

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 REPLY BRIEF

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INTRODUCTION

The Tribe dedicates much of its brief in this Court to repeating overheated factual allegations that were never found by the tribal courts or the district court and that are not at all challenged by the Tribe's tribal-law claims against API for conversion, trespass, and misappropriation of trade secrets. Its extensive arguments about federal-court deference to tribal courts are therefore misplaced (Tribe's Resp. Br. 10-17). The two, independent issues raised in this appeal are purely questions of federal law, which this Court answers *de novo*. And the facts material to those issues are few, undisputed, and worth summarizing again.

In 2003, the Sac & Fox Tribe of the Mississippi in Iowa undoubtedly dealt with an intra-tribal leadership dispute. As it must during such times, the federal government announced in March 2003 that it was recognizing a council, the elected Walker Council (App. 631), which had been federally recognized since before the dispute. *See In re Sac & Fox Tribe of Miss. in Iowa*, Decision And Order, at 2-3, NOV/TCO CO-03-02 (NIGC Sept. 10, 2003), *available at* <http://tinyurl.com/y97b22x> [hereinafter "NIGC Permanent Closure Order"]. Federal agencies and officials unanimously reaffirmed Walker's recognition in April, May, August, and September 2003 (App. 632-634, 643; NIGC Permanent Closure Order, at 14-17).

In light of Walker's recognition, NIGC held at the end of April that the Tribe's casino was operating in violation of federal law because it was then occupied and being run by the appointed Bear Council, dissidents who opposed Walker in the leadership dispute (App. 628-630). Federal law required that only

Walker operate the casino, and NIGC found that Bear's unlawful seizure of the casino was a threat to public safety (App. 628-630). The Bear Council did not administratively challenge Walker's federal recognition and "sought neither expedited review . . . nor administrative review" of NIGC's Notice of Violation and subsequent closure order; rather, it brazenly and illegally "continued to operate the casino." *In re Sac & Fox Tribe of Miss. in Iowa / Meskwaki Casino Litigation*, 340 F.3d 749, 753 (8th Cir. 2003). When Bear attempted to mount a federal-court challenge, this Court rebuffed it because Bear had not exhausted federal administrative remedies.¹ *See id.* at 755-758.

In June 2003, API entered into a contract with the Walker council on behalf of the Tribe (App. 570-577). The June 2003 Agreement was expressly linked with the Tribe's casino and the Walker council's federal power to operate it; API agreed to become an agent of the Tribe to provide the casino with federally required investigative and security services (App. 570). Both sides also agreed that disputes "aris[ing] out of" or "related to" the Agreement "shall be" arbitrated (App. 574). Beginning in June and continuing through the end of September, Walker paid API about \$1 million, as the Agreement required (Tribe's Resp. Br. 17; App. 572-573).

The Tribe alleges that, on October 1, 2003 — after Walker had paid API the funds at issue in the Tribe's conversion claim (Tribe's Resp. Br. 17) and after

¹ On behalf of the Tribe, Walker administratively appealed the remedy NIGC ordered. *See generally* NIGC Permanent Closure Order. NIGC held that Walker was the proper party to act for the Tribe and that Bear was not a party to the appeal. *See id.* at 9-10, 12-15. The Tribe, accordingly, is bound by NIGC's findings.

NIGC had ordered the Tribe's casino be permanently closed because Bear was still illegally occupying and running it, *see* NIGC Permanent Closure Order, at 15-16 — API's agents entered the closed casino and took gaming information (App. 583-584). The Tribe further alleges that the agents were armed and imprisoned those inside (App. 579-582), though its tort claims do not challenge that alleged conduct.

After a federally approved election in November 2003, the federal government recognized a council headed by Bear and stopped recognizing the Walker Council. *See Sac & Fox Tribe of Miss. in Iowa, Election Bd. v. Bureau of Indian Affairs*, 439 F.3d 832, 834 (8th Cir. 2006); *In re Sac & Fox Tribe of Miss. in Iowa*, Order Granting Petition To Reopen, at 2, NOV/CO-03-02 (NIGC Dec. 19, 2003), *available at* <http://tinyurl.com/ybxwmbj> [hereinafter "NIGC Reopening Order"]. In December 2003, NIGC lifted its order permanently closing the casino upon finding that the Tribe had finally complied with NIGC's unwavering command that the casino be controlled by the Tribe's "federally recognized leadership." NIGC Reopening Order, at 3-4. Finally in August 2005, nearly two years after the leadership dispute ended, the Tribe filed a lawsuit against API in tribal court, charging API with tribal-law conversion, trespass, and misappropriation of trade secrets, arising out of API's alleged actions in 2003 (App. 578-586).

From those facts, it follows for two separate and independent reasons that this Court should reverse the district court's dismissal of API's claim that the tribal-court lawsuit exceeds the federal limits on tribal authority over nonmembers. First, according to the Supreme Court's recent decision in *Plains Commerce Bank v. Long*, 128 S. Ct. 2709 (2008), the Tribe lacks civil regulatory jurisdiction to

apply its civil conversion, trespass, and misappropriation laws to API. Second, even if the Tribe had civil regulatory jurisdiction over API's alleged conduct, its courts exceeded their additionally limited civil adjudicative jurisdiction in violation of federal law: federal law dictates that the June 2003 Agreement is valid, and federal law requires the Tribe to arbitrate its claims, not litigate them in tribal court.

From those facts, it also follows for two separate and independent reasons that the district court erred as a matter of law in upholding the Tribe's sovereign immunity defense to API's contract claims. First, because the June 2003 Agreement is valid as a matter of federal law, the waiver of the Tribe's sovereign immunity within the Agreement is also valid as a matter of federal law. Second, because the district court's decision on tribal immunity was based entirely on deference to the tribal courts, if those courts lacked jurisdiction or exceeded what little they had, their rulings are void and not worthy of deference.

Federal law, in short, controls this case. The Tribe fundamentally errs in advocating otherwise. The district court's judgments contravene federal law and therefore must be reversed.

ARGUMENT

I. THE TRIBE HAS NOT CARRIED ITS BURDEN TO SHOW THAT IT CAN REGULATE THE ALLEGED CONDUCT OF API THAT IS TIED SPECIFICALLY TO ITS TRIBAL-COURT TORT CLAIMS.

The Tribe makes only two attempts to carry its burden under *Plains Commerce* of establishing that it can regulate API, a nonmember, through the tribal-law tort claims it filed in tribal court. First, the Tribe contends that it presumptively

can regulate API because API's alleged conduct occurred on tribal land (Tribe's Resp. Br. 43-45). Second, assuming it lacks that presumptive power, the Tribe contends that it nonetheless can exercise authority over API according to the second exception permitting tribal jurisdiction over nonmembers identified in *Montana v. United States*, 450 U.S. 544 (1980), because API's alleged conduct had "a direct effect on the Tribe's interests" (Tribe's Resp. Br. 48). Neither contention has merit.

A. The Tribe's Claimed Presumption Of Jurisdiction Over All Conduct Occurring On Tribal Land Is Directly Contrary To Settled Precedent.

Throughout this dispute, the Tribe has fixated on a conclusive link it supposes between tribal jurisdiction over a nonmember and the status of the land where the nonmember's conduct takes place. The Tribe may be right that in 1832 and 1959 — the years in which the two cases it cites were decided (Tribe's Resp. Br. 43-44) — Indian tribes had broad, even exclusive, authority over nonmembers on Indian land. "Nevertheless, beginning in 1978, the Supreme Court has substantially limited tribal power over nonmembers" and since "has imposed new limitations on the power of Indian tribes to exercise civil adjudicative authority over the conduct of nonmembers *in Indian country*." *Cohen's Handbook of Federal Indian Law* § 4.01[2][f], p. 220 & § 4.02[3][c][ii], p. 232 (2005) (emphasis added). So, when the Ninth Circuit in 1999 held that the "*Montana* presumption against tribal court jurisdiction" did not apply to nonmember activities taking place on Indian land, *State v. Hicks*, 196 F.3d 1020, 1028, the Supreme Court reversed, expressly spurning the presumption of jurisdiction the Tribe again and again calls upon. *See*

Nevada v. Hicks, 533 U.S. 353, 359-360 (2001); *see also id.* at 388 (O'Connor, J., concurring in part and concurring in the judgment) (“[T]he majority is quite right that *Montana* should govern our analysis of a tribe’s civil jurisdiction over nonmembers *both on and off tribal land.*” (emphasis added)). And barely two years ago, the Court reiterated that the “general rule restricts tribal authority over nonmember activities *taking place on the reservation*” and that “efforts by a tribe to regulate nonmembers, *especially on non-Indian fee land*, are ‘presumptively invalid.’” *Plains Commerce*, 128 S. Ct. at 2720 (emphases added). The Tribe offers nothing to diminish the modern rule: Indian tribes presumptively *cannot* regulate nonmembers, period.

B. The Tribe Has Not Satisfied The Second *Montana* Exception.

Federal law will let the Tribe apply its civil conversion, trespass, and misappropriation laws to API only if it satisfies either of the narrow exceptions to the prevailing presumption against tribal civil jurisdiction over nonmembers. On appeal, the Tribe pursues only the rarer, second *Montana* exception.² Because the Tribe and API agree on little more than that the second *Montana* exception is called the second *Montana* exception, a central issue in this case is how a court should decide whether a tribal-law claim filed against a nonmember in tribal court

² Believing that “API did not address the first *Montana* exception in its opening brief” (Tribe’s Resp. Br. 47), the Tribe abstains from invoking that exception, which lets an Indian tribe regulate a nonmember’s consensual relationships with the tribe or its members. *See Plains Commerce*, 128 S. Ct. at 2720. On two pages the Tribe overlooked, API in fact argued that the Tribe has not satisfied the first *Montana* exception (API’s Br. 28-29), as the district court below concluded (App. 791).

satisfies the exception. The Tribe has the worse of the argument.

Under both *Montana* exceptions, the first and most important step is to isolate the nonmember conduct to be regulated by particular tribal laws. The only pertinent conduct is that which is “tied specifically” to each tribal law brought to bear on the nonmember, *i.e.*, it is the conduct that the tribal laws “challenge[]” or “turn on.” *Plains Commerce*, 128 S. Ct. at 2720, 2725 & n. 2.³ In this case, the relevant alleged conduct is API’s receiving payment from Walker over many months (conversion), entering a closed casino (trespass), and taking and using information about the casino’s operation (trespass to chattels and misappropriation) (API’s Br. 17-18, 21-23). Without saying why, the Tribe rejects the first step and instead narrates a story about *all* of API’s alleged conduct, most of which ranges way beyond the conduct actually challenged by, and tied specifically to, its conversion, trespass, and misappropriation claims (Tribe’s Resp. Br. 50-51). Like the district court, the Tribe does not examine each of its tort claims separately but

³ Because a court must ignore conduct the tribal laws do not turn on, the analysis is like the familiar well-pleaded complaint rule (API’s Br. 13-14). The Tribe bristles at the analogy. Mistakenly assuming API would have to preserve the observation that its main argument is similar to another legal doctrine, the Tribe accuses API of not raising it below (Tribe’s Resp. Br. 52). That accusation is false. *See App.* 759. Then, the Tribe mischaracterizes API’s position as an “attempt to federalize tribal pleading practice, federalize the procedures a tribal court is required to follow when deciding motions to dismiss, or federalize the elements of claims of intentional torts against the Tribe” (Tribe’s Resp. Br. 53). The point is not that federal law dictates tribal civil procedure and lawmaking; it is that federal law requires that, before a nonmember can be held to account for violating a tribal law, a court must examine the conduct challenged by and tied specifically to that tribal law to see if it one of the limited *Montana* exceptions is satisfied.

embraces the view that it can apply any of its laws to a nonmember as long as it can prove that some link in the nonmember's chain of conduct triggers a *Montana* exception. The Supreme Court has decisively rejected that "in for a penny, in for a Pound" view. *Plains Commerce*, 128 S. Ct. at 2724.

After locating the conduct tied specifically to a particular tribal law, the court next must determine whether the conduct *typically* or *generally*⁴ "imperils the subsistence or welfare of the tribe," *i.e.*, whether it is "catastrophic" for "the political integrity, the economic security, or the health or welfare of the tribe." *Plains Commerce*, 128 S. Ct. at 2726-2727. The Tribe chafes under that formulation of the second *Montana* exception, clinging instead to the dated, original formulation despite the Supreme Court's warning that it is vague, "can be misperceived," and therefore should be read in light of the four decisions the Court cited when articulating it in *Montana*, all of which dealt with interests unique to Indian tribes. *See Strate v. A-1 Contractors*, 520 U.S. 438, 457-459 (1997). The

⁴ As API discussed in its Opening Brief (API's Br. 14-17), the Supreme Court has shown by example that this step is categorical, *i.e.*, that a court must consider the relevant conduct generically and not on the facts of the particular case. *See Plains Commerce*, 128 S. Ct. at 2724-2726. In part, the categorical approach stems from the fact that the *Montana* exceptions govern the exercise of both tribal *legislative* and tribal *adjudicative* jurisdiction over nonmembers: if a tribal legislature, for instance, cannot generally forbid nonmembers to misappropriate trade secrets, a tribal court cannot adjudicate a claim that a particular nonmember misappropriated particular trade secrets even if he allegedly took them from a business owned by the tribe. *See Plains Commerce*, 128 S. Ct. at 2720 (reaffirming the principle that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction" and holding that a tribal court lacked jurisdiction to hear a tribal-law claim against a nonmember because the tribe generally lacked the civil authority to regulate that type of nonmember conduct challenged by the claim).

Tribe also rejects the catastrophe standard as dictum (Tribe's Resp. Br. 50), though it plainly is not. *See Plains Commerce*, 128 S. Ct. at 2726; *see also* App. 787 (District Court Op. 17). The question, therefore, is not whether certain nonmember conduct merely "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe"; the question is, if a tribe could not regulate the nonmember conduct, would it cease to be a tribe? Quite plainly, if a tribe could not regulate membership, inheritance, and adoption, it would lose its distinction as a tribe. But conversion, trespass, and misappropriation protect nothing that makes Indian tribes unique.⁵

Failing to show how the nonmember conduct tied specifically to its tort claims meets the second *Montana* exception, the Tribe asserts that "when the action occurs on the Tribe's own land, the conduct has a direct effect on the Tribe's interests," such that the second *Montana* exception will always be satisfied by nonmember conduct occurring on tribal land (Tribe's Resp. Br. 47-48). But if all nonmember conduct on tribal land satisfied the second *Montana* exception, the exception would effectively become a presumption in favor of tribal jurisdiction over nonmembers on tribal land — the very presumption the Supreme Court has denounced. The *Montana* exceptions are not to be "construed in a manner that would swallow the rule [of no tribal jurisdiction] or severely shrink it." *Plains*

⁵ Even on the Tribe's case-specific approach to the *Montana* exceptions, the Tribe has utterly failed to answer API's contention that its alleged conduct did not catastrophically (or even directly) threaten the Tribe's protected interests because Walker *first* took the funds API is accused of converting and because NIGC *first* evicted the Tribe from the casino API is accused of trespassing (API's Br. 26-27).

Commerce, 128 S. Ct. at 2720.

In sum, attempting to carry its burden of showing that federal law authorizes its tribal-law suit against API, the Tribe offers only arguments that are contrary to prevailing law. Under the second *Montana* exception, Indian tribes have no civil legislative or adjudicative jurisdiction to apply their commonplace conversion, trespass, and misappropriation laws to nonmembers. So the Tribe here may not continue to press its tort claims against API in the tribal courts. The district court's decision dismissing API's declaratory judgment claim and sustaining the tribal court's jurisdiction therefore must be reversed. And API's other claims against the Tribe must be reinstated because the district court erred by deferring to the tribal court's holding, void for want of jurisdiction, that the Tribe has immunity to API's other claims. In fact, as API argues in its independent argument about Walker's authority, the Tribe has waived its immunity as a matter of federal law.

II. BECAUSE OF WALKER'S FEDERAL RECOGNITION, THE JUNE 2003 AGREEMENT IS VALID AS A MATTER OF FEDERAL LAW.

However this Court resolves the question of the second *Montana* exception, the tribal courts exceeded the bounds of any adjudicative jurisdiction they could possibly have had because, as a matter of federal law, Walker had authority to make the June 2003 Agreement and bind the Tribe to arbitrate disputes arising out of it.

During the Tribe's intra-tribal governmental dispute of 2003 and up until the federally approved election in November 2003, the federal agencies charged with managing Indian affairs repeatedly recognized *only* the Walker Council and expressly ruled that Walker *alone* had authority to run the Tribe's casino. The

central question posed by the Walker Council's federal recognition is whether it gave Walker federal authority to act on the Tribe's behalf in federally regulated domains.⁶ In fact, because the Tribe agrees that federal recognition at least gave Walker federal authority to act for the Tribe for "federal agency purposes" (Tribe's Resp. Br. 36-37), the question may be better framed as whether "federal agency purposes" included Walker's dealings with nonmembers participating in the Tribe's federal activities, like the operation of the Tribe's casino. As a matter of federal law, the answer to either question is "yes" (API's Br. 31-41). And also as a matter of federal law, it follows that the June 2003 Agreement is valid; that the Agreement's waiver of the Tribe's sovereign immunity is valid; and that the tribal courts, in proceeding to the merits of the Tribe's tort claims despite the Agreement's mandatory arbitration provision, exceeded their adjudicative jurisdiction over API.

A. The Tribe Cannot Avoid The Consequences Of Walker's Federal Recognition.

The Tribe's two principal responses to API's argument are evasive and erroneous. First, noting that API asked the tribal courts to affirm the contract

⁶ API has not argued, as the Tribe asserts, that federal recognition vests an individual or body with "all powers of tribal government" (Tribe's Resp. Br. 34) or that federal recognition generally determines "who has the authority to take governmental actions on behalf of the Tribe" (Tribe's Resp. Br. 42). The question thus is *not* "whether Walker was the legitimate leader of the Tribe when he signed" the June 2003 Agreement (Tribe's Resp. Br. 30); it is whether Walker, even if not the "legitimate leader" under tribal law, nonetheless had federal authority to bind the Tribe in matters of federal concern because of his federal recognition.

under federal law (and, alternatively, under tribal law), the Tribe contends that this Court must defer to the tribal courts and thus cannot even address API's argument that Walker's federal authority made the Agreement binding on the Tribe as a matter of federal law (Tribe's Resp. Br. 22-26). The Tribe overstates the amount of deference the tribal courts are owed on their determinations of federal law. This Court's precedents are clear: "when the tribal court applies federal law," its "determinations are accorded no deference and are reviewed by the district court *de novo*." *Prescott v. Little Six, Inc.*, 387 F.3d 753, 757 (8th Cir. 2004); *see Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994) ("The Tribal Court's determinations of federal law should be reviewed *de novo*."). This Court therefore can consider API's federal questions.⁷

The Tribe's second dodge is even more baseless. The Tribe contends that the consequences of federal recognition do not matter in this case because its tribal courts have ruled that, from the beginning, the federal government, BIA, and

⁷ The logical conclusion of the Tribe's position on deference exposes its absurdity. In the Tribe's view, "federal courts may not readjudicate questions — whether of federal, state, or tribal law — already resolved in tribal court absent a finding that the tribal court lacked jurisdiction" (Tribe's Resp. Br. 25 (quoting *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002))). Since, according to the Tribe, a tribal court "has jurisdiction to determine its own jurisdiction" (Tribe's Resp. Br. 26 (quoting *United States v. United Mine Workers of Am.*, 330 U.S. 258, 291 (1947)), the Tribe concludes that federal courts must defer to a tribal court on all issues that came up when it decided whether its jurisdiction over a nonmember is consistent with federal law. Were that so, federal courts could not even review a tribal court's application of the *Montana* exceptions. The fallacy at the center of the Tribe's argument is an equation of *civil* jurisdiction (a federal-law question) with *subject-matter* jurisdiction (a tribal-law question).

NIGC were wrong to recognize the Walker Council during the 2003 intra-tribal governmental dispute. In the Tribe's own words: "the appropriate tribal forum has now resolved the 2003 leadership question and determined that Walker was removed from office in March 2003 and in a valid, constitutional election held on May 22, 2003, the Bear Council was elected. *To the extent [BIA] made any interim determination to the contrary, its predictions are outdated and wrong, and certainly are not binding*" (Tribe's Resp. Br. 39 (emphasis added)). Yes, the federal government *should* recognize and deal with a tribe's lawful governing body (API's Br. 32). And yes, interim recognition *should* be changed, if necessary, after an intra-tribal dispute ends. *See Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983). But there is only one permissible route for challenging federal recognition — federal administrative review. *See In re Meskwaki Casino Litigation*, 340 F.3d at 753, 755-758. However the federal government *should* decide whom to recognize, only the federal government can make the decision.⁸ Tribal courts do not sit in judgment of the federal government and its agencies and cannot, years later, rewrite history to erase a federal recognition decision they disagree with. By itself, tribal-court resolution of a leadership dispute has effect only under tribal law.

Rightly or wrongly, all arms of the federal government recognized the Walker Council in June 2003, when API entered into the June 2003 Agreement.

⁸ It escapes the Tribe that all of the Interior Board of Indian Appeals decisions it favorably cites (Tribe's Resp. Br. 35-39) were made during federal administrative review, in many of which the Board reversed the agency's initial recognition.

The time for challenging Walker's federal recognition has long since lapsed. The question remains whether, in June 2003, that federal recognition vested Walker with a limited federal authority to bind the Tribe in matters related to its federal affairs and federally regulated activities, including overseeing casino operations.

The cases the Tribe cites as answering that question are inapt. This Court's earlier decision regarding the Sac & Fox leadership dispute did not hold that Walker's authority is "solely a matter of tribal law" (Tribe's Resp. Br. 31-32); rather, it held only that federal courts could not decide who was the Tribe's leader *under tribal law*. See *In re Meskwaki Casino Litigation*, 340 F.3d at 763-764. Neither did *Prescott v. Little Six* hold that tribal law controls the validity of all of a tribe's contracts (Tribe's Resp. Br. 14-15); *Prescott* more limitedly held only that ERISA does not control the validity of a tribe's employee benefits contracts. See 387 F.3d at 757-758. API's position is that a different body of federal law (federal Indian law) informs the validity of a different type of contract (contracts made for a tribe's federal services or federally regulated activities, such as contracts related to casino operation). Despite the Tribe's assertions, this Court has not decided whether federal law controls the validity of contracts made by a federally recognized entity acting within federal domains. See *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1420-1421 (8th Cir. 1996) (leaving open the question "whether the validity of [a casino] management contract can be affected by an interpretation of Tribal law").

B. Federal Recognition Gave The Walker Council Authority To Bind The Tribe To Contracts Related To, And Providing Needed Services For, Operating The Casino.

As API has demonstrated at length, federal recognition of a tribal entity would be rendered meaningless if the entity did not thereby gain federal authority to bind its tribe to agreements related to federal matters (API's Br. 32-34, 35-36, 39-40). Repeating a significant concession it has made throughout this case (*e.g.*, App. 703 (Tribe's SJ Br. 30)), the Tribe tries to confine the strength of that logic by arguing that federal recognition gives authority only for "limited federal agency purposes" (Tribe's Resp. Br. 36). That completely begs the question. "Federal agency purposes" include a tribe's dealings with third parties providing federal services and participating in federally regulated areas where third parties are essential, like casino operation (API's Br. 32-36, 39-40). Notably, the Interior Board of Indian Appeals concurs with API: "BIA step[s] in and issue[s] a decision only when the situation deteriorate[s] to the point that recognition of some government [is] essential for Federal purposes, such as maintaining the government-to-government relationship with the tribe *or operating [Indian Self-Determination Act] grants or contracts.*" *Administrative Appeal of Darrell Wadena, et al. v. Acting Minneapolis Area Director, Bureau of Indian Affairs*, 30 IBIA 130, 145 (Dec. 11, 1996) (emphasis added), *available at* 1996 WL 769760.²

² The Tribe's suggestion that a tribal entity may need to be both federally recognized and its tribe's "true" governing body under tribal law before it can bind its tribe to contracts (Tribe's Resp. Br. 33-34, 41-42) is incompatible with the Tribe's concession that federal recognition *by itself* gives a recognized entity authority for federal purposes. A tribal entity that is not its tribe's governing
(footnote continued on next page)

And so does NIGC: “The Commission is committed to the principle that *tribal gaming under the Indian Gaming Regulatory Act must be conducted by federally recognized leadership*.” NIGC Reopening Order, at 3 (emphasis added); see NIGC Permanent Closure Order, at 15 (for Indian gaming, the Secretary of the Interior is “the authority to determine who acts on behalf of the recognized tribe” (internal quotation marks omitted)).

Relying on *Goodface v. Grassrope*, the Tribe contends that the “federal agency purposes” for which, it concedes, Walker had authority include only the federal government’s own dealings with, and provision of services to, a tribe (Tribe’s Resp. Br. 36-37). As the Tribe parses *Goodface*, NIGC’s affirmation of Walker’s exclusive authority over the Tribe’s casino allowed him to run the casino only for, and enter into casino-related services contracts only with, federal officials. That distorts *Goodface*. *Goodface* held that ensuring the “continuation of necessary day-to-day services” to a tribe is the reason why BIA must recognize a council. See *Goodface*, 708 F.2d at 338-339. Compare *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942) (because of its duty to protect tribes, the government must recognize a council as acting for a tribe). *Goodface* does not say that the services a tribe may get after a council is recognized are provided by the federal government exclusively, nor does it attempt to list all the “federal

council under tribal law may have federal authority to bind its tribe in federal domains because of federal recognition. See, e.g., *Ramah Navajo Sch. Bd. v. Bureau of Rev. of NM*, 458 U.S. 832, 834-835, 839-843 (1982) (a nonprofit corporation was the “tribal organization” BIA recognized to build a tribal school).

agency purposes” for which federal recognition matters.

The June 2003 Agreement was made to provide the Tribe with federally required services (API’s Br. 35-36). Through the Agreement, Walker arranged for API to provide the Tribe with federally required security and investigative services for its casino (App. 570-571). Walker made the Agreement for federal purposes — operating the casino. Federal officials and agencies in 2003 repeatedly recognized the Walker Council and specifically ruled that Walker alone could operate the Tribe’s federally regulated casino. *See, e.g.*, NIGC Permanent Closure Order, at 15 (“We find that the Walker Council is the group that can lawfully act on behalf of the Tribe and correct the cases for closure . . .”). The Agreement, therefore, is valid and binding on the Tribe as a matter of federal law. Tribal courts cannot invoke tribal law or Walker’s status under tribal law to deem it invalid.

C. Because The June 2003 Agreement Is Valid, The Tribe Has Waived Its Immunity And The Tribal Courts Exceeded Their Adjudicative Jurisdiction By Hearing The Tribe’s Tort Claims.

Because the Agreement is valid and binding on the Tribe as a matter of federal law, the Agreement’s term mandating arbitration of all “disputes that may arise out of” the Agreement (App. 574) is also valid and binding as a matter of federal law.¹⁰ Two conclusions follow. First, because an arbitration agreement

¹⁰ The Tribe argues that the Agreement’s “forum selection clause” is not mandatory (Tribe’s Resp. Br. 28-29). What the Tribe quotes as the pertinent “forum selection clause” is merely the term in the Agreement permitting the parties to resort to federal or state court to decide whether a dispute “arise[s] under” the Agreement (Tribe’s Resp. Br. 29). The actual arbitration provision in the

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waives tribal sovereign immunity, *see C & L Enters. Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 423 (2001), the district court's ruling that the Tribe's immunity bars API's federal-court contract claims must be reversed. Second, because substantive federal arbitration law requires that *all* courts adhere to mandatory arbitration provisions in contracts affecting commerce, *see Southland Corp. v. Keating*, 465 U.S. 1, 10-17 (1984), *Wisconsin v. Ho-Chunk Nation*, 478 F. Supp. 2d 1093, 1100-1101 (W.D. Wis. 2006), the tribal courts have exceeded their especially limited civil adjudicative jurisdiction by proceeding to the merits of the Tribe's tort claims. Accordingly, even if the Tribe had carried its burden under *Montana* and *Plains Commerce* to show that it could apply its civil tort laws to API, API still should prevail on its claim that the tribal-court action cannot proceed.

CONCLUSION

API is entitled to summary judgment on its claim that the tribal-court proceedings violate federal law because the Tribe has not shown that it can regulate the alleged conduct of API at issue in its tort claims and because the Tribe must arbitrate its claims in any event. Additionally, either this Court should reject the Tribe's sovereign immunity defenses to API's other claims as a matter of law or, in the alternative, this case should be remanded for the district court to consider the defenses without deferring to the rulings unlawfully issued by the tribal courts.

Agreement is mandatory — disputes that “arise out of” the Agreement “*shall be submitted to arbitration*” (App. 574 (emphasis added)).

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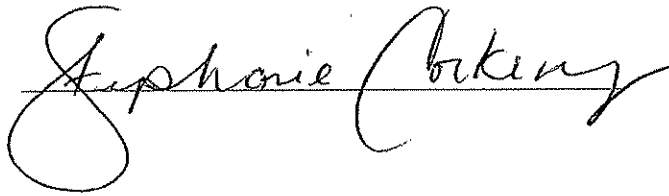
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