

THREE AFFILIATED TRIBES
FORT BERTHOLD RESERVATION

IN DISTRICT COURT
NEW TOWN, NORTH DAKOTA

Terrance Fredericks and Carol Good Bear,

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-2024-0357

**DEFENDANTS' MOTION TO
DISMISS**

Defendants move to dismiss Plaintiffs' Complaint pursuant to Rule 7 of the Tribal Code's Rules of Civil Procedure. This motion is supported by the memorandum of law and declaration filed concurrently with this motion.

Dated: October 7, 2024

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Case No. CV-2024-0357

**Memorandum in Support of Defendant's
Motion to Dismiss and in Opposition to
Motion for Temporary Restraining
Order and Preliminary Injunction**

Defendants file this Memorandum in Support of their Motion to Dismiss and in Opposition to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction.

INTRODUCTION

Plaintiffs Terrance Fredericks and Carol Good Bear are improperly litigating another political dispute against the elected officials of the Tribal Business Council (the "TBC") and the TBC itself. After Judge BJ Jones rejected a prior attempt to retroactively

enjoin the actions of the TBC, the Plaintiffs secured new counsel and now ask this Court to retroactively overrule a different decision made by the TBC. This Court should reject this new lawsuit as well.

Plaintiffs' new complaint centers on Resolution No. 24-248-FWF (the "Resolution"). The Resolution authorized an investment of \$250 million to balance the investment portfolio of the Mandan, Hidatsa, and Arikara Nation, also known as the Three Affiliated Tribes (the "Nation" or "Tribe").¹

For a decade, the TBC has overseen the People's Fund, which is funded with money generated by the Nation's energy revenue. The People's Fund's primary purpose is to fund an annual distribution to Tribal members.

Prior to the Resolution, the People's Fund was invested with the federal government's Bureau of Trust Funds Administration ("BFTA"). While the BFTA account involved low risk investment, it also produced low returns – particularly when considered against inflation. The BFTA has generated approximately a 3% return annually. As a result of this unbalanced portfolio, the People's Fund was not strategically invested to maximize returns.

To balance the portfolio, the TBC authorized the transfer of \$250 million from the BFTA account to a different investment. A portion of that new investment has a guaranteed 8% return, with projected returns significantly higher – far more than if the

¹ See Statement from MHA Nation Chairman Mark Fox, September 11, 2024, *available at* <https://www.mhatimes.press/statement-from-mha-nation-chairman-fox/> (last accessed October 1, 2024).

funds had stayed in the BFTA account. This new investment could add hundreds of millions of dollars to the People's Fund over the next decade. Overall, the TBC's diversification of the People's Fund investment portfolio represents a prudent investment strategy that balances risks and returns.

Plaintiffs incorrectly believe they have the ability to direct Tribal investments. They do not. The Nation's Constitution authorizes the TBC to manage Tribal investments.

Article VI of the Tribal Constitution places the Nation's judicial authority with the TBC. Under controlling Tribal law, a Tribal court may only exercise jurisdiction over the TBC where, after an adjudication, the TBC is determined to have violated the Indian Civil Rights Act—which Plaintiffs here cannot establish. Therefore, a judicial order intruding upon the TBC's authority is barred by the TBC's sovereign immunity, would itself violate the Nation's Constitution, and would run afoul of the political question doctrine. Other forms of relief in the complaint beyond injunctive relief—such as the request for attorneys' fees—are simply unavailable here. Furthermore, the lawsuit is moot and fails to state a cognizable legal claim.

Plaintiffs are not entitled to a preliminary injunction either. Tribal law forbids the court from enjoining the TBC unless there has been an "adjudication", so preliminary injunctive relief is unavailable. Even if preliminary relief were available to Plaintiffs against the TBC, Plaintiffs are not likely to succeed on the merits of their claims. Plaintiffs cannot indefinitely delay the implementation of TBC actions so they can try to

gather signatures for a referendum. And Plaintiffs have not identified any irreparable harm.

Plaintiffs' claims should be dismissed and their motion for temporary restraining order and preliminary injunction should be denied.

BACKGROUND

I. The MHA Nation Constitution

The TBC is the Nation's governing body. The TBC consists of six elected councilmembers, one from each segment of the Fort Berthold Indian Reservation, and a chairman elected at large.² Defendants were elected to various positions of the TBC—Mark N. Fox, as Chairman; Cory Spotted Bear, as Vice-Chairman; Fred Fox, as Executive Secretary; Mervin Packineau, as Treasurer; Robert White, as Councilman; Sherry Turner-Lone Fight, as Councilwoman; and Monica Mayer, as Councilwoman.

The Nation's Constitution grants the TBC wide authority to manage the Nation's affairs. 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 TBC authority to "delegate to the Tribal

² In 2022, Plaintiff Good Bear was unsuccessful in her 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>.

Court such judicial power and authority as may be necessary to realize the jurisdiction granted by the People.”

The Nation’s Constitution enumerates certain powers granted to TBC, 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 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.

Const., Article VI, Section 5.

II. Plaintiffs’ First Lawsuit

On September 5, 2023, Plaintiffs along with other tribal members filed a complaint alleging nine causes of action against the TBC and its members. The bulk of those claims challenged the TBC’s alleged use of executive actions to expend Tribal funds, including purchase of four properties in Las Vegas. Defendants moved to dismiss each of the claims for lack of jurisdiction under the sovereign immunity and political question doctrines.

On May 9, 2024, Judge BJ Jones entered an order granting in part and denying in part Defendants’ motion to dismiss. (Declaration of John Fredericks, ¶ 2 and Ex. A (hereinafter, the “Jones Order”).)³ Judge Jones dismissed the bulk of the plaintiffs’ claims for lack of jurisdiction, finding that Defendants had sovereign immunity as to

³ Judge Jones’ Order has been appealed to the MHA Nation Supreme Court and that appeal is pending.

past expenditures and that these claims therefore fell outside the limited waiver of the Tribe's Constitution. (*Id.* at 13.) Judge Jones also rejected the idea that tribal members have "communal" property rights that could support a due process claim under ICRA. (*Id.* at 17-18.) Judge Jones further found that Plaintiffs' claims were "simply not justiciable under the political question doctrine as they ask[ed] th[e] Court to substitute [Plaintiffs'] and its opinions for how the Defendants should operate the government." (*Id.* at 22.)

III. Plaintiffs' Second Lawsuit

Two of the same Plaintiffs now bring four claims alleging that the TBC wrongfully invested funds pursuant to Resolution 24-248-FWF. Plaintiffs seek a temporary restraining order and preliminary injunction directing the TBC to refrain from enforcing the or acting on the Resolution so that they can gather additional signatures to submit a referendum. (Plaintiff's Brief in Support of Mtn. for Temporary Restraining Or. & Prelim. Injunction at 7-8.) The funds at issue, however, have already been transferred from the BFTA as authorized by the Resolution. (Fredericks Decl. ¶ 3.)

ARGUMENT

I. Plaintiffs' complaint must be dismissed.

Pursuant to MHA Nation Rule 7, an action must be dismissed where a plaintiff has not met its burden to establish subject matter jurisdiction. Tribal courts applying Tribal law apply a standard similar to the federal Rule 12(b)(1). *Spano v. Mashantucket Pequot Gaming Enterprise*, 3 Mash. Rep. 204, 206, 4 Mash. 81, 82, 2000 WL 35571849, at *2 (Mash. Pequot Tribal Ct. 2000) ("[R]eview of federal case law is helpful in determining

the proper standard of review for a motion to dismiss . . . Many courts appear to prefer the use of rule 12(b)(1) when sovereign immunity is asserted.”). Federal Rule 12(b)(1), like MHA Nation’s Rule 7, require dismissal where a plaintiff has not established subject matter jurisdiction. *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.*

Plaintiffs’ claims in this lawsuit suffer from a variety of defects. The TBC’s sovereign immunity bars the claims. In addition, the political question doctrine prevents courts from adjudicating disputes that should be resolved through the political process. Because the funds at issue have already been distributed, the complaint must also be dismissed as moot. Finally, the complaint simply fails to state a claim.

A. Plaintiffs’ claims are barred by sovereign immunity.

“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)). “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). 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).

The protection of immunity is so powerful that courts have held 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.” *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998). “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”). 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).

Here, Plaintiffs name the TBC itself as a defendant, along with the members of the TBC. Plaintiffs bear the burden of proving an exception to sovereign immunity for each defendant. The burden for showing a clear and unequivocal waiver of immunity rests upon the party asserting the waiver. *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685-86 (8th Cir. 2011). The party asserting waiver cannot carry such a burden through implication. *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000). No exception exists in this case, so Plaintiffs’ claims must be dismissed.

1. Plaintiffs do not state a valid ICRA claim.

The purpose of the Indian Civil Rights Act (“ICRA”) is to provide tribal members with certain constitutional rights that tribes may not violate in exercising powers of self-governance. 25 U.S.C.A. § 1302. ICRA was “intended to promote the well-established federal policy of furthering Indian self-government[,]” *Santa Clara Pueblo v. Martinez*, 98 S.Ct. 1670, 1679 (1978) (citation omitted), and therefore imposes “certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.” *Id.* at 1676. Absent from ICRA, however, is any constitutional right to sue a tribe’s governing body, and its members, for the management and expenditure decisions it makes and to stall execution of its duties so that tribal members may gather support to challenge its management decisions.

The Nation’s Constitution provides a narrow waiver of sovereign immunity for rights protected under ICRA. This is the only instance in which Tribal law permits the Tribal Court to exercise jurisdiction over the TBC. Furthermore, this waiver of sovereign immunity is explicitly limited to only injunctive relief. MHA Nation Const. Art. VI, Section 3(b) (permitting “injunctive relief only against the Tribal Business Council”). And because the Nation’s Constitution requires an “adjudication” as a prerequisite to relief against the TBC, Plaintiffs cannot obtain a temporary restraining order or preliminary injunction against the TBC.

Here, Plaintiffs have not – and cannot – show that the TBC violated ICRA. Plaintiffs’ ICRA claim is based on the theory that they have “a vested communal interest in the money contained in the Fund.” (Compl. ¶ 56.) This Court should reject

this theory outright. Judge Jones specifically found that this kind of communal property right does not exist under ICRA. (Jones Order at 17-18 (“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.”).)

While ICRA may permit plaintiffs in some circumstances to bring claims against a tribal government, such as for breach of an employment agreement, it does not permit a due process claim for violation of an alleged communal property interest. The Nation’s Constitution provides the TBC with broad authority to manage the Nation’s economic affairs, expend funds, and regulate itself. Plaintiffs’ theory would effectively abrogate the TBC’s authority and would give any disgruntled Tribal member the right to sue the TBC and its members for any expenditures with which the Tribal member disagrees. As Judge Jones did, this Court must reject that novel and unsustainable theory.

Furthermore, Judge Jones found that the Nation’s Constitution only waives sovereign immunity for prospective injunctive relief, stating that the Court cannot “declare prior expenditures not supported by a public resolution as illegal as such would be granting retrospective relief.” (Jones Order at 23.) Judge Jones dismissed the prior lawsuit’s claims because they “attempt[ed] to pigeon-hole prior actions of the Defendants, and ask the Court to declare those actions void. . . [which] is beyond the

suffer from the same fatal flaw: Plaintiffs ask the Court to find a past action, Resolution 24-248-FWF, wrongful and to halt government action. Neither ICRA nor the limited waiver of sovereign immunity in the Nation's Constitution permit that type of relief.

2. *Ex parte Young* does not provide an exception to sovereign immunity in these circumstances.

In limited circumstances, a court may direct a government official to perform ministerial actions under the exception to sovereign immunity arising from the *Ex parte Young* line of cases. But *Ex parte Young* relief is limited to only ministerial actions of government officials. “[S]uits seeking to compel executive officials to perform a discretionary task . . . are not permitted.” *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)). Courts cannot “control the exercise of the discretion of an officer.” *Ex parte Young*, 209 U.S. at 158 (1908); *Seminole Tribe v. Florida*, 11 F.3d 1016, 1028 (11th Cir. 1994).

While Plaintiffs attempt to frame their claims in terms of referendum rights, the core of their claim disputes the TBC's decisions regarding the administration of the Nation's funds. Article VI, Section 5 of the Tribe's Constitution, however, gives explicit discretion to the TBC to manage the Nation's funds. The terms of such performance—how, when, and whether to exercise its powers—are not prescribed or limited; therefore, they are at the TBC's discretion. These are not merely ministerial actions—they are fundamental functions of the Nation's governing body. Indeed, the TBC has a significant interest in regulating Tribal 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 TBC's authority, and application of the *Ex parte Young* doctrine would represent a significant interference with its core interests. The *Ex parte Young* exception, therefore, does not apply.

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 injunctive relief against the TBC itself, not any particular member. In so doing, Plaintiffs impermissibly seek relief against the Nation's governing body. *Ex parte Young* therefore does not apply, and Defendants are shielded by sovereign immunity.

3. Plaintiffs' request for attorneys' fees is not authorized under the Tribe's Constitution or ICRA.

The Nation's Constitution waives the Nation's sovereign immunity for injunctive relief only under ICRA in certain circumstances. Therefore, the Nation's Constitution does not permit an award of attorneys' fees against the TBC. ICRA also does not

provide for that remedy against a Tribe or its governing body. Therefore, neither Tribal nor federal law authorizes an award of attorneys' fees.⁴ One of the purposes of sovereign immunity is to protect the public fisc. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (recognizing that liabilities that would be paid from public funds are barred by sovereign immunity). Because any such award of attorneys' fees would be paid out of the Nation's treasury, it is barred by sovereign immunity regardless of whether the Nation's Constitution could permit limited injunctive relief against the TBC.

B. Plaintiffs' claims are barred by 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.⁵ *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 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).

⁴ Similarly, *Ex parte Young* only permits injunctive relief to order an official to perform a ministerial act, not an award of attorneys' fees.

⁵ Unlike the United States federal government and the states, the Nation's government does not have "branches" of government. Instead, the Tribal Court is a subordinate part of the Nation's government that is headed by the TBC. 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.

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.)

The Tribal Court is an entity created by and subordinate to the TBC. The Nation’s Constitution establishes the TBC’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 TBC, the Tribal Court has no jurisdiction to act, and the Tribal Court cannot overrule or override decisions made by the TBC.

In the present case, the Nation's Constitution clearly commits certain powers and issues to the TBC – it alone has the authority to manage the Nation's economic affairs and to administer the Nation's funds.⁶ Yet, Plaintiffs request that this Court issue a temporary restraining order, preliminary injunction, and permanent injunction directing the TBC and its members to refrain from enforcing or otherwise acting on Resolution No. 24-248-FWF. In so doing, Plaintiffs ask the Court to intrude directly upon the TBC's authority.

Judge Jones correctly found that under political question doctrine, the Court cannot "substitute [Plaintiffs'] and its opinions for how the Defendants should operate the government," as it must not "dictat[ate] to the Defendants how to do what they are exclusively vested with the authority to do under the Constitution." (Jones Order, at 22.) The same is true here, and the Court should dismiss Plaintiffs' claims.

C. The Complaint's request to freeze funds is moot because the funds have already been transferred.

"A case becomes moot when it becomes impossible for the court to grant any effectual relief." *Robinson v. Pfizer, Inc.*, 855 F.3d 893, 897 (8th Cir. 2017). Here, the Complaint seeks to enjoin the transfer of funds authorized by the Resolution. But the funds have already been transferred. (Fredericks Decl. at ¶ 3.) Because the funds have

⁶ 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."

already been transferred, the Court cannot halt or prevent the transfer of funds via an injunction. Therefore, Plaintiffs' Complaint is moot and must be dismissed. *See Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169, 1172 (8th Cir. 1994) (dismissing a case as moot when the project was completed, so an order enjoining further construction "would serve no purpose and afford plaintiffs no relief").

D. The Complaint fails to state a claim for relief.

Even setting aside the myriad reasons why this lawsuit fails from the outset, the Complaint also fails to state a claim. The causes of action are premised on incorrect statements that are either contradicted by the Complaint itself or simply do not establish a violation of the law.

Count I alleges that the TBC violated the law by not adopting a duly passed resolution and not making the amounts paid a matter of public record. (Compl. ¶¶ 48, 49, 51, 52.) But as the Complaint itself notes, the TBC passed the Resolution. Therefore, the allegations in the Complaint based off the absence of a resolution or failure to make public record are contradicted by the material in the Complaint itself.

Count I also alleges that the Resolution violates a due process right to a referendum. (Compl. ¶¶ 50, 53.) But nothing about the right to a referendum requires the TBC to wait an indefinite amount of time to see if an action is referred to a vote. In fact, the Nation's Constitution does not place any time limit on the right to a referendum, so Plaintiffs' argument would effectively mean the TBC could never act at all, because any action could always be subject to a referendum in the future. Plaintiffs' position is nonsensical.

Count II is based on a “vested communal interest” in the money at issue. (Compl. ¶ 56.) As explained above, no such communal property interest exists. That alleged interest cannot support an ICRA claim.

Count II also alleges that expenditures cannot be made without a resolution. (Compl. ¶ 57.) Again, the Complaint itself admits that the TBC passed a resolution, so that allegation does not support a claim.

Count II alleges that the TBC passed the Resolution without meaningful notice. (Compl. ¶ 58.) But neither the Constitution nor the bylaws impose any notice requirement for resolutions. The provisions of the Constitution and Bylaws cited in Count II (Article VI, section 5(c) of the Constitution and Article I, section 3 of the Bylaws) only require a resolution for the expenditure of funds, not any notice or meeting requirements. To the contrary, the TBC has the constitutional authority to adopt procedures regarding the passage of resolutions. (Const. Art. VI, Sect 5(l).) Because the Complaint fails to establish any violation of the law with respect to the Resolution, it fails to state a claim for relief.

Counts III and IV request a writ of prohibition, an injunction, and a writ of mandamus. Those requests are forms of relief, not causes of action. To the extent that Paragraph 68 alleges that the Resolution was not duly passed, that allegation is contradicted by the other allegations in the complaint and does not state a basis for a claim.

II. The Court should deny Plaintiffs' motion for a temporary restraining order and preliminary injunction.

As an initial matter, the Nation's Constitution only permits injunctive relief against the TBC following an "adjudication." (Const. Art. VI, Sect. 3(b).) An "adjudication" means "the legal process of resolving a dispute; the process of judicially deciding a case." Black's Law Dictionary (9th ed.). Here, no adjudication has occurred. Because a determination via an adjudication is required before a Tribal court may award injunctive relief against the TBC for an ICRA violation, the limited waiver of sovereign immunity in the Nation's Constitution does not permit preliminary or temporary injunctive relief against the TBC.

Even if Plaintiffs could obtain preliminary injunctive relief against the TBC, they cannot meet the threshold to obtain that relief. Pursuant to MHA Nation Rule 17, the Court may only issue a temporary restraining order or preliminary injunction in civil cases upon a showing of irreparable harm. "It is well-established that the burden of establishing the necessity of a temporary restraining order or a preliminary injunction is on the movant." *Nokota Horse Conservancy, Inc. v. Bernhardt*, 666 F. Supp. 2d 1073, 1077 (D.N.D. 2009). Courts assess whether a preliminary injunction or temporary restraining order should be granted under the *Dataphase Systems Inc.* factors: (1) the movant's probability or likelihood of success on the merits, (2) the threat of irreparable harm or injury to the movant absent the injunction, (3) the balance between the harm to the movant and the harm that the injunction's issuance would inflict on other interested parties, and (4) the public interest." *Id.*

Plaintiffs' motion fails under each of the *Dataphase* factors.

A. Plaintiffs are unlikely to succeed on the merits.

Plaintiffs have the burden of proving they are likely to succeed on the merits. *Nokota*, 666 F. Supp. 2d at 1077. For the reasons discussed in Section I, Plaintiffs are unlikely to succeed on the merits.

The only discussion in Plaintiffs' motion regarding likelihood of success on the merits is that they believe they will obtain enough signatures to pursue a referendum. But that does not explain why Plaintiffs are likely to succeed on their claims in this lawsuit. Furthermore, it is purely speculative and does not serve as a basis for relief. Plaintiffs may not indefinitely pause the operation of government while they attempt to gather signatures for a referendum – no such power exists in the Nation's Constitution, and creating such a mechanism would hobble the Constitutional powers of the TBC.

B. There is no threat of irreparable harm.

Plaintiffs cannot show irreparable harm. Plaintiffs claim that their "primary concern" is that the BTFA will transfer the funds before they can obtain the signatures necessary to move forward with a referendum vote. (Compl. ¶ 46.) As discussed above, the money has already been transferred so this argument carries no weight. Plaintiffs can proceed – or not – with their referendum if they get enough signatures without any need for a preliminary injunction.

The remainder of Plaintiff's irreparable harm briefing only addresses proceeds from the funds and taxation issues. But the funds have not been spent or lost – they have simply been reinvested in what the TBC determined, pursuant to its constitutional

authority, to be a more prudent investment. Plaintiffs have no right or entitlement to a particular investment structure or tax structure. Plaintiffs' failure to prove irreparable harm requires dismissal of their motion for a preliminary injunction. *Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297, 299 (8th Cir. 1996) (citations omitted) (observing that "failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction").

C. The harm to the TBC outweighs any harm to Plaintiffs, and the public interest favors denying the motion.

Plaintiffs do not discuss the balance of harms or the public interest. The absence of any discussion on those points in their motion concedes that those factors weigh against issuing a preliminary injunction.

Furthermore, the TBC has an important interest in managing the Nation's affairs, including its expenditures. More importantly, tribal members have an unequivocal interest in their government being able to operate pursuant to its broad constitutional authority. Members of the TBC are directly elected by the public to act on their behalf. The Court should not abridge the TBC's authority by substituting the judgment of two Tribal members and their lay advocate for that of the public's elected officials. Such actions would constitute serious harm to the functioning of the Nation's government, which outweighs the (nonexistent) harm to Plaintiffs and also tips the balance of the public interest against issuing a preliminary injunction.

Conclusion

For the foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiffs' claims and deny their motion for temporary restraining order and preliminary injunction.

Dated: October 7, 2024

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