

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

| | | |
|------------------------|---|--------------------------|
| DAWN BLOCK |) | 16-CV-1054 |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | MOTION TO DISMISS |
| |) | |
| DAKOTA NATION GAMING |) | |
| COMMISSION AND DAKOTA |) | |
| SIOUX CASINO AND HOTEL |) | |
| |) | |
| Defendants. |) | |
| |) | |

COMES NOW Defendants Dakota Nation Gaming Commission and Dakota Sioux Casino and Hotel, who move to dismiss the Plaintiff’s Complaints for lack of jurisdiction. Dakota Nation Gaming Commission and Dakota Sioux Casino and Hotel files this Motion pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The attached Memorandum of Law provides the justification for the Dakota Nation Gaming Commission and Dakota Sioux Casino and Hotel’s motion to dismiss.

Respectfully submitted,

SISSETON-WAHPETON OYATE LEGAL
DEPARTMENT

Dated: February 2, 2017

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ATTORNEY FOR THE SISSETON-WAHPETON
OYATE OF THE LAKE TRAVERSE
RESERVATION

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

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| |) | |
| DAWN BLOCK |) | 16-CV-1054 |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | DEFENDANTS’ |
| |) | MEMORANDUM IN |
| |) | SUPPORT OF MOTION |
| |) | TO DISMISS |
| DAKOTA NATION GAMING |) | |
| COMMISSION AND DAKOTA |) | |
| SIOUX CASINO AND HOTEL |) | |
| |) | |
| Defendants. |) | |
| |) | |

Defendants Sisseton-Wahpeton Oyate Gaming Commission, an arm and agency of the Sisseton-Wahpeton Oyate tribal government regulating and monitoring gaming on behalf of the tribal government¹ and Dakota Sioux Casino and Hotel, a gaming operation wholly owned and operated by the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, a sovereign nation and federally recognized Indian tribe, (together, the “Defendants” or the “Tribe”) file this motion to dismiss the claims brought against them by Plaintiff Dawn Block. The Defendants now move the Court to dismiss the action against them under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction and under Federal Rule of Civil Procedure 12(b)(6), Plaintiff has failed to state a claim upon which relief may be granted and Plaintiff has failed to exhaust her tribal court remedies.

¹ The tribal gaming commission is known as the Sisseton-Wahpeton Oyate Gaming Commission and not Dakota Nation Gaming Commission.

² Dakota, Minnesota & Eastern R.R. Corp. v. Schriffer, 715 F. 3d 712 (8th Cir. 2013),

BURDEN OF PROOF

“As federal courts are courts of limited jurisdiction, it is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.”² “It is well settled that the plaintiff bears the burden of establishing subject matter jurisdiction.”³ The Eighth Circuit Court of Appeals has held that “tribal sovereign immunity is a threshold jurisdictional question.”⁴ “On a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists.”⁵

STATEMENT OF FACTS

Ms. Block’s general factual allegations are difficult to understand. Ms. Block appears to claim that information she voluntarily provided to the Tribe was then provided to individuals for the purpose of defamation and to obtain credit in her name. Ms. Block claims that this Court has jurisdiction under the Privacy Act of 1974 with no mention of the Indian Gaming Regulatory Act (“IGRA”) or tribal law and policy regulating gaming. Furthermore the Tribe is immune from suit, and it has not waived its immunity. Finally, Ms. Block does not allege the Tribe has waived sovereign immunity in this Court as to her or her Complaint.

² Dakota, Minnesota & Eastern R.R. Corp. v. Schriffner, 715 F. 3d 712 (8th Cir. 2013), quoting Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994).

³ Nucor Corp v. Nebraska Public Power Dist., 891 F.2d 1343, 1346 (8th Cir. 1989).

⁴ Amerind Risk Management Corp. v. Malaterre, 633 F.3d 680, 684 (8th Cir. 2011), citing Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1044 (8th Cir. 2000).

⁵ Garcia v. Akwesasne Housing Authority, 268 F.3d 76, 84 (2nd Cir. 2001); Chayoon v. Chao, 355 F.3d 141, 143 (2nd Cir. 2004).

LEGAL ANALYSIS

Ms. Block's Complaint is a confusion of allegations that are difficult to understand and ultimately present more conclusory statements rather than factual allegations.⁶ In an attempt to sort through Block's claims the Defendants state as follows:

1. The Tribe and its Entities are Immune from Suit.

The Court must dismiss Ms. Block's Complaint for lack of jurisdiction, as the Tribe is immune from suit. Neither Congress, nor the Tribe, has waived immunity in this matter. Without a waiver of immunity "[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."⁷ The U.S. Supreme Court recently upheld that tribes enjoy immunity from suit even if the tribe's activities involve off reservation commercial activity.⁸ The recent decision of the U.S. Supreme Court follows a long and established legal precedence of tribal sovereign immunity, not only for activities of tribes on tribal lands but also for activities off tribal lands.

In this case, the Dakota Sioux Casino & Hotel is located on tribal land. The Dakota Sioux Casino & Hotel is owned and operated by the Tribe. The named tribal entities, the Defendants, were created for the purpose of conducting and regulating tribal gaming where funding is then used for and by the tribal government. Under the Indian Gaming Regulatory Act ("IGRA"), "tribal gaming is a means of promoting tribal

⁶ Conclusory statements are not entitled to a presumption of trust because this Court is not bound to accept as true a legal conclusion couched as a factual allegation when considering a motion to dismiss. See Papasan v. Allain, 478 U.S. 265, 286 (1986).

⁷ Oklahoma Tax Comm. V. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 48 (1978).

⁸ Michigan v. Bay Mills Indian Community, 134 U.S. 2024 (2014).

economic development, self-sufficiency and strong tribal governments.”⁹ Defendants are instrumentalities of tribal government. The IGRA requires the Tribe to have the sole proprietary interest and responsibility for the conduct of gaming activity.¹⁰

In its Amended Gaming Compact, the Tribe and the State of South Dakota acknowledged that “[a]ny discrepancies in the gaming operation any violation of the Tribal Gaming Commission regulations and rules of this Compact shall be immediately reported to the Tribal Gaming Commission and the South Dakota Commission on Gaming for appropriate action by the Tribal Gaming Commission pursuant to the terms of this Compact.”¹¹ Ms. Block attempts to circumvent the laws and regulations set forth for gaming and bring this case directly to Federal Court under the Privacy Act of 1974.

Block does not even allege the Tribe has waived its immunity nor has she pointed to any basis that the Tribe has waived immunity, which is fatal to her claim. “Indian tribes enjoy immunity because they are sovereigns predating the Constitution, and because immunity is thought necessary to promote the federal policies of tribal self-determination, economic development and cultural autonomy.”¹² Ms. Block provides no showing that the Tribe or its entities waived immunity as to Ms. Block and therefore her Complaint should be dismissed.

⁹ 25 U.S.C. § 2702.

¹⁰ 25 U.S.C. § 2710(a)(2)(A).

¹¹ Amended Gaming Compact, 4.3.

<http://www.sdtribalrelations.com/Documents/SWOAmendedGamingCompact.pdf#SWO%20Compact>. Last Visited on February 1, 2017.

¹² American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985). See also Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040, 1044 (8th Cir. 2000). Court found Tribe that “[s]overeign immunity is a jurisdictional prerequisite which may be asserted at any stage of the proceedings.”

2. Ms. Block's complaint fails to state a claim under the Privacy Act of 1974

Ms. Block's Complaint alleges her gaming records were disclosed without her consent and that upon request to Dakota Sioux Casino and Hotel she was not provided with names of individuals to whom such disclosure was allegedly made. Ms. Block does not sufficiently show her claim warrants relief under the Privacy Act of 1974, nor does Block provide any information that leads to wrongdoing of the Tribe. Ms. Block does not show her cause of action would be for injunctive relief under (g)(1)(A) or (g)(1)(B) or whether she is claiming damages under (g)(1)(C) or (g)(1)(D) of the Privacy Act of 1974.

If Ms. Block were seeking damages she would need to prove that "(1) the information in questions is a "record" contained within "a system of records; (2) the agency improperly "disclosed" the information; (3) an adverse impact resulted from the disclosure; and (4) the agency's disclosure was willful or intentional. . . If these elements are shown, a plaintiff may recover monetary damages by further establishing that "actual damages" were sustained as a result of the agency's Privacy Act of 1974 violation."¹³ Ms. Block's Complaint does not meet these elements, additionally she would struggle with showing Defendant's or the Tribe are "agencies" within the meaning of the Privacy Act of 1974. It is also unclear what remedy Ms. Block is seeking from her Complaint.

As stated by the National Indian Gaming Commission ("NIGC"), [t]he Privacy Act of 1974 provides safeguards against unwarranted invasions of privacy through the misuse of record by *Federal* agencies ...".¹⁴ The Tribe is not a federal agency.¹⁵ Ms.

¹³ Barry v. United States DOJ, 63 F. Supp. 2d 25, 27 (D.D.C. 1999).

¹⁴ <https://www.nigc.gov/utility/freedom-of-information-act>. Last visited on February 2, 2017.

¹⁵ "In order to prevail, this Court has discussed the split among the circuits regarding whether section 7 allows a private cause of action against state agencies" Peters v.

Block does not show “[t]he conduct of federal employees in using and disclosing confidential information on citizens is governed by the Privacy Act of 1974 . . . [t]hat statute, which applies only to agencies of the United States and employees thereof, provides for a private cause of action and grants jurisdiction to the federal district courts with no minimum jurisdiction amount requirement.”¹⁶ In her Complaint, Ms. Block acknowledges Dakota Sioux Casino & Hotel is owned by Dakota Nation Gaming Enterprises and nowhere alleges that Defendants are federal agencies.¹⁷ Under these circumstances, Ms. Block has failed to state a claim under the Privacy Act of 1974.

3. Ms. Block Failed to Exhaust Tribal Remedies.

Ms. Block fails to show how the Privacy Act of 1974 would be a mechanism for relief, however a breach of internal control, if any, would be governed by gaming laws and regulation. The Complaint does not describe the type of contact with Dakota Sioux Casino & Hotel, whether it was formal or informal or whether her “copies” are tied to the Defendants. In fact Ms. Block did not make a formal complaint to Defendant Gaming Commission, which would be one of her tribal remedies. “Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to

Fenesis, 2009 U.S. Dist. LEXIS 116480 (D. Minn. Dec. 14, 2009). The Court in Fenesis, found that named defendants in the Minnesota Department of Corrections was not a federal agency and therefore failed to state a claim under the federal Privacy Act. While Fenesis deals with a state Department, the same analysis could be used in Ms. Block’s claim. While Ms. Block does not make any allegation under section 7, the analysis can be used for the Dakota Sioux Casino and Hotel and Gaming Commission, which neither are federal agencies.

¹⁶ Morris v. Danna, 411 F. Supp. 1300 (D. Minn. 1976).

¹⁷ Defendant Gaming Commission and Dakota Nation Gaming Enterprise are two separate entities. Both are arms of the Sisseton-Wahpeton Oyate. Dakota Nation Gaming Enterprise was established by the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation and includes three casino properties, which includes Dakota Sioux Casino and Hotel.

stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction.”¹⁸ Ms. Block has provided no evidence that an exception exists in her requirement to exhaust the tribal remedies available to her.

Every aspect of Ms. Block’s Complaint lends itself to the jurisdiction of the Tribe. Her claim involves a member of an Indian Tribe, instrumentalities of tribal government, and alleged activities on tribal lands. The examination of tribal sovereignty and jurisdiction should be conducted in the first instance by the tribal court itself.¹⁹ While this Court must dismiss the federal action, Ms. Block may seek relief pursuant to her tribal remedies. In the event Block has a proper claim against the Defendant’s, such claim should be commenced in the first instance in accordance with Tribal law.

Conclusion

For the foregoing reasons, the Court must dismiss Block’s Complaint for lack of jurisdiction and for failure to state a claim upon which relief may be granted.

Respectfully submitted,

SISSETON-WAHPETON OYATE LEGAL
DEPARTMENT

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¹⁸ Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987).

¹⁹ Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation, 27 F.3d 1294, 1299 (8th Cir. 1994) (citing National Farmers, 271 U.S. at 856).

