

No. 09-2605

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**ATTORNEY'S PROCESS AND INVESTIGATION SERVICES, INC.
Plaintiff-Appellant,**

v.

**SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA,
Defendant-Appellee.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA**

**APPELLANT ATTORNEY'S PROCESS AND INVESTIGATION
SERVICES, INC.'S OPENING BRIEF**

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SUMMARY OF CASE AND POSITION ON ORAL ARGUMENT

Attorney's Process and Investigation Services, Inc. (API), brought this action seeking (1) a declaratory judgment that the Sac and Fox Tribe of the Mississippi in Iowa (the Tribe) lacks civil jurisdiction to regulate API, a non-Indian, through the Tribe's tort suit in tribal court and (2) an order compelling arbitration of the Tribe's tort claims and other claims arising out of an agreement between the two parties.

After API exhausted tribal remedies, the district court granted the Tribe's motion to dismiss and denied API's motion for summary judgment, applying one of the two narrowly drawn exceptions to the general rule that tribes lack jurisdiction over non-Indians, articulated by the United States Supreme Court in *Montana v. United States* and *Plains Commerce Bank v. Long*. API appeals because the district court's decision is wrong for two reasons. The district court improperly applied the exception that allows a tribe to regulate nonmember conduct that is catastrophic for its traditional and uniquely Indian interests, and further, incorrectly concluded that tribal law, not federal law, governed the arbitrability of the claims filed in tribal court.

Because this case involves difficult and important issues about tribal jurisdiction over non-Indians and federal recognition of tribal authorities, API requests thirty minutes of argument, with ten minutes of it reserved for rebuttal.

CORPORATE DISCLOSURE STATEMENT

As required by Federal Rule of Appellate Procedure 26.1 and 28(a)(1), Attorney's Process and Investigation Services, Inc. ("API") states that it has no parent corporation and that no publicly held or traded company owns 10% or more of API.

TABLE OF CONTENTS

	<u>Page(s)</u>
SUMMARY OF CASE AND POSITION ON ORAL ARGUMENT.....	i
CORPORATE DISCLOSURE STATEMENT.....	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.....	v
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF ISSUES	2
STATEMENT OF THE CASE	3
I. THE PARTIES AND THE ORIGIN OF THEIR DISPUTE.....	3
II. THE TRIBAL COURT PROCEEDINGS AGAINST API.....	4
III. API'S FEDERAL COURT ACTION AGAINST THE TRIBE.....	4
STATEMENT OF FACTS	5
I. THE JUNE 2003 AGREEMENT.....	5
II. THE ALLEGED EVENTS OF OCTOBER 1, 2003	7
SUMMARY OF ARGUMENT.....	8
STANDARD OF REVIEW	10
ARGUMENT.....	11
I. BECAUSE THE TRIBE HAS NO CIVIL JURISDICTION TO REGULATE THE CONDUCT AT ISSUE IN ITS TORT CLAIMS, ITS TRIBAL COURTS HAVE NO JURISDICTION TO ADJUDICATE THE CLAIMS.....	11
A. The Rules Of Tribal Civil Jurisdiction Focus On The Specific Nonmember Conduct A Tribe Seeks To Regulate.....	11
B. The Alleged Conduct Challenged By The Tribe's Tort Claims Does Not Give The Tribe Civil Jurisdiction Over API	17
C. The District Court Made Three Legal Errors In Applying The Second Montana Exception.....	20

TABLE OF CONTENTS

	<u>Page(s)</u>
1. The District Court Failed To Focus On The Alleged Conduct At Issue In The Claims The Tribe Has Brought Against API	21
2. The Conduct Challenged By The Tribe's Claims Does Not Implicate The Essential Elements That Make Indian Tribes Distinct	24
3. API's Conduct Posed No Catastrophic Risks To The Tribe's Protected Interests	26
D. No Other Ground Sustains The Tribe's Civil Jurisdiction In This Case	28
E. Because The Tribe Has No Civil Jurisdiction Over API, The District Court's Rulings Must Be Reversed	29
II. AS A MATTER OF FEDERAL LAW, WALKER HAD AUTHORITY TO BIND THE TRIBE TO THE JUNE 2003 AGREEMENT WITH API	30
A. The Federal Agencies Empowered To Manage Indian Tribes And Indian Gaming Authoritatively Determined That Walker Had Authority To Bind The Tribe To Contracts Like The June 2003 Agreement	31
B. Without Support, The District Court Effectively Overturned The Official Determinations Of The BIA And NIGC	37
C. Walker's Agreement To Arbitrate, Which Waived The Tribe's Sovereign Immunity, Is Independently Valid	41
D. Because The Agreement And The Arbitration Provisions Are Valid As A Matter Of Federal Law, The District Court's Rulings Must Be Reversed	45
CONCLUSION	46
CERTIFICATE OF COMPLIANCE	48
CERTIFICATE OF FILING AND SERVICE	49
CERTIFICATE OF COSTS	50

TABLE OF AUTHORITIESPage(s)**CASES**

<i>AT&T Techs., Inc. v. Communications Workers of Am.</i> , 475 U.S. 643 (1986)	42
<i>Atkinson Trading Co. v. Shirley</i> , 532 U.S. 645 (2001)	12
<i>Babbitt Ford, Inc. v. Navajo Indian Tribe</i> , 710 F.2d 587 (1983)	27
<i>Bruce H. Lien Co v. Three Affiliated Tribes</i> , 93 F.3d 1412 (8th Cir. 1996)	35, 43
<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440 (2006)	42, 43
<i>C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.</i> , 532 U.S. 411 (2001)	41, 44, 45
<i>California Valley Miwok Tribe v. United States</i> , 424 F. Supp. 2d 197 (D.D.C. 2006)	32
<i>California Valley Miwok Tribe v. United States</i> , 515 F.3d 1262 (D.C. Cir. 2008).....	32
<i>Casino Resource Corp. v. Harrah's Entertainment</i> , 243 F.3d 435 (8th Cir. 2001)	35
<i>Donovan v. Coeur d'Alene Tribal Farm</i> , 751 F.2d 1113 (9th Cir. 1985).....	18, 25, 31, 37
<i>Duncan Energy Co. v. Three Affiliated Tribes</i> , 27 F.3d 1294 (8th Cir. 1994)	1, 10, 46
<i>EEOC v. Fond du Lac Heavy Equip.</i> , 986 F.2d 246 (8th Cir. 1993)	25
<i>Elliot v. White Mountain Apache Tribal Court</i> , 2006 WL 3533147 (D. Ariz.)	28

TABLE OF AUTHORITIES
(CONTINUED)

	<u>Page(s)</u>
<i>Franchise Tax Bd. v. Constr. Laborers Vacation Trust</i> , 463 U.S. 1 (1983)	13
<i>Fry v. Colville Tribal Court</i> , 2007 WL 2405002 (E.D. Wash.).....	27
<i>Goodface v. Grassrope</i> , 708 F.2d 335 (8th Cir. 1983)	2, 32, 33
<i>Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.</i> , 535 U.S. 826 (2002)	13, 14
<i>In re Sac & Fox Tribe of Miss. Iowa/Meskwaki</i> , 340 F.3d 749 (8th Cir. 2003)	2, 38
<i>James v. United States</i> , 550 U.S. 192 (2007)	14, 15
<i>Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.</i> , 523 U.S. 751 (1998)	43
<i>Louisville & Nashville RR Co. v. Mottley</i> , 211 U.S. 149 (1908)	13
<i>MacArthur v. San Juan County</i> , 497 F.3d 1057 (10th Cir. 2007)	25
<i>Montana v. United States</i> , 440 U.S. 147 (1979)	30
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	2, 11, 12, 27
<i>Nevada v. Hicks</i> , 533 U.S. 353 (2001)	passim
<i>Nijhawan v. Holder</i> , 129 S. Ct. 2294 (2009).....	14
<i>Nord v. Kelly</i> , 520 F.3d 848 (8th Cir. 2008)	29

TABLE OF AUTHORITIES
(CONTINUED)

	<u>Page(s)</u>
<i>Okla. Tax Comm'n v. Graham</i> , 489 U.S. 838 (1989)	41
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	11, 24
<i>Plains Commerce Bank v. Long</i> , 128 S. Ct. 2709 (2008).....	passim
<i>Ramah Navajo Sch. Bd. v. Bureau of Rev. of NM</i> , 458 U.S. 832 (1982)	33
<i>Robb v. Hungerbeeler</i> , 370 F.3d 735 (8th Cir. 2004)	30
<i>Sac & Fox Tribe of the Mississippi in Iowa, Election Bd. v. Bureau of Indian Affairs</i> , 439 F.3d 832 (8th Cir. 2006)	4, 7, 41
<i>Sandvik AB v. Advent Int'l Corp.</i> , 220 F.3d 99 (3rd Cir. 2000)	42, 43
<i>Seminole Nation v. United States</i> , 316 U.S. 286 (1942)	2, 32
<i>Shepard v. United States</i> , 544 U.S. 13 (2005)	15
<i>Snyder v. Navajo Nation</i> , 382 F.3d 892 (9th Cir. 2004)	25
<i>Sphere Drake Ins. Ltd. v. All Am. Ins. Co.</i> , 256 F.3d 587 (7th Cir. 2001)	42
<i>Strate v. A-1 Contractors</i> , 520 U.S. 438 (1997)	2, 18, 24, 28
<i>Taylor v. United States</i> , 495 U.S. 575 (1990)	14, 15, 16
<i>United States v. Lara</i> , 541 U.S. 193 (2004)	31

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

<i>United States v. United States Fidelity & Guar. Co.</i> , 309 U.S. 506 (1940)	44
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978)	11, 32, 39
<i>Yakus v. United States</i> , 321 U.S. 414 (1944)	37

STATUTES

25 U.S.C. § 1	32
25 U.S.C. § 1a	32
25 U.S.C. § 2	32
25 U.S.C. § 2a	32
25 U.S.C. § 9	32
25 U.S.C. § 13	32
25 U.S.C. § 450a	34
25 U.S.C. § 1621(d)(1)	33
25 U.S.C. §§ 2701 et seq.	2
25 U.S.C. § 2702	34
25 U.S.C. §§ 2704-2708	34
25 U.S.C. § 2710(b)(2)(E)	36
25 U.S.C. § 2710(b)(2)(F)	36
28 U.S.C. § 1291	1
28 U.S.C. § 1331	1
28 U.S.C. § 1367(a)	1

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

OTHER AUTHORITIES

25 C.F.R. § 83.2	33, 43, 44
<i>Cohen Handbook of Federal Indian Law</i> § 22.02[1] (2005)	33
Wright et al., <i>Federal Practice & Procedure</i> § 3566 (3d ed. 2008)	13

JURISDICTIONAL STATEMENT

The United States District Court possessed subject matter jurisdiction over API's claims pursuant to 28 U.S.C. §§ 1331 and 1367(a) because the issue of a tribe's power to regulate a nonmember is a federal question, *see Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1295-1296 (8th Cir. 1994), and because API's other claims derive from the common nucleus of operative facts.

On June 18, 2009 the district court entered a final order and judgment in favor of the Tribe. On June 29, 2009, API timely filed a Notice of Appeal.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. **Indian tribes presumptively may not regulate conduct of nonmembers. As an exception to that rule, a tribe may regulate nonmember conduct that is catastrophic for its traditional and uniquely Indian interests. Does the conduct at issue in conversion, trespass, and misappropriation claims fail to meet that exception?**

Plains Commerce Bank v. Long, 128 S. Ct. 2709 (2008); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Montana v. United States*, 450 U.S. 544 (1981).

2. **In June 2003, the federal Bureau of Indian Affairs recognized Alex Walker, Jr., as the leader of the Sac & Fox Tribe of the Mississippi in Iowa, and the federal National Indian Gaming Commission recognized him as the only person who could run the Tribe's federally regulated casino. Regardless of his status under tribal law, did Walker then have authority to enter the Tribe into contracts needed for the casino's operation and to agree to arbitrate related disputes?**

Seminole Nation v. United States, 316 U.S. 286 (1942); *In re Sac & Fox Tribe of Miss. Iowa/Meskwaki*, 340 F.3d 749 (8th Cir. 2003); *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983); 25 U.S.C. §§ 2701 et seq.

STATEMENT OF THE CASE

I. THE PARTIES AND THE ORIGIN OF THEIR DISPUTE

In June 2003, Alex Walker, Jr., entered into an agreement (the June 2003 Agreement) on behalf of the Tribe with API, a Wisconsin corporation that provides investigative and security services to Indian tribes and others. App. 578 (Tribal Trial Court Complaint, ¶ 3). Under the June 2003 Agreement, Walker retained API to provide investigative and security services to the Tribe. App. 570 (June 2003 Agreement, 1). The parties also agreed that all disputes related to the Agreement would be arbitrated. App. 574 (June 2003 Agreement, 5).

At the time he entered into the Agreement, Walker was the leader of the Tribe's federally recognized tribal council, the constitutionally elected tribal council called the Walker Council. App. 777-778 (District Court Opinion, 7-8). At the same time, a competing council appointed in March 2003 by the Tribe's Hereditary Chief and led by Homer Bear (the Bear Council) claimed to be the Tribe's governing council. App. 772-773 (District Court Opinion, 2-3). The federal government refused to recognize the Bear Council, so when the Bear Council physically wrested control of the Tribe's governmental functions (including the casino) in April 2003, the government shut the casino down. App. 629 (National Indian Gaming Commission Notice of Violation ¶ 4(E)). Walker remained the federally recognized leader of the Tribe until November 2003, when the federal

government recognized a newly constituted council. *Sac & Fox Tribe of the Mississippi in Iowa, Election Bd. v. Bureau of Indian Affairs*, 439 F.3d 832, 834 (8th Cir. 2006).

II. THE TRIBAL COURT PROCEEDINGS AGAINST API.

Under the new leadership, the Tribe founded a court system and filed, as its first case, a tort suit against API in August 2005. App. 578-586 (Tribal Trial Court Complaint). The Tribe's complaint alleged tort claims against API, including for conversion, trespass, and misappropriation of trade secrets. App. 583-584. The conversion claim challenges API's receipt of tribal funds from Walker. App. 584. The trespass to land claim challenges API's entry into the Tribe's casino. App. 583. And the trespass to chattels and misappropriation claims challenge API's taking of casino business information. App. 583, 584.

In September 2005, API moved to dismiss the Tribe's complaint on the ground that the tribal Trial Court lacked jurisdiction over it. App. 587-592. In July 2006, the tribal Trial Court held a hearing on API's motion. App. 593-627. Almost two years later, in March 2008, the tribal Trial Court denied API's motion, App. 635-646, which the tribal Court of Appeals affirmed, App. 647-664.

III. API'S FEDERAL COURT ACTION AGAINST THE TRIBE.

Principally to stop the tribal-court proceedings, which API had already moved to dismiss, API filed its federal-court complaint against the Tribe in October 2005. App. 10-17. The next month, the district court

stayed federal proceedings pending API's exhaustion of its tribal-court remedies. App. 29-48.

After the tribal Court of Appeals affirmed its jurisdiction over API, API moved to reopen its federal case on January 2, 2009. App. 50-54. The district court granted the motion five days later. App. 5 (District Court Docket #41). The Tribe filed an Answer, App. 521-525, and a Motion to Dismiss, App. 58-59. API moved for Partial Summary Judgment. App. 535. On June 18, 2009 the district court entered its Order granting the Tribe's motion and denying API's motion. App. 771-793. Judgment was entered in favor of the Tribe on the same date. App. 794. On June 29, 2009, API timely filed a Notice of Appeal. App. 795-796.

STATEMENT OF FACTS

The facts relevant to this appeal are relatively straightforward and largely undisputed. There are two sets — the facts surrounding the June 2003 Agreement, and those surrounding API's alleged conduct on October 1, 2003.

I. THE JUNE 2003 AGREEMENT

The Tribe is a federally recognized Indian tribe, which owns and operates the Meskwaki Bingo-Casino-Hotel. App. 578 (Tribal Trial Court Complaint ¶ 2). API is not a member of the Tribe. It is a Wisconsin corporation in the business of investigative, security, and law enforcement consulting. App. 579 (Tribal Trial Court Complaint, ¶ 3); App. 570 (June 2003 Agreement, 1).

On June 16, 2003, API entered into the June 2003 Agreement with the Tribe to provide services for the Tribe and its casino. App. 570-577 (June 2003 Agreement). Because the Tribe's casino was then shut down by federal order, the services API agreed to provide included "[d]eveloping a security plan for the re-opening of the Tribe's Gaming Facility" and "investigat[ion] [of] allegations of unlawful acts and tribal policy violations of the dissident group involving Tribal funds, and gaming operations." App. 570 (June 2003 Agreement, § I.2.B and E). The Agreement also provided that all disputes "that may arise out of this Agreement" shall be arbitrated. App. 570 (June 2003 Agreement, § III.2).

The June 2003 Agreement was executed on behalf of the Tribe by Alex Walker while he was the chairman of the Tribe's federally recognized council. See App. 577 (June 2003 Agreement); App. 647, 650-651 (*Tribal Court of Appeals Memorandum and Order*, p. 1). Between March and August 2003, the months immediately before and after Walker negotiated the June 2003 Agreement, federal officials at the Bureau of Indian Affairs (BIA) repeatedly affirmed that they recognized Walker, and only Walker, as the sole head of the Tribe.¹ On April 30, after Bear had wrested control of

¹ In March 2003, BIA recognized Walker. App. 631. In April 2003, the Acting Assistant Secretary for Indian Affairs and the Deputy Commissioner of Indian Affairs recognized Walker. App. 632. In May 2003, the Secretary of the Interior recognized Walker. App. 633-634. And in August 2003, two months after Walker and API entered their Agreement, BIA again recognized Walker. App. 643.

the casino from Walker, they also affirmed that only Walker, because of his federal recognition, was authorized to run the Tribe's casino. The National Indian Gaming Commission (NIGC) issued a Notice of Violation on April 30, 2003, concluding that federal law forbade Bear to be in control of the Tribe's casino because he was not federally recognized. App. 628-630. NIGC ultimately ordered the casino be closed because it did not view the Bear Council as authorized to operate it. App. 651. Walker remained the federally recognized leader of the Tribe until November 2003, when Bear obtained federal recognition after a federally approved election. *See* 439 F.3d at 834. Even so, in March 2008, almost five years after the events of 2003, the tribal Trial Court determined that, under tribal law, Bear had ousted Walker as leader in tribal elections that had taken place in May 2003. *See* App. 776-777.

II. THE ALLEGED EVENTS OF OCTOBER 1, 2003.

The tort claims that the Tribe has brought against API challenge acts API allegedly took on October 1, 2003. As they have not yet been proved to any court, API does not concede the veracity of the allegations in the Tribe's complaint. Those allegations, nonetheless, are relevant for issues in this case because they form the basis of the Tribe's tort claims. The Tribe contends that API and its agents (some of whom were allegedly armed with batons and one of whom was allegedly armed with a gun) entered the Tribe's casino, imprisoned occupants, seized tribal property and gaming

information, and caused damage to tribal property. App. 778 (District Court Opinion 8).

SUMMARY OF ARGUMENT

The tribal courts have no power over API. According to the federal rules governing Indian jurisdiction over nonmembers, the Tribe lacks jurisdiction to regulate API's alleged conversion, trespasses, and misappropriation, so the Tribe's courts also lack jurisdiction to adjudicate the Tribe's claims. The tribal courts also are constrained by federal law to defer to the parties' preference, expressed in the June 2003 Agreement, to arbitrate claims like those the Tribe has brought. The focal point of this case, upon which all the issues turn, is that jurisdictional shortcoming.

Indian jurisdiction over nonmembers is strictly limited and depends entirely on the nature of the nonmember conduct a tribe aims to regulate. Through tort claims filed in tribal court, the Tribe seeks to apply its trespass, conversion, and misappropriation laws to API, a nonmember. The conduct those laws challenge and turn on ordinarily is not the sort of conduct a tribe may regulate in line with its limited allowance of jurisdiction — *i.e.*, it is not catastrophic for those few essential elements that make a tribe distinct — so the tribal courts cannot adjudicate the Tribe's claims against API.

In concluding otherwise, the district court made three legal errors: it mistook the Tribe's tort claims as challenging more conduct than they actually do; it misperceived and expanded the set of uniquely Indian

interests a tribe may protect from nonmembers; and it failed to account for undisputed facts that show that API's alleged conduct was no intrusion on the Tribe's protected interests. As a matter of law, then, API is entitled to summary judgment on its claim to stop the Tribe from proceeding against it in tribal court, and the district court's dismissal of API's other claims should be vacated.

There is another, independent reason why all of the district court's judgments should be reversed. API's June 2003 Agreement with the Tribe requires that the Tribe's tort claims be arbitrated, not adjudicated in tribal court. The district court held that tribal law governs the validity of the Agreement, and it deferred to the tribal courts' conclusion that, under tribal law, the federally recognized governing council of the Tribe lacked authority to commit the Tribe to the Agreement and its arbitration provisions. That is wrong as a matter of federal law. Federal, not tribal, law governs the Agreement's validity because federal law governed the authority of the Walker council to enter the Agreement. At the time the Agreement was entered, the federal agencies charged with managing Indian affairs recognized only Walker as the head of the Tribe, giving him authority to act on the Tribe's behalf in all federal domains, even those that involve third parties. One such federal domain is the Tribe's casino, for which the June 2003 Agreement was necessary and with which it was inextricably intertwined. Indeed, the federal government shut down the Tribe's casino rather than permit anyone but Walker to operate it, thereby making clear

Walker's federal authority. The district court's decision to the contrary must be reversed and judgment entered in favor of API.

The Tribe's sovereign immunity is another federal domain controlled by federal, not tribal, law where federal recognition is dispositive. Walker's status as the federally recognized head of the Tribe made him the only tribe member with authority to waive the Tribe's immunity, which he did in the Agreement's arbitration provisions. Accordingly, at least the arbitration provisions of the Agreement are valid. The district court erroneously concluded that the arbitration provisions were neither severable nor valid on their own, and its judgment premised on that error should be reversed.

STANDARD OF REVIEW

Both the question whether the Tribe has civil regulatory jurisdiction over API and the question whether Walker's federal recognition gave him federal authority to bind the Tribe to the June 2003 Agreement are questions of federal law. This Court therefore considers them *de novo*. *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994). Inasmuch as the tribal courts' factual findings and conclusions of tribal law are material, this Court should reject clearly erroneous factual findings and should "accord[] more deference" to determinations of tribal law than it does to determinations of federal law. *Ibid*.

ARGUMENT

I. BECAUSE THE TRIBE HAS NO CIVIL JURISDICTION TO REGULATE THE CONDUCT AT ISSUE IN ITS TORT CLAIMS, ITS TRIBAL COURTS HAVE NO JURISDICTION TO ADJUDICATE THE CLAIMS.

A. The Rules Of Tribal Civil Jurisdiction Focus On The Specific Nonmember Conduct A Tribe Seeks To Regulate.

With only limited sovereignty subject to federal control, *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978), Indian tribes presumptively have no power to regulate nonmembers, both with legislation and through adjudication. *Plains Commerce Bank v. Long*, 128 S. Ct. 2709, 2720 (2008). They have no criminal jurisdiction over nonmembers, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), and no civil jurisdiction as well, save for two “limited” exceptions (called the *Montana* exceptions after the case that elaborated them). *Plains Commerce*, 128 S. Ct. at 2720 (discussing *Montana v. United States*, 450 U.S. 544 (1981)). Under the first *Montana* exception, a tribe may regulate a nonmember’s consensual relationships with the tribe or its members. *Plains Commerce*, 128 S. Ct. at 2720. Under the second, a tribe may regulate nonmember conduct that “imperils the subsistence or welfare of the tribe,” *i.e.*, conduct “catastrophic” for “the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 2726-2727.

So strong is the presumption against Indian civil jurisdiction over nonmembers that in each case the “burden rests *on the tribe* to establish one

of the exceptions.” *Id.* at 2720 (emphasis added); *see Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654 (2001). The burden is not light. In keeping with their narrowness, the exceptions are not “construed in a manner that would swallow the rule [of no tribal jurisdiction] or severely shrink it.” *Plains Commerce*, 128 S. Ct. at 2720. Tellingly, the Supreme Court has “never held that a tribal court had jurisdiction over a nonmember defendant.” *Nevada v. Hicks*, 533 U.S. 353, 358 n. 2 (2001).

The *Montana* exceptions focus on the “conduct” or “activities” an Indian tribe seeks to regulate. *Plains Commerce*, 128 S. Ct. at 2720. The relevant conduct is that which is “tied specifically” to the tribal law (or the tribal cause of action) brought to bear on a nonmember. *Id.* at 2725 & n. 2. To the extent conduct targeted by a tribal law fits within an exception, *that* conduct may be regulated by *that* law, but no more. *See id.* at 2723.

“[W]hen it comes to tribal regulatory authority, it is not ‘in for a penny, in for a Pound.’” *Id.* at 2724 (quoting *Atkinson*, 532 U.S. at 656). Moreover, only the conduct *of the nonmember* a tribe seeks to regulate with its law can give rise to jurisdiction. *See Montana*, 450 U.S. at 565 (a tribe may regulate “the activities *of nonmembers*” and “the conduct *of non-Indians*” (emphases added)). It is not enough that the conduct of someone else — say, an Indian or the tribe itself — meets one of the exceptions.

In short, to determine whether an Indian law or cause of action satisfies a *Montana* exception and may be applied to a nonmember, a court must isolate the nonmember conduct to be regulated by the law or cause of

action. That method is not unique to Indian law, but is common whenever a federal court must determine whether another sovereign's laws or causes of action satisfy a federal standard. For federal-question jurisdiction, for instance, the method is embodied in the well-pleaded complaint rule. Under the rule, federal-question jurisdiction depends entirely on the elements of a plaintiff's well-pleaded claim; a court "will look only to the claim itself and ignore any extraneous material." 13D Wright et al., *Federal Practice & Procedure* § 3566, p. 262 (3d ed. 2008). Factual context or issues related to defenses are irrelevant, even if those issues are "very likely" to arise "in the course of the litigation." *Louisville & Nashville RR Co. v. Mottley*, 211 U.S. 149, 152 (1908). The same is true for the method of applying the *Montana* exceptions, and tribal courts must apply an analog of the well-pleaded complaint rule for assessing their adjudicative jurisdiction. For tribal jurisdiction to succeed, tribal laws and causes of action must "*challenge[]*" and "*turn[] on*" nonmember conduct that sustains tribal jurisdiction. *Plains Commerce*, 128 S. Ct. at 2720 (emphases added). The conduct cannot be mere circumstantial context or be potentially relevant by way of defense.

The rules for determining federal-question jurisdiction and Indian legislative and adjudicative jurisdiction are so similar because they serve similar policies. The well-pleaded complaint rule "severely limits the number of cases" that may be heard in federal court. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983); see *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002) (the rule

prevents the “radical[] expans[ion]” of jurisdiction). Likewise, the requirement that Indian law challenge and turn on jurisdiction-conferring conduct keeps Indian jurisdiction over nonmembers “limited.” *Plains Commerce*, 128 S. Ct. at 2720. The well-pleaded complaint rule is “bright-line,” requires no speculation, and so allows “an early decision on” jurisdiction. 13D Wright, *supra*, § 3566, p. 274; *see Holmes Group*, 535 U.S. at 832. The same is invaluable for tribal regulatory jurisdiction because the *Montana* rules apply, not just to the adjudicative jurisdiction of tribal courts (where jurisdiction should be resolved readily and promptly), but also to the regulatory jurisdiction of tribal legislatures (where the potential applicability of tribal law should be knowable before it is violated). Finally, the well-pleaded complaint rule ensures that a plaintiff is the “master of his complaint.” *Holmes Group*, 535 U.S. at 831 (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-399 (1987)). The emphasis on the nonmember conduct does the same for a tribal-court plaintiff: to obtain tribal-court jurisdiction, he must plead claims that challenge and turn on conduct that a tribe has power to regulate.

Another similar method applies when courts must determine whether a state crime is the same as a generic crime in the federal career-criminal laws, *see Taylor v. United States*, 495 U.S. 575 (1990), or whether it generically “involves conduct” identified in the federal career-criminal laws, *James v. United States*, 550 U.S. 192, 201-202 (2007) (emphasis added); *see also Nijhawan v. Holder*, 129 S. Ct. 2294, 2299 (2009). Applying the so-

called categorical approach, a court considers “whether the conduct encompassed by” the state law at issue satisfies the federal standard “in the ordinary case” or “by its nature,” *James*, 550 U.S. at 208, and, if the state law is overinclusive, whether certain documents (like charging documents) show that a subcategory of the law meets the federal standard, *Shepard v. United States*, 544 U.S. 13, 26 (2005). In all events, the elements of the charged offense, viewed generally, drive the analysis, not factual context or defenses. So, if a person has been convicted of a crime that is categorically different from the crimes that satisfy the federal standard, his prior conviction does not count for sentencing enhancement even if he could have been convicted of a crime that satisfies the federal standard. *See Taylor*, 495 U.S. at 601-602.

The categorical approach is essentially the same approach used by the Supreme Court in *Plains Commerce*. Considering the defendant’s sale of land — the conduct targeted by the plaintiffs’ discrimination claim as they had delimited it in their tribal-court complaint, *see Plains Commerce*, 128 S. Ct. at 2725 — the Court held that, *as a general matter*, it was a “very different thing[]” than “conduct taking place on the land,” which tribal law might regulate per a *Montana* exception, *id.* at 2726. In relating the challenged acts to the tribe’s interests, the Court paid no attention to the particular facts of the defendant’s sale, but concluded that “the mere resale of [land already sold in fee simple to non-Indians] works no additional intrusion on tribal relations or self-government.” *Id.* at 2724. Under the

Court's analysis, a tribe *never* may regulate a nonmember's sale of land because that conduct, by its nature, has no impact on protected tribal interests. Thus, *Plains Commerce* shows that tribal law may be applied to nonmember conduct only if the law *categorically* targets conduct that, by its nature or in the ordinary case, would fit within a *Montana* exception.

As with the well-pleaded complaint rule, using a categorical approach for the *Montana* exceptions serves the same important goals as using it in the sentencing context. Principally, the approach avoids "the practical difficulties and potential unfairness of a factual approach." *Taylor v. United States*, 495 U.S. 575, 601 (1990). Just as with state criminal law, it is easier and fairer to evaluate tribal law categorically than factually. In the tribal legislative setting, before a nonmember's potentially jurisdiction-conferring activities even happen, the categorical approach provides clear notice to both the tribe and nonmembers about which tribal laws, if any, may govern nonmember conduct. Given the "limited nature of tribal sovereignty and the liberty interests of non-members," *Plains Commerce*, 128 S. Ct. at 2723, clear notice is vital. In the tribal adjudicative setting, the question of tribal civil jurisdiction is litigated before the factual allegations in a tribal-court complaint are proved; an approach that relies on the particular facts underlying a tribal cause of action cannot sensibly be applied at the earliest stages of tribal litigation. The categorical approach prevents tribal-court plaintiffs from trumping up nonmember conduct in their complaints to generate tribal jurisdiction through artful pleading. The restraint the

approach imposes comports with the overriding rule that the *Montana* exceptions remain limited and not swallow the presumption against tribal civil jurisdiction. As it should be, such jurisdiction will be reserved for only those tribal laws that categorically target conduct at the heart of the *Montana* exceptions.

B. The Alleged Conduct Challenged By The Tribe's Tort Claims Does Not Give The Tribe Civil Jurisdiction Over API.

In this case, the district court affirmed the tribal courts' jurisdiction over the Tribe's claims against API, concluding that the Tribe had carried its heavy burden under the rarely satisfied second *Montana* exception and had demonstrated that its tort claims challenge nonmember conduct that is catastrophic for tribal self-government.² App. 785-791 (District Court Opinion 15-21). According to the methodology just outlined, that conclusion is wrong. The Tribe has no power to regulate API's conduct through the tribal-law causes of actions it chose to file in tribal court.

In its complaint against API, the Tribe charges that, without its permission, API took tribal funds (conversion), entered its casino (trespass), took information about the operation of the casino (trespass to chattels), and used that information (misappropriation of trade secrets). App. 583-586 (Tribal Trial Court Complaint, ¶¶ 35-46). Many of the complaint's factual

² The district court based its holding solely on the second *Montana* exception. It properly concluded that the Tribe's other arguments in favor of jurisdiction lacked merit. See Part I.D, *infra*.

allegations range far beyond those claims and the facts necessary to prove them, however. For instance, the Tribe alleges that API damaged tribal property and brought 30 “enforcers” armed with batons and at least one firearm. App. 582 (Tribal Trial Court Complaint ¶ 32). (And in its briefing below, the Tribe contended that API attempted “to forcibly install” the Walker Council “as tribal leaders.” App. 693 (Tribe’s Memorandum 20).) None of those assertions, however, has any relation to the elements of the actual claims the Tribe has brought. Thus, even if true, such conduct would merely be context for the conduct at issue in the Tribe’s much more limited tort claims. The alleged conduct of API “tied specifically” to the tribal real and personal property laws, with which the Tribe seeks to regulate API, is separate, distinct, and, most importantly, all that matters for determining the Tribe’s civil jurisdiction.

The laws on which the Tribe’s tort claims are founded “challenge” and “turn on” API’s entering onto land and taking of tribal funds and business secrets, and no more. None of that conduct implicates the sovereign interests protected by the second *Montana* exception, let alone catastrophically threatens them. The Supreme Court has made clear that the second *Montana* exception is properly applied only to protect discrete and unique things that make a tribe: punishing *tribal* offenders, determining *tribal* membership, regulating *members’* domestic relations, and prescribing rules of inheritance *for members*. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997); *see* Part I.C.2, *infra*. The type of nonmember conduct that the

Tribe's tort laws and tort claims turn on does not imperil the survival of the Tribe as a separate polity or its members' intra-tribal relations. Nor is the Tribe's casino, as site and object of the conduct, independently a covered interest. As important as it may be practically for the Tribe's economy, a casino, even one that is tribally owned, is a business enterprise and is not one of the few aspects of a tribe that makes it unique; far from being an Indian tradition or the mark of a tribe's residual sovereignty, Indian gaming is subject to substantial federal regulation. It is not, as it "must be," "connected to that right of the Indians to make their own laws and be governed by them." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001).

If the conduct actually challenged by the Tribe's four tort claims sufficed for the second *Montana* exception, many commonplace acts would suffice as well, and the exception would severely shrink the rule. Every banned gambler who sneaks back into an Indian casino and wins a hand of poker does the same sorts of acts; so does someone who breaks into a business, owned and operated by an individual tribe member, and steals its customer lists. As these examples reveal, it is not the *conduct* challenged by the Tribe's claims that drives its arguments for civil jurisdiction, but rather the *context* surrounding that conduct. And the mere fact that the Tribe itself asserts those common tort claims does not alter the analysis or change the conclusion that the conduct placed at issue by the claims does not plausibly satisfy the second *Montana* exception.

The categorical approach confirms the absence of tribal civil jurisdiction to regulate API through the Tribe's tort claims. Trespass to land and chattels, misappropriation, and conversion do not by their nature involve conduct catastrophic for a tribe's traditional and distinct traits. In the ordinary case, a nonmember contemplating entering an Indian-owned business without permission or taking an Indian's business secrets could not remotely predict that his conduct would subject him to tribal civil jurisdiction because trespass, misappropriation, and conversion laws do not, by their nature, protect against catastrophic threats to tribal political integrity. The nonmember conduct challenged by the Tribe's claims — entering a casino, accessing and using a casino's business information, and being paid under a contract — is categorically disconnected from the Tribe's traditional and unique traits (like self-government and familial relations), whether or not the conduct was authorized.

Under the second *Montana* exception, accordingly, the Tribe has no power to apply its civil trespass, misappropriation, and conversion laws to API.

C. The District Court Made Three Legal Errors In Applying The Second *Montana* Exception.

In concluding that the second *Montana* exception authorizes the Tribe to regulate API through its tort claims, the district court committed three errors — each of which requires reversal. First, the court lost focus of the alleged conduct of API that is actually at issue in the Tribe's claims and

relied upon extraneous and contextual conduct. Second, the court expanded the set of unique tribal interests protected by the second *Montana* exception. Third, the court failed to rationalize how, in light of the undisputed facts, API's alleged conduct could have threatened the Tribe's protected interests with catastrophe. As shown above, API's alleged conduct, analyzed in line with governing precedents, cannot give the Tribe civil jurisdiction to regulate API through the tort claims the Tribe filed in tribal court.

1. The District Court Failed To Focus On The Alleged Conduct At Issue In The Claims The Tribe Has Brought Against API .

The district court identified certain alleged facts that it believed satisfied the second *Montana* exception, specifically those related to what it termed the "raid" on the Tribe's casino. *See App. 788-789* (District Court Opinion 18-19). But it failed to consider whether the Tribe's tort claims actually challenged that supposedly jurisdictional conduct. They do not, and the district court's legal error requires reversal.

As an initial matter, some factors undergirding the district court's ruling are irrelevant because they are not *nonmember conduct* challenged by the claims in the complaint, the only considerations relevant to the *Montana* exceptions. Walker's hiring API is *member conduct*, and his purpose for hiring API — allegedly "to assist in the resolution of an intra-tribal government dispute" — is not even *conduct*. *App. 788* (District Court Opinion 18). The Agreement's terms and purposes are not conduct, either.

Ibid. To be sure, the merits of all of the Tribe's tort claims turn on whether API had permission to do what it allegedly did, and the Agreement may well be the focal point of that issue. Yet that issue relates solely to API's defense based on contractual authority and challenges conduct *of the Tribe* — whether *it* validly gave API permission — not the conduct of API, so it cannot give rise to civil jurisdiction over API. If the validity of official tribal action supported tribal jurisdiction over nonmembers, the second *Montana* exception would swallow the rule; any tribal-law claim could challenge the legitimacy of some Indian conduct — the validity of applicable tribal laws, say, or the authority of an Indian official.

The bulk of the rest of the conduct the district court attributed to API cannot support the court's decision because it is not conduct challenged by the Tribe's tort claims. For those claims, it does not matter that API allegedly "invaded" tribal land, "raided" the Tribe's casino, "sought to wrest control of the Casino" from the Bear Council, mounted "a direct challenge to the Bear Council," and aimed "specifically to weaken one side of an intra-tribal governmental dispute." App. 788-789 (District Court Opinion 18-19). Likewise, the Tribe's claims do not challenge the number of alleged trespassers, how they were armed, and API's alleged assaults and false imprisonments. App. 778 (District Court Opinion 8). Instead of claims that closely track that alleged conduct — like hijacking the casino, interfering with elections, and deposing its governing council — the Tribe has brought only run-of-the-mill real and personal property claims for which there is no

tribal civil jurisdiction. *Montana* requires a scalpel's precision. Regulating casino raids and interference with tribal politics through trespass, conversion, and misappropriation laws is as imprecise as regulating threats against the President through handgun registration laws.

Still, assuming the Tribe had (and brought) claims challenging jurisdictional conduct, its civil jurisdiction would extend no further than those particular claims, since such jurisdiction extends no further than the claims that challenge and turn on jurisdictional conduct. The district court forgot this precept, too, even while looking at conduct that it should have ignored. The conduct the court believed authorized tribal regulation of API consisted of the events that allegedly took place at the Tribe's casino on October 1, 2003. App. 788-789 (District Court Opinion 18-19). The Tribe's conversion claim, though, expressly challenges only API's taking of payments from Walker starting in June 2003. The events of October 1, 2003, do not reach back and retroactively make nonjurisdictional conduct jurisdictional. The Tribe's conversion claim must stand or fall on its own, and it falls: the Tribe has offered no reason to think the conduct of taking money (without permission) categorically threatens an Indian tribe's self-government with catastrophe.

2. The Conduct Challenged By The Tribe's Claims Does Not Implicate The Essential Elements That Make Indian Tribes Distinct.

The district court read the Supreme Court's characterization of the interests protected by the second *Montana* exception far too broadly — an error the Supreme Court has repeatedly cautioned against. The Court, for example, has warned that the term “tribal self-government,” a.k.a. “the political integrity, the economic security, or the health or welfare of the tribe,” is less than clear and “can be misperceived” — typically too broadly. *Strate*, 520 U.S. at 457-459. To limit the second *Montana* exception, then, the Court warned that those labels should not be “[r]ead in isolation,” but should be read in light of the uniquely Indian activities and traits that the Court has said the exception indisputably encompasses. *Id.* at 459. Specifically, the Court identified only four things that make a tribe unique: punishing tribal offenses (which, for nonmembers, *Oliphant* carved out of the list), tribal membership, tribal adoptions and domestic relations, and rules for tribal inheritances. *Id.* at 459. As honed by the Court, the second *Montana* exception authorizes tribal civil jurisdiction over nonmembers only when necessary to protect those, and perhaps similarly, unique elements of tribal existence, *i.e.*, only when necessary to preserve “the right of reservation Indians to make their own laws and be ruled by them.” *Id.* at 459; *see Hicks*, 533 U.S. at 361. That is distinct from the right, which the

Tribe lacks, “to make its own laws and have *others* be governed by them.” *MacArthur v. San Juan County*, 497 F.3d 1057, 1075 (10th Cir. 2007).³

The district court did not heed the Supreme Court’s direction. A nonmember who trespasses, misappropriates business secrets, and accepts payment from an Indian does not engage in conduct that threatens anything uniquely Indian or anything that makes a tribe a tribe. (Casinos, despite their potential value to tribes, can hardly be called traditional features of Indian tribes: not all tribes have them, and those that do have not had them for long. Tribes may engage in various business ventures, but those business activities are not the type of traditions protected by the second *Montana* exception.) Such conduct may affect a tribe’s business and financial interests, but not its right to make laws and subject its members to them.

Only on an impermissibly loose reading of “the political integrity, the

³ So refined, the second *Montana* exception to the presumption against tribal civil jurisdiction over nonmembers closely tracks one of the exceptions to the presumption that federal laws apply to Indians. See *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (“[T]he tribal self-government exception is designed to except purely intra-mural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes.”); see also *EEOC v. Fond du Lac Heavy Equip.*, 986 F.2d 246, 249 (8th Cir. 1993). Both exceptions, then, should apply “only in those *rare* circumstances where the *immediate* ramifications of the conduct are felt *primarily* within the reservation by members of the tribe and where self-government is *clearly* implicated.” *Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004) (emphases added).

economic security, or the health or welfare of the tribe” can the opposite result be justified.

3. API’s Conduct Posed No Catastrophic Risks To The Tribe’s Protected Interests.

To give rise to tribal civil jurisdiction, conduct must do more than implicate tribal self-government; it must catastrophically threaten it. *Plains Commerce*, 128 S. Ct. at 2726-2727. The district court’s opinion states that API’s alleged conduct met that extreme standard. But in light of the undisputed facts, it could not have. For the political and economic interests the district court thought relevant — *i.e.*, the dispute between the Bear and Walker councils and the alleged interference with the Tribe’s casino operations — API’s alleged conduct “work[ed] no additional intrusion.” *Id.* at 2724; *see id.* at 2723 (“[A]ctivities . . . may be regulated” by tribes “to the extent” that they “intrude on the internal relations of the tribe or threaten tribal self-rule.”).

It was the conduct of others, not the alleged conduct of API, that catastrophically harmed the Tribe’s interests. API’s alleged trespasses and misappropriation could not have caused any marginal injury beyond NIGC’s Notice of Violation and court order shutting down the casino and precluding Bear from controlling the business and its property at a time when, as the Tribe alleges, Bear was the only entity with power over them. Likewise, API’s alleged conversion of tribal funds, which it got from Walker, could not have caused any marginal injury beyond Walker’s first taking those

funds from the Tribe at a time when, as the Tribe alleges, Bear was the only entity with power to disburse them. In short, “the key point is that any threat to the tribe’s sovereign interests flows from” events preceding API’s alleged conduct — federal closure of the casino and Walker’s dispute with Bear. *Id.* at 2724.

The cases the district court cited to buttress its application of the catastrophe standard are inapt. App. 789-791 (District Court Opinion 19-21). Chief among their many inadequacies, none of the decisions even applied the catastrophe standard, let alone recited it. Instead, each asked a watered-down question — whether the nonmember conduct “threatens or has some direct effect” on tribal self-government, *Montana*, 450 U.S. at 566 — that is inconsistent with *Plains Commerce*.⁴

⁴ The cited cases are inapposite for other reasons. The Ninth Circuit’s conclusion that a tribe may regulate nonmember repossession of automobiles under the second *Montana* exception, based on the possibility that the repossession could turn violent or leave someone stranded, *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (1983), is at least called into question by *Strate*’s holding that tribes have no jurisdiction over a full-on automobile accident (which poses the same risks). The reasoning of the unpublished *Fry v. Colville Tribal Court*, 2007 WL 2405002 (E.D. Wash.) does not reach API’s case: there, the district court upheld tribal jurisdiction under the first *Montana* exception, because the nonmember had expressly consented to it, and went on to hold that the second *Montana* exception also afforded jurisdiction, because, by consenting, the nonmember had put the tribe’s integrity at stake, *id.* at *3. The third decision cited by the district court was not even a true *Montana* case; it was an exhaustion case, considering only the question whether exhaustion was unnecessary because

D. No Other Ground Sustains The Tribe's Civil Jurisdiction In This Case.

Below, the Tribe offered two other bases for upholding the tribal court's civil jurisdiction over API. Neither is sound.

First, echoing the tribal Court of Appeals, the Tribe contended that it can presumptively regulate API because API's alleged conduct happened on trust land. The Tribe's attempt to peg civil jurisdiction entirely to the status of the land underfoot is not only "unusual," as the district court observed, App. 786 (District Court Opinion 16 n. 7); it also is wrong. Indian tribes presumptively lack civil jurisdiction over nonmembers no matter where their conduct takes place. *See Plains Commerce*, 128 S. Ct. at 2719 (the "general rule restricts tribal authority over nonmember activities taking place on the reservation"); *id.* at 2720 ("[E]fforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'"); *Hicks*, 533 U.S. at 359-360 (2001); *Strate*, 520 U.S. at 454-455. The Tribe's flipped presumption contradicts settled law.

Second, the Tribe argued under the first *Montana* exception that API had consented to tribal jurisdiction over the conduct at issue in the Tribe's tort claims. Both tribal courts correctly rejected that argument, and the district court noted it "would do the same." App. 791 (District Court Opinion 21). The Tribe's trespass, misappropriation, and conversion claims all are founded upon the absence of consent. They challenge allegedly

it was so "plain" that tribal courts had no jurisdiction. *Elliot v. White Mountain Apache Tribal Court*, 2006 WL 3533147 (D. Ariz.).

nonconsensual aspects of API's relationship with the Tribe and its members. API allegedly had only one consensual relationship with an Indian (Walker), but the Tribe's particular tort claims do not challenge that. *Compare Plains Commerce*, 128 S. Ct. at 2716 (disagreeing that the first *Montana* exception authorized tribal jurisdiction over a discrimination claim that merely "arose directly from [a] preexisting commercial relationship"); *Nord v. Kelly*, 520 F.3d 848, 856 (8th Cir. 2008). Furthermore, neither "expressly" nor by its "actions" has API consented to jurisdiction. *Id.* at 2724. By requiring arbitration and permitting the parties to compel arbitration and enforce arbitral judgments in only state and federal courts, the June 2003 Agreement plainly manifests API's withholding of consent to tribal civil jurisdiction. *See id.* at 2729 (Ginsburg, J., dissenting) (arbitration and forum selection clauses manifest a non-Indian's withholding of consent).

E. Because The Tribe Has No Civil Jurisdiction Over API, The District Court's Rulings Must Be Reversed.

Since the Tribe may not lawfully regulate API through the tribal civil laws invoked in the Tribe's complaint, the tribal courts have no civil jurisdiction to adjudicate the Tribe's claims. *See Plains Commerce*, 128 S. Ct. at 2720 ("A tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."). Not only must the district court's dismissal of API's declaratory judgment claim therefore be reversed; but for the same reasons, API must be awarded summary judgment on that claim. *See id.* at 2727 (awarding judgment rather than remanding for further proceedings).

It follows that API's other claims must be reinstated as well. In agreeing with the Tribe's contention that it had not waived sovereign immunity to API's contract claim, the district court "defer[red]" to the tribal courts' conclusion that the only possible waiver of the Tribe's immunity — the Agreement — was not valid. App. 784 (District Court Opinion 14). Rulings of a tribal court lacking jurisdiction are "necessarily null and void," *Plains Commerce*, 128 S. Ct. at 2717, and deference to an *ultra vires* judgment is improper, *Montana v. United States*, 440 U.S. 147, 153 (1979); *Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004). At a minimum, the district court must determine the Agreement's validity for itself. And as API demonstrates in the next part of this Brief, the validity of the Agreement is a matter of federal law (not tribal law, as the district court believed), which this Court can conclusively resolve without remanding.

II. AS A MATTER OF FEDERAL LAW, WALKER HAD AUTHORITY TO BIND THE TRIBE TO THE JUNE 2003 AGREEMENT WITH API.

Central to this case and this appeal is the validity of the June 2003 Agreement and its severable arbitration provisions, which turns on whether Walker had authority to bind the Tribe to them. If he did, the district court's judgment must be completely reversed: the Tribe's sovereign immunity defenses to API's breach-of-contract and arbitration claims must be rejected (because the Tribe waived them in the Agreement), and API must be awarded summary judgment on its claim that the tribal courts have exceeded

their limited jurisdiction in hearing the Tribe's tort claims against API (because the Tribe's claims should have been arbitrated). *See* Part II.D, *infra*.

Failing to address almost all of API's arguments, the district court held that the Agreement's validity and Walker's authority were questions of *tribal* law, and it deferred to the tribal courts' view that the Agreement is invalid because Walker was not, as a matter of tribal law, on the Tribe's governing council when he made it. App. 783-785 (District Court Opinion 13-15). But because the Agreement was essential to, and is inextricably intertwined with, Walker's *federally* authorized operation of the Tribe's casino, his authority to enter the agreement is a question of *federal* law. Accordingly, the district court should have deferred to the federal officials who determined that Walker, alone among the Tribe's members, was authorized to run the Tribe's casino at the time he made the Agreement. The Agreement is valid as a matter of federal law, no matter Walker's status under tribal law, regardless of whom the Tribe now claims was then its governing council under tribal law.

A. The Federal Agencies Empowered To Manage Indian Tribes And Indian Gaming Authoritatively Determined That Walker Had Authority To Bind The Tribe To Contracts Like The June 2003 Agreement.

The federal government has "plenary and exclusive authority" over tribes and their members, *United States v. Lara*, 541 U.S. 193, 200 (2004), and tribal law, in all its forms, is "subject to ultimate federal control,"

Wheeler, 435 U.S. at 322. *E.g.*, *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267-1268 (D.C. Cir. 2008) (affirming federal power over tribal constitutions). As authorized by Congress, the federal government's power over tribes flows from the President, to the Secretary of the Interior, to the Commissioner and Bureau of Indian Affairs (BIA). 25 U.S.C. §§ 1, 1a, 2, 2a, 9, 13. "[I]n its responsibility for carrying on government to government relations" with Indian tribes, BIA must "recognize and deal with some tribal governing body," even when a tribe is amidst an intra-tribal governmental dispute. *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983). BIA's is a serious task that must not be discharged arbitrarily, for it is bound by the federal government's longstanding "moral" and "fiduciary" duty to identify and deal with only lawfully constituted governing councils that represent tribal membership. *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942); *see California Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197, 201-202 (D.D.C. 2006), *aff'd* 515 F.3d 1262 (D.C. Cir. 2008) (discussing *Seminole Nation*). For the federal government knowingly to deal with "a tribal council which . . . was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation." *Seminole Nation*, 316 U.S. at 297.

While the federal government's exacting duty to identify a tribe's faithful and representative leaders and to deal only with those leaders may arise from its own "responsibility for carrying on government relations with

the tribe,” *Goodface*, 708 F.2d at 339, it does not follow that federal recognition has no consequence for nonmembers, as the district court maintained. *See* App. 785, 792 (District Court Opinion 15 n. 6, 22 (discussing 25 C.F.R. § 83.2)). Quite the contrary. The federal government has a strong and legitimate interest in ensuring that nonmembers deal with the tribal government or tribal organizations that it officially recognizes as acting on a tribe’s behalf in federal Indian programs and federally authorized and regulated Indian enterprises. Federal programs for Indians involve more than just providing federal services and funds to tribes. For instance, under the watershed Indian Self-Determination and Education Assistance Act, tribes can “take over administration of programs formerly administered by the federal government on their behalf.” *Cohen’s Handbook of Federal Indian Law* § 22.02[1], p. 1347 (2005). As a matter of federal law, the tribal entities that the federal government recognizes and approves to engage in federal programs and spend federal funds act “*under the authority of*” federal law. 25 U.S.C. § 1621(d)(1) (emphasis added). As a necessary and direct result of that approval and that authority, they become involved with and contract with nongovernmental, nonmember third parties. *See, e.g., Ramah Navajo Sch. Bd. v. Bureau of Rev. of NM*, 458 U.S. 832, 834-835, 839-843 (1982) (describing cooperative federal and tribal school-building program in which non-Indians contract with the tribe through a federally recognized tribal organization, the school board). Nonmembers, then, have a pivotal role in the federal-tribal relationship. If they could not rely on the

federal government's sponsorship and recognition of the tribal entities participating in tribes' federally overseen activities, federal recognition would be rendered mostly meaningless. The provision of services to Indians would be paralyzed, and the success of Indian-controlled enterprises would be endangered, contrary to express congressional policy. *See, e.g.*, 25 U.S.C. § 450a (setting forth policies of Indian Self-Determination and Education Assistance Act); 25 U.S.C. § 2702 (setting forth policies of Indian Gaming Regulatory Act).

Immediately before and after the execution of the June 2003 Agreement, not only did federal agencies, using their delegated powers and fulfilling their fiduciary obligations to identify the Tribe's representative leader, repeatedly recognize Walker (and refuse to recognize Bear) as the head of the Tribe and the only individual authorized to exercise its *federal* powers. But they also made express and concrete the federal interest in ensuring that Walker, not Bear, operated the Tribe's casino, and they invited nonmembers to rely on his authority in that federally authorized and regulated domain. On April 30, 2003, after Bear had forcibly taken control of the casino, the National Indian Gaming Commission (NIGC) — the federal agency with exclusive authority over Indian gaming, *see* 25 U.S.C. §§ 2704-2708 — issued him a Notice of Violation. App. 628-630. In demanding that Bear vacate the casino and allow “the federally recognized tribal government [*i.e.*, Walker] access to and control of” it, App. 630 (NOV ¶ 6), the Notice of Violation conclusively demonstrates that only Walker,

because of his federal recognition, had authority to run the Tribe's federally regulated casino *as a matter of federal law*.⁵

That federal authority necessarily entailed making contracts with nonmembers. Running a casino means entering into contracts. A casino is a business enterprise, requiring contracts with customers (gamblers) and suppliers. A federally authorized and regulated Indian casino, moreover, by

⁵ This Court's decision in *Bruce H. Lien Co v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996) did not hold that federal law has no bearing on the validity of casino-related contracts, as the Tribe might argue. It held only that NIGC, during its review of preexisting casino management contracts, cannot pass on their validity. *Id.* at 1418-1419. *Bruce H. Lien* did not hold that the contracts' validity was controlled entirely by tribal law but consciously left that question to be considered first by the tribal court, as tribal-court-exhaustion principles required in that case: "Questions regarding whether IGRA or the NIGC divest the Tribal Court of authority to rule on the issues regarding the contract's validity, whether IGRA is applicable to the Tribal Court action, and *whether the validity of the management contract can be affected by an interpretation of Tribal law*, are issues relating to the Tribal Court's jurisdiction which should be dealt with first by the Tribal Court itself." *Id.* at 1420-1421 (emphasis added). Furthermore, although the Court noted that the validity of the casino management contract did not arise under federal law because it did not "raise a federal question per se," *id.* at 1421, that correct application of the well-pleaded complaint rule — the invalidity of a contract is an affirmative defense — does not portend that federal law is completely irrelevant to the validity of casino-related contracts. *See Casino Resource Corp. v. Harrah's Entertainment*, 243 F.3d 435, 439 (8th Cir. 2001) (noting that *Bruce H. Lien* does not rule out the possibility that there are federal issues in disputes about Indian casino contracts).

law *must* enter into certain contracts. Casinos must have security services so they can operate in a manner that “adequately protects . . . safety.” 25 U.S.C. § 2710(b)(2)(E). They must hire investigators to do background checks on casino employees. 25 U.S.C. § 2710(b)(2)(F).

The Tribe cannot seriously maintain that the Agreement was beyond the authority of the person charged by the federal government with operating the Tribe’s casino. Unlike, say, a contract to build a school, the Agreement plainly is casino-related. Indeed, its stated purposes were to provide federally required security and investigation services. *See* App. 570-571 (June 2003 Agreement at 1-2). And inasmuch as the purpose of the Agreement was to use force to remove Bear from the casino, *cf.* App. 788 (District Court Opinion 18), Walker had federal authority to do that, too, as the Notice of Violation recognizes. App. 629 (NOV ¶ 5.B (finding that Walker was “unable to regain control” of the casino “without the use of force”)). In all events, even if that supposed aspect of the Agreement exceeded Walker’s authority, the other aspects of the Agreement, including its arbitration clause, were authorized and remain valid and binding.

In sum, Walker’s status under tribal law is utterly immaterial to the Agreement’s validity. The federal government, as it had the power (and obligation) to do, picked Walker to run the Tribe’s casino. The Agreement was made pursuant to that federal authority, so it is valid and binding against the Tribe.

B. Without Support, The District Court Effectively Overturned The Official Determinations Of The BIA And NIGC.

The district court offered no reason for its assumption that the validity of the Agreement is a matter of tribal law, not federal law. Nowhere in its opinion did it even mention the NIGC's Notice of Violation, which had figured prominently in API's briefs. Without citation, it simply stated that the "validity of the Agreement turns on whether the Walker Council was the governing body at the time the Agreement was executed," which it saw as a question of tribal law, touching on an intra-tribal leadership dispute, that only tribal courts could resolve. App. 783-784 (District Court Opinion 13-14).

Yet finding the Agreement invalid on account of Walker's lack of *tribal* authority effectively, and impermissibly, overturns the authoritative *federal* decisions of the Secretary of the Interior, BIA, and NIGC, which recognized Walker and deemed him the only Tribe member with authority to run the casino. That considered decision by the NIGC, acting pursuant to its delegated powers, conclusively establishes that at all relevant times, Walker had authority under federal law to enter into contracts related to the operation of the federally regulated casino. NIGC's decision cannot be gainsaid now because the proper time and place to do so has long since passed. *See Yakus v. United States*, 321 U.S. 414, 434 (1944) ("[O]bviously we cannot pass upon action which might have been taken on a protest by petitioners, who have never made a protest or in any way sought the remedy

Congress has provided.”). Indeed, this Court has already rejected Bear’s first, improper attempt to challenge NIGC’s decision on the ground that he had “sought neither expedited review before the Chairman [of NIGC] nor administrative review before the entire NIGC.” *See In re Sac & Fox Tribe of Miss. Iowa/Meskwaki*, 340 F.3d 749, 753, 755-758 (8th Cir. 2003). What the federal courts could not overturn directly cannot now be overturned indirectly.

Moreover, that the district court’s decision conflicts with the NIGC’s decision and orders is clear. Under the district court’s reasoning, only the Bear council had the authority to operate the casino during the period at issue because tribal law gave Bear alone that power. *See App. 778* (District Court Opinion 8 (“At the time of the raid, the Bear Council had governing control over the Casino.”)). Yet, Bear’s attempt to control the casino was the fundamental reason why NIGC issued the Notice of Violation.⁶ Any

⁶ The Notice of Violation found Bear’s control of the casino violated federal law in three ways. NIGC found that the “tribal government recognized by the Secretary of the Interior is not in control of the Tribe’s gaming operation and remains excluded from the premises by the occupying group,” in violation of federal statutes and regulations requiring that “the Tribe have the sole proprietary interest in and the sole responsibility for the conduct of gaming on the Tribe’s lands.” App. 629 (NOV ¶ 4.B, 4.G (citing 25 U.S.C. § 2710(b)(2)(A) and 25 C.F.R. § 522.4(b)(1))); *ibid.* (NOV ¶ 5.A). NIGC also found that Bear’s “forcible occupation of the gaming operation and tribal offices” left Walker “unable to regain control without the use of force,” in violation of federal law requiring that casinos be operated in a manner that adequately protects public health and safety. App. 629 (NOV ¶ 4.C (citing 25 U.S.C. § 2710(b)(2)(E) and 25 C.F.R. § 522.4(b)(7))); *ibid.*

casino-related contract Bear then might have made would have been unauthorized and in violation of federal law.

The Tribe's attempted end-run around NIGC's decision is not just untimely; it also is unfounded. Tribal law must give way to federal law. *See Wheeler*, 435 U.S. at 322. Thus, the tribal courts' assessment of Walker's authority under tribal law can cast no doubt upon the federal officials' assessment of his authority under federal law.

There are sound policy reasons to hold that the federal recognition confers some authority on a recognized tribe member, notwithstanding the district court's dismissal of API's concern about the consequences of finding that tribal law controls the validity of contracts made between tribes and nonmembers involved in federal programs and federally authorized and regulated enterprises like casinos. In the court's view, nonmembers assume the risk that a tribal council will repudiate contracts made by the federally recognized tribal council. *See* App. 792 (District Court Opinion 22). The court suggested that the risk surfaces only during intra-tribal disputes, *ibid.*, but there is no logical reason for that assumed constraint. The question is which law controls the authority of a federally recognized tribal council to commit a tribe to a contract pertaining to federal programs and federally authorized and regulated enterprises. If tribal law controls, a tribal council

(NOV ¶ 5.B). NIGC further concluded that Bear had violated federal law requiring "entrance and inspection of the operation by a tribal official who is authorized by the federally recognized tribal government." App. 629 (NOV ¶ 4.D (citing 25 C.F.R. § 573.6(a)(9))); App. 630 (NOV ¶ 5.C).

could repudiate *any* contract tribal law deems unlawful, even ones made by it and ones made by predecessors long before an intra-tribal leadership dispute (if any even occurs). No continuity would be guaranteed. In all likelihood, nonmembers would balk at the prospect of participating in federal Indian programs and federally authorized and regulated Indian enterprises. And, as a result, federal objectives and programs would be frustrated.

Holding that a federally recognized tribal entity, regardless of his authority under tribal law, has federal authority to bind a tribe to certain nonmember contracts does not disparage a tribe's resolution of an intra-tribal leadership dispute or unduly enmesh federal courts in tribal politics. It is no more disparaging than holding that federal recognition of a council gives the council authority to act on a tribe's behalf in dealings with the federal government, regardless of the council's status under tribal law, which the Tribe conceded already is the case. *See* App. 703 (Tribe's Memorandum 30 ("BIA acknowledgment of a particular tribal council means only that the BIA recognizes it for purposes of providing services to a federally recognized tribe.")). While there may be times when the governing council for tribal law purposes is not the same as the one for federal law purposes, those times should be brief because federal executive agencies and officials, following their duty to recognize the lawfully constituted governing council representative of a tribe's membership, will synchronize federal and tribal authority so they are concurrent. Indeed, that is precisely

what happened here, once the Bear council prevailed in a recognized tribal election. *See Sac & Fox Tribe v. Bureau of Indian Affairs*, 439 F.3d 832, 834 (8th Cir. 2006) (BIA recognized Bear council three days after the November 2003 election).

C. Walker's Agreement To Arbitrate, Which Waived The Tribe's Sovereign Immunity, Is Independently Valid.

Like the authority to commit the Tribe to contracts needed for, and inextricably intertwined with, the Tribe's federally authorized casino operations, the Tribe's sovereign immunity and the authority to waive it are controlled by federal, not tribal, law. *See Okla. Tax Comm'n v. Graham*, 489 U.S. 838, 841-842 (1989) (recognizing a tribe's immunity is a "federal immunity" and, as such, cannot support federal-question jurisdiction consistent with the well-pleaded complaint rule) (citing *Puyallup Tribe, Inc. v. Wash. Game Dep't*, 433 U.S. 165 (1977)). Accordingly, in addition to his federal authority to operate the casino, Walker also had authority as the federally recognized tribal council over the Tribe's federally conferred sovereign immunity. And in agreeing to arbitrate all disputes arising out of the Agreement, he waived that immunity. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 423 (2001) (an arbitration agreement waives tribal sovereign immunity).

The district court's decision to the contrary is premised on two legal errors. First, the court failed to recognize that an agent may have limited authority to commit his principal to arbitration agreements, even where his

contracting authority in other areas is circumscribed. Second, it failed to recognize that Walker's federal recognition gave him that limited authority to waive the Tribe's federally conferred immunity.

The district court erroneously held that an agent may have authority to commit his principal to an arbitration provision only if he has authority to commit his principal to every provision in the contract with the arbitration provision. App. 784 (District Court Opinion 14). Perhaps the most fundamental principle of "substantive federal arbitration law" is that "an arbitration provision is severable from the remainder of the contract."

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006).

Accordingly, "agreements to arbitrate can be deemed to be valid contracts severable from a larger contract if these agreements are recognized as

meeting the conditions of contract formation." *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 108 (3rd Cir. 2000). In other words, a contract with an arbitration provision really contains two agreements — one to arbitrate and one for something else. As long as at least the separate agreement to arbitrate is valid, the court can order arbitration. *Buckeye*, 546 U.S. at 444-445; see *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (a litigant cannot be required to arbitrate a dispute he has not agreed to arbitrate). Hoping to avoid arbitration, litigants often will challenge the validity of the separate arbitration agreement on the ground that the person who purported to commit him to both agreements contained in the single contract was not his agent. See *Sphere Drake Ins. Ltd. v. All*

Am. Ins. Co., 256 F.3d 587, 590-592 (7th Cir. 2001); *see also Buckeye*, 546 U.S. at 444 n. 1. That type of challenge to an arbitration agreement “calls into question all provisions contained” in the overarching contract, “including provisions relating to arbitration” because the essence of the challenge is that the supposed agent had *no* contracting authority whatsoever. *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1417 (8th Cir. 1996). Yet, because of the severability principle, it may be that there is an “independent source of the validity of the arbitration clause once the underlying contract is taken off the table.” *Sandvik*, 220 F.3d at 108. Indeed, it is an elementary principle of agency law that a principal may define his agent’s authority as he pleases. So a principal may restrict his agent only to make agreements to arbitrate certain disputes.

In this case, Walker’s federal recognition and authority was an “independent source” of authority to commit the Tribe to the Agreement’s arbitration provision waiving the Tribe’s sovereign immunity, apart from any authority he had to commit the Tribe to the rest of the Agreement’s provisions. Tribal sovereign immunity is incidental to federal recognition, and as such, is a product of, and is controlled by, federal law. *See* 25 C.F.R. § 83.2. Once the government recognizes a tribe, it also must recognize a council to have authority for the tribe in federal domains. *See* Part II.A, *supra*. Tribal sovereign immunity is one of those federal domains because it is entirely a matter of federal law determined by reference to federal law. *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754, 759

(1998). As a matter of federal law, then, control over that immunity is vested in the recognized tribal council.⁷

It makes no sense to conclude that a recognized council's authority over a tribe's sovereign immunity, simply because it arises "by virtue of [its] government-to-government relationship with the United States," 25 C.F.R. § 83.2, has only inter-governmental effect. *See* App. 785, 792 (District Court Opinion 15 n. 6, 22). Tribal immunity, a federal privilege, is plainly ineffective against the supremacy of the federal government. Like the operation of a casino, decisions regarding sovereign immunity necessarily involve interactions with nonmember third parties.

Holding that Walker could waive the Tribe's sovereign immunity would not, as the district court feared, "void the Tribal Court's finding on the Tribe's intra-tribal governmental dispute" (App. 792 (District Court Opinion 22)). It would only rebuff the district court's erroneous view that

⁷ Responding to API's view that federal recognition determines which tribal entity can waive a tribe's sovereign immunity, the district court quoted just one questionable source stating, "A tribal official cannot waive the tribe's sovereign immunity *unless authorized to do so by tribal law*." App. 784 (District Court Opinion 14 (quoting 42 C.J.S. *Indians* § 22 (Online ed. 2008) (emphasis added))). For that statement, the source in turn cites a single case, in which the Supreme Court stated that "immunity cannot be waived by officials" in response to the argument that immunity had been waived by a "failure to object." *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 513 (1940). Not only is the case totally unsupportive; but the Supreme Court has since rejected its holding that immunity cannot be waived by tribal officials. *See C & L Enters.*, 532 U.S. at 418-419.

the tribal courts' resolution of the Tribe's governmental dispute controls the *federal* law governing tribal sovereign immunity. Walker's federal recognition gave him authority over the Tribe's immunity, and pursuant to his authority, he waived the Tribe's immunity in the Agreement's severable arbitration provision, which is valid as a matter of federal law.

D. Because The Agreement And The Arbitration Provisions Are Valid As A Matter Of Federal Law, The District Court's Rulings Must Be Reversed.

The validity of the Agreement and its arbitration provisions establishes the invalidity of the district court's judgments. Clearly, if they are authorized, the court erred in concluding that the Tribe had not waived its sovereign immunity. *See C & L Enters.*, 532 U.S. at 423. This Court thus must reverse the dismissal of API's contract and arbitration claims.

Furthermore, the Court should award API summary judgment on its claim that the tribal courts have exceeded their jurisdiction in adjudicating the Tribe's tort claims. "A tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Plains Commerce*, 128 S. Ct. at 2720. When an Indian tribe has regulatory jurisdiction over certain nonmember conduct under one of the *Montana* exceptions, its tribal courts' adjudicative jurisdiction over the same is subject to additional limits. For instance, tribal courts may not err in deciding federal questions, particularly those that pertain to their jurisdiction, and a federal court sitting in review of a tribal

court's assessment of its jurisdiction must review the tribal court's determinations of federal law *de novo*. See *Duncan Energy*, 27 F.3d at 1300.

In this case, the Agreement between API and Walker requires arbitration of all disputes arising out of the Agreement. App. 574 (June 2003 Agreement 5). API and the Tribe agree that the Tribe's tort claims all come within the scope of the Agreement's arbitration provisions.⁸ See App. 695 (Tribe's Memorandum 22). Thus, all sides agree that the tribal courts should have not have proceeded to consider the Tribe's tort claims (despite whatever regulatory jurisdiction *Montana* might authorize) if the Agreement is valid against the Tribe. Because of their wrong determination of federal law and Walker's authority, however, the tribal courts have proceeded to exercise adjudicative jurisdiction that they manifestly lack. And the district court has incorrectly ratified that jurisdiction. Accordingly, as a matter of law, API is entitled to judgment in its favor and against the Tribe.

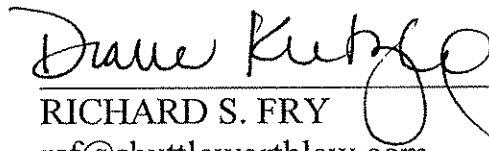
CONCLUSION

Because the Tribe has not met its burden under *Montana* and *Plains Commerce* to justify regulating API's conduct at issue in its tort claims and

⁸ At first glance, API's position that the Tribe's tort claims are covered by the Agreement's arbitration clause may appear inconsistent with API's position that the Agreement is not a basis for tribal civil jurisdiction under *Montana*, but the two are reconciled. *Montana* narrowly depends on nonmember conduct at issue in a claim; the Agreement's arbitration clause more broadly depends on a claim's connection to the Agreement. The Agreement is not the nonmember conduct at issue in the Tribe's tort claims, yet the claims arise out of it.

because the Tribe must arbitrate its claims in any event, API's is entitled to summary judgment on its claim to stop the tribal courts' proceedings. The Tribe's sovereign immunity defenses to API's other claims also should be rejected as waived; at a minimum, the case should be remanded so the district court can consider anew whether the defenses were waived.

Dated: August 18, 2009.



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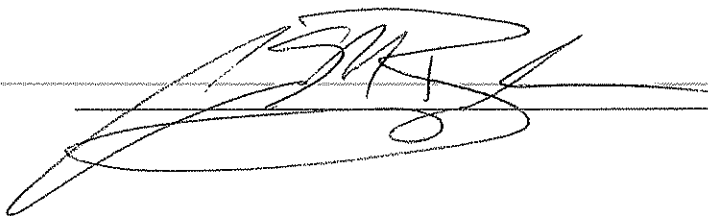
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ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

ATTORNEY'S PROCESS AND
INVESTIGATION SERVICES, INC.,

Plaintiff,

vs.

SAC & FOX TRIBE OF THE
MISSISSIPPI IN IOWA,

Defendant.

No. 05-CV-168-LRR

ORDER

TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	RELEVANT PROCEDURAL BACKGROUND	2
A.	<i>Intra-Tribal Governmental Dispute</i>	2
B.	<i>Tribal Court Complaint</i>	3
C.	<i>Federal District Court Complaint</i>	4
D.	<i>Tribal Court Considers Jurisdiction Issue</i>	4
E.	<i>API Appeals Tribal Court Decision to Federal District Court</i>	4
III.	RELEVANT FACTUAL BACKGROUND	5
A.	<i>Parties</i>	5
B.	<i>Casino</i>	5
C.	<i>Dispute</i>	5
D.	<i>Agreement</i>	6
E.	<i>Bear Council's Communications with Federal Agencies</i>	7
F.	<i>API Raids the Casino</i>	8
IV.	ANALYSIS	8
A.	<i>Parties' Arguments</i>	8
B.	<i>Subject Matter Jurisdiction and Sovereign Immunity</i>	9
C.	<i>Subject Matter Jurisdiction</i>	10
1.	<i>Count I: request for declaratory judgment</i>	10
2.	<i>Count II: breach of contract</i>	10
D.	<i>Sovereign Immunity</i>	11
1.	<i>Count I: request for declaratory judgment</i>	11

2.	<i>Count II: breach of contract</i>	13
E.	<i>Tribal Court's Jurisdiction Over API</i>	15
1.	<i>Protective prong</i>	16
i.	<i>Political integrity</i>	18
ii.	<i>Economic security</i>	18
iii.	<i>Cases applying protective prong</i>	19
2.	<i>Consent prong</i>	21
3.	<i>Miscellaneous arguments</i>	21
i.	<i>Section 83.2</i>	21
ii.	<i>Arbitration clause</i>	22
V.	<i>CONCLUSION</i>	23

I. INTRODUCTION

The matters before the court are the “Motion to Dismiss” (docket no. 48), filed by Defendant Sac & Fox Tribe of the Mississippi in Iowa (“Tribe”), and the “Motion for Partial Summary Judgment on Jurisdictional Grounds” (docket no. 63) (“Summary Judgment Motion”), filed by Plaintiff Attorney’s Process and Investigation Services, Inc. (“API”).

II. RELEVANT PROCEDURAL BACKGROUND

*A. Intra-Tribal Governmental Dispute*¹

In 2002, Alex Walker, Jr. was the leader of the seven-member elected council that governs the Tribe. On September 26, 2002, some Tribe members became dissatisfied with

¹ The court’s recitation of the facts is drawn from the record before the court and the Tribal Court’s record. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 21 (1987) (“[T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the tribal court before either the merits or any question concerning appropriate relief is addressed.”) (quoting *Nat’l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 (1985)). The court also notes the parties do not dispute the material facts at issue in this case—only their legal implication. *See* Brief in Support of Summary Judgment Motion (docket no. 63-5), at 3 (discussing Tribal Court of Appeals’s factual findings).

this “Walker Council” and submitted recall petitions for its members.

On October 10, 2002, the Walker Council purported to accept the recall petitions. However, the Walker Council never set recall elections. On March 4, 2003, the Walker Council rejected the recall petitions.

Also on March 4, 2003, the Tribe’s Hereditary Chief Old Bear appointed an interim tribal council. The “Bear Council” consisted of Hereditary Chief Old Bear and six other Tribe members.

On March 26, 2003, Hereditary Chief Old Bear administered oaths of office to the Bear Council.² On April 14, 2003, some members of the Tribe signed a declaration of support for Hereditary Chief Old Bear’s actions. These same Tribe members also agreed that none of the members of the Walker Council were qualified to serve on the Tribe’s council.

On May 22, 2003, the Tribe held a special election to resolve the intra-tribal dispute. The Tribe elected all seven members of the Bear Council. In the fall of 2003,³ the Tribe held another election and confirmed the Bear Council in its entirety.

B. Tribal Court Complaint

On August 3, 2005, the Bear Council filed a tort action on behalf of the Tribe in the Court of the Sac & Fox Tribe of the Mississippi in Iowa (“Tribal Court”). *See Sac & Fox Tribe of the Miss. in Iowa v. API*, No. API-CV-Damages-2005-01 (Court of the Sac & Fox Tribe of the Mississippi in Iowa). The Tribe alleged trespass to land, trespass to chattel, theft of tribal funds and misappropriation of trade secrets.

² On April 8, 2003, the Walker Council filed a declaratory judgment suit in this court against the Bear Council. The Walker Council asked this court to determine which council was authorized to govern the Tribe. The court dismissed the suit for lack of subject matter jurisdiction. *Sac & Fox Tribe of the Miss. in Iowa v. Bear*, 258 F. Supp. 2d 938 (N.D. Iowa 2003) (Reade, C.J.), *aff’d*, 439 F.3d 832 (8th Cir. 2006).

³ The date of the fall 2003 election is unclear from the record.

On September 23, 2005, API filed a motion in the Tribal Court. API asked the Tribal Court to dismiss the Tribe's complaint, claiming the Tribal Court lacked subject matter jurisdiction over API.

C. Federal District Court Complaint

On October 21, 2005, API filed a Complaint (docket no. 2) in this court. The Complaint alleges the Tribe, acting under the leadership of the Bear Council, breached a contract and asks the court to bar the Tribe's lawsuit in the Tribal Court. Additionally, API asks the court to compel arbitration.

On November 15, 2005, the court entered an Order (docket no. 24). The court stayed the instant action pending exhaustion of remedies in the Tribal Court.

D. Tribal Court Considers Jurisdiction Issue

On March 26, 2008, the Tribal Court entered an order ("Tribal Court Order") (docket no. 48-5, Ex. 7) in which it denied API's motion to dismiss. The Tribal Court concluded it could exercise civil jurisdiction over API.

On December 23, 2008, the Appellate Court of the Sac & Fox Tribe of the Mississippi in Iowa ("Tribal Court of Appeals") affirmed the Tribal Court. Tribal Court of Appeals Order (docket no. 48-5, Ex. 8).

On January 20, 2009, the Tribal Court stayed its proceedings pending this court's resolution of issues related to the Tribal Court's exercise of civil jurisdiction over API.

E. API Appeals Tribal Court Decision to Federal District Court

On January 2, 2009, API filed a Motion to Reopen (docket no. 37) in the instant action. On January 7, 2009, the court granted the Motion to Reopen (docket no. 41) and lifted its stay.

On January 27, 2009, the Tribe filed an Answer (docket no. 49) in which it denies the substance of the Complaint and alleges that the court lacks subject matter jurisdiction over this action. That same date, the Tribe filed its Motion to Dismiss.

On March 1, 2009, API filed the Summary Judgment Motion. The Summary Judgment Motion also contains a resistance to the Motion to Dismiss. On March 11, 2009, the Tribe filed a Reply (docket no. 69) in support of its Motion to Dismiss. On April 2, 2009, the Tribe filed a Resistance (docket no. 74) to the Summary Judgment Motion. On April 13, 2009, API filed a Reply (docket no. 77-2) in support of its Summary Judgment Motion. On May 8, 2009, the Tribe filed a corrected version of its Resistance to the Summary Judgment Motion (docket no. 86).

API requests oral argument on the Motion to Dismiss and the Summary Judgment Motion (together, "Motions"). The court finds oral argument is not necessary. The Motions are fully submitted and ready for decision.

III. RELEVANT FACTUAL BACKGROUND

A. Parties

API is a security services corporation with its principal place of business in Wisconsin. The Tribe is a federally recognized Indian Tribe whose members live on the Meskwaki Settlement ("Settlement") in Tama County, Iowa. The Tribe owns the Meskwaki Bingo•Casino•Hotel ("Casino") under a state-tribal compact with the State of Iowa. *See In re Sac & Fox Tribe of the Miss. of Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 751 (8th Cir. 2003).

B. Casino

The Casino is the Tribe's "economic engine" and is located on the Settlement. Tribal Court of Appeals Order at 16. The National Indian Gaming Commission ("NIGC") regulates the Casino.

C. Dispute

From September 2002 through the fall of 2003, the Tribe was embroiled in the intra-tribal governmental dispute discussed above. The Bear Council ultimately prevailed over the Walker Council. The Bear Council has retained control of the Tribe's

government and the Casino during the pendency of the instant action.

D. Agreement

In June of 2003, after the Bear Council had been elected in the May 2003 elections, the Walker Council continued to try to do business on behalf of the Tribe. On June 16, 2003, the Walker Council purported to enter into an agreement with API on behalf of the Tribe ("Agreement") (docket no. 2-2, Ex. A). The Agreement purported to engage API on behalf of the Tribe for "investigation, security and law enforcement consulting services[.]" Agreement at 1. More specifically, the Agreement stated API would "perform services directly relating to the investigation of a takeover by dissidents at the [Casino]," investigate "individuals involved in the unlawful acts against the Tribal Government" and "[i]nvestigate allegations of unlawful acts and tribal policy violations of the dissident group involving Tribal funds[] and gaming operations." *Id.* at 1-2.

The Agreement contained an arbitration clause. The arbitration clause states, in relevant part:

i. The parties shall make efforts to settle through dialogue and negotiation any disputes that may arise out of this Agreement. However, should such efforts fail after thirty (30) days, the dispute shall be submitted to arbitration, which shall be conducted in Des Moines, Iowa, in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be heard before one arbitrator chosen by consensus of the parties. If the parties cannot mutually agree on an arbitrator, the arbitrator shall be chosen in accordance with the Rules of the American Arbitration Association. The decision of the arbitrator shall be final and binding upon the parties.

ii. [. . .] Judgment on the award of the arbitrator may be entered by the Federal District Court for the Northern District of Iowa under the Federal Arbitration Act or [an] Iowa state court pursuant to Iowa law. For this purpose, the Tribe and API hereby irrevocably consent to the jurisdiction over their

persons of such courts for such purpose, including to enter judgment on an arbitration award, and waive any defense based on improper venue, inconvenient venue, or lack of personal jurisdiction.

iii. The failure of any party to submit voluntarily to arbitration shall be deemed to be a breach of this Agreement. Provided, that if either party has a good faith position that a dispute does not arise under this Agreement, that party may file an action in the Federal District Court for the Northern District of Iowa, or the Iowa state courts, to determine whether the dispute is the proper subject of arbitration under this Agreement.

Id. at 5.

At the time API executed the Agreement, it was under the impression that the Walker Council was the Tribe's true governing body. However, API was incorrect. On March 26, 2008, the Tribal Court held the Walker Council had no authority to enter into the Agreement on behalf of the Tribe because the Bear Council had exclusive governing power over the Tribe at the time the Agreement was executed. The Tribal Court held that, consequently, the Agreement was invalid and unenforceable against the Tribe. This decision was affirmed by the Tribal Court of Appeals.

E. Bear Council's Communications with Federal Agencies

Hereditary Chief Old Bear and others communicated with various federal agencies regarding the newly installed Bear Council. However, these federal agencies refused to recognize the Bear Council for purposes of gaming activities and other federal matters until after the second election in the fall of 2003. For instance, on March 17, 2003, Hereditary Chief Old Bear received a letter from the United States Department of the Interior Bureau of Indian Affairs ("BIA") in which the BIA stated it could not involve itself in the dispute over whether the Walker Council or Bear Council was the Tribe's true governing council. In this letter, the BIA also indicated that it recognized the Walker Council as the Tribe's governing body. On April 1, 2003, Hereditary Chief Old Bear received a letter from the

United States Department of the Interior Office of the Secretary (“Secretary”) in which the Secretary stated it continued to recognize the Walker Council as the Tribe’s official leadership. On May 9, 2003, Hereditary Chief Old Bear received a letter from the BIA stating it continued to recognize the Walker Council as the governing Tribal authority. On May 23, 2003, Hereditary Chief Old Bear received a letter from the Secretary stating that, because the May 22, 2003 election had not been held in accordance with tribal law, the Department would not recognize the results of that election.

F. API Raids the Casino

On October 1, 2003, API raided the Casino pursuant to the Agreement with the Walker Council and without authority from the Bear Council. At the time of the raid, the Bear Council had governing control over the Casino. Approximately thirty individuals associated with API stormed the Casino. Many were armed with batons. At least one individual affiliated with API had a firearm. The Tribe alleges API seized tribal property, assaulted and falsely imprisoned Tribe members and employees, intentionally damaged Tribal property and misappropriated the Tribe’s trade secrets. Additionally, API took control of the Tribe’s gaming information, including the Tribe’s financial records, surveillance, ongoing gaming investigations, personnel files and legal files.

IV. ANALYSIS

A. Parties’ Arguments

In the Complaint, API asks the court for a declaratory judgment that the Tribal Court may not exercise civil jurisdiction over API. API alleges the Tribe breached the Agreement and seeks damages for the breach.

In its Motion to Dismiss, the Tribe argues the court must dismiss the instant action because (1) the court lacks subject matter jurisdiction over the dispute; (2) sovereign immunity bars the Tribe from being sued in the instant action; and (3) API has failed to state a claim upon which relief can be granted. The Tribe also argues the Tribal Court has

civil jurisdiction over API with respect to the Tribe's tort claims.

In its Motion for Summary Judgment, API argues (1) the court has subject matter jurisdiction over the Complaint; (2) the Walker Council waived the Tribe's sovereign immunity in the Agreement pursuant to the arbitration clause; and (3) the Tribal Court has no civil jurisdiction over API. The court examines each of these arguments below.

B. Subject Matter Jurisdiction and Sovereign Immunity

The Tribe argues the court must dismiss the instant action for lack of subject matter jurisdiction because it "has not waived its sovereign immunity from this suit." Brief in Support of Motion to Dismiss (docket no. 48-2), at 8. The Tribe conflates subject matter jurisdiction and sovereign immunity. As the Eighth Circuit Court of Appeals noted,

[S]overeign immunity is jurisdictional in nature. Sovereign immunity, however, is not of the same character as subject matter jurisdiction. First of all, tribal sovereign immunity may be waived in certain circumstances and is subject to the plenary power of Congress. Lack of subject matter jurisdiction, on the other hand, may not be waived. Second, sovereign immunity operates essentially as a party's possible defense to a cause of action. In contrast, subject matter jurisdiction is primary and an absolute stricture on the court. Finally, a waiver of sovereign immunity cannot extend a court's subject matter jurisdiction.

We find, therefore, that sovereign immunity is a jurisdictional consideration separate from subject matter jurisdiction[.]

In re Prairie Island Dakota Sioux, 21 F.3d 302, 304-05 (8th Cir. 1994) (internal citations omitted); *see also Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous.*, 207 F.3d 21, 28 (1st Cir. 2000) ("[A]lthough tribal sovereign immunity is jurisdictional in nature, consideration of that issue always must await resolution of the antecedent issue of federal subject-matter jurisdiction."). Accordingly, the court first considers whether it has subject matter jurisdiction over the instant action and then proceeds to determine whether sovereign immunity applies.

C. Subject Matter Jurisdiction

The party seeking to establish the court's subject matter jurisdiction, API, bears the burden of proving it. *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990). API alleges the court has subject matter jurisdiction over the Tribe under Count I, the request to bar the Tribal Court's exercise of civil jurisdiction over API, pursuant to 28 U.S.C. § 1331. API alleges the court has supplemental jurisdiction over Count II, its breach of contract claim, pursuant to 28 U.S.C. § 1367(a).⁴

1. Count I: request for declaratory judgment

The court has federal question subject matter jurisdiction over Count I, API's request for a declaratory judgment concerning the Tribal Court's exercise of civil jurisdiction over API. Count I requires the court to decide whether the Tribal Court may exercise civil jurisdiction over API, a non-Indian. "The question of whether an Indian tribe has the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court is a federal question under 28 U.S.C. § 1331." *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 513 (8th Cir. 1989) (citing *Nat'l Farmers Union*, 471 U.S. at 852).

2. Count II: breach of contract

As in other cases, to exercise supplemental jurisdiction over a claim against an Indian tribe, "the 'claims within the action' must 'derive from a common nucleus of operative fact.'" *Auto-Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation*, 495 F.3d 1017, 1024 (8th Cir. 2007) (quoting *Myers v. Richland County*, 429 F.3d 740, 745 (8th Cir. 2005)); see also *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 936 (7th Cir. 2008) (exercising supplemental jurisdiction over plaintiff's state law contract claim against a tribe in Indian Gaming Regulatory Act case). "A plaintiff's claims derive from a

⁴ The Complaint contains a typographical error. In its jurisdictional statement, API alleges the court derives supplemental jurisdiction over the breach of contract claim pursuant to "28 U.S.C. §[]1365(a)." Complaint at ¶ 7. Section 1365(a) governs a court's jurisdiction over actions brought by the United States Senate, not supplemental jurisdiction.

common nucleus of operative fact if the ‘claims are such that [the plaintiff] would ordinarily be expected to try them all in one judicial proceeding.’” *OnePoint Solutions, LLC v. Borchert*, 486 F.3d 342, 350 (8th Cir. 2007) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)).

The torts forming the basis of the Tribe’s claims against API are all rooted in the Agreement, because API raided the Casino pursuant to its terms. The court is satisfied that API’s claims arise from a common nucleus of operative fact. Therefore, the court shall exercise supplemental jurisdiction over Count II.

D. Sovereign Immunity

Next, the court turns to consider whether sovereign immunity bars the court’s exercise of jurisdiction in this case. “While federal jurisdiction exists [. . .], [a tribe]’s sovereign immunity [may] still bar[] claims from being brought against it unless [its] immunity has been waived by the tribe or unequivocally abrogated by Congress.” *Ho-Chunk Nation*, 512 F.3d at 936 (internal quotation marks omitted). “It is well settled ‘that Indian tribes possess the same common-law immunity from suit traditionally enjoyed by sovereign powers.’” *Mo. River Servs., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848, 852 (8th Cir. 2001) (quoting *Val-U Constr. Co. v. Rosebud Sioux Tribe*, 146 F.3d 573, 576 (8th Cir. 1998)). “[A] tribe may waive its immunity, but ‘a tribe’s waiver must be “clear.”’” *Id.* (quoting *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001)). A tribe may waive its immunity in an arbitration agreement. *Id.*

The Tribe argues sovereign immunity bars the court from adjudicating both Count I and Count II. The court examines the application of the doctrine of sovereign immunity as to each count separately.

1. Count I: request for declaratory judgment

The Tribe argues that sovereign immunity bars Count I, that is, API’s request for

a declaratory judgment concerning the propriety of the Tribal Court's exercise of civil jurisdiction over API.

Although there do not appear to be any cases discussing whether sovereign immunity bars a federal district court from considering this issue, controlling precedent clearly presumes that sovereign immunity does *not* bar a district court from reviewing a tribal court's decision to exercise civil jurisdiction over a non-member. *See, e.g., Bruce H. Lien*, 93 F.3d at 1421 (“[T]he tribal courts themselves are given the first opportunity to address their [civil] jurisdiction and explain the basis (or lack thereof) to the parties. *As a jurisdictional inquiry, appeal of this issue may be had in the federal district court.*”) (internal citations omitted) (emphasis added); *Duncan Energy*, 27 F.3d at 1300 (8th Cir. 1994) (“Once tribal court remedies have been exhausted, a [t]ribal [c]ourt's determination of tribal [civil] jurisdiction may be reviewed in the federal district court.”) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987)). The court also notes that, if sovereign immunity barred this claim, then no federal district court could consider this issue. The wealth of federal case law concerning tribal court civil jurisdiction over non-members demonstrates that sovereign immunity does not bar a district court from considering this matter.

To be sure, principles of sovereign immunity prevent a federal district court from considering this question before a tribal court has considered it. In November of 2005, this court stayed the instant action because the parties had not exhausted Tribal Court remedies concerning the Tribal Court's exercise of civil jurisdiction over API. *API v. Sac & Fox Tribe of the Miss. in Iowa*, 401 F. Supp. 2d 952, 958 (N.D. Iowa 2005) (Reade, C.J.). In doing so, the court recognized that “the examination of tribal sovereignty and jurisdiction should be conducted in the first instance by the tribal court itself[.]” *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294, 1299 (8th Cir. 1994); *see also LaPlante*, 480 U.S. at 16 (applying exhaustion rule to diversity

cases and holding a federal court should “stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction” (internal quotation marks omitted)).

As discussed above, the parties have exhausted Tribal Court remedies on the civil jurisdiction issue. The Tribal Court found that its exercise of civil jurisdiction over API was proper. The Tribal Court of Appeals affirmed that decision. Because the civil jurisdiction question has been fully exhausted in the Tribal Court system, sovereign immunity does not bar the court’s consideration of this issue.

In conclusion, the court finds that sovereign immunity does not bar Count I.

2. Count II: breach of contract

Next, the court turns to consider whether sovereign immunity bars Count II, API’s breach of contract claim. API argues the Walker Council waived the Tribe’s sovereign immunity as to Count II when the Walker Council entered into the Agreement containing the arbitration clause on behalf of the Tribe. Absent waiver by a tribe or action by Congress, “[t]ribes 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. Mfg. Tech., Inc.*, 523 U.S. 751, 760 (1998). A tribe’s consent to arbitration may operate as a waiver of its sovereign immunity. *C & L Enters.*, 532 U.S. at 423.

The validity of the Agreement turns on whether the Walker Council was the governing body of the Tribe at the time the Agreement was executed. As the court previously noted, the question over the Tribe’s true governing body is an intra-tribal dispute and not subject to the court’s jurisdiction. *API*, 401 F. Supp. 2d at 961 (citing *Longie v. Spirit Lake Tribe*, 400 F.3d 586, 589 (8th Cir. 2005) (explaining that federal courts should refrain from exercising jurisdiction pursuant to 28 U.S.C. § 1331 when the case involves an intra-tribal dispute)); *In re Sac & Fox Tribe*, 340 F.3d at 766 (affirming this court’s decision that it lacked subject matter jurisdiction to resolve an intra-tribal

leadership dispute).

The Tribal Court determined the Walker Council was not the governing body at the time the Agreement was executed and that the Agreement was therefore not binding. Accordingly, the court defers to the Tribal Court's finding that the Agreement is not valid and finds any waiver of sovereign immunity in the Agreement to be *ultra vires*. See *Prescott v. Little Six, Inc.*, 387 F.3d 753, 756-57 (8th Cir. 2004) (“[W]e defer to the tribal courts’ interpretation of tribal law.”).

API argues the Tribal Court’s determination that the Agreement is invalid has no bearing on the Walker Council’s ability to waive the Tribe’s sovereign immunity. The court disagrees. The Eighth Circuit Court of Appeals has held a challenge to the validity of a contract with a tribe “calls into question all provisions contained therein (including provisions relating to arbitration, sovereign immunity, and federal district court jurisdiction).” *Bruce H. Lien Co.*, 93 F.3d at 1417. If the Walker Council was not authorized to enter into the Agreement, then it follows that it was not authorized to waive the Tribe’s sovereign immunity pursuant to the arbitration clause contained in the Agreement. *Id.*; see also 42 C.J.S. *Indians* § 22 (Online ed. 2008) (“A tribal official cannot waive the tribe’s immunity unless authorized to do so by tribal law.”). The Tribal Court held the Walker Council was not the Tribe’s governing body at the time the Walker Council purported to enter into the Agreement and waive the Tribe’s sovereign immunity through the arbitration clause. API presents no other evidence that the Tribe waived its sovereign immunity. Accordingly, the court finds the Tribe did not waive its sovereign immunity to be sued for breach of the Agreement in this court. As a result, the Tribe’s sovereign immunity bars API from bringing its breach of contract claim in this court.⁵

⁵ Because sovereign immunity bars the court’s consideration of API’s breach of contract claim, it need not address the Tribe’s alternative argument that API’s breach of contract claim fails to state a claim upon which relief can be granted.

This holding is limited in scope to Count II, the breach of contract claim. As set forth above, sovereign immunity does not bar the court from considering Count I, the request for a declaratory judgment concerning the Tribal Court's exercise of civil jurisdiction over API.⁶

E. Tribal Court's Jurisdiction Over API

Next, the court turns to consider whether the Tribal Court may exercise civil jurisdiction over API with respect to the Tribe's tort claims in light of the fact that API is a non-Indian third party. Generally, a tribe may not exercise civil jurisdiction over non-Indian third parties. *See Montana v. United States*, 450 U.S. 544, 565 (1981). There are two exceptions to this general rule. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships

⁶ API argues a provision in the Code of Federal Regulations, 25 C.F.R. § 83.2 (2009), supports its argument that the Tribe waived its sovereign immunity in the Agreement. Section 83.2 states that when the BIA acknowledges a tribe's existence, the recognized tribe "is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 25 C.F.R. § 83.2. API insists the BIA's acknowledgment that the Walker Council was the Tribe's governing council at the time the Agreement was executed "vested the Walker Council with power over the Tribe's federal sovereign immunity." Brief in Support of Motion for Summary Judgment (docket no. 63), at 19. API cites no authority for this interpretation of § 83.2.

In the court's view, API misapprehends the purpose of § 83.2, which is "to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes." *See* 25 C.F.R. § 83.2. This regulation does not give an invalid tribal council the power to waive a tribe's sovereign immunity simply because it is recognized as a tribe's governing body by the BIA. Moreover, as with other sovereign nations, sovereign immunity inheres to a tribe as a nation—not to a coalition of tribe members purporting to act as a tribe's governing authority. *See Ninigret Dev.*, 207 F.3d at 29 (noting a tribe's "sovereign immunity predates the birth of the Republic" and "rests on the status of Indian tribes as autonomous political entities, retaining their original natural rights with regard to self-governance") (internal quotation marks omitted).

with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Id.* Second, a tribe has civil jurisdiction over non-Indians when a non-Indian engages in conduct on tribal land that “threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.” *Id.* at 566. “These exceptions are limited ones, and cannot be construed in a manner that would swallow the rule or severely shrink it[.]” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2720 (2008) (internal citations and quotation marks omitted). A tribal court must first examine whether it has civil jurisdiction over a non-Indian, and, after the tribal court completes its examination, a district court has federal question jurisdiction to review whether a tribal court has exceeded the lawful limits of its jurisdiction. *Nat’l Farmers*, 471 U.S. at 856.⁷

1. Protective prong

The Tribe (Bear) argues the Tribal Court has civil jurisdiction over API under the protective prong of the *Montana* exception: “A tribe may [. . .] retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana*, 450 U.S. at 566.

⁷ The Tribal Court of Appeals drew an unusual distinction between tortious nonmember conduct on fee land and tortious nonmember conduct on trust land; namely, that *Montana* applies only to tribal fee lands, not tribal trust lands. The Tribal Court of Appeals concluded that, because the Casino is on trust land rather than fee land, *Montana* should not apply, and, consequently, the “Tribe retain[ed] *presumptive* civil jurisdiction” over API. Tribal Court of Appeals Order at 16 (emphasis in original). API challenges this conclusion. After concluding *Montana* did not apply, however, the Tribal Court of Appeals applied the traditional *Montana* analysis and concluded in the alternative that, even if *Montana* applied, the Tribal Court had jurisdiction over API under *Montana*. As set forth below, the court agrees with the Tribal Court of Appeals’s alternate conclusion. Accordingly, the court need not consider whether *Montana* applies to Tribal land held in trust because the Tribal Court’s civil jurisdiction over API is proper in any event.

“The conduct must do more than injure the tribe, it must ‘imperil the subsistence’ of the tribal community.” *Plains Commerce*, 128 S. Ct. at 2727 (quoting *Montana*, 450 U.S. at 566). “[T]he elevated threshold for application of [this] *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.’” *Id.* (quoting F. Cohen, Handbook of Federal Indian Law § 4.02[3][c] at 232, n.220 (2005 ed.)). Federal courts recognize that “it can be argued that torts committed by or against Indians on Indian land always threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Philip Morris USA, Inc. v. King Mtn. Tobacco Co., Inc.*, 552 F.3d 1098, 1109 (9th Cir. 2009) (internal quotation marks omitted). Accordingly, a federal district court should bear in mind that the “generalized threat that torts by or against its members pose for any society[] is not what the [protective] *Montana* exception is intended to capture.” *Id.* (citing *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 657 n.12 (2001) (“*Montana*’s second exception can be misperceived. The exception is only triggered by *nonmember conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered necessary to self-government.”) (emphasis in original)). Instead, *Montana*’s protective exception “envision[s] situations where the conduct of the nonmember poses a direct threat to tribal sovereignty.” *Id.* (citing *Atkinson*, 532 U.S. at 657 n.12).

The court agrees with the Tribe’s assessment that “[a] case more suitable for application of the ‘protective’ prong can scarcely be imagined.” See Tribe’s Resistance Brief (docket no. 86-3), at 17. API’s conduct had a “direct effect” on both the political integrity and the economic security of the Tribe. *Montana*, 450 U.S. at 566. And, API’s conduct did more than injure the Tribe—it “imperil[ed]” its subsistence. *Plains Commerce*, 128 S. Ct. 2727. The court examines API’s impact on the Tribe’s political integrity and economic security, in turn.

i. Political integrity

API's conduct imperiled the Tribe's political integrity. In essence, API invaded the Tribe's land to quell an intra-tribal governmental dispute. API argues this intra-tribal dispute was merely incidental to the raid. API contends that, if the court finds the raid imperiled the Tribe's political integrity, any action taken by a non-member on tribal land during an intra-tribal governmental dispute would justify a court's invocation of the second *Montana* exception. The court disagrees. API's actions were made and intended to be a direct challenge to the Bear Council. API raided the Casino on behalf of the Walker Council, which was not the Tribe's true governing authority. API conducted the raid pursuant to the Agreement, and the Agreement's terms indicate the services API was expected to provide related directly to the Tribe's governmental affairs. *See* Agreement at ¶ I.2.A (stating API "shall perform services directly relating to the investigation of a takeover by dissidents at the [Casino] located on the Tribe's reservation lands" and "[i]nvestigat[e] [. . .] individuals involved in the unlawful acts against the Tribal Government"). In other words, API was hired to assist in the resolution of an intra-tribal governmental dispute, which strikes at the heart of the second *Montana* exception. The fact API believed it was operating with the consent of the Tribe's governing authority, that is, the ousted Walker Council, has no effect on the application of this exception. In truth and in fact, API raided the Casino specifically to weaken one side of an intra-tribal governmental dispute, which happened to be the Bear Council, the Tribe's true governing body. This is an act with potentially catastrophic consequences to the Tribe's government. The court concludes this merits the application of the protective prong of the *Montana* exception and that the Tribal Court's exercise of civil jurisdiction over API was proper.

ii. Economic security

API's conduct also imperiled the Tribe's economic security. The center of API's activity was the raid of the Casino, which is the Tribe's economic hub. As the Tribal

Court of Appeals noted, the Casino “is the Tribe’s economic engine, and is where some of the Tribe’s most sensitive documents are kept. It was precisely these things over which API sought control, on behalf of the Walker Council.” Tribal Appeals Court Order at 16. The Tribe’s economic viability turns on the Casino’s operations, and API sought to wrest control of the Casino out of the hands of the Tribe’s true governing body, the Bear Council, and into the hands of the Walker Council. The fact API believed it was operating pursuant to the Tribe’s authority does not change the fact that API forcefully and intentionally compromised the Tribe’s economic center. The court finds API’s raid of the Casino had potentially catastrophic consequences to the Tribe’s continuing economic security.

API argues the Casino was not operating at the time the raid occurred, thereby diminishing the economic instability the raid created. Even so, the raid of the Casino had potentially catastrophic consequences to the Tribe. API sought to transfer control of the Casino to Tribe members who were without authority to manage and operate the Casino. API also misappropriated Casino trade secrets. These and other acts had a potentially devastating impact on the continuing viability of the Casino, whether or not it was operating at the time of the raid.

iii. Cases applying protective prong

The cases in which courts have applied the second *Montana* exception are aligned with the instant action.

In *Babbitt Ford, Inc. v. Navajo Indian Tribe*, the Ninth Circuit Court of Appeals held the protective prong of *Montana*’s jurisdictional exception applied to an automobile company’s repossession of a vehicle on tribal land. 710 F.2d 587, 593 (9th Cir. 1983). The *Babbitt* court reasoned this conduct had a direct effect on the tribe’s health and welfare because “[r]epossession of an automobile has the potential to leave a trib[e] member stranded miles from his or her nearest neighbor” and “repossession without the consent

of the tribe member also may escalate into violence, particularly if others join the affray.” *Id.*

In *Fry v. Colville Tribal Court of the Confederated Tribes of the Colville Reservation*, a district court applied the second *Montana* exception due to a stipulated judgment designating jurisdiction in the tribal court because “the nonmember defendant put the political integrity of the tribe and the tribal court at issue in any failure to abide by the terms of the judgment.” No. CV-07-0178-EFS, 2007 WL 2405002, *3 (E.D. Wash. Aug. 17, 2007). The judgment at issue provided for the disposition of a significant amount of real and personal property within tribal boundaries. *Id.*

In *Elliot v. White Mountain Apache Tribal Court*, a district court held the second *Montana* exception likely applied because a non-member’s conduct caused a fire that burnt a great deal of timber on the tribe’s land. No. CIV 05-4240-PCT-MHM, 2006 WL 3533147, *5 (D. Ariz. Dec. 6, 2006). The court held this impacted the tribe’s ability to use its own land. *Id.* The court reasoned the non-member’s conduct “threaten[ed] the economic security of the tribe based upon the interference of the use of the tribe’s land and timber and the overall welfare of the tribe as such resources are material to the tribe’s stability.” *Id.*

In *Cheromiah v. United States*, a district court applied the second *Montana* exception in a case involving a medical malpractice claim against a medical services provider. 55 F. Supp. 2d 1295, 1305 (D.N.M. 1999). The hospital “provide[d] the only western medical care most [. . .] Tribe members receive[d].” *Id.* The court held “[m]alpractice by the major medical provider to the Tribe has a significant impact on ‘the right of reservation Indians to make their own laws and be ruled by them’ as it may jeopardize their very ability to survive as a people.” *Id.* (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997)).

In summary, the court finds that the second *Montana* exception applies and that the

Tribal Court's exercise of civil jurisdiction over API was proper.

2. Consent prong

The Tribe also argues the Tribal Court has civil jurisdiction over API under the consent prong of the *Montana* analysis. Because the court has already found the Tribal Court's exercise of civil jurisdiction over API was proper under the protective prong of the *Montana* exceptions, the court need not address this issue. The court notes, however, that both the Tribal Court and Tribal Court of Appeals declined to apply this *Montana* exception. This court would do the same. *See, e.g. Montana*, 450 U.S. at 565 ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.").

3. Miscellaneous arguments

API argues that two other factors bar the Tribal Court from exercising civil jurisdiction over API: (1) 25 C.F.R. § 83.2 and (2) the arbitration clause. The court addresses these arguments, in turn.

i. Section 83.2

API argues that the question of whether the Walker Council had authority to enter into the Agreement and choose arbitration for dispute resolution is a matter of federal law, not tribal law. API claims the question of who "the 'true' governing council of a tribe *for tribal issues* is simply irrelevant to the *federal issue* of who can waive the tribe's sovereign immunity and agree to resolve disputes in a non-tribal forum." API Summary Judgment Motion Br. at 17 (emphases in original). In support of this argument, API cites 25 C.F.R. § 83.2, the regulation discussed above that gives rise to federal recognition of Indian tribes. API contends that, because the BIA and NIGC recognized the Walker Council as the governing body of the Tribe under § 83.2, this recognition attributed federal powers to the Walker Council, including the federal power to waive sovereign immunity through

an arbitration clause.

For the same reasons discussed above, the court finds § 83.2 is inapplicable. As the Tribal Court of Appeals held, “[t]he BIA recognition process exists for the benefit of the federal-tribal relationship, not to give disappointed third parties an authority higher than the tribe as to tribal law.” Tribal Court of Appeals Order at 9. The Tribal Court found the Walker Council was without authority to enter into the Agreement. The Walker Council was therefore without the authority to bind the Tribe to the arbitration clause in the Agreement. The court will not apply § 83.2 to void the Tribal Court’s finding on the Tribe’s intra-tribal governmental dispute or its effect on the Agreement.

API argues that, if the court does not interpret and apply § 83.2 in the manner it suggests, “[a]ny private business doing business with a tribe during an intra-tribal leadership dispute would run the risk of its [a]greement being voided by subsequent events beyond its control when a new tribal council came into power.” API Summary Judgment Br. at 22. The court recognizes this risk; however, this is a risk API chose to take. As the Tribal Court of Appeals noted, a “chilling effect” on a nonmember’s negotiation with a tribe may be “inevitable” given the possibility of intra-tribal disputes. Tribal Court of Appeals Order at 10. However, “businesses that choose to work with an affirmatively *ousted* tribal council are taking a substantial risk. They ought not be heard [to] complain when the gamble fails.” *Id.* (emphasis in original). The court concludes the unique set of facts giving rise to the Tribal Court’s civil jurisdiction is unusual and appropriate for *Montana*’s rarely applied protective exception.

ii. Arbitration clause

API’s argument that the arbitration clause in the Agreement bars the Tribal Court from exercising civil jurisdiction is a non-starter. As the court noted in its earlier decision:

Before the arbitration clause in the Agreement can be enforced, a court must determine whether the Agreement is valid. If [the Walker Council] had authority to enter into the

Agreement and it was validly formed, then, the court agrees that the arbitration clause should be enforced. If, however, on the other hand, [the Walker Council] was without authority to enter into the Agreement on behalf of the Tribe and the Agreement is found to be an invalid and unenforceable contract, the provisions of the contract, including the arbitration clause, cannot be enforced.

Attorney's Process, 401 F. Supp. 2d at 961. The Tribal Court found the Agreement is void. The arbitration clause contained in the Agreement is therefore unenforceable. *Id.*; see also *Bruce H. Lien Co.*, 93 F.3d 1417 (noting a challenge to the validity of a contract with a tribe also challenges the validity of an arbitration agreement in the contract). The arbitration clause cannot operate to bar the Tribal Court from exercising civil jurisdiction over API because the Bear Council never agreed to it.

In summary, the court concludes the Tribal Court's exercise of civil jurisdiction over API is proper.

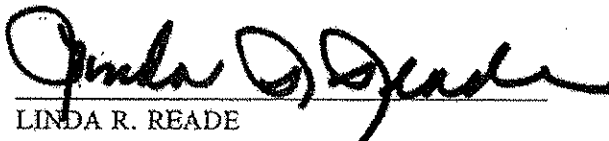
V. CONCLUSION

In light of the foregoing, **IT IS ORDERED THAT:**

- (1) The Motion to Dismiss (docket no. 48) is **GRANTED**;
- (2) The Summary Judgment Motion (docket no. 63) is **DENIED**; and
- (3) The Complaint (docket no. 2) is **DISMISSED**. The Clerk of Court is **DIRECTED** to close this case.

IT IS SO ORDERED.

DATED this 18th day of June, 2009.


LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA