

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

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

Defendants file this reply memorandum in support of their motion to dismiss.

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INTRODUCTION

The majority of Plaintiffs' claims (causes of action 1, 2, 3, 6, 7, and 8) make no mention of the Indian Civil Rights Act of 1968 ("ICRA"). Despite this, Plaintiffs inappropriately shoehorn their political grievances regarding the Tribal Business Council's (the "Council") management and expenditure of Tribal funds under ICRA in an attempt to circumvent the Council's sovereign immunity. But Plaintiffs' claims are not actually civil rights claims. The Tribal Court should not permit Plaintiffs to intrude upon the Council's constitutional authority to manage the Tribe's affairs. Plaintiffs' claims should be dismissed.

ARGUMENT

I. ICRA does not waive sovereign immunity for Plaintiffs' claims.

A. Plaintiffs' claims in this suit are not civil rights violations.

While Plaintiffs argue that the Tribal Court has jurisdiction over this dispute because Article VI, § 3(b) of the Tribe's Constitution waives sovereign immunity for violations of ICRA, their claims do not fall within the scope of ICRA. First, most of the causes of action alleged in this matter are not ICRA claims. That alone ends the Court's inquiry on causes of action 1, 2, 3, 6, 7, and 8. Those claims must be dismissed.

As to the remaining causes of action, Plaintiffs' claims do not seek to vindicate the type of civil rights that fall under ICRA. ICRA enumerates certain constitutional rights that tribes may not violate in exercising powers of self-governance. Tribes may not:

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the

people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments; . . .

(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;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C.A. § 1302. ICRA further outlines certain rights and procedures for criminal proceedings and punishments that are not relevant here. *Id.*

The purpose of ICRA is to provide tribal members with “constitutional rights which other Americans enjoy . . . with the realization that this goal is best achieved by maintaining the unique Indian culture and necessarily strengthening tribal governments.” *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1144 (8th Cir. 1973).

ICRA was “intended to promote the well-established federal ‘policy of furthering

Indian self-government” by selectively incorporating constitutional rights, tailored to the needs of tribal governments. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978) (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

Absent from ICRA is any constitutional right to sue a tribe’s governing body, and its members, for the management and expenditure decisions it makes. Allowing Plaintiffs to challenge the Council’s management and expenditures of Tribal funds based on ICRA would grossly rewrite ICRA, which is intended to allow tribal governments to retain autonomy in governance – especially where the Tribe’s constitution manifestly delegates the power and discretion 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 to the Council. MHA Const. art. VI, § 5; *Id.* at art. XI, § 6. See *Boice v. Washoe Tribe of Nevada & California*, No. C-WT-97-34, 2001 WL 36209875, at *5 (Nev. Inter-Tribal C.A. May 16, 2001) (affirming dismissal where appellant claimed the tribe violated her due process rights under ICRA by wrongfully terminating her and stating that the United States Supreme Court “clearly and firmly held that Tribes are immune from suit, except in those cases where the Tribe has consented to be sued or where Congress has authorized the suit against the Tribe.”)

The Court should not find a waiver of sovereign immunity for claims that fall outside the scope of ICRA. See *Van Wyhe v. Reisch*, 581 F.3d 639, 653 (8th Cir. 2009) (stating that courts “indulge every reasonable presumption against waiver”); *Pan Am. Co. v. Syucan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1980) (stating 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.”), overruled on other grounds; *Demontiney v. U.S. ex rel. Dep’t of Interior, Bureau of Indian Affs.*, 255 F.3d 801, 811 (9th Cir. 2001) (“There is a strong presumption against waiver of tribal sovereign immunity.”). Thus, all the non-ICRA claims in this matter must be dismissed.

B. Plaintiffs’ purported “communal property” interest does not support a due process claim under ICRA.

In an attempt to circumvent sovereign immunity, Plaintiffs claim that they have a “communal property” interest that supports a procedural due process claim under ICRA. That novel theory is not supported by any of the authority Plaintiffs cite. Moreover, accepting that position would effectively abrogate the doctrine of sovereign immunity and improperly interfere with Tribal governance.

Due process claims require a two-step analysis: (1) determining whether plaintiff asserts a protected interest; and (2) determining what process was due. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); see also *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972) (stating that the requirements of procedural due process apply only where plaintiffs show that a protected liberty or property interest has been affected.) “[T]he range of interests protected by procedural due process is not infinite.” *Id.* at 570. Whether a protected interest exists depends on the Tribe’s law. See *Martinez*, 436 U.S. 49, 63, fn. 14 (1978) (stating that Section 1302 of ICRA was implemented to fit the needs of tribal governments and that § 1302(8) guarantees equal protection of a tribe’s laws, rather than those of the United States). If a plaintiff can demonstrate a

protected property interest, then the plaintiff must show what process was due but not afforded to the plaintiff. That analysis requires weighing “the private interest affected by the official action; second, the risk of an erroneous deprivation of the property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Here, Plaintiffs do not have any protected property interest in the funds expended or actions taken by the Council pursuant to its constitutional authority. Recognizing that they do not have any such interest, Plaintiffs cite to *Francis v. Wilkinson*, *Simmonds v. Hale*, *Good Iron v. Hall*, and *Bordeaux v. Wilkinson* to argue that a communal property interest supports their due process claim under ICRA. Each of these cases, however, is distinguishable. Both *Francis* and *Simmonds* involved due process claims in the context of individual employment contracts; unlike this case, though, federal courts have expressly recognized that individual employment contracts can establish a property interest. See *Francis v. Wilkinson*, 1992 Northern Plains App. LEXIS 5, *7; *Simmonds v. Hale*, 2001 Northern Plains App. LEXIS 3, *3. *Good Iron* merely restates the general rule without any helpful analysis—it was contingent on “the complaint sufficiently stat[ing] a basis for an Indian Civil Rights Act violation.” *Good Iron v. Hall*, 26 Indian L. Rep. 6029, 6030 (Ft. Bert. Tr. Ct. Dec. 18, 1998). Here, Plaintiffs do not state a valid claim under ICRA. In *Bordeaux*, the Court assessed whether an

undefined communal property interest conferred *standing* upon the plaintiff, not whether the notion of communal property could support a due process claim under ICRA. Moreover, *Bordeaux* does not provide any analysis of due process – much less analysis that would be persuasive or helpful to this Court. The only authority cited in *Bordeaux* regarding communal property is an 1893 decision from the United States Court of Claims (which is not an authority on Tribal law) dealing with a dispute between the Delawares and the Cherokee Nation about the rights conferred by membership, not whether individual Tribal members had a communal property interest under the customs of the MHA Nation that supported a due process claim. In short, *Bordeaux* provides no meaningful support for Plaintiffs’ argument that communal property rights are protected under the due process provision of ICRA.

Even if Plaintiffs could show that their novel “communal property” theory could sufficiently support the first part of a due process claim, they have not shown that they were deprived of process under the *Mathews* balancing test. Indeed, there is no “private interest” impacted by the actions subject to this lawsuit – only public expenditures of money. And unlike a criminal defendant wrongfully imprisoned (who is deprived of a liberty interest), Plaintiffs have not explained how they would be erroneously deprived of anything. Rather, they disagree with governmental decisions, but disagreement is not an erroneous deprivation of process.

Most significantly, the impact of Plaintiffs’ theory on Tribal government administration is difficult to overstate. The Tribe’s Constitution provides the Council with broad authority to manage the Tribe’s economic affairs, expend funds, purchase

land, and regulate itself. Plaintiffs' theory would effectively abrogate the Council's authority and would give any disgruntled Tribal member the right to sue the Council and its members for any expenditures with which the Tribal member disagrees. Worse, there is no need to impose such a drastic burden on Tribal government because Tribal members already have a check on the Council—they can vote to replace Council members. There is no need for this Court to rewrite the Tribal Constitution and the structure of Tribal government.

Plaintiffs cannot evade sovereign immunity by shoehorning their claims into a civil rights violation based on a novel “communal property” due process theory. Because there is no unequivocal waiver of sovereign immunity, Plaintiffs' claims should be dismissed.

II. Defendants are shielded by sovereign immunity because the *Ex Parte Young* exception does not apply.

A. Plaintiffs impermissibly seek to compel the Council to perform discretionary tasks.

As Plaintiffs recognize, the *Ex Parte Young* doctrine does not permit actions “seeking to compel executive officials to perform a discretionary task.” *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118, 1128 (D. Minn. 1994). Yet, Plaintiffs ignore the broad discretion conferred upon the Council by the Constitution:

- (a) To manage all economic affairs and enterprise of the Three Affiliated Tribes of the Fort Berthold Reservation. . . .
- (c) To administer any funds or property 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.

MHA Constit., art. VI, § 5.

Plaintiffs base their requests for relief on allegedly wrongful actions and omissions by the council, including bookkeeping, past purchases of land interests, and the procedure in which it expends funds. Given the broad authority vested in the Council by the Constitution, these actions are not merely ministerial. *See Seminole Tribe v. Florida*, 11 F.3d 1016, 1028 (11th Cir. 1994) (finding that IGRA provided for discretionary acts, given that the state could decide whether to negotiate contracts and the terms of those contracts, and therefore the *Ex Parte Young* exception did not apply). Moreover, the relief requested in the Complaint goes far beyond the prospective injunctive relief authorized under either the MHA Nation's waiver of sovereign immunity for ICRA claims (Const., Art. VI, § 3(b)) and beyond the ministerial injunctive relief permitted by *Ex Parte Young*. The *Ex parte Young* exception, therefore, does not apply, and sovereign immunity protects Defendants from suit.

B. The Council has a special sovereignty interest in management of its financial resources.

Plaintiffs do not dispute that the Council has a significant interest in regulating the Tribe's funds, property, and economic affairs. Nor do they address the weight of authority demonstrating the wide array of special sovereignty interests found in other jurisdictions. *See MacDonald v. Village of Northport Michigan*, 164 F.3d 964, 972 (6th Cir. 1999) (finding that the state had a special sovereignty interest in maintaining access to the Great Lakes); *ANR Pipeline v. Lafaver*, 150 F.3d 1178, 1193 (10th Cir. 1998) (finding

that the state had a special sovereignty interest in the integrity of its property tax system); *Jacobson v. Bruning*, 2007 WL 1362638, at *5 (D. Neb. Apr. 24, 2007) (finding that the state had a special sovereignty interest in regulations regarding ground water within state boundaries, which had fiscal consequences for the state).

Instead, Plaintiffs claim that the gravamen of their complaint does not implicate special sovereignty interests because they seek to vindicate their civil liberties as recognized by ICRA. But, Plaintiffs' reliance on ICRA, as discussed, is based on an overreading of that statute, and the relief they request explicitly restricts the Council's exercise of authority over tribal property – including an order directing the Council to sell the Las Vegas properties it purchased on behalf of the Tribe, imposing a constructive trust, and issuing distributions to Tribal members. *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.”) Such an order itself would violate Article IX of the Tribe’s Constitution. The Council’s special sovereignty interests preclude the application of the *Ex parte Young* exception, and Plaintiffs’ claims should be dismissed.

CONCLUSION

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

Dated: February 2, 2024

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