THREE AFFILIATED TRIBES

FORT BERTHOLD RESERVATION

IN DISTRICT COURT

NEW TOWN, NORTH DAKOTA

Terrance Fredericks and Carol Good Bear,

Plaintiffs,

ORDER GRANTING MOTION FOR LEAVE TO FILE AMENDED COMPLAINT AND ORDER DISMISSING AMENDED COMPLAINT

vs.

Three Affiliated Tribes Tribal Business Council, Mark Fox, Chairman of TAT, Corey Spotted Bear, Vice-Chair of TAT, Fred Fox, Executive Secretary of TAT, Mervin Packineau, TAT Treasurer, Robert White TAT Councilman, Sherry Lone Fight TAT Councilwoman and Monica Mayer, TAT Councilwoman

Defendants

Civil No. CV- 2024-0357

The Plaintiffs are enrolled members of the Three Affiliated Tribes who brought this suit against the Tribes' Business Council (hereinafter TBC) and the members of the TBC asserting that recent actions by the Defendants to transfer monies from the Nation's "Peoples Fund" (hereinafter fund) from one investment to another constitutes a deprivation of a property without due process of law under the Indian Civil Rights Act, 25 U.S.C. §1302. In their original complaint they sought preliminary injunctive relief to enjoin the Defendants from taking any actions to transfer the fund from a government "Trust Account', defined at 25 C.F.R. §115.002, to a private equity account, TWG Global, pending resolution of this suit. In their amended complaint, filed the date of hearing on the Defendants' motion to dismiss, they noted that the

Defendants had already perfected the transfer and thus sought alternative remedies from this Court, arguing that their rights to seek a referendum on the contested actions of the Defendants had been stymied by the execution of the transfer.

The Defendants initially filed a motion to dismiss the complaint alleging that it is barred by the doctrine of sovereign immunity, involves political questions not justiciable in this Court and fails to state claims upon which relief can be granted. After receiving the motion for leave to file the amended complaint the date of hearing on the motion to dismiss, the Defendants opposed the motion for leave to file an amended complaint, asserting that the amended complaint contains the same legal deficiencies as the original complaint and was filed late. The Court has reviewed the original and amended complaints and notes that the only changes appear to be related to remedies being sought and the proposed amended complaint does not add additional Defendants or additional legal theories. The Court notes that as a general matter a party may seek modified remedies in the course of litigation to conform to changed circumstances without necessarily amending their pleadings. In this case the Plaintiffs ask in their amended complaint to enjoin the Defendants from taking additional actions not referenced in their original complaint, but those additional remedies are still predicated upon the same legal theories as the original complaint so the Court finds that the amended complaint should be filed, but the Court does not find that the amended complaint has remedied the legal deficiencies in the original complaint as noted herein and thus dismisses both complaints for failure to state claims arising under the Indian Civil Rights Act and thus the complaints are dismissed on sovereign immunity and political question grounds. [1]

Hearing on the motion to dismiss was held on the 7th day of November 2024 with the

[1] Although the Court could permit the Defendants to file a separate response to the amended complaint the Court in its discretion waives that as it is not necessary in light of the ruling herein.

some of the named Plaintiffs appearing in person and all through their legal advocate, Steve Kelly. The Defendants appeared through their attorney Timothy Purdon. The Court heard argument from each side and left the record open for the Defendants to respond to the motion for leave to file the amended complaint for some additional filings from the Plaintiffs regarding their assertion that the change in placement of some of the Peoples' Fund money may result in the "disbursements" of that fund to MHA Members being subject to federal income, as well as for off-reservation members, state income taxes.

The Defendants filed a motion to dismiss the original complaint claiming that: 1) the Defendants are immune from suit under the sovereign immunity doctrine and defense and pursuant to Title I, Section 1.4 of the TAT Tribal Code and neither the TAT Constitution nor the Indian Civil Rights Act waive that immunity; 2) the suit is barred under the political question doctrine and; 3) that the complaint does not present legally justiciable claims.

The Plaintiffs have responded with a memorandum in opposition to the motion claiming that the Tribal Constitution of the TAT, Article VI, §3(b), constitutes a clear and unequivocal waiver of immunity from this suit and that they have raised causes of action arising under the Indian Civil Rights Act that serve as an express federal abrogation of the Defendants' immunity from suit for the injunctive relief they seek.

For the reasons stated herein this Court finds that the Plaintiffs have failed to allege a violation of the Indian Civil Rights Act in their complaint because although they may have pleaded a "property" right to the People's Fund, due to the nature of the resolutions creating said Fund, the assertion that the Defendants' actions in transferring some of the monies in that Fund out of a federal trust fund to a private investment results in a "deprivation" under ICRA is rejected. Additionally, there is not a "taking" under ICRA because of the potential tax

implications to Plaintiffs due to the transfer of some of the Fund monies to another investment source that may render future disbursements taxable events.

FACTS PRESENTED

Because this matter is presented to the Court on the Defendants' motion to dismiss the Court must construe the facts in a light most favorable to the Plaintiffs and assume that, if given the chance to, they could prove those facts. However, because the sovereign immunity defense is not only one shielding the sovereign from liability, but also from defending a lawsuit, the Court may reject allegations in the complaint that are speculative or not supported by fair inferences from the facts alleged. Therefore, it must be demonstrated on the face of the complaint or on other matters presented to the Court that the sovereign immunity defense is either abrogated by federal law or there is a clear and unequivocal waiver under tribal law for the Court to permit this suit to proceed. See Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040 (8th Cir. 2000).

The Plaintiffs assert in their complaint and motion for preliminary injunction that on January 24, 2013 Defendant Tribal Business Council (hereinafter TBC) passed Resolution No 13-004-VJB creating an administrative department of the Tribes to administer a "People's Fund" funded by oil and revenue received by the Tribes. Simultaneous with this action the TBC established a trust account with the Bureau of Trust Land Management known as the "Proceeds of Labor Account PL 10017014." That account was created under 25 C.F.R. §115.002 and is administered pursuant to the regulations laid out therein. The monies in these trust accounts have apparently generated a 3% return on investment since inception. The TBC then proceeded to create a distribution and eligibility plan for the distribution of the monies in the Fund to membership. The resolution required the TBC to approve of a distribution plan that would then

be submitted to a referendum vote in accordance with Article VIII of the TAT Constitution. That never happened and both parties acknowledged that at hearing as no referendum vote was held to start the distribution.

Despite that a year later the TBC passed Resolution 14-112-VJB to approve of a distribution plan put forth by the administrative agency, People's Fund Department, created to administer the monies in the Fund "allocating eighty percent of the Tribe's non-renewable oil and gas resource revenues to the People's Fund and has limited the use of the principal amount of investment except as may be authorized by the Business Council in the future." The complaint alleges that since 2014 the TBC has authorized the distribution of approximately 600 million dollars to the membership, both those on and off the reservation inclusive of minor children, through per capita distributions. These distributions have not been subjected to federal or state income tax because they have been paid out of a federal trust funded with income derived from tribal trust lands and deposited into a federally-managed trust fund.

Despite the TBC's failure to submit the issue of how the monies are to be distributed to the membership and to what members, as required by the resolution creating the Fund, the Plaintiffs do not take issue with the distribution resolution and method of distributing the Fund itself. Instead, they complain about TBC Resolution No 24-248-FWF allegedly passed during a closed session of the TBC at a different location than the TBC chambers that purports to transfer 250 million dollars from the federal trust account maintained for the Fund into a different investment account called TWG Global LLC. The Defendants claim in their motion to dismiss that this deposit carries with it a 8% guaranteed return on investment as compared to the 3% realized on the current BTLM account, while the Plaintiffs disparage the investment in their pleadings alleging that the company was only recently incorporated in Delaware on December

12, 2023 and that it appears to be highly speculative and does not have a clear business purpose as it is described on the State of Delaware Secretary of State's website as an entity of general type, not an investment entity. They also point out that pursuant to IRS Notice 2014-17 that only distributions from trust funds maintained by the Department of Interior to tribal members are tax-exempt and the transfer of funds to TWG Global LLC may render future distributions from that fund taxable incidents for tribal members.

In their original complaint the Plaintiffs sought a preliminary injunction preventing the transfer of the 250 million, an injunction barring the transfer until Plaintiffs could submit a referendum petition to challenge the transfer, a permanent injunction to enjoin the transfer and attorney's fees and costs under the private attorney general doctrine. Before the hearing could be held on the motion to dismiss the TBC in an open meeting repassed the resolution transferring the money and according to an affidavit from one of the Tribes' attorneys, John Fredericks III the money was transferred before October 7, 2024.

At hearing on November 7, 2024 advocate for the Plaintiffs explained that they wanted to file the amended complaint because the transfer of the money from the BTLM account to TWG Global LLC had been perfected and that as a result people were not signing the referendum petition that some of the Plaintiffs started circulating. The Court noted that nothing in Art. VIII of the Constitution imposed a time restriction on the submission of a referendum petition, so the Court was unsure why the transfer interfered with the referendum process. The Court also noted that the resolution of this action before the Court would not foreclose the right of referendum even if the Court ruled that the Plaintiffs had failed to state claims for relief under the ICRA as the referendum right is created under the TAT Constitution, not the Indian Civil Rights Act.

In their proposed amended complaint the Plaintiffs do not change the factual or legal predicates for their lawsuit, but instead amend their prayers for relief, now asking that the Court enjoin the TBC from prohibiting tribal members and the public from attending TBC meetings except when they have legal grounds to go into closed sessions, enjoining the TBC from passing a resolution involving expenditure of monies in closed sessions, and an order prohibiting any future transfer of trust funds out of the BTF for a period of 120 days to permit them to circulate a petition for referendum to challenge the prior transfer. All of those prayers for relief relate back to what they claim to have been an unlawful transfer of monies from the BTLM account to the TWG Global Account.

LEGAL ANALYSIS

In analyzing the legal claims raised by both Parties this Court does not start with a blank slate. Some of the legal arguments offered in this case were also vetted in another matter filed in this Court by these same Plaintiffs along with other MHA members, Good Bear v. TAT, CV-2023-0469. That case involved similar claims of violations of the Indian Civil Rights Act and the Tribal Constitution and permitted this Court to address the breadth of the sovereign immunity and political question defenses in this Court, as well as whether the Tribal Constitution waived sovereign immunity and in what circumstances. The Court's decision on some of those issues is attached to the Defendant's filing and affidavit of Attorney Fredericks. This Court noted at oral argument that both the TBC and the Plaintiffs had filed competing appeals from this Court's May 9, 2024 order granting in part and denying in part the motion to dismiss. This Court was hopeful that the MHA Nation Supreme Court would pontificate on some of these weighty issues in time for this Court to be educated, but the Court has learned that after initially agreeing to hear the appeals and setting them for oral arguments the MHA

Supreme Court backtracked and determined that it had no jurisdiction to hear the TBC appeal because it did not arise from a final order of this Court. This ruling seems to contradict both federal and tribal case law that an order denying the sovereign immunity defense is a final order subject to appeal under the collateral order doctrine because sovereign immunity is not just a defense to liability but also a shield from having to defend a suit. See Whole Women's Health v. Jackson, 596 US 30 (2023); Francis v. Wilkinson, 20 ILR 6015 (N.Pls Inter-Tribal Court of Appeals 1993). Nonetheless, this Court must try to adhere to the legal analysis in that case insofar as apposite to this case.

Defendants claim that this Court is barred from granting any of the relief being sought on the grounds of: 1) sovereign immunity; 2) the political question doctrine; and 3) failure to state legally justiciable claims in this Court. They specifically assert that the Plaintiffs' complaint fails to demonstrate that these Plaintiffs have any "personal" property right to the People's Funds that is protected under the Indian Civil Rights Act and that even if they do a reinvestment of the monies in that fund does not constitute a "deprivation" of that property right under the Indian Civil Rights Act. The Plaintiffs disagree and contend that the transfer of the trust funds out of a secure US government-secured account that provides some tax sanctuary for members into a speculative account being held by a recently-created LLC that has no specified business purpose or track record of investment is so speculative that it will undoubtedly result in the People's Fund being depleted and less money going to the membership and also result in the members having to pay taxes on the distributions.

Unlike the argument in Good Bear v. TBC, where the Plaintiffs argued that the TBC was expending tribal revenue without proper resolutions thus precluding the exercise of their constitutional right of referendum to overturn those expenditures, the Plaintiffs herein

acknowledge that there is a resolution, initially passed in closed session but later passed in open session, transferring some of the People's Fund monies out of the BTLM account and into a private account and that some MHA members had actually started the circulation of a referendum petition after learning of the resolution. The Plaintiffs seem to take issue with what they consider the "secretive" nature of how the resolution was passed, but do acknowledge the existence of resolutions creating the fund, creating an administrative agency to oversee the Fund, distributing the monies in the Fund and one supporting the transfer of some Fund monies into another account that they challenge in this lawsuit. It seems to be beyond peradventure that the TBC acted to start distribution of the Fund without a referendum of the people to offer their opinions on who should get the monies contrary to Resolution 14-112-VJB . Not surprisingly the Plaintiffs do not take issue with that legal reality, but only the recent actions of the TBC in redirecting some of those funds from the BTLM account to the private account. They do this despite the enabling resolution stating that future distributions will be governed by the enabling resolution, "except as may be authorized by the Business Council in the future."

This distinguishes this case from the Good Bear ruling where the Court recognized a property right as being taken when tribal revenues were allegedly being spent without proper resolutions, thus circumventing the referendum rights preserved to the membership in the TAT Constitution. This Court did not hold in Good Bear that all monies of the Tribe were communal monies of the membership, and that the membership had some general property right to challenge all expenditures of tribal funds. It only recognized a very limited property right where tribal revenues were being spent in contravention of the TAT Constitution. The "taking" in that case was the expenditure of the tribal revenues without membership having the right to countermand it through a referendum.

In this case the Defendants claim that there is no waiver of sovereign immunity under the Tribes' Constitution at Art. VI, Section 3(b) because the Plaintiffs possess no property right to the People's Fund and even if they do they have not alleged a deprivation of that right by demonstrating that the Defendants have transferred some of the Fund monies into a private account in the hope of getting more of a return on investment than the current account. They also point out that nothing that the Defendants have done prevents the Plaintiffs and other tribal members from exercising the right to seek a referendum on the actions they took.

In determining whether the Plaintiffs have stated a legally cognizable claim to a property right the Court starts with the Northern Plains Inter-Tribal Court of Appeals decision in Francis v. Wilkinson, 20 ILR 6015 (N.Pls Inter-Tribal Court of Appeals 1993)[2] where the NPTCA held that an individual has a property right to monies owed on a contract and when the Tribe breaches the contract that party may sue under the waiver of sovereign immunity provision of the TAT Constitution as a taking of that property right. The property right recognized in that case was extremely broad as most Courts have held that a breach of contact claim does not rise to the level of a property right under the 14th amendment to the US Constitution and the Indian Civil Rights Act.

The Plaintiffs here make a similar argument as made in the Good Bear case that sovereign immunity has been clearly and unequivocally waived in the Tribes' Constitution at Art. VI, Section 3(b) because they have stated a cognizable claim of a taking of a property right without due process of law by the TBC and its members. The Plaintiffs argue that the MHA

[2] This decision was rendered by the Northern Plains Inter-Tribal Court of Appeals which was once the court of appeals for the Tribes, but the Tribes now have their own independent Appellate Court, the MHA Nation Supreme Court. This Court has never seen any resolution when the new appellate Court was created to disaffirm those precedents or a decision of the MHA Supreme Court unmooring this Court from those precedents. It should be noted that there was an order denying reconsideration in Francis that limited the type of relief this Court can issue even if it finds an ICRA violation.

Constitution, at Article VI, Section 3(b), contains an express wavier of immunity from suit in this case. That section states:

SECTION 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 Tubal Business Council, hereby specifically grant to the Tribal Court the authority to enforce the provisions of the Indian Civil Rights Act, 25 U.S.C. 1301, et seq., including the ***award of injunctive relief only*** *against the Tribal Business Council if it is determined through an adjudication that the Tribal Business Council in a specific instance violated that Act.* ***(Emphasis added)***

They also assert that federal law, the Indian Civil Rights Act, is a federal abrogation of the sovereign immunity of the individual members of the TBC for injunctive relief under the Ex Parte Young doctrine and the clams they make against the individual TBC members do raise alleged actions taken in excess of their authority and thus can be litigated in this Court.

This Court has recognized that the Tribes and the individual Defendants, as well as other tribal officials, are not subject to suit in this Court in a variety of contexts. See Johnson v. Fox, CIV 2019-0436 (dismissing claim of tribal member asserting that the RBC and its members had unlawfully deprived him of the right to obtain a business license with the Tribes). It must be remembered that the defense of sovereign immunity is a federal common law defense which the United States Supreme Court held in Santa Clara Pueblo v. Martinez, 436 US 49, 58 (1978) applies to suits against Indian tribes and their officials in federal court. The Supreme Court in Martinez did not directly address whether the common law defense is also available in tribal courts, implying that it was, but noted that an exception for injunctive or declaratory suits for ICRA violations may exist in tribal court, again under a common law exception to immunity recognized in Ex Parte Young, 209 U.S. 123 (1908). That exception was conjured up by the US Supreme Court to defeat the 11th amendment immunity of State officials against suits for injunctive or declaratory relief alleging violations of federal law.

There is no federal statute governing the availability of the sovereign immunity defense for Tribes in federal or state courts and instead the Supreme Court has continued to interpret the common law in issuing several decisions subsequent to Santa Clara Pueblo. After Santa Clara Pueblo the US Supreme Court has been adamant in protecting the defense in federal and state courts even when the Tribe and its officials engaged in off-reservation business activities, The Supreme Court has acknowledged that "tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." Kiowa Tribe of Okla. v. Manufacturing Technologies, 523 U.S. 751, 760 (1998). There are only two recognized instances in which a tribe might be subject to suit. These instances include occasions where 1) Congress has authorized the suit by abrogating the immunity; or 2) the tribe has waived its immunity. Kiowa Tribe of Okla. v. Manufacturing Technologies, 523 U.S. 751, 754 (1998). For a tribe to waive sovereign immunity, such a waiver must be "clear." Oklahoma Tax Comm'n v. Citizen Band Potawatoni Tribe of Okla., 498 U.S. 505, 509 (1991). A waiver "cannot be implied but must be unequivocally expressed." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

This Court recognized in Good Bear that the TAT Constitution contains an express and unequivocal waiver of the Tribes' sovereign immunity from suit when a party is able to demonstrate a violation of ICRA and is seeking prospective injunctive relief. The Constitution supersedes that part of the Tribal Code which seems to require the TBC to waive immunity from suit by resolution. See Title I, Chapter 1.4 stating that:

> *Sovereign Immunity- Nothing contained in the* ***code*** *shall be construed as a waiver of sovereign immunity from suit of the Tribe, its officers, business or entities unless specifically waived. A waiver of immunity will not be implied, and any waiver must be expressly stated as to its terms and conditions.*

Title I, Chapter 1.4 would not control in a situation where the people have waived immunity in the Constitution as the Tribal Code cannot supersede the TA Constitution. See Gwinn v. Tribal Election Board, Case 2020-0374 (September 4, 2020, affirmed by MHA Supreme Court), striking down TAT Election Ordinance requiring candidates to reside in Segment for at least one year to run for office as violating Art. IV, Sec. 6 of the TAT Constitution that has a six-month residency requirement.

There are some limiting principles to the waiver however, as the waiver only applies to actions to enforce the Indian Civil Rights Act and permits injunctive relief "only" against the TBC. It is not clear whether the "only" in the Constitution refers to "injunctive relief" or to "the TBC." If the latter the individual members of the RBC would retain immunity from suit unless there is some other clear waiver or an abrogation of their immunity under other tribal law or federal law. It should be noted that in Francis v. Wilkinson, 20 ILR 6015 (N.Pls Inter-Tribal Court of Appeals 1993, reconsideration denied 1993) the Northern Plains Inter-Tribal Court of Appeals, in a decision that is still binding on the Court, seemed to initially ignore the import of the word "only" in the Constitution in both regards as it held that a suit for money damages for a breach of contract was a cognizable claim against the then Chairman of the Tribes, Wilbur Wilkinson, under the waiver of immunity in the TAT Constitution, despite the waiver only applying to claims for injunctive relief against the TBC. This Court took that decision even further in Bordeaux v. Wilkinson by holding that the decision in Francis meant that the waiver also applied to suits for "monetary damages against Tribal Officials found to be acting outside the scope of their tribal authority." Bordeaux at 6132. It is not clear how the Bordeaux Court read the Francis case this broadly. Francis involved a suit brought by the Tribal Comptroller for

money damages after he was terminated by the TBC with a contract that provided for one-year severance pay. After he was denied the severance, he sued the TBC and individual members of the TBC for his severance pay. This Court dismissed the suit on sovereign immunity grounds finding that the right to contractual damages was not a property right under the ICRA. The NPICA reversed and explicitly held that in certain circumstances, citing Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), a claim to compensatory damages such as severance pay could constitute a property right under the 14th amendment and under the circumstances in Francis' termination, he did have a valid property right and could sue for his severance. The Court used the following language in Roth as the litmus test for determining whether a person has a right under the ICRA:

> "To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id at 577.

The fact that the Francis court initially seemed to ignore the fact that the waiver only permitted injunctive relief, not monetary relief, must have been the basis for the Bordeaux court finding that the decision also allowed for suits for money damages against the TBC members. Francis did not expressly find that however, so the Court finds that the Constitutional waiver only pertains to suits for injunctive relief to remedy future violations of the ICRA. The Francis Court actually clarified that on reconsideration when it expressly held as such.

The Francis decision is still binding precedent in this Court. It permitted the suit to proceed against the TBC and the members of the TBC. This Court thus finds that the "only" language in Article VI, Section 3(b) does not restrict suits against the members of the TBC, but only restricts the type of relief the Court can grant, although again the Francis Court does not clearly articulate why the claim for severance in that case was one seeking injunctive relief

unless the Court was holding that an injunction against denying Francis his severance pay was injunctive relief.[3] Francis was actually the subject of a rehearing request by the Tribes and in the order denying reconsideration the Court clearly limited the scope of judicial relief to future injunctive relief:

> *The Tribal Court has authority to hear this case on its merits, but the only relief that the Court can impose against the Tribal Council is injunctive relief. Suffice it to say that relief may not be adequate and the doors may well be closed for any orderly redress in Tribal Court for alleged wrongs of the defendants against the plaintiff. However, this Court and the Trial Court must abide by the legal constraints placed upon it by the Tribal Constitution and Tribal Business Council.*

Bordeaux is not a binding precedent on this Court as it was a trial-level decision, although this Court always strives to reconcile the decisions of this Court with decisions of other Judges, current and past. The property right in that case was described as a "communal" property right and the Plaintiffs herein seize upon the language in that decision to argue that they have a "communal property right" to the Tribes' resources that they are seeking to vindicate with this lawsuit. They argue that when the TBC spends tribal resources their rights are implicated because those resources are community property and thus, they have an argument that community property is being taken without due process of law when the Defendants expend tribal resources in the ways they describe in their complaint.

A close examination of Bordeaux however reveals that the "property" right found therein is more nuanced than the broad concept of communal property, which makes for a good Kumbaya moment but would render any tribal expenditure of monies a potential property deprivation and would turn this Court into some type of super-legislative body with veto power

[3] If the ruling in Francis is that any claim for monetary relief against the TBC for breach of contract is a property right it is unclear to this Court why there is such an emphasis in contracts entered into between parties and the Tribes to address the waiver of immunity language. See Dog Eagle v. Tribes, CIV 2020-0172 (contract between Tribes and in-house attorney containing waiver of immunity language is not a valid waiver due to the DOI not approving of the contract).

over TBC decisions, thus flipping the Constitution on its head. The NPITCA warned of this in the Francis decision in its reconsideration order when Judge Foughty wrote:

> *Nor can it be said that the Tribal Court by implication acts as a check on the tribal governing authority. The general authority given to Tribal Court in this case is given by the Tribal Business Council and Article VI Section 3 and Section 3 (b) Constitution and By Laws of Three Affiliated Tribes of The Fort Berthold Reservation both sections are cited in full.*

Judge McLees clearly limited the "communal property" claims to challenges to monies expended by the TBC without resolutions when he held that " (w)ithout a resolution from the tribal business council approving compensation paid to its members, it is doubtful whether a mechanism (i.e. referendum) exists for tribal members to challenge the propriety of the actions taken by the council- without resolution there is no official record of action taken by the tribal business council." The "taking" was therefore not of the actual monies spent on the bonuses to TBC members, but of the membership's right to challenge the bonuses by referendum.

The legal issue in this case, similar to Good Bear, is whether the Plaintiffs in this case have cited to a "right" protected under the Indian Civil Rights Act that they have been allegedly deprived of without due process of law. That right must be one they have "a legitimate claim of entitlement to" under Francis using the Roth decision as a basis for determining that issue.

The seminal case for determining whether a person has a "property right" protected under the 14th amendment due process clause, which appears to be the model used by Congress in drafting the Indian Civil Rights Act, is Board of Regents v. Roth, where the Supreme Court held that the following standard determines if a property interest is involved:

> *To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. 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.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

On the same day that Roth was issued, the Supreme Court decided the similar -- but distinctly disparate -- circumstances of Perry v. Sindermann, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). There, the plaintiff was also a nontenured professor at a state junior college whose one-year contract was not renewed. Unlike its determination in Roth, the Court concluded that the plaintiff had alleged a property interest, deserving of constitutional protection, because his employer had guidelines and "binding understandings" which implicated a right to contract renewal. In reliance upon Roth, the Court restated the attributes of a property interest, which is worthy of constitutional protection, as follows:

We have made clear in Roth, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

This Court need not decide whether the Plaintiffs have proven that they have a property right to the monies in the People's Fund because as mentioned at oral argument the Court must also find a colorable claim of a deprivation of that property right without due process of law in order to find a waiver of immunity in this case. It certainly seems to this Court that the TBC when it created the People's Fund wanted to give the membership certain rights to control the

ultimate decision of who should get the monies and under what circumstances as they left that issue up to the people in a referendum vote. That vote never occurred, but the language of the enabling resolution strongly suggests that the TBC created a Fund and a department to administer that Fund that creates a *"mutually explicit understandings that support (t)his claim of entitlement."* Perry v. Sinderman, supra. Of course, this does not mean that the TBC could not end the People's Fund in a situation where oil and gas revenue dwindled to the point that it became impossible to fund the program. But a property right need not be inviolable for it to have ICRA protection.

The Court will therefore assume, for the sake of argument, that the Plaintiffs have demonstrated an ICRA-protected entitlement to future distributions from the People's Fund. That does not end the inquiry. The ICRA requires a showing of a "deprivation" of that property right without due process of law. As the Court indicated at oral argument, the undersigned does not believe the Plaintiffs have pled a sufficient takings argument to survive the motion to dismiss on sovereign immunity and political question grounds.

In Good Bear the Court found that the Plaintiffs had stated a colorable claim of a deprivation of a property right under ICRA because of the assertion therein that tribal monies were being spent without proper resolutions thus depriving the Plaintiffs therein of their rights to challenge those expenditures by referendum, a right guaranteed under the TAT Constitution. That argument does not apply in this case as the Plaintiffs acknowledge that there was a resolution, TBC Resolution No 24-248-FWF, passed to support the transfer of some of the People's Fund monies from the government-controlled account to the private account. Indeed, the Plaintiffs acknowledged at hearing that they were circulating a referendum petition to overturn that action that had been stopped when the transfer occurred. Defendants' counsel

acknowledged at hearing that nothing in TBC Resolution No 24-248-FWF or the Tribes' Constitution prevents the Plaintiffs from continuing to seek a referendum on the implementation of the resolution, which if successful, would require the monies to be transferred back to the BTF. Indeed, in the Plaintiffs' amended complaint they seek an injunction of 120 days to permit them to circulate that referendum petition thus evidencing that even the Plaintiffs agree that their right of referendum is being taken in this case, unlike Good Bear.

So, the question is whether the transfer of monies which the Plaintiffs arguably have an entitlement to from one fund to another for the apparent purpose of generating more investment income for the Fund is a taking. Also is the fact that any future distributions from the new fund created to accept the 250 million from the BTF account may be taxable constitute a taking?

Admittedly federal court jurisprudence on the issue of what act of a legislative body constitutes a "taking" both in the eminent domain and due process arenas seems to be in a state of flux, see Sheetz v. City of El Dorado, 601 U.S. 267 (2024) with the US Supreme Court appearing to side more often with property owners. In the due process arena however, the Courts have consistently held that in order to demonstrate a deprivation of a property right a party must demonstrate that the government has deprived the person of the free use or enjoyment of the property, or the benefits previously received from that property. Plaintiffs speculate that the transfer of the 250 million of the People's Fund from the BTF account to the private account may result in a loss of revenue to the People's Fund because the private account is with an entity just incorporated under Delaware law and appears speculative. Defendants counter that argument by indicating that they took the action they did to actually increase the benefits of the People's Fund for the membership and that any assertion of a deprivation is just conjecture. The Court agrees 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. The Court admires the due diligence done by the advocate for the Plaintiff to look into the background of the LLC where this money has been transferred, but that research does not convince the Court that a taking has occurred in this case.

The argument regarding the potential taxability of future destructions from the account where the TBC transferred the money is well-taken, but the mere fact that the future distributions may be subject to federal and state income taxes is not a "deprivation" under the ICRA. The Defendants would not be collecting that tax, and the Court is not convinced that the argument regarding taxability is correct. Even if it is, subjecting one's property to potential taxation is not a government deprivation.

POLITICAL QUESTION DOCTRINE AND NON-JUSTICIABILITY CLAIMS

The Defendants also claim that the Plaintiffs are trying to challenge decisions of the TBC that are left to their discretion under the TAT Constitution and thus should be barred by the political question doctrine. The political question doctrine is one which limits judicial authority to intervene into matters that are exclusively delegated to a coordinate branch of government to resolve. The political question doctrine applies "where there is 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department; **or a lack of judicially discoverable and manageable standards for resolving it . . . .**'" Nixon v. United States, 506 U.S. 224, 228, 122 L.Ed. 2d 1, 113 S. Ct. 732 (1993) (emphasis added) (quoting Baker v. Carr, 369 U.S. 186, 217, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962)). The policy behind the political question doctrine derives from the need to maintain separation of powers between coequal branches of government. Elrod v. Burns, 427 U.S. 347, 351, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) (citing Baker, 369 U.S. at 217). "It is the relationship between the judiciary and the

coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the political question Baker, 369 U.S. at 210.

Numerous tribal courts have adhered to this doctrine including Moran v. Confederated Salish and Kootenai Court of Appeals, Montana Oct 23, 19951995 Mont. Salish & Kootenai Tribe LEXIS 2; Delgado v. Oneida Bus. Commission, Oneida Appeals Commission Trial Court Jun 07, 20002000 Oneida Trial LEXIS 17; Chapman v. Little River Band of Ottawa Indians, Little River Band of Ottawa Indians Tribal Court Dec 15, 20082008 MI Ottawa Trib. LEXIS 2; Benjamin v. Weyaus, Mille Lacs Band of Ojibwe Court of Appeals Oct 14, 20082008 Mille Lacs Band Ojibwe App. LEXIS 1; In re Saunoke, Cherokee Nation Supreme Court Dec 19, 2018, 2018 Cherokee Nation Supreme LEXIS 12.

If a complaint presents issues exclusively reserved to the TBC under the Tribal Constitution or other governing law those issues may not be justiciable in a court of law as the Court may be intruding upon the prerogative of the legislative and executive branches of government. All of the claims of the Plaintiffs relate to issues that are not subject to judicial scrutiny under this doctrine. Although it is true that the enabling resolution for the People's Fund refers to the right of the people by referendum to decide how and to whom the monies are to be distributed, no referendum was ever held, and the subsequent implementing resolution refers to changes to the distribution that "may be authorized by the Business Council in the future." How 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.

The Court having found that the Plaintiffs have failed to allege a cause of action arising under ICRA the Court need not address the claims for relief to determine if they fall within the

province of the Court to grant. A remedy cannot be granted unless a violation is shown.

WHEREFORE it is hereby

ORDERED, ADJUDGED AND DECREED that the Court grants the request of the Plaintiffs to file their amended complaint seeking alternative judicial relief, but dismisses that amended complaint on the ground that it is barred by sovereign immunity and the political question doctrine.

Dated this 24th day of January 2025.

BY THE COURT:

BY: B.J. Jones

B.J. Jones
Associate Judge

ENTERED ON: 1/24/25
BY: BB