comply with the duties prescribed for such administration in the Tribe's governing documents. [*Id.*, ¶¶ 22–33]. One such primary duty is to expend tribal funds only upon a resolution duly passed by the Tribal Business Council and with the amount of such expenditure duly recorded as a matter of public record. [*Id.*, ¶ 27].

[¶4] Historically, the Tribal Business Council acted in accordance with these duties. [*Id.*, ¶ 43]. However, since at least 2009, the Tribal Business Council has failed to comply with some or all of these duties. [*Id.*, ¶ 47]. Most significantly, large sums of tribal money have been spent with little to no public record authorizing such expenditures and no notice to the enrolled members of the Tribe as to the way their money was being used. [*Id.*, ¶¶ 94–95]. A pertinent example of the pattern of behavior is the expenditure of over \$100,000,000.00 of tribal funds to purchase land in Las Vegas, Nevada. [*Id.*, ¶¶ 92–93]. No resolution was ever proposed or passed to authorize the use of such funds. [*Id.*]. And the amount was not made part of the public record as required by the Constitution—instead, "the purchase was made public only after several local and regional news agencies" reported on the transaction. [*Id.*].

[¶5] Plaintiffs, concerned about the sound administration and use of tribal funds, have attempted to gather information necessary to advise the public of the scope of the Tribal Business Council's business dealings. [*Id.*, ¶¶ 96–104]. These requests were met with no response. [*Id.*]. Due to the large amount of funds at issue—over \$940 million spent without proper authorization between 2010 and 2022—Plaintiffs initiated this lawsuit seeking to hold Defendants accountable for funds missing from the public record and to prevent Defendants from continuing to spend tribal funds without complying with constitutional requirements.

[¶6] Defendants now yet again seek to avoid public accountability. They claim that this Court is bereft of jurisdiction to hear Plaintiffs' claims, and that their conduct must be permitted to continue unabated. The Tribe's governing documents and this Court's own prior caselaw, however, demonstrate that Defendants' claims are unavailing. Plaintiffs therefore respectfully request that this Court deny Defendants' motion to dismiss.

LEGAL STANDARD

[¶7] The Rules of Civil Procedure for the Three Affiliated Tribes Tribal Court permit a defendant to challenge the jurisdiction of the Tribal Court to hear an action. *See* MHA Nation R. Civ. P. 7 (“Defenses may include lack of jurisdiction, improper service and failure to state a claim for relief.”). Although the Rules do not expressly provide for a motion to dismiss on the basis of jurisdiction, the Tribal Court may look to the North Dakota Rules of Civil Procedure for guidance. *See* MHA Nation R. Civ. P. 1 (“The North Dakota Rules of Civil Procedure shall be used for matters not specifically addressed herein and where not in conflict with these rules.”). Those rules provide that the “lack of subject-matter jurisdiction” may be made “by motion.” N.D. R. Civ. P. 12(b)(1); *see also* *Env't'l L. & Pol'y Ctr. v. N.D. Pub. Serv. Comm'n*, 2020 ND 192, ¶16, 948

N.W.2d 838 (stating that “a motion to dismiss under [Rule] 12(b)(1) allows a party to challenge the court’s subject matter jurisdiction”).

[¶8] Courts recognize two distinct challenges to subject matter jurisdiction. *Env’t L. & Pol’y Ctr.*, 2020 ND 192, ¶17 (citing *Gould Elec’s, Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000)). A Rule 12(b)(1) motion may be “treated as either a facial or factual challenge.” *Gould Elec’s, Inc.*, 220 F.3d at 176 (citing *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977)). A facial challenge to subject matter jurisdiction “attacks the complaint on its face” and requires a court to “consider the allegations of the complaint as true.” *Mortensen*, 549 F.2d at 891. A factual challenge, however, attacks jurisdiction “irrespective of the pleadings,” and “matters outside the pleadings” may be considered. *Env’t L. & Pol’y Ctr.*, 2020 ND 192, ¶17 (quotation omitted). And the plaintiff “bears the burden of proving jurisdiction exists in a factual challenge.” *Id.*

[¶9] Because Defendants here present matters outside the pleadings, the Court may be tempted to construe Defendants’ motion as a factual challenge to subject matter jurisdiction. However, Plaintiffs contend that this Court’s subject matter jurisdiction is well-established under the allegations as pleaded within the complaint itself, and the Court need not refer to matters outside of the pleadings to satisfy itself of the existence of jurisdiction here. *See Gould Elec’s, Inc.*, 220 F.3d at 176–77 (construing the Rule 12(b)(1) challenge as factual solely due to the district court’s decision to consider matters “which were not referenced in or attached to the Complaint”). Plaintiffs should therefore be afforded the standard of review attendant to a facial challenge. *See Mortensen*, 549 F.2d at 891 (stating that under a facial challenge, the allegations in the complaint must be construed as true). Nevertheless, under either standard, Defendants’ challenges to this

Court's jurisdiction over Plaintiffs' complaint are unavailing according to the plain language of the constitutional provisions supporting Plaintiffs' claims.

ANALYSIS

[¶10] Defendants' motion is simply yet another attempt to avoid being held accountable by their constituents. They claim that the Tribe's sovereign immunity prevents tribal members from holding the Tribe and its representatives to account for their violations of the Tribe's governing documents. They also claim that this Court lacks the authority to enforce Defendants' compliance with tribal law, either due to the alleged political nature of Plaintiffs' claims or under a disingenuously narrow view of the scope of this Court's authority. Each of these arguments fail on their merits, and Plaintiffs must be permitted to continue to leverage the mechanisms of accountability for the Tribe's elected officials.

I. Plaintiffs' claims are not barred by sovereign immunity.

[¶11] Defendants argue that Plaintiffs' suit is barred by sovereign immunity because the Council has not specifically waived such immunity and because Plaintiffs' claims intrude upon the Council's discretionary authority to act on behalf of the Tribe. However, Defendants overlook the plain language of the Tribal Constitution which grants this Court the specific authority to hear Plaintiffs' claims. And because the duties which Plaintiffs seek to compel Defendants to perform are far from discretionary, sovereign immunity does not bar Plaintiffs' complaint here.

A. The Constitution contains an express waiver of sovereign immunity.

[¶12] Plaintiffs do not intend to undermine the long-standing rule of law in favor of the sovereignty of the Tribe. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) ("Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government." (quotations omitted)). This sovereignty extends to and includes

“the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Id.* at 58. But this immunity is not absolute—the law provides for and recognizes that sovereign entities may waive their sovereign immunity through some affirmative act. *See id.* (stating that “a waiver of sovereign immunity cannot be implied by must be unequivocally expressed”); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 898 (2d Cir. 1996) (“Indian tribes and their governing bodies possess common law immunity from suit *absent an unequivocal waiver by the tribe.*” (emphasis added)).

[¶13] The Constitution of the Tribe contains just such an unequivocal waiver of sovereign immunity here. The Constitution expressly and unambiguously provides that:

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 Tribal 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 has in a specific instance violated that Act.

MHA Nation Const. Art. VI, § 3(b). This constitutional grant of authority to this Court by the people of the Tribe plainly operates to waive sovereign immunity for suits alleging ICRA violations. That Defendants would have this Court ignore the existence of Article VI, § 3(b) does not obviate its existence and does not undermine the legality of Plaintiffs’ complaint.

[¶14] Moreover, that Article VI, § 3(b) operates as a waiver of tribal sovereign immunity in specific instances is well-established by this Court. The Northern Plains Intertribal Court of Appeals squarely addressed the issue in *Francis v. Wilkinson* when it considered whether “the Constitution of the Three Affiliated Tribes or federal law expressly waive[s] council immunity from suit alleging Indian Civil Rights Act violations.” 20 Indian L. Rep. 6015, 6015 (N. Plns. Intertr. Ct. App. Jan. 21 1993). The *Wilkinson* court cited Article VI, § 3(b) of the Constitution and

concluded that “[t]he tribal court has authority to hear this case on its merits.” *Id.* at 6016. It further stated that “[a] plain reading of [§ 3(b)] expressly and unequivocally waives immunity by granting the tribal court the authority to enforce the Indian Civil Rights Act” *Id.* at 6019 (quotations omitted).

[¶15] This Court has referred to the conclusions of the *Wilkinson* court as well as Article VI, § 3(b) itself in its own ruling in favor of the waiver of sovereign immunity. In *Bordeaux v. Wilkinson*, this Court determined that “sovereign immunity possessed by the governing body of the Three Affiliated Tribes does *not* bar the instant action brought by the plaintiff.” 21 Indian L. Rep. 6131, 6131 (Ft. Bert. Tr. Ct. Oct. 1, 1993). The *Bordeaux* court stated that “[o]ne need only look to the Constitution of the Three Affiliated Tribes (article VI, section 3(b)) . . . to confirm that injunctive relief against the tribal business council for violations of the Indian Civil Rights Act is authorized by the constitution.” *Id.* at 6132. Because the constitutional provisions “expressly and unequivocally waive[s] council immunity from ICRA suits,” the *Bordeaux* court determined that “[s]overeign immunity has thus become a non-issue in this action.” *Id.* (quotations omitted).

[¶16] The *Bordeaux* and *Wilkinson* line of decisions—and their conclusion that Article VI, § 3(b) operates as an express waiver of sovereign immunity—have since been relied upon and reinforced by this Court and the Northern Plains Intertribal Court of Appeals. See *Simmonds v. Hale*, No. CV-08-08-00 (N. Plns. Intertr. Ct. App. June 25, 2001) (holding that “the trial court has indeed ignored binding precedent in the case of [*Wilkinson*], a decision issued by this Court, wherein it was held that sovereign immunity is waived in certain circumstances”); *Good Iron v. Hall*, 26 Indian L. Rep. 6029, 6030 (Ft. Bert. Tr. Ct. Dec. 18, 1998) (finding that Article VI, § 3(b) confers a “specific grant of authority to the tribal court . . . to enforce the provision of the Indian Civil Rights Act” (quotations omitted)).

[¶17] There thus exists a well-established express and unequivocal waiver of the Tribe's sovereign immunity for suits brought within this Court to enforce the provisions of the ICRA. Plaintiffs seek relief from this Court directly. The sole remaining qualification for this Court's jurisdiction under Article VI, § 3(b) is therefore whether Plaintiffs have stated a plausible claim under the ICRA for this Court's intervention.

B. Plaintiffs have stated a plausible ICRA claim.

[¶18] "Tribal forums are available to vindicate rights created by the ICRA." *Santa Clara Pueblo*, 436 U.S. at 65. The ICRA provides that "[n]o Indian tribe in exercising powers of self-government shall . . . (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." 25 U.S.C. § 1302(a)(8). The law of this Court provides that § 1302(a)(8) creates a procedural due process interest. *See Wilkinson*, 20 Indian L. Rep. at 6019 (stating that the "taking" of a "constitutionally protected property interest" gives rise to a claim under the "due process clause" of the ICRA); *see also Williams v. Sisseton-Wahpeton Sioux Tribal Council*, 387 F. Supp. 1194, 1199 (D.S.D. 1975) (stating that the ICRA "provides that Indian tribes shall not deny individual Indians liberty or property without due process of law."). To determine whether a tribe has breached this procedural due process interest, a court must determine (1) whether a protected property interest exists and (2) whether the tribe, "in exercising powers of self-government," has deprived a person of such property interest. *Wilkinson*, 20 Indian L. Rep. at 6019. At the motion to dismiss stage of litigation, however, a plaintiff need only demonstrate the existence of a protected property interest to prevail. *See id.* (remanding to the Fort Berthold District Court because it concluded the employment contract at issue constituted a protected property interest and "it should be determined, through adjudication in tribal court, if the council has, in this specific instance, violated the ICRA").

[¶19] “A protected property interest exists where a plaintiff has a legitimate claim of entitlement to a benefit that is derived from a source such as state law.” *Schueller v. Goddard*, 631 F.3d 460, 462–63 (8th Cir. 2011) (quotations omitted); *see also Wilkinson*, 20 Indian L. Rep. at 6019 (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). A protected property interest under procedural due process, therefore, involves a “legitimate claim of entitlement” that goes beyond “an abstract need or desire.” *Wilkinson*, 20 Indian L. Rep. at 6019 (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

[¶20] Plaintiffs have demonstrated a protected property interest in the communal funds of the tribe sufficient to overcome Defendants’ motion to dismiss under the ICRA due process clause. This Court has previously and consistently recognized the “communal nature of tribal property.” *Bordeaux*, 21 Indian L. Rep. at 6132. The “distinctive characteristic” of communal property is that “every member of the community”—including Plaintiffs here—“is an owner” regardless of their right to use or dispose of such property in their individual discretion. *Id.* (quoting *Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 302 (U.S. Ct. Cl. 1893)). Accordingly, a plaintiff “does not need to prove she was deprived of money that would otherwise have gone to her” to claim a protected property interest in the use of communal tribal funds. *Id.* Instead, “[t]he nature of communal ownership and the rights flowing therefrom” are sufficient to establish a protected property interest for purposes of the ICRA. *Id.*

[¶21] In reaching this conclusion, the *Bordeaux* court concurred in the plaintiff’s phrasing of the nature of her interest and the nature of the dispute:

The Plaintiff and the Defendants have the right to sit at the same table, because they are all enrolled tribal members. The Defendants have the right to decide whether and how to distribute what is on the table, because that is one of their duties as Council members. But, when they make rules on how to distribute things, they have to follow those rules. When the rules are broken, they can be enforced by anyone

sitting at the table. Consequently, the Plaintiff has a sufficient property interest to enable her to bring this suit.

Id. Plaintiffs approach this Court according to these same principles. Defendants must follow the rules and procedures governing the use of tribal funds as prescribed by the Tribe's governing documents when they spend, disburse, and otherwise dispose of tribal monies. Plaintiffs seek to enforce Defendants' compliance with those rules and procedures. Such an action is properly within the province of this Court's jurisdiction according to the ICRA due process clause. *Cf. Williams*, 387 F. Supp. at 1199 ("[A]t the very core of due process is the proposition that a governing body must abide by and be governed by its own constitution and ordinances adopted pursuant to that constitution.").

II. The *Ex parte Young* doctrine applies to authorize suit against tribal officials as proper defendants even if sovereign immunity were not waived.

[¶22] Defendants argue that sovereign immunity bars this Court's exercise of jurisdiction over Tribal officials acting in their official capacity. However, individual officers and officials of a tribe are "not protected by the tribe's immunity from suit." *Santa Clara Pueblo*, 436 U.S. at 59; *accord Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014) ("[T]ribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct."); *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 171–72 (1977) ("The doctrine of sovereign immunity . . . does not immunize the individual members of the Tribe."). Moreover, because the Tribe itself is not immune from suit under sovereign immunity by operation of Article VI, § 3(b) of the Constitution, neither are the members of the Tribal Business Council or Tribal officers. As an "exception to sovereign immunity," the *Ex parte Young* doctrine is only applicable if sovereign immunity operates to bar a claim. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997). Because the Constitution contains a clear and

unequivocal waiver of sovereign immunity here, this Court need not resort to *Ex parte Young* to restore jurisdiction as against tribal officials. Accordingly, this Court may exercise jurisdiction over such Defendants regardless of the applicability of the *Ex parte Young* exception.

[¶23] Nevertheless, even if the doctrine is unnecessary to find jurisdiction exists here, Plaintiffs have demonstrated that the circumstances supporting the application of *Ex parte Young* are satisfied. The basic premise of the *Ex parte Young* doctrine is that courts may enjoin sovereign officers “from acting unconstitutionally, either because their action is alleged to violate the Constitution directly or because it is contrary to . . . the supreme law of the land.” *Vann v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008). However, the doctrine does not permit actions “seeking to compel executive officials to perform a discretionary task” or actions “that are in reality against the state.” *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118, 1128 (D. Minn. 1994). The doctrine also prohibits actions against state officials that “implicate[] special sovereignty interests.” *Idaho*, 521 U.S. at 281. Defendants assert that each of these three prohibitions would operate to bar this Court’s exercise of jurisdiction pursuant to the *Ex parte Young* exception to sovereign immunity. However, none of these prohibitions are legally or factually supported in this case.

[¶24] First, the duties which Plaintiffs seek to compel Defendants to perform are not “discretionary.” A court may only direct an official to act “where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action.” *Ex parte Young*, 209 U.S. 123, 159 (1908). An act is “ministerial” in nature if it is mandatory—in other words, where the official has a duty to perform the act regardless of the exercise of discretion. *Id.* Defendants attempt to cloud the record regarding the nature of the acts Plaintiffs are seeking to compel them to perform by claiming Plaintiffs are seeking to control the

ultimate decisions Defendants reach regarding the use of tribal funds. However, Plaintiffs' complaint does not seek to impose Plaintiffs' or this Court's will in place of the Tribal Business Council. Instead, Plaintiffs seek to compel Defendants' compliance with the provisions of tribal law that require Defendants to explain their expenditures of tribal funds on the public record and in the light of day.

[¶25] For example, the Constitution unambiguously requires that “[a]ll 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.” MHA Nation Const. Art. VI, § 5 (emphasis added). The word “shall” is mandatory, and “creates an obligation impervious to judicial discretion.” *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 27 (1998). The requirement of spending tribal funds only upon a resolution passed by the Tribal Business Council and the making of the amounts of funds spent a matter of public record is therefore mandatory, and involves no exercise of discretion.¹ This obligation is distinguishable from the discretionary duty to “negotiate” underpinning the Eleventh Circuit’s decision in *Seminole Tribe v. Florida*, which Defendants claim is analogous to the duties Plaintiffs invoke here. *See* 11 F.3d 1016, 1028–29 (11th Cir. 1994). And as is clearly demonstrated in Plaintiffs’ complaint, Defendants have failed to meet these mandatory requirements. The “discretionary act”

¹ These same principles apply to many other provisions of the governing documents of the Tribe which are at issue here. *See, e.g.*, MHA Nation Bylaws Art. I, § 3 (stating, *inter alia*, that the Treasurer “shall” keep a record of tribal funds, “shall” report on all receipts and expenditures, “shall not” dispose of tribal funds “except when he is authorized to do so by a resolution duly passed by the Council,” and that “[t]he books and records of the Treasurer shall be audited at least once each year”); *see also* MHA Charter, § 9 (“The officers of the Tribe shall maintain accurate and complete accounts of the financial affairs of the Tribe, which shall clearly show all credits, debts, pledges, and assignments.”). Each duty created or imposed by such provisions is mandatory, and involves no exercise of discretion.

prohibition therefore does not bar Plaintiffs' claims even if the *Ex parte Young* exception were necessary to invoke jurisdiction.

[¶26] Next, Plaintiffs claims are not barred under the *Ex parte Young* doctrine for being claims which are in reality against the sovereign entity itself. This argument is “reminiscent of the losing argument” in the original *Ex parte Young* decision, and is “no more persuasive a century later.” *Vann*, 534 F.3d at 750. This argument arises from the aforementioned distinction between discretionary and ministerial acts, and reflects the caution that compelling a sovereign official to perform a discretionary act on behalf of the sovereign would be in reality compelling the sovereign itself to action even if the sovereign is afforded immunity from suits seeking such result. *Id.* at 753. To do so would be to undermine the doctrine of sovereign immunity as a whole by permitting the exception to swallow the rule. *Id.* However, there is no such risk here because the provisions of tribal law that Plaintiffs seek to enforce are mandatory and ministerial—not discretionary. Moreover, Plaintiffs seek to prevent tribal officers from acting in contravention to tribal law—such as by spending tribal funds which are not duly authorized by resolution and part of the public record of the Tribe. Preventing a sovereign officer from acting illegally does not interfere with that officer's discretion so as to prevent application of *Ex parte Young* here. *See id.* at 754 (citing *Ex parte Young* for the proposition that “[a]n injunction to prevent [an official] from doing that which he has no legal right to do is not an interference with the discretion of an officer”).

[¶27] Lastly, the gravamen of Plaintiffs' complaint does not implicate a special sovereignty interest so as to defeat application of *Ex parte Young* even if sovereign immunity were to apply. Defendants claim that there exists a bright-line rule that any action “which implicates a special sovereignty interest[]” is prohibited, and that the allocation of financial resources is a sufficiently special sovereignty interest to defeat jurisdiction. *See Idaho*, 521 U.S. at 281 (“[T]his case is

unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests."'). But the case upon which Defendants base their argument—*Idaho v. Coeur d'Alene Tribe of Idaho*—involved “state ownership of navigable waters” which “uniquely implicate[d] sovereign interests.” *Id.* at 284. In this case, Plaintiffs do not seek to restrict the Tribal Business Council's exercise of authority over tribal property; Plaintiffs instead only seek to enforce Defendants' compliance with the plain requirements of the Constitution. Indeed, the *Idaho* Court itself recognized that where “[t]he gravamen of the complaint and its ultimate purpose was to vindicate the plaintiffs' civil liberties,” and “not to establish ownership over state resources or funds,” the relief being sought did not prohibit application of the *Ex parte Young* doctrine. *See id.* at 279 (citing *Milliken v. Bradley*, 433 U.S. 267, 269 (1977)). The “gravamen of the complaint” is identical here—Plaintiffs seek to vindicate their “civil liberties” as recognized by the ICRA and as specifically permitted according to Article VI, § 3(b) of the Constitution.

[¶28] Accordingly, even if Plaintiffs were required to resort to *Ex parte Young* to establish jurisdiction, Defendants' arguments do not defeat jurisdiction. But as previously argued, this Court need not consider the prohibitions Defendants raise under *Ex parte Young* due to the express and unequivocal waiver of sovereign immunity for claims related to ICRA violations under the Constitution.

III. The political question doctrine does not bar Plaintiffs' claims.

[¶29] Defendants next contend that this Court cannot exercise jurisdiction over Plaintiffs' claims because to do so would intrude upon issues committed to the Tribal Business Council's discretion under the Tribe's governing documents. However, these so-called “political questions” do not deprive this Court of jurisdiction to consider whether Defendants' actions have violated Plaintiffs'

due process rights, and the political question doctrine does not bar this Court's exercise of jurisdiction.

[¶30] That the existence of a political question which is not properly within the province of judicial determination divests a court a jurisdiction is recognized by federal courts. *See Baker v. Carr*, 369 U.S. 186 (1962). Courts examine six factors to determine “whether a case presents a nonjusticiable political question:”

(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing a lack of respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment of multifarious pronouncements by various departments on one question.

Lin v. United States, 177 F. Supp. 3d 242, 255 (D.D.C. 2016) (citing *Baker*, 369 U.S. at 217). But even though “any one of these factors” may indicate the existence of a non-justiciable political question, a cursory examination of Plaintiffs claims here reveals that none of these political question factors are satisfied. *Id.* at 256.

[¶31] First, the precise issue which Plaintiffs have placed before the Court—whether Defendants' failures to abide by the provisions of tribal law regarding procedural requirements attendant to the expenditure of tribal funds violate Plaintiffs' due process rights under the ICRA—is under this Court's jurisdiction pursuant to the Constitution. *See* MHA Nation Const. Art. VI, § 3(b). Second, this issue is clearly subject to “judicially discoverable and manageable” standards for resolution, as evidenced by this Court's prior adjudications of due process claims. *See Wilkinson*, 20 Indian L. Rep. at 6019; *Bordeaux*, 21 Indian L. Rep. at 6132. Third, deciding the existence of a due process violation here is possible without judicial inquiry into political policies due to the

mandatory nature of the constitutional provisions underlying Plaintiffs' claims. *See* MHA Nation Const. Art. VI, § 5. Fourth, the Constitution's express grant of authority to the Tribal Court to decide whether the Tribal Business Council has violated the ICRA supports that the exercise of judicial jurisdiction here may be accomplished without "expressing a lack of respect" to another coordinate branch of government. *Id.*, Art. VI, § 3(b). Fifth, the only "unusual need for unquestioning adherence to a political decision already made" is that *in favor of* jurisdiction, because the Constitution expressly granted the Tribal Court the jurisdiction to hear Plaintiffs' claims. *Lin*, 177 F. Supp. 3d at 255. In other words, that the "People of the Three Affiliated Tribes" decided to grant this Court authority to hear due process claims under the ICRA with the express intent "to achieve a responsible and wise administration" of the powers designated to the Council reflects the only political decision worthy of unquestioning adherence here. MHA Nation Const. Art. VI, § 3(b). Lastly, there is no risk of multiple pronouncements on a single question because the entire question at issue is committed solely to this Court's jurisdiction. *Id.*

[¶32] Accordingly, none of the six factors governing a court's analysis of a non-justiciable political question apply to divest this Court of jurisdiction. Rather, many of the factors support this Court's exercise of jurisdiction over the subject matter of Plaintiffs' complaint. Defendants' arguments to the contrary are necessarily unavailing as a result.

IV. The Tribal Court is imbued with the authority to review the Tribal Business Council's actions under the Indian Civil Rights Act.

[¶33] Lastly, Defendants' perfunctory claim that this Court must defer to the Tribal Business Council's interpretation of its own authority in all circumstances is without merit. Defendants contend that because Plaintiffs' claims are based upon decision-making which is committed to the Tribal Business Council's discretion, the Tribal Court may not intervene. This argument is plainly contradicted by the Constitution. The people of the Tribe specifically committed to this Court the

jurisdiction and authority “to enforce the provisions of” the ICRA against the Tribal Business Council. MHA Nation Const. Art. VI, § 3(b). This specific grant of authority to the Tribal Court permits this Court to hear claims which are based in the ICRA—including those which contend that the Tribal Business Council’s dereliction of mandatory duties violates a tribal member’s procedural due process rights in the expenditure of communally owned tribal funds. These are precisely the circumstances under which Plaintiffs approach this Court. Defendants’ arguments to the contrary are therefore in direct contravention of the intent of the “People of the Three Affiliated Tribes” and must be rejected.

CONCLUSION

[¶34] Defendants seek to foreclose the ability of tribal members to hold their elected leaders accountable for depriving them of their due process rights attendant to the expenditure of communally owned tribal funds. But despite Defendants’ tortured attempts to argue otherwise, the Constitution plainly and unambiguously stands in favor of accountability and of this Court’s power to hear Plaintiffs’ claims. Because Plaintiffs’ claims are committed to this Court’s jurisdiction under the Constitution, Defendants’ motion must be denied.

Dated: January 12, 2024

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THREE AFFILIATED TRIBES

IN DISTRICT COURT

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Plaintiffs,

vs.

Mark N. Fox, as Three Affiliated Tribes' Tribal Chairman, Cory Spotted Bear, as Three Affiliated Tribes' Vice-Chairman, Fred Fox, as Three Affiliated Tribes' Executive Secretary, Mervin Packineau, as Three Affiliated Tribes' Treasurer, Robert White, as Three Affiliated Tribes' Councilman, Sherry Turner-Lone Fight, as Three Affiliated Tribes' Councilwoman, Monica Mayer, as Three Affiliated Tribes' Councilwoman, and The Three Affiliated Tribes' Tribal Business Council,

Defendants.

Case No. CV-2023-0469

CERTIFICATE OF SERVICE

[¶1] The undersigned hereby certifies that on January 12, 2024, a true and correct copy of the Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss was filed with the Court by U.S. Mail and Email at the following address:

Fort Berthold District Court
P.O. Box 969
New Town, ND 58763
deputyclerks@mhanation.com

and served by electronic mail on Defendants' counsel at the following email address:

Timothy Q. Purdon
TPurdon@robinskaplan.com
Timothy W. Billion
TBillion@robinskaplan.com

Dated: January 12, 2024

LARSON · KING, LLP

By s/ Jack E. Zuger

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