

THREE AFFILIATED TRIBES
FORT BERTHOLD RESERVATION

IN DISTRICT COURT
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

**MEMORANDUM IN SUPPORT OF
DEFENDANTS’ MOTION TO DISMISS**

Defendants file this Memorandum in Support of their Motion to Dismiss.

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INTRODUCTION

This is a political dispute lodged against the elected officials of the Tribal Business Council and the Council itself. Plaintiffs bring nine claims against the Council and Council members, in various combinations. The Tribe's Constitution, however, vests authority in the Tribal Business Council alone to direct the Tribe's affairs and grants the Council broad powers to act on behalf of the Tribe. The Tribal Court may not intrude on this authority and accordingly lacks jurisdiction to adjudicate these claims. This action must be dismissed.

FACTS

The Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Indian Reservation (the "Tribal Business Council" or the "Council") is the governing body of the Three Affiliated Tribes of Fort Berthold (the "Tribe"). The Council consists of six elected councilmembers, one from each segment of the Fort Berthold Indian Reservation, and a chairman elected at large. Defendants were elected to various positions of the Council – 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; and Monica Mayer, as Three Affiliated Tribes' Councilwoman.

The Tribe's Constitution grants the Tribal Business Council wide authority manage the affairs of the Tribe. Article VI, Section 3 provides that "the Tribal Business

Council of the Three Affiliated Tribes [is granted] all necessary sovereign authority - legislative and judicial - for the purpose of exercising the jurisdiction granted by the People in Article I of this Constitution.” This Section further provides the Council authority to “delegate to the Tribal Court such judicial power and authority as may be necessary to realize the jurisdiction granted by the People.”

Article VI, Section 5 enumerates certain powers granted to Tribal Business Council, including:

- (a) To manage all economic affairs and enterprise of the Three Affiliated Tribes of the Fort Berthold Reservation. . . .
- (c) To administer any funds or properly within the exclusive control of the Tribes to make expenditures from available Tribal funds for public purposes of the Tribes. . . .
- (l) To adopt resolutions regulating the procedure of the Tribal Business Council and other Tribal agencies and Tribal officials of the Reservation.

Article XI, Section 6 provides that the Council is expressly authorized to purchase any interest in land on behalf of the Tribe:

The Tribal Business Council of the Three Affiliated Tribes is hereby authorized and empowered to acquire by purchase . . . any lands or interests in land for and on behalf' of the Three Affiliated Tribes under such terms as may be agreed upon provided the acquisition is approved by the Secretary of the Interior.

Pursuant to the Council’s authority to manage the Tribe’s economic affairs, it has made certain purchases and expenditures, including properties in Las Vegas.

In 2022, Plaintiffs Good Bear and Danks were unsuccessful in their bid for election to the Tribal Business Council. Joe Skurzewski, *Unofficial: Mark Fox, Tex Hall to face off in MHA Tribal Chairman election*, KFYRTV, Sept. 20, 2022, <https://www.kfyrtv.com/2022/09/21/unofficial-mark-fox-tex-hall-face-off-mha-tribal->

chairman-election; see also *Un-official List of Candidates in the 2022 Tribal Business Council Election of the Three Affiliated Tribes*, MHANATION.COM, Aug. 30, 2022, <https://static1.squarespace.com/static/5a5fab0832601e33d9f68fde/t/62e74caf1398071b2d695a1d/1659325615970/scan.pdf>. Plaintiffs commenced this action on September 5, 2023.

LEGAL STANDARD

Pursuant to MHA Nation Rule 7, an action must be dismissed where a plaintiff has not met their burden to establish subject matter jurisdiction. Federal Courts have long applied a similar standard under the Federal Rule of Civil Procedure 12(b)(1). See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990). Courts are not limited to the facts pleaded in a complaint but can “weigh the evidence and satisfy itself as to the existence of its power to hear the case.” *Osborn*, 918 F.2d at 730. Consideration of extrinsic evidence does not convert the motion to dismiss to one for summary judgment. *Id.*

ANALYSIS

I. Sovereign immunity bars Plaintiffs’ claims.

“Among the core aspects of sovereignty that tribes possess . . . is the ‘common-law immunity from suit traditionally enjoyed by sovereign powers.’” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 782 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, (1978)). Common law immunity from suit is “‘a necessary corollary to Indian sovereignty and self-governance.’” *Bay Mills Indian Cmty.*, *Id.* at 788 (quoting *Three Affiliated Tribes of Ft. Berthold Rsrv. v. Wold Eng’g, P.C.*, 476 U.S. 877, 890 (1986)).

Any alleged waiver of immunity must be clear and unequivocally expressed. *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001).

A. The *Ex parte Young* exception to sovereign immunity does not apply.

Knowing that their claims are barred by sovereign immunity, Plaintiffs allege that the *Ex parte Young* exception to sovereign immunity provides the Court with jurisdiction to adjudicate this dispute. Not so. “Sovereign immunity is the rule – not the exception – even in the absence of prior cases specifically addressing this issue.” *Church v. Missouri*, 913 F.3d 736, 745 (8th Cir. 2019). The *Ex parte Young* exception does not apply where plaintiffs seek to compel officials to perform discretionary acts, nor where plaintiffs assert the exception as a guise to sue the government itself. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118, 1128 (D. Minn. 1994) (citing *Ex parte Young*, 209 U.S. 123, 158 (1908)).

“[S]uits seeking to compel executive officials to perform a discretionary task . . . are not permitted.” *Id.* Courts cannot “control the exercise of the discretion of an officer.” *Ex parte Young*, 209 U.S. 123, 158 (1908); *Seminole Tribe v. Florida*, 11 F.3d 1016, 1028 (11th Cir. 1994). Courts may “only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty.” *Ex parte Young*, 209 U.S. at 158.

Seminole Tribe v. Florida is instructive. In *Seminole Tribe*, plaintiffs sought to compel state officials to negotiate a compact under the Indian Gaming Regulatory Act

(IGRA). *Seminole Tribe v. Florida*, 11 F.3d 1016, 1028 (11th Cir. 1994). The IGRA, however, did “not allot merely ministerial acts to the state . . . rather, it provide[d] for the negotiation of a contract, the terms of which are left to the discretion of the state and the tribe.” *Id.* The IGRA further provided “a procedure should the state decide not to negotiate.” For these reasons, the Eleventh Circuit found that in addition to the terms of any negotiations, “the mere question of whether the state should negotiate at all [was] subject to discretion” and the *Ex parte Young* exception therefore did not apply. *Seminole Tribe v. Florida*, 11 F.3d 1016, 1028–29 (11th Cir. 1994).

Here, Plaintiffs seek an injunction against all Defendants for their alleged failure to comport with their obligations. Compl. at ¶¶ 152-58. Plaintiffs base this request for relief on the basis of actions taken or omitted by the Council and its members, including bookkeeping, past purchases of land interests, and the procedure in which it expends funds. *See* Compl. Article VI, Section 5 of the Tribe’s Constitution, however, gives explicit discretion to the Tribal Business Council and its members to exercise broad powers on behalf of the Tribe:

- (a) To manage all economic affairs and enterprise of the Three Affiliated Tribes of the Fort Berthold Reservation. . . .
- (c) To administer any funds or properly within the exclusive control of the Tribes to make expenditures from available Tribal funds for public purposes of the Tribes. . . .
- (l) To adopt resolutions regulating the procedure of the Tribal Business Council and other Tribal agencies and Tribal officials of the Reservation.

As in *Seminole Tribe*, the Tribe’s Constitution grants the Council the powers to perform. The terms of such performance—how, when, and whether to exercise its powers—are not prescribed; therefore, they are at the Council’s discretion. These are

not merely ministerial actions – they are fundamental functions of the Tribe’s governing body. The *Ex parte Young* exception, therefore, does not apply, as plaintiffs seek to control the exercise of the discretion of tribal officers, and sovereign immunity protects Defendants from suit.

Moreover, the *Ex parte Young* exception cannot apply where a suit in reality is against the government, rather than an official. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984); *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 853 F. Supp. 1118, 1128 (D. Minn. 1994). The general rule is that relief sought “is in fact against the sovereign if the decree would operate against the [sovereign]. And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief.” *Pennhurst*, 853 F. Supp. at 1128.

Here, Plaintiffs seek an injunction against “all defendants,” including the Tribal Business Council itself. In so doing, Plaintiffs impermissibly seek relief against the Tribe’s governing body. Further, as discussed, plaintiffs impermissibly seek to enjoin the Council from using its discretion to exercise its powers. Affording the relief plaintiffs seek limits the authority and discretion the Tribal Business Council is granted by the Constitution. *Ex parte Young* therefore does not apply, and Defendants are shielded by sovereign immunity.

B. The Tribal Business Council has special sovereignty interests in the allocation of its financial resources, and the *Ex parte Young* exception thereby does not apply.

The *Ex parte Young* exception to sovereign immunity does not apply where a dispute implicates significant special sovereignty interests. In *Idaho v. Coeur d'Alene Tribe of Idaho*, the United States Supreme Court held that a suit against the state of Idaho by an Indian tribe seeking to quiet title to submerged land within the state was barred because the relief the tribe sought implicated Idaho's "special sovereignty interests." 521 U.S. 261, 281 (1997). The Court noted that a state's ownership of land underlying navigable waters was an essential attribute of a state's sovereignty. *Id.* at 283. And, as a result, the *Ex parte Young* doctrine was inapplicable. *Id.* at 287. The Court further directed that in such cases courts "must examine the effect of the [relief requested] and its impact on these special sovereignty interests in order to decide whether the *Ex parte Young* fiction is applicable." *Id.* at 262.

Following *Coeur d'Alene*, several federal courts have found that various special sovereignty interests preclude application of the *Ex parte Young* exception. See *MacDonald v. Village of Northport Michigan*, 164 F.3d 964, 972 (6th Cir. 1999) (holding that a state's "great interest in maintaining access to the Great Lakes" was a "special sovereignty interest" that precluded *Ex parte Young*); *ANR Pipeline v. Lafaver*, 150 F.3d 1178, 1193 (10th Cir. 1998) ("[A] state's interest in the integrity of its property tax system lie[s] at the core of the state's sovereignty.... [I]t is impossible to imagine that a state government could continue to exist without the power to tax."); *Jacobson v. Bruning*, No. 4:06CV3166, 2007 WL 1362638, at *5 (D. Neb. Apr. 24, 2007) ("The plaintiff seeks in the

present case to divest the State of Nebraska of some or all of the State's regulatory authority with respect to ground water within the State's boundaries. The case implicates significant sovereignty interests and risks fiscal consequences for the State.”).

Pursuant to the Tribe’s Constitution, the Tribal Business Council and its officers have a significant interest in regulating the Tribe’s funds, property, and economic affairs. *See Stanley v. Darlington Cnty. Sch. Dist.*, 84 F.3d 707, 716 (4th Cir. 1996) (“It would be an unfathomable intrusion into a state's affairs . . . for a federal court to determine the allocation of a state's financial resources.”) These functions are at the core of the Council’s authority, and application of the *Ex parte Young* doctrine would represent a significant interference with its core interests. Those special sovereignty interests preclude the application of the *Ex parte Young* exception.

C. The Tribal Council has not waived sovereign immunity.

Tribal sovereign immunity protects tribes from suit, absent a clear waiver of immunity by the tribe or express authorization by Congress. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (“In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.”). Any alleged waiver of immunity must be clear and unequivocally expressed. *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). The protection of immunity is so fundamental and powerful that there can be no “waiver of tribal immunity based on policy concerns, or perceived inequities arising from the assertion of immunity or the unique context of a case.” *Pan*

Am. Co. v. Syucan Band of Mission Indians, 884 F.2d 416, 419 (9th Cir. 1980), overruled on other grounds, *C & L Enters.*, 532 U.S. at 418.

“There is a strong presumption against waiver of tribal sovereign immunity.” *Demontiney v. U.S. ex rel. Dep’t of Interior, Bureau of Indian Affs.*, 255 F.3d 801, 811 (9th Cir. 2001); *see also Van Wyhe v. Reisch*, 581 F.3d 639, 653 (8th Cir. 2009) (addressing state sovereign immunity and declaring that courts “indulge every reasonable presumption against waiver”). The party asserting waiver has the burden to show a clear and unequivocal waiver. *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011). Such a burden cannot be carried through implication. *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1044 (8th Cir. 2000).

Plaintiffs have not met their burden to prove that the Tribal Council and its members have waived their immunity. At no point did Defendants expressly waive its sovereign immunity, nor have Plaintiffs provided any allegations to support such conclusion.

II. Plaintiffs’ claims are barred under the political question doctrine.

The political question doctrine limits judicial authority to intervene into matters that are exclusively delegated to a coordinate branch of government to resolve.¹ *See Baker v. Carr*, 369 U.S. 186, 686 (1962). The doctrine applies “where there is ‘a textually demonstrable constitutional commitment of [an] issue to a coordinate political

¹ Unlike the United States federal government and the states, The Tribe’s government does not have “branches” of government. Instead, the Tribal Court is a subordinate part of the Tribe’s government that is headed by the Tribal Council. The political question doctrine’s limitation on interference with government functions entrusted to a different political body or political process applies with even greater force in this situation.

department” *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). “The doctrine prohibits Courts from delving into issues that are more properly resolved in the political process. . . .” *Leech Lake Band of Ojibwe v. LaRose*, No. CV-06-43, 2007 WL 7561598, at *2 (Leech Lake Trial Div. Aug. 23, 2007).

Similar to United States federal and state courts, tribal courts have used this principle to decline from hearing disputes brought to their courts. *Delgado v. Oneida Bus. Comm.*, No. 00-TC-0004, 2000 WL 35782584, at *5 (Oneida Trial Ct. June 7, 2000) (“The issue of per capita [payment proposal] itself, is a policy choice made through political means. It is not within the authority of the judicial branch to determine whether there should be a per capita, or in what amount.”); *Leech Lake Band of Ojibwe v. LaRose*, No. CV-06-43, 2007 WL 7561598, at *5 (Leech Lake Trial Div. Aug. 23, 2007) (finding that insofar as plaintiff sought a declaratory judgment for the purposes of determining whether the Defendant violated his oath as an elected leader and should be removed from office, the request for relief clearly violate the political question doctrine); *Benjamin v. Weyaus*, No. 08-APP 07, 2008 WL 6807014, at *8 (Mille Lacs C.A. Oct. 14, 2008) (affirming that under the MCT Constitution the Band Assembly was reserved the exclusive right to conduct removal proceedings against the Appellant and that the Court of Central Jurisdiction Court lacked the jurisdiction to intervene to enjoin the proceeding or to review its ultimate decision on removal.)

In the present case, the Tribe’s Constitution clearly commits certain powers and issues to the Tribal Business Council—the Council alone has the authority to manage

the Tribe's economic affairs, administer the Tribe's funds, adopt resolutions regulating the Council and other agencies, and purchase land on behalf of the Tribe.²

Furthermore, the Tribal Court is an entity created by and subordinate to the Council. The Constitution establishes the Council's authority relative to the Tribal Court's in Article IV, Section 3: "The Tribal Business Council [may] delegate to the Tribal Court judicial power and authority to realize the jurisdiction granted by the People in Article I of the Constitution." Without a delegation of authority from the Council, the Tribal Court has no jurisdiction to act, and the Tribal Court cannot overrule or override decisions made by the Council.

Plaintiffs' Complaint is rife with requests that the Tribal Court intrude on the issues constitutionally committed to the Tribal Business Council. Plaintiffs bring nine causes of action for three categories of alleged wrongdoing: (I) use of executive actions to expend Tribal funds, including purchase of four properties in Las Vegas (causes of action nos. 1, 2, 4, 5, 8, 9); (II) improper record keeping (causes of action nos. 1, 2, 3, 5, 6, 8, 9); and (III) failure to provide requested information (causes of action nos. 1, 5, 7, 9). The Tribe's Constitution, however, delegates authority to the Council on each of these issues. Article VI, Section 5 provides the Council the authority to manage all of the Tribe's economic affairs and enterprises, administer funds, and regulate its own procedure. Article XI, Section 6 provides that the Council is expressly authorized to

² In Article VI, Section 7, the Constitution provides that any additional powers belong to the political process: "Any rights and powers heretofore vested in the . . . [Tribe], but not expressly referred to in this Constitution, shall not be abridged . . . but may be exercised by the people of the Fort Berthold Reservation through the adoption of appropriate Bylaws and Constitutional Amendments."

purchase any interest in land on behalf of the Tribe. The Bylaws prescribe that certain Council Members maintain accurate accounting records but provide discretion to these Members in administration of these duties. *See e.g.*, Bylaws, art. I, § 2 (“The Secretary of the Tribal Business Council . . . shall perform such other clerical duties relating to the business of the Council as it may direct.”) Finally, Article VIII provides that the Council shall enforce referendum rights—it does not require the Council to provide voter information upon request.

Each of the issues underlying Plaintiffs’ claims is committed to the Tribal Business Council’s determination and discretion. Plaintiffs cannot undo their election loss or make political decisions or policy changes through the Tribal Court. Under the political question doctrine, adjudication of these issues and powers is reserved for the Tribal Business Council. Plaintiffs’ Complaint should thereby be dismissed.

III. The Tribal Court must defer to the Council on questions of the Council’s own authority.

The Tribal Business Council is the Tribe’s sole governing body. Const. Art. III § 1; Art. VI § 3. And the Constitution provides the Council with broad enumerated powers to direct the Tribe’s affairs. Art. VI § 5.

Where the Tribal Business Council enacts and executes an order pursuant to its constitutional powers, Tribal courts must defer to the Council’s interpretation of its own authority unless it is clearly unreasonable. *See Pearsall v. Tribal Council for the Confederated Tribes*, No. 02-02-004, 2003 Grand Ronde Trib. LEXIS 13, at *33 (Grande Ronde Tribal Ct. Feb 19, 2003) (evaluating the interpretations made by the council for

the Confederated Tribes of the Grand Ronde Community of Oregon of an ordinance the council enacted and stating that the tribal court must “defer to the Council’s interpretation of [the ordinance] unless it is clearly unreasonable”); *cf. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.”) (footnote omitted).

In the present case, the Tribe’s Constitution provides the Council with the authority to manage the Tribe’s economic affairs, administer funds, purchase land, and to regulate its own procedure. Plaintiffs bring suit in large part due to the Council’s decision making process as related to purchase of four properties in Las Vegas and its record keeping. The Tribal Court, however, must defer to the Council’s interpretation of its authority, unless it is clearly unreasonable. And here, the Council’s interpretation is not “clearly unreasonable.” The Council has a strong interest in regulating its own procedure and expending funds to the benefit of Tribal Members, and this suit should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this action be dismissed.

Dated: December 6, 2023

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