MHA SUPREME COURT CASE NO.: AP-2025-001

DISTRICT COURT CASE NO.: CV-2024-0357

IN THE SUPREME COURT OF THE
MANDAN, HIDATSA & ARIKARA NATION

Terrance Fredericks & Carol Goodbear,

Plaintiffs-Appellants,

v.

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-Appellees.

ON APPEAL FROM THE MHA NATION DISTRICT COURT FOR
THE FORT BERTHOLD RESERVATION, NEW TOWN, NORTH DAKOTA

DEFENDANTS'-APPELLEES' BRIEF

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INTRODUCTION

The Indian Civil Rights Act ("ICRA") does not provide Appellants, or any other tribal member, a due process right to direct the investment strategy of the Tribe. The MHA Nation Constitution confers that authority upon the Tribal Business Council ("TBC" or "Council"). The TBC properly exercised that authority in passing Resolution No. 24-248-FWF, which authorized part of the People's Fund to be moved to a new investment account.

In reframing their dissatisfaction with the TBC's investment decisions as a due process injury, Appellants assert that they were deprived of rights that do not exist. Appellants cannot establish any due process violation under ICRA because there has been no deprivation of their property rights. Moreover, the Tribal Court did not, as Appellants allege, deprive them of their right to an evidentiary hearing under the MHA Constitution or of their shareholder rights. No such right exists. The Tribal Court correctly dismissed Appellants' claims, and this Court should affirm the Tribal Court's ruling.

STANDARD OF REVIEW

Courts review de novo orders granting motions to dismiss. *E.g.*, *Coons v. Mineta*, 410 F.3d 1036, 1039 (8th Cir. 2005); *see also United States v. Rodriguez*, 581 F3d 775, 796 (8th Cir. 2009) (stating that de novo review applies in matters involving constitutional challenges and questions of statutory interpretation).

Reviewing courts do not consider issues that Appellants failed to raise before the lower court, as those issues are waived. *E.g., Kruger v. Nebraska*, 820 F.3d 295, 306 (8th Cir. 2016) (citing *Shanklin v. Fitzgerald,* 397 F.3d 596, 601 (8th Cir.2005) ("Absent exceptional circumstances, we cannot consider issues not raised in the district court.")). Appellants may not, therefore, "make a new, undeveloped argument for the first time on appeal." *Cent. Valley Ag Coop. v. Leonard*, 986 F.3d 1082, 1090 (8th Cir. 2021).

STATEMENT OF JURISDICTION

Appellees do not contest that this Court has jurisdiction to review the Tribal Court's order dismissing Appellants' claims.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. The MHA Nation Constitution.

The Tribal Business Council is the Tribe's governing body. The other named Defendants/Appellees are the TBC's elected councilmembers. The MHA Nation Constitution grants the TBC wide authority to manage the Nation's affairs. Article VI, Section 3 of the Constitution, for instance, 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 Court such judicial power and authority as may be necessary to realize the jurisdiction granted by the People."

The Constitution also enumerates specific powers granted to the 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.

MHA Const., art. VI, sec. 5.

Consistent with the TBC's broad constitutional authority, the TBC and its members enjoy sovereign immunity from suit. The Constitution provides only a narrow waiver of this immunity, with the tribal court granted jurisdiction to enforce the Indian Civil Rights Act through a very specific form of injunctive relief:

> SEC. 3(b). The People of the Three Affiliated Tribes, in order to achieve a responsible and wise administration of this sovereignty delegated by this Constitution to the 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 **o*nly against the Tribal Business Council if it is determined through an adjudication that the Tribal Business has in a specific instance violated that Act.***

Id. at art. VI, sec. 3(b).

The MHA Constitution also provides Tribal members with the right to referendum:

> Upon a petition signed by at least 10 percent of the qualified voters of each community, demanding a referendum on any proposed or enacted ordinance or resolution of the Tribal Business Council, the Council shall call an election and the vote of a majority of the qualified voters voting in such referendum shall be binding upon the Tribal Business Council, provided that at least 30 percent of the eligible voters shall vote in such referendum.

Id. at art. VIII. The right to refer ordinances or resolutions, though, does not convey any substantive or procedural rights on Appellants under the circumstances presented here.

II. The People's Fund and Resolution #24-248-FWF.

In 2013, the Tribe established the People's Fund, and the TBC has overseen the Fund for over a decade. The primary purpose of the People's Fund is to provide an annual distribution to enrolled Tribal members on or about July 31 of each year. Appellants' claims center around Resolution No. 24-248-FWF (the "Resolution"), a resolution authorizing an investment of $250 million to help balance the investment portfolio of the Tribe. The Resolution was initially passed in closed session and subsequently passed again in open session. *See* Order at 8-9 ("[T]he Plaintiffs herein acknowledge that there is a resolution, initially passed in closed session but later passed in open session . . . ")

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—an approximate 3% return annually. To balance the portfolio, the TBC authorized the transfer of $250 million from the BFTA account to a different investment, TWG Global LLC. A portion of the new investment has a guaranteed 8% return—far more than if the funds remained in the BFTA account. The funds at issue were thereafter transferred. Oct. 7, 2024 Decl. of John Fredricks III in Support of Def.'s Mot. to Dismiss and in Opposition to Mot. for Temp. Restrain. Order and Prelim. Inj. at ¶ 3.

Appellants argue that Resolution #24-248-FWF deprived them of a protected property interest under ICRA. In their original complaint, Appellants brought four claims, alleging that the TBC wrongfully invested funds pursuant to Resolution 24-248-FWF and seeking a temporary restraining order and preliminary injunction directing the TBC to refrain from acting on the Resolution so that they could gather additional signatures to submit a referendum. Appellees moved to dismiss the claims on the basis of the TBC's sovereign immunity and Appellants' failure to establish an ICRA violation. Appellants thereafter moved the Tribal Court for leave to amend the Complaint, and Appellees opposed the motion on similar grounds.

On January 24, 2025, the Tribal Court issued an Order Granting Motion for Leave to File Amended Complaint and Dismissing the Amended Complaint (the "Order"). The Tribal Court wrote, in relevant part, that even assuming, "for the sake of argument, that the Plaintiffs have demonstrated an ICRA-protected entitlement to future distributions from the People's Fund," the Tribal Court agreed that "there is no claim of a deprivation when funds are transferred from one account to another and there is no proof that the transfer will deprive the people of the future benefits from that investment." Order at 15, 19. The Tribal Court further stated that "[h]ow to invest monies generated by oil and gas revenue paid to the Tribe generated from tribal lands, not allotted lands, for the benefit of the people seems to the Court to be an exclusive issue for the TBC to decide and not for this Court to second-guess." *Id.* at 21.

Appellants now appeal the Tribal Court's dismissal of their claims. As explained further below, Appellants still fail to establish any legal basis that the TBC violated ICRA.

ISSUES PRESENTED

I. Due Process under the ICRA: Whether Appellants can establish a protected due process right under ICRA that enables them to override the TBC's investment decisions for the Peoples' Fund.

II. Referendum Rights: Whether Appellants have a sufficient remedy in their rights to referendum under Article VIII of the MHA Nation Constitution.

III. Sovereign Immunity: Whether the narrow waiver of sovereign immunity in Article VI, Section 3(b) of the MHA Nation Constitution applies where the TBC has been found, through adjudication, to have not violated the ICRA.

IV. Political Question Doctrine: Whether the MHA Nation Constitution vests the Tribe's investment decisions exclusively with the TBC, rendering the issue nonjusticiable.

V. Shareholder Rights: Whether Appellants have waived their shareholder rights argument, and if not, whether the property rights of tribal members in the People's Fund constitute shareholder interests.

ARGUMENT

I. Appellants cannot establish any violation of ICRA by the Tribal Business Council.

A. Appellants cannot establish a protected property right under ICRA.

Appellants have abandoned their prior allegations in the original and Amended Complaint and now explicitly concede that they do not have a communal property interest in the People's Fund. Appellants' Br. at 22; *see also* Proposed Am. Compl. at ¶ 52 ("In passing Resolution No. 24-248-FWF, the Council directly violated Article VI, Section 5(c) of the Constitution and Article I, Section 3 of the Bylaws. Said violations constitute deprivation of communal property

without procedural due process of law."). Instead, Appellants now base their ICRA claim on an alleged "right to receive the personal distributions that the law promises them." Appellants' Br. at 22. Under this theory, they argue that the Tribal Court erred in dismissing the case because it "should have enjoined the TBC from further depleting the Fund until proper procedures (including a possible referendum) could occur." *Id.* at 23.

But even under this theory, Appellants fail to establish a protected right under ICRA because Appellants do not have a property interest in the TBC's investment strategy. And, as discussed further below, even if Appellants had a recognized property interest in their annual People's Fund distributions under ICRA, their due process claims still fail because they have not been ***deprived*** of any property.

To have a protected property interest, Appellants must "have more than an abstract need or desire for it." Instead:

> He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

The Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

Here, Appellants attempt to mask their intent to override the TBC's investment authority by framing their claims as an individual right to

distributions. Tellingly, however, they seek to enjoin the TBC from making decisions related to the People's Fund without "notice and approval of the membership" (*E.g.*, Appellants' Br. at 8.) — despite acknowledging that Resolution No. 24-248-FWF was passed to support the transfer of the funds at issue and that they retain the ability to exercise their referendum rights. In effect, Appellants ask the Court to prevent the TBC from managing the Tribe's affairs because they disapprove of its decisions.

Appellants do not have any right to control the investment decisions of the TBC. The MHA Constitution vests that authority in the TBC alone. *See* MHA Const., art. VI, sec. 5.

B. Appellants have not been deprived of any property rights.

Appellants' claims further fail because they have not been *deprived* of any property right. It is well established that a due process violation cannot be found without a demonstrable *deprivation* of a recognized property interest. *See Minnetonka Moorings, Inc.*, 367 F.Supp.2d at 1257-58; *Owensboro Waterworks Co. v. City of Owensboro*, 200 U.S. 38, 46 (1906); *Pitchford v. City of Earle*, No. 3:06CV00140 WRW, 2007 WL 3256851, at *3 (E.D. Ark. Nov. 2, 2007); *Hansen v. Keifer*, 8:20CV373, 2021 WL 327065, at *3 (D. Neb. Feb. 1, 2021). "When the claim is based on the deprivation of property, the Supreme Court has held that the crucial requirement is that the plaintiff was deprived of his property without due process of law."

Radice v. Doe, No. 3:24-cv-531, 2024 WL 3429345, at *3 (D. Conn. July 14, 2024) (citing *Parratt v. Taylor*, 451 U.S. 527, 537 (1981)). "Only after proof of deprivation of a property or liberty interest does the Court reach the question of whether the process afforded was adequate." *Corner Const. Corp. v. Rapid City School Dist. No. 51-4*, 845 F.Supp.1354, 1357 (D. S.D. 1994).

Here, Appellants argue that they were "deprived of their property interest in the People's Fund distributions." Appellants' Br. at 23. While Appellants may have a legally cognizable expectation to receive these distributions annually, the distributions would admittedly not occur until on or around July 31, 2025. *See id* at 6. It would be impossible for the TBC to deprive tribal members of an alleged property right that has not yet matured. Appellants' claims regarding future distributions are, therefore, impermissibly speculative. Indeed, Appellants themselves state that the Tribe has "issued a per capita payment from the People's Fund to every eligible member around late July or early August of each year, including in 2024." Appellants Br. at 6.

In its Order, the Tribal Court agreed, writing that "there is no claim of a deprivation when funds are transferred from one account to another and there is no proof that the transfer will deprive the people of the future benefits from that investment." Order at 19-20. The Tribal Court correctly found that the TBC did not deprive Appellants of any property rights because the Resolution at issue

merely transfers funds from one account to another. The funds at issue still remain available for the benefit of Tribal Members, and the Tribal Court's order should be affirmed.

Moreover, the MHA Constitution provides Appellants with a direct remedy to address their claims—and as discussed further below, this remedy does not require the Court to interfere with the TBC's constitutional authority. Article VIII provides that tribal members may "upon a petition by at least 10 percent of the qualified voters of each community, [demand] a referendum on any proposed or enacted ordinance or resolution of the Tribal Business Council." The Constitution does not impose any deadline for the timing of a referendum petition. *Id.*

Importantly, the Constitution does not provide Appellants the right to enjoin the TBC from managing the Tribe's economic affairs so that they might gather signatures for a referendum. Appellants have a constitutional right to continue their efforts to seek signatures. Compl. at ¶¶ 42-43. But this Court should not permit Appellants to use ICRA to effectively pause the TBC's exercise of its constitutional authority simply because Appellants are unable to garner sufficient political support. *See* MHA Const., Article VI, Section 5. Indeed, such a ruling would allow Appellants to permanently block TBC action by simply never gathering enough signatures for a referendum. The Tribal Court correctly ruled

that nothing precludes Appellants from exercising their rights to referendum, and its ruling should be affirmed.

II. Appellants do not have a right to an evidentiary hearing under the MHA Constitution.

Appellants' argument that the Tribal Court erred by failing to conduct an evidentiary hearing defies the plain text of the MHA Nation Constitution. The Constitution provides a narrow waiver of sovereign immunity for rights protected under ICRA. This narrow wavier is consistent with the purpose of sovereign immunity—to ensure the Tribe's sovereignty and to shield its government from outside interference. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 782 (2014) ("Common law immunity from suit is 'a necessary corollary to Indian sovereignty and self-governance.'") (quoting *Three Affiliated Tribes of Ft. Berthold Rsrv. v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)).

"There is a strong presumption against wavier 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"). In fact, "[s]overeign 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).

Here, Article VI of the Constitution is clear: The Tribal Court has "the authority to enforce the provisions of the Indian Civil Rights Act . . . **if it is determined through an adjudication that the Tribal Business has in a specific instance violated that Act.**" MHA Const. Art. VI, sec 3(b) (emphasis added). The Constitution does not provide for a waiver sovereign immunity where, as here, Appellants fails to present a valid cause of action stating a violation of a protected right under ICRA.

As set forth above in Section IA and IB, Appellants have not alleged—in their original complaint or proposed amended complaint—a valid violation of ICRA because Appellants have not established, and cannot establish, a protected property right in future distributions from the People's Fund, where funds were merely transferred from one account to another. Nor have they adequately pled a past deprivation of any such alleged protected property right. The TBC, therefore, retains its sovereign immunity, and Appellants are not entitled to any kind of evidentiary hearing.

Sovereign Immunity provides immunity not just from liability, but also for the burden of defending an action. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature. Indeed, the terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit."); *La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d

837, 843 (D.C. Cir. 2008) (finding that sovereign immunity is not merely a defense, but immunity from the attendant burdens of litigation). As such, a complaint claiming waiver of sovereign immunity for an ICRA violation under Article VI of the Tribe's Constitution must allege a cognizable claim of violation of ICRA before an evidentiary hearing is required. To hold otherwise is to turn the doctrine of sovereign immunity on its head. Here, in its Order, the Tribal Court[1] explicitly found that the TBC did not deprive Appellants of a property right by transferring funds from one account to another. Order at 19-20. It then issued a final judgment in favor of the TBC. That ruling should not be disturbed.

This plain reading of the Constitution is consistent with the Court's recent Order Denying Motion for Reconsideration in *Good Bear et al. v. Fox et al.*, CV-2-23-0469. There, the Court stated that a waiver of sovereign immunity under Article VI "specifically requires an adjudication in the FBDC on the issue of whether the MHA Tribal Business Council violated the Indian Civil Rights Act in a specific instance." *Good Bear et al. v. Fox et al.*, CV-2-23-0469, March 31, 2025 Order Denying Mot. for Reconsideration at 2-3. The Court further opined that "[i]f the FBDC finds

[1] Appellants' claims that they lacked sufficient notice of the hearing on the motion to dismiss is also baseless. Setting aside that Appellants were not entitled to an evidentiary hearing, Appellants had full notice of the motion and the legal arguments prior to the hearing. Moreover, Appellants took no affirmative steps to develop the record or seek additional process—they did not for instance, request that the Tribal Court adjourn the hearing or issue subpoenas compelling testimony.

no Indian Civil Rights violation, the limited, qualified waiver of sovereign immunity does not apply." *Id.* at 3.

The Tribal Court acted within the clear bounds of its constitutional authority. It did not err by declining to hold an evidentiary hearing that, as discussed above, Appellants are not entitled to where they have not adequately pled an ICRA violation. The Tribal Court's ruling should be affirmed.

III. The Court should not interfere with the TBC's constitutional authority to manage tribal affairs pursuant to the political question doctrine.

The political question doctrine restricts judicial authority to intervene where matters are exclusively delegated to a coordinate branch of government. *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 Court cannot, therefore, delve "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).

The Constitution grants the TBC broad powers to manage the Tribe's economic affairs, to administer funds, and to adopt resolutions. MHA Const., Art. VI, sec. 5. Article III of the MHA Nation's Bylaws details the only requirements for how and when the TBC meets. The Bylaws do not require that the TBC must pass a resolution in an open hearing, nor do the Bylaws limit when the TBC can meet

in closed or executive sessions. The TBC exercised its constitutional authority in passing Resolution No 24-248-FWF. Appellants may still exercise their constitutional right to referendum. But Appellants cannot dictate how the TBC chooses to meet or how it manages the Tribe's economic affairs—those matters are committed exclusively to the TBC itself.

Moreover, Appellants' attempt to use the judicial process to circumvent the Constitution's delegation of authority and narrow waiver of sovereign immunity would also violate the political question doctrine. Article VI of the Constitution clearly states that the Tribal Court may only exercise jurisdiction over the TBC where, after an adjudication, the TBC is determined to have violated ICRA. As discussed, Appellants have not established—and cannot establish—a violation of any protected right under the ICRA as pled. Therefore, a judicial order dictating how the TBC should act with respect to Resolution No 24-248-FWF is not only barred by the TBC's sovereign immunity but would also intrude upon the TBC's constitutional authority, running afoul of the political question doctrine.

IV. The Appellants' new shareholder rights argument fails.

In an additional attempt to recast their grievances as a cognizable ICRA claim, Appellants have raised a new shareholder rights argument. As an initial matter, Appellants have waived this argument by failing to substantively raise it

prior to this appeal. Moreover, their analogy to shareholder rights is inapposite to this dispute.

It is well established that reviewing courts do not consider issues that appellants failed to raise before the lower courts. *See e.g., Kruger v. Nebraska*, 820 F.3d 295, 306 (8th Cir. 2016). Where, as here, appellants "make a new, undeveloped argument for the first time on appeal," these issues are considered waived. *Cent. Valley Ag Coop. v. Leonard*, 986 F.3d 1082, 1090 (8th Cir. 2021). Appellants' new shareholder rights argument was not raised before the Tribal Court. In their response to Appellees' initial motion to dismiss, Appellants merely asserted, without legal analysis, that "[p]erhaps 'communal interest' may not be the proper term as all Tribal members are actually equal shareholders in the assets of the Tribe." Their response to the motion to dismiss the Proposed Amended Complaint contains no mention of their shareholder rights theory. Accordingly, the argument is waived on appeal.

Moreover, Appellants' reliance on *American Premier Underwriters v. Amtrak*, 709 F.3d 584 (6th Cir. 2013) is misplaced and inapposite to the current dispute. In *Amtrak*, the court recognized a shareholder's property interest stemming from a contractual relationship within a private corporate setting. Here, Appellants are tribal citizens challenging the decisions of their tribal government—a relationship governed by constitutional and tribal law principles, not corporate law.

The MHA Nation Constitution makes no mention of the Tribal Members having shareholder rights—Appellants shareholder rights theory has no support under the Constitution and, further distinguishing the present case, the TBC is shielded by sovereign immunity, unlike any corporate entity.

For these reasons, Appellants' shareholder rights argument is both procedurally waived and substantively baseless. The Court should not disturb the Tribal Court's dismissal of Appellants' claims.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the Tribal Court's dismissal of Appellants' claims.

Dated: May 7, 2025

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