

**STATE OF MINNESOTA
IN COURT OF APPEALS**



App. File No. #A-08-80 and App. File No. #A-08-81

DENNIS E. OBERLOH, ET AL. (PLAINTIFF/APPELLEE)

VS.

LOREN JOHNSON (DEFENDANT/APPELLANT)

DENNY DEAN PRESCOTT (PLAINTIFF/APPELLEE)

VS.

LOREN JOHNSON (DEFENDANT/APPELLANT)

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT OF REDWOOD COUNTY
IN THE STATE OF MINNESOTA (HON. LELAND BUSH),
TRIAL COURT FILE NO. 64-CV-07-211 AND 64-CV-07-212

DEFENDANT/APPELLANT'S OPENING APPELLATE BRIEF

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STATEMENT REGARDING TYPE SIZE AND STYLE

I certify that this brief complies with the type volume limitation set forth in Rule 132.01(3) of the Minnesota Rules of Civil Appellate Procedure because it contains less than 14,000 words, not including parts of the brief exempted by Rule 132.01(3). This brief also complies with the typeface requirements of Rule 132.01 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

STATEMENT REGARDING ORAL ARGUMENT

Defendant respectfully requests oral argument.

STATEMENT OF RELATED CASES

No related cases are pending and there have been no previous appeals concerning this matter.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the lower court err in converting Treasurer Johnson's Motion to Dismiss into a Motion for Summary Judgment?

The lower court held the submission of additional material, i.e., Tribal law and Tribal Court decisions, was sufficient to convert Appellant's Motion to Dismiss into a Motion for Summary Judgment. In opposition, *see Miller v. Reddin*, 422 F.2d 1264 (9th Cir. 1970).

2. Did the lower court err by failing to dismiss the action based upon the doctrine of sovereign immunity?

The lower court held there was insufficient facts established to dismiss the action based upon the doctrine of sovereign immunity. In opposition, *see* Chayoon v. Sherlock, 89 Conn.App. 821 (Conn.App. 2005); Bassett v. Mashantucket Pequot Museum & Research Center, Inc. 221 F.Supp.2d 271 (D.Conn. 2002); Diver v. Peterson, 524 N.W.2d 288 (Minn.App. 1994).

3. Did the lower court err in exercising concurrent jurisdiction over a Tribal dispute?

The lower court held Public Law 280 allowed the state court to assume concurrent jurisdiction over the instant dispute. In opposition, *see* Bryan v. Itasca County, 426 U.S. 373 (1976); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

STATEMENT OF THE CASE

This is a tort case brought against an elected Tribal leader of a federally-recognized Indian Tribe, stemming from his on-reservation mailings of newsletters to members of the Tribe. Defendant, Loren Johnson, was at all times relevant hereto the Treasurer of the Lower Sioux Indian Community – a federally recognized Indian Tribe. He later served as President of the Community eventually resigning therefrom in December of 2007. It is uncontested that the

Tribe possesses sovereign immunity from unconsented suit, and has not waived that immunity.

On or about March 27, 2007, Appellees served their complaints on Appellant alleging libel per se and defamation based upon a newsletter sent to enrolled members of the Lower Sioux Indian Community. (Aplt. App. 1-13). On September 19, 2007, Appellant filed his Notice of Motion and Motion to Dismiss based upon the doctrine of sovereign immunity. (Aplt. App. 14-296). On October 11, 2007, Appellee Prescott filed his Memorandum of Law in Response to Motion to Dismiss. (Aplt. App. 297-417). On October 12, 2007, Appellee Oberloh filed his Memorandum of Law in Response to Motion to Dismiss. (Aplt. App. 418 - 507). On October 22, 2007, Appellant specially-appeared before the lower court and moved to dismiss the complaint based upon his immunity, and the lower court denied the motion on December 12, 2007. (Aplt. App. 508-518). On January 11, 2008, Appellant filed his Petition for Discretionary Review. (Aplt. App. 519-537).

STATEMENT OF THE ARGUMENT

The court below erred by refusing to dismiss the action based upon the doctrine of sovereign immunity enjoyed by all federally recognized Indian Tribes and their officials and in exercising concurrent jurisdiction over a Tribal dispute.

STANDARD OF REVIEW

On a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists. Chayoon v. Chao, 355 F.3d 141, 143 (2nd Cir.2004)(*quoting* Garcia v. Akwesasne Hous. Auth., 268 F.3d 76, 84 (2nd Cir.2001)). On review, this Court is not bound by and need not give deference to the trial court's determination of a purely legal question. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn.1984). Rather, this Court will engage in a de novo review to determine whether the lower court correctly applied the law. Desjarlait v. Desjarlait, 379 N.W.2d 139, 141 (Minn.App.1985), *pet. for rev. denied* (Minn. Jan. 31, 1986).

FACTS

The Lower Sioux Indian Community (the “Tribe”) is a federally recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934 as amended, 25 U.S.C. § 476, thereby possessing and exercising all inherent sovereign powers of a Tribal government. Indeed, the status of the Tribe as a sovereign nation was recognized by this Court in Klammer v. Lower Sioux Indian Community, 535 N.W.2d 379 (Minn.App. 1995)(“The Community is a federally recognized Indian Tribe occupying an Indian Reservation located near Morton, Minnesota.”) The Tribe operates under a federally approved Constitution and Bylaws and is governed by a five (5) member Community Council. The

Community Council consists of a President, Vice-President, Secretary, Treasurer, and Assistant Secretary-Treasurer. (Aplt. App. 184-185). Appellant was seated on the Community Council on October 12, 2006 and was subsequently appointed by the remaining members of the Community Council to the Treasurer's position. (Aplt. App. 56-74). Accordingly, Appellant served the Tribe as does a legislator for the State of Minnesota with the additional duties of maintaining the Tribe's finances.

Similar to most legislative bodies, the Tribal Council has broad legislative and administrative powers in managing the official affairs of the Lower Sioux Indian Community. Appellant's duties are listed in the Bylaws of the Lower Sioux Indian Community in Minnesota Article 1 DUTIES OF OFFICERS §4 as follows:

The Treasurer shall be the custodian of all funds in the possession of the Community from any source. At such time as the Community Council or the Secretary of the Interior shall deem necessary, he shall give a bond with a surety company of recognized standing in an amount to be determined by the Community Council, such surety and bond to be approved by the Commissioner of Indian Affairs. He shall keep an accurate record of all community funds and shall disburse the same in accordance with the vote of the Community Council. The books of the Treasurer containing the financial status of the Community shall be open to audit and examination by duly authorized officers of the Secretary of the Interior at all times, and shall be open to inspection by members of the Community Council and its officers.

However, contrary to the opinion of the lower court, these duties do not constitute the Treasurer's only responsibilities. For example, the Community Council has the authority, as enumerated in ARTICLE V – POWERS, of the Constitution to:

(a) To negotiate with the Federal, State, and local Governments on behalf of the Community, and to advise and consult with the representatives of the Interior Department ...; (b) To employ counsel for the protection and advancement of the rights of the Community and its members ...; (c) To approve or veto any sale, disposition, lease, or encumbrance of community lands, interests in lands, or other community assets; (d) To advise the Secretary of the Interior with regard to all appropriation estimates or Federal projects for the benefit of the Community prior to the submission of such estimates to the Bureau of the Budget and to Congress; (e) To make assignments of community land to members of the Community in conformity with Article IX of this Constitution; (f) To manage all economic affairs and enterprises of the Community in accordance with the terms of a charter ...; (g) To appropriate for public purposes of the Lower Sioux Indian Community available funds within the exclusive control of the Community; (h) To levy assessments upon members of the Community for the use of Community property and privileges, and to permit the performance of reservation labor in lieu thereof, and to levy; (i) To safeguard and promote the peace, safety, morals, and general welfare of the Community by regulating the conduct of trade and the use and disposition of property upon the reservation ...; (j) To establish ordinances ...; (k) To regulate the manner of taking nominations for Community officers and of holding community elections ...; (l) To adopt resolutions regulating the procedure of the Community Council itself and of other Community agencies and community officials; (m) To encourage and foster the arts, crafts, traditions, and culture of the Mdewakanton Sioux Indians of Minnesota; (n) To charter subordinate organizations for economic purposes and to regulate the activities of all such organizations ...; (o) To protect and preserve the property, wildlife and natural resources of the Community; (p) To delegate to subordinate boards, or community officials, or to cooperative associations ...; (q) To select delegates to sit in the annual conference of the Minnesota Mdewakanton Sioux Indians and in the National Council of the entire Sioux Nation.

To apprise members of the affairs of the Tribe, members of the Community Council, namely the President and the Treasurer, submitted weekly update letters to all enrolled members that covered a wide array of topics. On March 12, 2007, Loren Johnson, in his official capacity as Treasurer for the Lower Sioux Indian

Community, issued a report that included statements regarding Municipal Capital Corporation. (Aplt. App. 75-76). This “Treasurer’s Report” is the subject of Appellees’ separate lawsuits brought in state court against Appellant purportedly in his individual capacity.

Appellee Oberloh received payments from the Tribe and its entities for accounting and auditing services provided to the Tribal Community Center and Jackpot Junction Casino Hotel – the tribally-owned gaming operation and for management of the children’s trust accounts. In fact, Appellee Oberloh has provided auditor/accounting services to the Tribe for almost twenty (20) years. (Aplt. App. 217-218). Additionally, Appellee Oberloh formed and owned shares of Municipal Capital Corporation, Inc., an entity that has also contracted with the Tribe. (Aplt. App. 221-223). The Tribe ceased utilizing Appellee Oberloh’s services.

Appellee Prescott is an enrolled member of the Lower Sioux Indian Community. He leases Denny’s Quik Stop from the Tribe and was responsible in part for the establishment of Municipal Capital Corporation, Inc. Appellee Prescott brought a similar action in Tribal Court in or about September of 2006 in which the Tribal Court held “[t]he evidence clearly shows that the information published and distributed by Community Council officials to the Lower Sioux membership concerning [Prescott’s] leasehold interest and a referendum election

on said interest and his removals from the Community Council is true.” (Aplt. App. 58).

The claims against Appellant, which are the subject of this appeal are libel per se and defamation. Appellant appeals the lower court’s denial of his Motion to Dismiss based upon the doctrine of sovereign immunity and the failure of the lower court to abstain from exercising jurisdiction over a Tribal dispute.

JURISDICTIONAL STATEMENT

This is an appeal from an Order of the Fifth Judicial Circuit of Redwood County in the State of Minnesota (Hon. Leland Bush), denying Appellant’s motion to dismiss for lack of subject matter jurisdiction, on the grounds that it is questionable whether Appellant, as an elected official of the Lower Sioux Indian Community – a federally recognized Indian tribe – enjoys immunity from suit as a matter of federal law.

Subject matter jurisdiction in the lower court was predicated on 28 U.S.C. §1360 and 18 U.S.C. 1162 (“Public Law 280”). (Order of Hon. Leland Bush (Aplt. App. 512-513)). The lower court’s order was entered on December 12, 2007. Appellant filed a Petition for Discretionary Review on January 11, 2008. (Aplt. App. 519-537).

LEGAL STANDARD

“Tribal sovereign immunity is a matter of subject matter jurisdiction...which may be challenged by a motion to dismiss under Fed.R.Civ.P. 12(b)(1). . . .” E.F.W. v. St. Stephen’s Indian High School, 264 F.3d 1297, 1302-03 (10th Cir. 2001) (citations omitted). Upon a defendant’s Rule 12(b)(1) motion to dismiss, the plaintiff bears the burden of proving jurisdiction. Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992); Osborn v. United States, 918 F.2d 724, 729 n.6 (8th Cir. 1990). Specifically: “On a [tribe’s] motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists.” Garcia v. Akwesasne Housing Authority, 268 F.3d 76, 84 (2nd Cir. 2001). Moreover, the party seeking to invoke the Court’s jurisdiction must allege all facts necessary to establish it. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

The primary focus of Appellant’s motion to dismiss is an assertion of sovereign immunity, an argument that implicates the Court’s subject matter jurisdiction. St. Stephen’s Indian High School, 264 F.3d at 1302-03. When a challenge is made to the Court’s subject matter jurisdiction, the party asserting the existence of such jurisdiction—here, the Appellees, bear the burden of establishing that such jurisdiction exists. Montoya v. Chao, 269 F.3d 952, 955 (10th Cir. 2002).

Although sovereign immunity is recognized as an affirmative defense, it is clear that the party seeking to sue a sovereign entity bears the burden of showing that such immunity has been waived. *See e.g. James v. U.S.*, 970 F.3d 750, 752 (10th Cir.1992).

As will be discussed below, no waiver of sovereign immunity has been authorized that would allow the Appellees to bring an action against an elected leader of the Lower Sioux Indian Community. Here, the lower court impermissibly shifted the jurisdictional burden by forcing Appellant to prove that he is a governmental official entitled to claim sovereign immunity when the pleadings clearly illustrate that he acted in his official capacity when issuing weekly newsletters to the members of the Lower Sioux Indian Community.

ARGUMENT

I. THE LOWER COURT ERRED IN CONVERTING APPELLANT'S MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT.

The lower court held that “[t]he Plaintiffs have correctly characterized and treated the Defendant’s motion as one for Summary Judgment, and have submitted a number of affidavits in opposition to the defense motion.” (Aplt. App.511-512). This was clear error. Rule 12.02 of the Minnesota Rules of Civil Procedure states that “[i]f, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and

not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” The thrust of Appellant’s defense is based upon lack of subject matter jurisdiction which is outside the parameters of Rule 12.02’s conversionary provisions. Accordingly, the lower court erred when it converted Appellant’s motion to dismiss into a motion for summary judgment.

Even if this Court determines that the lower court’s decision to convert Appellant’s motion to dismiss into a motion for summary judgment was correct based upon the defenses raised in the motion to dismiss, the exhibits attached to the Appellant’s motion to dismiss do not warrant conversion. Specifically, the exhibits attached to the Motion to Dismiss in response to the complaint filed by Appellee Prescott were as follows:

1. Constitution of the Lower Sioux Indian Community; (Aplt. App. 44-55)
2. Decision issued by the Tribal Court of the Lower Sioux Indian Community; (Aplt. App. 56-74)
3. Treasurer’s report that was attached to Appellee’s complaint; (Aplt. App. 75-76)
4. Decision issued by the Minnesota Court of Appeals; (Aplt. App. 77-87) and

5. Judicial Ordinance of the Lower Sioux Indian Community. (Aplt. App. 88-148).

Similarly, the attachments for Appellant's motion to dismiss against Appellee Oberloh were as follows:

1. Constitution of the Lower Sioux Indian Community; (Aplt. App. 183-197)
2. Decision of the Tribal Court of the Lower Sioux Indian Community; (Aplt. App. 198-216)
3. Agreement between Appellee Oberloh and the Lower Sioux Indian Community for accounting services (no indication this was relied upon by the lower court); (Aplt. App. 217-218)
4. Articles of Incorporation for Municipal Capital, Inc. (attached to Appellee's complaint; (Aplt. App. 221-223)
5. Treasurer's report (attached to Appellee's complaint); (Aplt. App. 219-220)
6. Decisions issued by the Minnesota Court of Appeals; (Aplt. App. 224-234) and
7. Judicial Ordinance of the Lower Sioux Indian Community. (Aplt. App. 235-296)

Appellant could have just cited the laws of the Tribe but decided to attach same solely for the judge's convenience. If statutes and legal decisions are sufficient to convert a motion to dismiss into a motion for summary judgment, a

motion to dismiss would be rendered futile. At least one court has held that “[b]y no stretch of the imagination can the Xerox copies of opinions of this court, attached to a memorandum of law submitted ... in connection with the Rule 12(b)(6) motions be said to constitute matters outside the pleadings sufficient to transform a Rule 12(b)(6) motion into a motion for summary judgment.” Cf. Miller v. Reddin, 422 F.2d 1264 (9th Cir. 1970). Based upon the foregoing, the lower court erred when it converted Appellant’s motion to dismiss into a motion for summary judgment.

II. THE LOWER SIOUX INDIAN COMMUNITY IS A SOVEREIGN INDIAN NATION ENTITLED TO THE PROTECTION OF SOVEREIGN IMMUNITY.

The United States Supreme Court has expressly held that “[l]ike foreign sovereign immunity, tribal sovereign immunity is a matter of federal law.” Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S.Ct. 1700, 1705 (1998). Under federal law, an Indian tribe is a sovereign authority and, as such, has tribal sovereign immunity, not only from liability, but also from suit. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57-58 (1978); Tamiami Partners v. Miccosukee Tribe of Indians, 63 F.3d 1030, 1050 (11th Cir. 1995)(recognizing that allowing a suit against a Tribe to go to trial would render tribal sovereign

immunity "meaningless".)¹ Pursuant to sovereign immunity principles, an Indian Tribe is subject to suit only where Congress has so authorized or where the Tribe has waived its immunity by consenting to suit. Kiowa Tribe, 523 U.S. 751 at 754. Absent such authorization or consent, the courts do not have subject matter jurisdiction over suits against a Tribe.² “Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe.” Puyallup Tribe, Inc. v. Department of Game of State of Wash., 433 U.S. 165, 172, 97 S.Ct. 2616, 2621 (1977); *See also* Pit River Home and Agr. Co-op. Ass'n v. U.S., 30 F.3d 1088, 1100 (9th Cir.1994) (“sovereign immunity is a jurisdictional defect that may be asserted by the parties at any time or by the court sua sponte”). Thus tribal sovereign immunity is more than simply “a defense on the merits,” but rather is an exemption from suit that bars a state court's exercise of jurisdiction over a Tribe. *See* Santa Clara Pueblo, 436 U.S. at 58, 98 S.Ct. at 1677;

¹ Indian tribes possess common-law immunity from suit that predates the United States Constitution. *See* Santa Clara Pueblo v. Martinez, 436 U.S.49, 58,98 S.Ct. at 1677 (1978); United States v. Wheeler, 435 U.S. 313, 322-23, 98 S.Ct. 1079, 1085-86 (1978); United States v. Mazurie, 419 U.S. 544, 557, 95 S.Ct 710, 717 (1975); United States Fidelity & Guaranty Co., 309 U.S. at 512, 60 S.Ct. at 656; Sycuan Band of Mission Indians, 884 F.2d at 418; Kennerly v. United States, 721 F.2d 1252, 1258 (9th Cir. 1983).

² As noted above, “[a]bsent congressional or tribal consent to suit, state and federal courts have no jurisdiction over Indian tribes; only consent gives the courts the jurisdictional authority to adjudicate claims raised by or against tribal defendants.” Sycuan Band of Mission Indians, 884 F.2d at 418. *See also* Santa Clara Pueblo, 436 U.S. at 58-59, 98 S.Ct. at 1677; Puyallup III, 433 U.S. at 173, 97 S.Ct. at 2621; Snow v. Quinault Indian Nation, 709 F.2d 1319, 1321 (9th Cir. 1983); United States v. Oregon, 657 F.2d 1009, 1013 (9th Cir. 1981); California ex rel. California Dep't of Fish and Game v. Quechan Tribe of Indians, 595 F.2d 1153, 1155 (9th Cir. 1979).

Puyallup Tribe, Inc., 433 U.S. at 172, 97 S.Ct. at 2621. The Appellees have provided no evidence, and in fact, the lower Court expressly recognized that “it does not appear that the tribe has specifically waived its sovereign immunity.” (Aplt. App. 531).

III. THE TRIBE’S SOVEREIGN IMMUNITY EXTENDS TO THE APPELLANT.

Appellant’s immunity from the instant action is coextensive with the Tribe’s sovereign immunity. Tribal officers are protected and entitled to sovereign immunity in official capacity claims. Dry v. United States, 235 F.3d 1249, 1254 (10th Cir. 2000). The doctrine of sovereign immunity “extends to individual tribal officials acting in their representative capacity and within the scope of their authority. Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985); *See also* Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Okla., 725 F.2d 572, 574 (10th Cir. 1984). Therefore, if a complaint “alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked.” Tenneco, 725 F.2d at 574. Otherwise, a Tribe’s sovereign immunity may not be avoided simply by suing Tribal officers. *See* Kenai Oil & Gas, Inc. v. Department of the Interior, 522 F.Supp. 521, 531 (D.Utah 1981)(held that individual claims against Business Committee members were essentially against the Tribe itself and barred by sovereign immunity); Felix Cohen, *Handbook on*

Federal Indian Law, at 284 (reprinted. 1984)(“[I]t has been held that where the Tribe itself is not subject to suit, tribal officers cannot be sued on the basis of tribal obligations.”) (footnote omitted).

The Appellees, here, have stated that “[t]he actions of Defendant Loren Johnson were not made in the ordinary course of his position with the Lower Sioux Indian Community and are not privileged communications.” (Aplt. App. 4 and 10). To strip a Tribal official of his immunity, the Appellees must do more than just allege Appellant acted outside of his representative capacity and beyond the scope of his authority – they must establish facts that reasonably support their allegations. Here, Appellees have failed to meet this burden, and therefore, the action against Appellant is, essentially, an action against the Tribe.

Furthermore, all of the purported “unlawful” acts relate to and derive from Appellant’s position and authority as Treasurer of the Lower Sioux Indian Community. As the Treasurer of the Tribe, Appellant was apprizing members of the financial affairs of the Tribe. Appellees were not forced to enter into contracts with the Lower Sioux Indian Community, but purposefully availed themselves of such contracts, and any business decision made by the Council is understandably a matter of public interest for the Tribe because it would ultimately affect the amount of per capita payments distributed to each individual member on a monthly basis. In other words, whenever per capita payments are decreased, the Tribal members

demand, and have a right, to know the Tribe's financial position. The mailing of the newsletter was an intrinsic duty and responsibility carried out pursuant to the authority bestowed to Appellant as an elected leader of a federally recognized Indian Tribe. Further, contrary to Appellees' outright misrepresentations, Appellant had the support of the Community Council when he mailed the newsletters, and in fact, the newsletters were often a collaborative effort.

The series of cases, Chayoon v. Mashantucket Pequot Tribal Nation, Docket No. 3:02CV0163 (D.Conn. 2002), Chayoon v. Chao, 355 F.3d 141 (2nd Cir. 2004), *cert. denied sub nom. Chayoon v. Reels*, 543 U.S. 966 (2004), and Chayoon v. Sherlock, 89 Conn.App. 821 (Conn.App. 2005) are directly on point. The plaintiff in these cases, Joseph Chayoon, was an employee of the Foxwoods Casino, a casino owned and operated by the Mashantucket Pequot Gaming Enterprise, an arm of the Mashantucket Pequot Tribe. In his first lawsuit, Plaintiff sued the Tribe and Foxwoods Casino for wrongful termination. The case was dismissed for lack of subject matter jurisdiction, based on the sovereign immunity of the Tribe and the casino. Plaintiff then filed a second lawsuit, naming 18 individual defendants, including seven (7) members of the Tribal Council. Plaintiff's second case was similarly dismissed with the Court explaining:

Chayoon cannot circumvent tribal immunity by merely naming officers or employees of the Tribe where the complaint concerns actions taken in defendant's official or representative capacities and the complaint does not allege they acted outside the scope of their authority.

Chayoon v. Chao, 355 F.3d at 143.

Nevertheless, Chayoon filed a third wrongful termination lawsuit in state court naming eight individuals of the casino. Chayoon v. Sherlock, 89 Conn. App. At 824. Plaintiff argued sovereign immunity should not apply because defendants were not Indians and were being sued individually, and because in terminating his employment defendants acted in violation of federal law and therefore beyond the scope of their authority. Id. at 825. Defendants argued that at the time plaintiff was terminated they were all casino employees, and plaintiff's claims related to conduct undertaken pursuant to their employment responsibilities. The court agreed with the defendants, affirming dismissal on the basis of sovereign immunity. The court began by observing that "[t]ribal immunity extends to all tribal employees acting within their representative capacity and within the scope of their official authority." Id. at 826.

With that established, the primary issue for the Chayoon v. Sherlock court was "whether the plaintiff had made sufficient claim that the defendants acted beyond the scope of their authority so as to denude them of the protection of sovereign immunity." Id. at 828. The Court explained:

In the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads – and it is shown – that a tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe.... Claimants may not simply describe their claims against a tribal official as in his individual capacity in

order to eliminate tribal immunity ...[A] tribal official – even if sued in his individual capacity – is only stripped of tribal immunity when he acts manifestly or palpably beyond his authority....Id., *citing* Bassett v. Mashantucket Pequot Museum & Research Center, Inc., 221 F.Supp.2d 271, 280 (D.Conn. 2002). To overcome sovereign immunity, plaintiff “must do more than allege the defendants’ conduct was in excess of their ... authority; [he] must allege or otherwise establish facts that reasonably support those allegations.” Id. The court held that nothing alleged by plaintiff suggested that defendants acted “manifestly or palpably beyond their authority in their conduct regarding the termination of his employment.”

Id. at 829. Emphasis added. In language that applies equally well to Plaintiffs’ claims here, the Chayoon v. Sherlock court stated:

[T]he complaint against the defendants in the present matter patently demonstrates that in terminating the plaintiff’s employment, the defendants were acting as employees of Foxwoods within the scope of their authority. It is insufficient for the plaintiff merely to allege that the defendants violated federal law or tribal policy in order to state a claim that they acted beyond the scope of their authority. *See* Bassett v. Mashantucket Pequot Museum & Research Center, Inc., *supra*, 221 F.Supp.2d at 280-81. Such an interpretation would eliminate tribal immunity from damages actions because a plaintiff must always allege a wrong or a violation of law in order to state a claim for relief. In order to circumvent tribal immunity, the plaintiff must have alleged and proven, apart from whether the defendants acted in violation of federal law, that the defendants acted “without any colorable claim of authority....”

Id. at 281. The court concluded that the Plaintiff had made no proffer of such conduct and that he merely alleged that he sued the defendants in their personal capacities and that they acted outside the scope of their authority. Without more, the court dismissed all claims against the Tribal officials.

Here, as in Chayoon, Appellees have failed to plead facts showing that Appellant acted “without any colorable claim of authority.” Id. *See also* Native

Am. Distributing v. Seneca-Cayuga Tobacco Co., 2007 WL 1673535 (N.D.Okla. 2007)(“tribal official, even if sued in an individual capacity, is only stripped of tribal immunity when he acts ‘without any colorable claim of authority’”); Trudgeon v. Fantasy Springs Casino, 71 Cal.App.4th at 644 (“Where the plaintiff alleges no viable claim that tribal officials acted outside their authority, immunity applies”)(*citing* Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991)).

Nor have the Appellees alleged that Appellant acted manifestly or palpably beyond his authority in his conduct regarding the issuance of the newsletters. Bassett v. Mashantucket Pequot Museum, 221 F.Supp.2d at 280. Quite the contrary, Appellees allege that Appellant acted outside the scope of his authority without any facts supporting their allegation. Further, they falsely contend Appellant acted without the authority of the Community Council. Appellees’ generic, conclusory assertions that Appellant acted outside the scope of his authority, without a factual basis therefore, are insufficient to circumvent tribal immunity. *See, eg.*, Chayoon v. Sherlock, 89 Conn. App. At 829-30.

It must also be noted that Appellees’ complaint is not only directed at stopping Appellant’s ongoing or future conduct, but rather, in recovering monetary damages. Where “the ‘essential nature and effect’ of the relief sought is against the Tribe, the Tribe is the ‘real, substantial party in interest,’ and its immunity

applies to bar suit, irrespective of claims against Tribal officials.” Shermoen v. United States, 982 F.2d 1312, 1320 (9th Cir. 1992). As the Ninth Circuit explained:

A suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of questionably sovereign power.

Id. at 1320. Appellees’ requested relief – the payment of \$50,000.00 for each Appellee – will “require affirmative action by the sovereign [and] the disposition of unquestionably sovereign property.” Id. Because the requested relief “would expend itself on the public treasury or domain”, Appellees’ claims are necessarily against the sovereign itself. Shermoen, 982 F.2d at 1320.

IV. THE LOWER COURT ERRED WHEN IT REFUSED TO DISMISS THE ACTION BASED UPON THE IMMUNITY OF APPELLANT IN HIS INDIVIDUAL CAPACITY.

The Court clearly erred when it allowed the Appellees to circumvent the doctrine of sovereign immunity by bringing a claim against Appellant in his individual capacity. While claims against tribal officials in their individual capacities are occasionally justified, the Appellees here have not successfully supported such a claim against Appellant in his individual capacity. Even if the Appelles had asserted such a claim, it could not stand alone. Like state and federal agents and officials, tribal agents and officials are generally protected by the

sovereign's immunity. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).³ A Tribe's immunity extends to its agents and officials when acting in their representative capacity and within the scope of their authority. Baker Elec. Co-op., Inc. v. Chaske, 28 F.3d 1466, 1471 (8th Cir. 1994) (stating that if tribal officers act within their authority, they are "clothed with the Tribe's sovereign immunity").⁴

The immunity of tribal officials is not limited to high-level officers or officials who are performing governmental functions and exercising discretion. Bassett v. Mashantucket Pequot Museum & Research Ctr., Inc., 221 F.Supp.2d 271, 277-78 (D. Conn. 2002). Instead, tribal immunity extends to all tribal employees acting within their representative capacity and within the scope of their official authority.⁵ Id. at 278. Accordingly, federal district courts across the country have overwhelmingly treated sovereign immunity as a bar to claims

³See also Dry v. United States, 235 F.3d 1249, 1253 (10th Cir. 2000); Fletcher v. United States, 116 F.3d 1315, 1324 (10th Cir. 1997); Burlington Northern v. Blackfeet Indian Tribe, 924 F.2d 899, 901 (9th Cir. 1991), *overruled on other grounds*, Big Horn County Elec. Co-op., Inc. v. Adams, 219 F.3d 944 (9th Cir. 2000); Runs After v. United States, 766 F.2d 347 (8th Cir. 1985).

⁴See also Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty., 991 F.2d 458, 460 (8th Cir. 1993); Evans v. McKay, 869 F.2d 1341, 1348 n.9 (9th Cir. 1989); Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985); United States v. Oregon, 657 F.2d 1009, 1012 n.8 (9th Cir. 1982); Davis v. Littell, 398 F.2d 83, 84-84 (9th Cir. 1968), *cert. denied*, 393 U.S. 1018, Jan. 13, 1969.

⁵ See E.F.W. v. St. Stephen's Indian High School, 264 F.3d 1297, 1304 (10th Cir. 2001) (holding that claims against employees of a tribal social service agency in their official capacities were barred by sovereign immunity); Dry, 235 F.3d at 1252-53 (holding that various tribal officials, including the tribe's general legal counsel, prosecutor, director of law enforcement, and seven other law enforcement personnel, were immune from suit in their official capacities); Hardin, 779 F.2d at 479-80 (holding that claims against "various tribal officials" were "barred by the Tribe's sovereign immunity"); Snow, 709 F.2d at 1322 (holding that claims against a tribal revenue clerk were barred by sovereign immunity).

against a wide variety of tribal officials and employees, including: the president of a tribal college; a boxing promoter; a marketing manager; the Executive Director of a museum; the Projects Director of a museum; tribal attorneys; members of a tribal business council; employees responsible for the maintenance of a casino parking lot; and a consultant.⁶

The Appellees name Mr. Johnson as defendant in his individual capacity. To be successful in hailing this Tribal official into court, Appellees must prove that the conduct in question is not related to his current or former governmental duties. To overcome an official's sovereign immunity, "a claimant must allege and prove that the officer has acted outside of the scope of his authority." Coggeshall Dev. Corp. v. Diamond, 884 F.2d 1, 3 (1st Cir. 1989). The allegation and proof that an official acted outside his or her authority is necessary to convert the action from

⁶ See Cohen v. Winkleman, 428 F.Supp.2d 1184, 1189 (W.D. Okla. 2006) (dismissing claims against a tribal college and its president on the basis of sovereign immunity); Frazier v. Turning Stone Casino, 254 F.Supp.2d 295, 309-10 (N.D. N.Y. 2003) (dismissing claims for injunctive relief against chief, boxing promoter, and marketing manager for acts taken in their official capacities as agents of the Oneida Nation and its Casino); Bassett v. Mashantucket Pequot Museum & Research Ctr., Inc., 221 F.Supp.2d 271, 277-78 (D. Conn.2002) (finding that tribal immunity applied to the Executive Director of a museum and to the Projects Director of the museum); Catskill Dev., L.L.C. v. Park Place Entm't Corp., 206 F.R.D. 78, 923 (S.D. N.Y. 2002) (holding that a tribe's sovereign immunity extended to its attorneys); Ordinance 59 Ass'n v. Babbitt, 970 F.Supp. 914, 921 (D. Wyo. 1997) (holding that members of tribal business council were entitled to sovereign immunity); Romanella v. Hayward, 933 F.Supp. 163, 167 (D. Conn. 1996), aff'd on other grounds, 114 F.3d 15 (2nd Cir 1997), (characterizing a plaintiff's action against tribal employees responsible for the maintenance of a casino parking lot as "a suit against the tribe" and holding that "the individual defendants' immunity from suit is coextensive with the Tribe's immunity from suit."); United State ex rel. Shakopee Mdewakanton Sioux Cmty. v. Pan American, 650 F.Supp. 278, 281 n.5 (D. Minn. 1986) (Community officials and a consultant hired by the Community would be protected by the Community's immunity if they acted in their official capacities and within the authority granted them.)

one against the sovereign to one against the official in their individual capacity. Malone v. Bowdoin, 369 U.S. 643, 646-48 (1962). Appellees' complaint must be dismissed based upon their failure to prove, or even attempt to prove, any conduct where Appellant has acted outside the scope of his authority.

However, even if this Court finds that the Appellees have met their burden of establishing that Appellant has acted outside the scope of his authority, the allegations are insufficient to strip him of his immunity. "A tribal official—even if sued in his 'individual capacity'—is only 'stripped' of tribal immunity when he acts 'manifestly or palpably beyond his authority.'" Shenandoah v. Halbritter, 275 F.Supp.2d. 279, 287 n.5 (N.D. N.Y. 2003) (*citing* Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 359 (2nd Cir. 2000)). *See also* Hardin, 779 F.2d at 479-80 (holding that various Tribal officials sued in their individual capacities were still entitled to the protection of sovereign immunity because they had acted within the scope of their authority). Further, "an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." Id. Finally, a mere claim of error in the exercise of an official's authority is not sufficient. Larson, 337 U.S. at 690. *See also* Snow, 709 F.2d at 1322 (holding that Tribal immunity extended to Tribal revenue clerk where there had "been no allegation that [the clerk] exceeded the scope of her authority"); Bassett, 221 F.Supp.2d at 280 (stating that a claim against a Tribal official "lies outside the scope of tribal

immunity only where the complaint pleads—and it is shown—that a Tribal official acted beyond the scope of his authority to act on behalf of the [tribe]). If an official's actions relate to the performance of their official duties, they are generally treated as being within the scope of their authority. *See Romanella*, 933 F.Supp. at 168 (holding that Tribal employees responsible for the maintenance of a casino parking lot were entitled to assert the Tribe's immunity from suit in their individual capacities even if they may have been negligent, because the claims related directly to their performance of their official duties). Appellees assert claims against Appellant in his individual capacity. However, no allegation in the complaint would support a theory of liability against him in his individual capacity, and it is clear error for the lower court to shift the burden to Appellant to prove that he was in fact acting in his official capacity when issuing the newsletters.

Appellees have failed to make any factual allegations that would support the conclusion that Appellant exceeded the scope of his authority. To the contrary, the Appellees allege only actions which would reasonably fall within the scope of the authority of a Tribal official – namely, apprising members of the Tribe of the financial status and affairs of the Community. With just a mere allegation in the Complaint that Appellant exceeded the scope of his authority, without any factual allegations that could support such a conclusion, Appellant must not be stripped of his immunity from suit. Accordingly, the lower court's decision must be reversed.

V. NO FACT QUESTION REMAINS BECAUSE THE TREASURER OF A FEDERALLY RECOGNIZED INDIAN TRIBE IS THE TYPE OF “OFFICIAL” WHO IS PROTECTED BY SOVEREIGN IMMUNITY.

The lower court denied Appellant’s motion to dismiss because “[f]act questions remain as to whether the Defendant Loren Johnson is the type of ‘official’ who may be protected by sovereign immunity.” (Aplt. App. 532). Without even resorting to Appellant’s motion to dismiss, it could not have been more clear that he was acting in his official capacity as an elected leader of the Lower Sioux Indian Community when issuing newsletters to the Tribal members. Following are examples of “facts” that support Appellant’s contentions that he was acting within his scope of authority as illustrated by Appellee Prescott’s pleading:

- Appellee Prescott states “[t]hat Defendant, Loren Johnson, is the treasurer of the Lower Sioux Indian Community.” (Aplt. App. 2)
- Appellee Prescott is an enrolled member of the Lower Sioux Indian Community and operates a convenience store on the reservation. (Aplt. App. 2)
- Appellee has a lease with the Lower Sioux Indian Community in which the Tribe is attempting to terminate. (Aplt. App. 2)
- Appellee and the Lower Sioux Indian Community are currently in arbitration over a dispute with the convenience store. (Aplt. App. 3)

- Appellee Prescott was a member of the Community Council and was “illegally” removed. (Aplt. App. 3)
- Referendums in the Community have been initiated but the Tribal Court has refused to take action. (Aplt. App. 3)
- An election for the Community Council is scheduled and Appellee Prescott plans to run for the vacant seat. (Aplt. App. 3)
- Appellee Prescott claims Appellant’s motive is to damage his reputation in the community. (Aplt. App. 3)
- Appellant’s alleged defamatory statement involved Appellee’s interest in a corporation that had conducted business with the Lower Sioux Indian Community. (Aplt. App. 3-4)
- Appellant only sent this newsletter to Tribal members of the Lower Sioux Indian Community. (Aplt. App. 4)
- As an exhibit, Appellee attached the newsletter that clearly illustrated it was sent in the Treasurer’s official capacity. For example, the newsletter was published on Tribal letterhead, it was signed by Loren Johnson as Treasurer of the Lower Sioux Indian Community, and it only concerned matters of interest to the Tribe and its members. (App. 341-342)

Similarly, Appellee Oberloh's complaint clearly demonstrates that the newsletter was issued by Appellant in his official capacity as Treasurer of the Tribe. For example:

- Appellee Oberloh states that Defendant Loren Johnson is the Treasurer of the Lower Sioux Indian Community. (Aplt. App. 9)
- Appellee Oberloh provided accounting services for the Lower Sioux Indian Community. (Aplt. App. 10)
- Appellant's alleged defamatory statements involved a conflict of interest between Appellee Oberloh and the Lower Sioux Indian Community. (Aplt. App. 10)
- The newsletters were sent to the members of the Lower Sioux Indian Community. (Aplt. App. 10)
- Appellant's motive in issuing the newsletters was to interfere with his business relationships with the members of the Lower Sioux Indian Community. (Aplt. App. 10)
- As an exhibit, Appellee attached the newsletter that clearly illustrated it was sent in the Treasurer's official capacity. For example, the newsletter was published on Tribal stationary, it was signed by Loren Johnson as Treasurer of the Lower Sioux Indian Community, and it only concerned matters of interest to the Tribe and its members. (Aplt. App. 341-342)

In summation, the Treasurer of the Lower Sioux Indian Community issued a newsletter, on tribal letterhead and signed by Loren Johnson as “Treasurer” of the Lower Sioux Indian Community, addressed solely to members of the Tribe dealing with issues that directly affected the financial status of the Tribe with a purported motive to affect the Appellees’ relationships with members of the Tribe. How could this not be enough factual evidence to support dismissal of the complaint based upon the doctrine of sovereign immunity?

Further, there has been no contention that Appellant did not serve as an elected official of the Lower Sioux Indian Community during the time the newsletters were issued. Accordingly, during the time the alleged tort occurred, he was among the highest officials of the Tribe. This Court has recognized immunity for similarly situated individuals and those with less authority in governmental affairs. *See Mathis v. Kennedy*, 243 Minn. 219, 223, 67 N.W.2d 413, 417 (1954) (applying absolute privilege to statements made in course of judicial proceedings); *Carradine v. State*, 511 N.W.2d 733, 735 (Minn. 1994) (applying to officer for alleged defamatory statements made in arrest report); *Board of Regents of Univ. of Minnesota v. Reid*, 522 N.W.2d 344, 346-47 (Minn.App. 1994)(absolute immunity applied where university officials gave a press briefing and communicated with the press regarding allegations that university professors committed civil and criminal fraud); *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S.Ct. 966, 972 (1998); *Farrington*

v. City of Richfield, 488 N.W.2d 13, 16 Minn.App. 1992)(Local legislators are entitled to absolute immunity from § 1983 liability for legislative activities); Johnson v. Dirkswager, 315 N.W.2d 215, 223 (Minn. 1982) (holding that Minnesota Department of Public Welfare Commissioner has absolute privilege); Ryan v. Wilson, 231 Iowa 33 (1941) (governor); Other states have also held that officials such as Appellant are entitled to immunity. *See* Blair v. Walker, 64 Ill.2d 1 (1976) (governor); Hackworth v. Larson, 83 S.D. 674 (1969) (secretary of state); Gold Seal Chinchillas, Inc. v. State of Washington, 69 Wash.2d 828 (1966) (attorney general); Matson v. Margiotti, 371 Pa. 188 (1952) (attorney general); Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335 (1959)(Acting Director of the Office of Rent Stabilization); Davis v. Littell, 398 F.2d 83, 85 (9th Cir.1968) (general counsel of tribe absolutely immune from suit), *cert. denied*, 393 U.S. 1018, 89 S.Ct. 621 (1969); White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 8, 480 P.2d 654, 658 (1971) (general counsel and general manager of subordinate economic organization of tribe absolutely immune from suit).

Of course, the most persuasive court decision was summarily discussed and distinguished by the lower court without any acknowledgement that the defendant in that case was only a Tribal attorney where as here the Defendant is the elected leader of the Tribe. Specifically, in Diver v. Peterson, 524 N.W.2d 288 (Minn.App. 1994), the Plaintiff brought an action against the Defendant,

individually and in his official capacity as Tribal attorney, for defamation under state law. (Aplt. App. 77-78). The Divers, Tribal employees, were terminated from their employment with the Tribe. The Tribal attorney issued a press release to the area television stations reporting that the Tribe had fired the Divers for stealing Tribal property. The District Court dismissed the Divers' complaint, because the Tribe's sovereign immunity extended to the Tribal attorney and had not been waived. The Divers appealed. The Appellate Court held that the "Divers' recourse for the alleged torts of the tribal attorney is through tribal institutions and procedures." Id. at 290. The Appellate Court dismissed the action stating:

The District Court correctly entered summary judgment in Peterson's favor as the state court lacks subject matter jurisdiction. Under the doctrine of tribal sovereign immunity, the Divers may pursue their claims against Peterson through tribal procedures. Public Law 280 has not abrogated the tribe's sovereign immunity, nor has the tribe expressly waived its sovereignty on this issue. Moreover, Peterson enjoys absolute immunity from the Divers' defamation suit because he made the allegedly defamatory statements while performing assigned duties as the tribal attorney and spokesperson, and the statements pertained to issues of public concern.

Here, the facts are strikingly similar, and therefore, dismissal was clearly warranted, and yet, the lower court only summarily acknowledged the Diver decision. Appellees specifically acknowledge in their complaint that "Defendant, Loren Johnson, is the Treasurer of the Lower Sioux Indian Community." (Aplt. App. 2 and 9). Appellees allege that the Treasurer is publishing "defamatory and

libelous statements about the Plaintiff for the sole purpose of damaging the Plaintiff's reputation in the Community.” (Aplt. App. 3 and 10) Additionally, Plaintiffs acknowledge these “defamatory statements” were only sent to members of the Lower Sioux Indian Community. (Aplt. App. 4 and 10). Appellant's duties included apprizing the Tribal members of the financial status of the Tribe via his “Treasurer's Report”. The fact that Municipal Capital Corporation was benefiting from transactions with the Tribe at the expense of individual Tribal members was a matter of public concern.

Simply stated, this is a Tribal dispute with a former agent and a member of the Tribe in which the state court may not assume jurisdiction in the absence of a waiver. Because Appellant was acting within the scope of his authority and there has been no waiver of sovereign immunity, the lower court's decision must be reversed as the facts presented to date are strikingly similar to those in the Diver decision with the exception that the Defendant in Diver was merely a Tribal attorney, and here, Appellant served the Tribe in the highest legislative position authorized by Tribal law.

VI. THE LOWER COURT ERRED WHEN IT ASSUMED CONCURRENT JURISDICTION OVER THE INSTANT DISPUTE.

The lower court held that the state court and tribal court have “concurrent” jurisdiction over the instant dispute because of the Public Law 280 grant of state

court jurisdiction over civil causes of action in Indian Country in Minnesota. (Aplt. App. _____). 28 U.S.C.A. § 1360. Although the State of Minnesota has adopted Public Law 280, this act alone is insufficient to authorize the state to enforce its civil tort claims against the Tribe and its officials. Public Law 280 authorized the State of Minnesota to enforce statutory schemes that are primarily criminal and prohibitory, but did not authorize states to enforce statutory schemes that are primarily civil and regulatory. Using that analysis, the Supreme Court in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), held that California's gaming laws, although they include criminal enforcement provisions, cannot be applied to the activity of Indian Tribes because they are primarily civil and regulatory in construction and application. Pursuant to Cabazon, courts have held that a wide array of state statutes, despite criminal enforcement mechanisms almost always present, are primarily civil and regulatory in nature and thus are inapplicable to Tribal activity on a Tribe's reservation. Twenty-Nine Palms Band v. Wilson, 925 F.Supp. 1470 (C.D.Cal. 1996)(state boxing laws do not apply); Confederated Tribes v. State of Washington, 938 F.2d 146 (9th Cir. 1991)(state speed laws do not apply); Segunda v. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987)(local rent control laws do not apply); City of Lincoln City v. Department of the Interior, 2001 U.S. Dist. Lexis 9865 (D.Ore. 2001)(state coastal zone management laws do not apply); Middletown Rancheria v. Workers'

Compensation Appeals Board, 71 Cal. Rptr.2d 105 (Cal.App. 1998)(state workers compensation laws do not apply); State v. Stone, 572 N.W.2d 725 (Minn. 1997)(state traffic laws regarding insurance, registration, licensing, speeding, seat belts, and child safety seats do not apply); State v. Cutler, 527 N.W.2d 400 (Wisc.App. 1994)(state fireworks sales laws do not apply); People v. Lowry, 34 Cal. Rptr.2d 382 (Cal.App. 1994)(reversing conviction because local dog licensing laws do not apply). Public Law 280 simply cannot be viewed as a general grant of jurisdiction to state courts to determine civil disputes with the Tribe. “[T]here is notably absent any conferral of jurisdiction over the tribes themselves...” under Public Law 280. Bryan v. Itasca County, 426 U.S. 373, 389 (1976). In other words, Public Law 280 does not authorize the State of Minnesota to subject the Tribe and its officials to civil actions, i.e., tort actions, brought under the color of state law.

However, the issue of whether or not there is concurrent jurisdiction here is irrelevant - the law still requires that a party first seek and exhaust remedies in tribal court. *See, e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987) (regardless of whether federal court's jurisdiction is based upon federal question or diversity, “federal policy supporting tribal self-government directs a federal court to stay its hand” to give tribal court opportunity to first determine its jurisdiction); Stock West Corp. v. Taylor, 964 F.2d 912, 920 (9th Cir.1992) (requiring

exhaustion in tribal court whenever a “colorable question” of tribal jurisdiction and/or sovereign immunity is presented).⁷

Although Appellant objects to the exercise of concurrent jurisdiction over the instant dispute, it is clear the lower court at the very least had an obligation to dismiss the action to allow the Tribal Court to determine the jurisdictional issues. Based upon the issues as framed by the Appellees’ complaint, it is impossible to sever the interests of the Tribe in this litigation. If a determination is found that Appellant acted outside the scope of this authority when issuing newsletters, this Court will be inundated with claims of defamation from other members of the Community for newsletters, memorandums, and campaign material sent by the elected leaders of the Community and those seeking to be elected (some even authored by Appellee Prescott). Surely, the Tribe has an interest in the outcome of this litigation as evidenced by their request to submit an amicus brief.

Most important, the crux of this dispute, as framed by the lower court, involves whether or not Appellant was acting in his official capacity as delineated in the Constitution and Bylaws of the Tribe. In an unbroken line of precedent

⁷ See also National Farmers’ Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 856-857 (1985); Gaming World Int’l., Ltd. v. White Earth Band of Chippewa Indians, 317 F.3d 840, 849-852 (8th Cir. 2003); Reservation Tel. Coop. v. Three Affiliated Tribes, 76 F.3d 181, 184 (8th Cir. 1996); Bruce H. Lien v. Three Affiliated Tribes, 93 F.3d 1412, 1419 (8th Cir. 1996); Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1299 (8th Cir. 1994); Kishell v. Turtle Mountain Housing Author., 816 F.2d 1273, 1276 (8th Cir. 1987). Exhaustion is required at both the trial court and appellate levels. DeMent v. Oglala Sioux Tribe, 874 F.2d 510, 517 (8th Cir. 1989); Dillon v. Yankton Housing Author., 144 F.2d 581, 584 (8th Cir. 1998); and DuBray v. Rosebud Housing Author., 565 F.Supp. 462, 469 (D.S.D. 1983).

spanning nearly a century, even the federal government and foreign courts have held that interpreting a Tribal Constitution lies with the individual Tribe, and it is not the province of the foreign judiciary or the federal government to second-guess that interpretation. The Community has explicitly retained its authority to interpret the Constitution and has not delegated this authority to the Tribal Court and certainly not the courts of a foreign jurisdiction. In fact, the laws of the Lower Sioux Indian Community specifically provides that the Community Council will issue Constitutional interpretations upon request and that such opinions are conclusive and final as to the meaning and interpretation of the Constitution and the powers contained therein. Based thereon, this matter should have been dismissed for resolution by the Tribe.

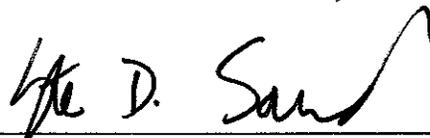
CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the decision of the lower court issued on December 12, 2007, and dismiss this action based upon the doctrine of sovereign immunity.

Dated this 28th day of April, 2008

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