



1 4. Shortly after his fall, the Plaintiff filed a worker's compensation claim the Defendant  
2 5. and began receiving payments and medical treatment while his worker's compensation  
3 claim was being investigated.

4 6. On or about March 2016, the Defendant denied Plaintiff's worker's compensation  
5 claim. Claiming Plaintiff had suffered a previous injury and refusing to accept any medical evidence  
6 from his treating physicians to the contrary. The Plaintiff had thirty days to challenge that decision.

7 7. During the thirty day appeal window, the Defendant's claims adjuster contacted the  
8 Plaintiff multiple times and threatened and harassed Plaintiff regarding his claim.

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10 8. In particular, the claims adjuster told the Plaintiff that he would face jail time if the  
11 Plaintiff appealed the worker's compensation decision.

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13 9. Plaintiff discussed this issue with Defendant's Human Resource Department who  
14 informed him that he should drop his claim to avoid jail time and file for state disability, and that the  
15 Defendant would contest any unemployment benefits.

16 10. Plaintiff asked what his next steps would be and was informed by the HR department  
17 at Barona that he should seek medical treatment and could return to work once he recovered.

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19 11. From Mach 2016 to September 2016 the Plaintiff continued to seek treatment at his  
20 own expense in the hopes of returning to his job.

21 12. On September 15, 2016, Defendant terminated the Plaintiff for being on medical  
22 leave.

23 13. At no time was the Plaintiff offered any alternative position or any means of coming back  
24 until his knee was fully healed.

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26 14. The Defendant never produced any evidence documentary or otherwise to substantiate its  
27 claim that it *had* indeed offered such a position.

1           15. On or about February, 2017, Plaintiff then filed an initial set of claims with the Tribal  
2 Court, alleging claims of including worker’s compensation retaliation, negligence, and  
3 wrongful termination.

4           16. On April 21, 2017, the Tribal Court dismissed all three claims in a written  
5 order. In particular, the Tribal Court ruled on the evidence in a demurrer saying the Plaintiff’s injury  
6 was not serious, and not incurred while working, despite no medical evidence being in issue in the  
7 demurrer and none being submitted.

8           17. On or about May 2017, Defendant’s attorney replied that the Tribal Court had no  
9 internal procedures for appeal, and thereby dismissed the Plaintiff’s appeal.

10           18. After receiving Defendant’s attorney’s response Plaintiff submitted two new claims  
11 challenging the due process of the Tribe’s internal procedures, and challenging the due process of the  
12 Tribe’s judicial procedures. The claims requested injunctive relief and/or money damages.

13           19. On or about June 2017, the Tribe argued it had not waived its sovereign immunity for  
14 due process claims and had no forum to hear these claims.

15           20. On or about July 2017, Plaintiff submitted a third set of claims alleging the same due  
16 process violations and citing case law indicating that the ICRA had waived the Tribe’s sovereign  
17 immunity for ICRA claims in Tribal Court.

18           21. On July 21, 2017 the Defendant responded again that it had no forum for due process  
19 challenge, and that it still had not waived its sovereign immunity.

20           22. Once the Plaintiff received confirmation that the Tribe had no venue for redress of  
21 Plaintiff’s grievances, this suit was filed.

22           23. The suit requested both money and injunctive relief.  
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1 **III. STATEMENT OF LAW**

2 **a) Indian Sovereignty Generally**

3 In general, Indian tribes enjoy inherent sovereignty except where it has been taken away from  
4 them by treaty or Congress. *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975).  
5 “Congress has plenary authority to limit, modify or eliminate the powers of local self-government  
6 which the tribes otherwise possess.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670,  
7 1676, 56 L. Ed. 2d 106 (1978)

8 In the absence of Congressional statute, Tribes enjoy immunity from suit for those matters  
9 that are considered intramural to Tribal Sovereignty, the most common example being limits on  
10 Tribal Membership. *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005).

11 In recent years, the Federal Court has necessarily recognized that many laws of general  
12 applicability are in fact enforceable against Indian Tribes even without a specific waiver of sovereign  
13 immunity based on Congress’s plenary authority over Indian Tribes. *Donovan v. Coeur d’Alene*  
14 *Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) The enforcement of these laws require an  
15 exhaustion of Tribal Remedies prior to moving into other forums. *Nat’l Farmers Union Ins.*  
16 *Companies v. Crow Tribe of Indians*, 471 U.S. 845, 857, 105 S. Ct. 2447, 2454, 85 L. Ed. 2d 818  
17 (1985) (referring to criminal matters and the general exhaustion requirement).

18 In *Donovan*, the Court specifically stated that, “we have not adopted the proposition that  
19 Indian tribes are subject only to those laws of the United States expressly made applicable to them.”  
20 *Donovan* at 1116. The Court then ruled that OSHA was applicable against Indian Tribes.

21 **b) ICRA**

22 The Indian Civil Rights Act is an express act of Congress applying those constitutional  
23 protections to people under the jurisdiction of the Tribe. Congress sought in crafting the Indian Civil  
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1 Rights Act to protect those citizens under the authority of the Tribe and likewise support Tribal  
2 Sovereignty.

3         The Indian Civil Rights Act provides that a Tribe shall not “deny to any person within its  
4 jurisdiction the equal protection of its laws or deprive any person of liberty or property without due  
5 process of law.” 25 U.S.C.A. § 1302 (West)”. This statute is interpreted to serve as a limited waiver  
6 of Tribal Sovereignty. This waiver is complete in Tribal Court, the question remains whether it can  
7 be upheld in Federal Court as well. Federal Courts have extended this waiver to apply to habeas  
8 corpus actions because the statute specifically provides this as a remedy.  
9

10         Cases analyzing the Indian Civil Rights Act have been anything but consistent or clear. The  
11 record is likewise sparse of cases when a Tribe has intentionally attempted to abrogate a Plaintiff’s  
12 rights by refusing to establish a forum. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65, 98 S. Ct.  
13 1670, 1680, 56 L. Ed. 2d 106 (1978), The Court analyzed whether there is an express waiver of  
14 immunity in the statute as the first grounds of bringing the case to Federal Court. The court then  
15 ruled against the Plaintiff noting in passing that provided Tribal Remedies are sufficient. *Id.*  
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17         Striking a different path yet again the Court in *Barker v. Menominee Nation Casino*, 897 F.  
18 Supp. 389, 395 (E.D. Wis. 1995) found that Tribal Courts, independent of Tribes and casinos can be  
19 sued for violations of ICRA. *Id.*  
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21         The Court then moved back towards its original holding that “ICRA only provides a basis for  
22 an individual to bring a habeas corpus civil claim.” *Pink v. Modoc Indian Health Project, Inc.*, 157  
23 F.3d 1185, 1189 (9th Cir. 1998). However, in so doing it cited *Santa Clara Pueblo* which held that  
24 Tribal Remedies provided are effective. Once again, the Court did not analyze or decide what  
25 happens when a Tribe refuses to establish a forum for ICRA claims contrary to the purpose of the  
26 statute.  
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1 In *Demontiney v. U.S. ex rel. Dep't of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 814  
2 (9th Cir. 2001), the Court blanket stated that Tribal Remedies being insufficient was grounds to allow  
3 suit. In ruling against the Plaintiff, however, the Court made particular note of the fact that the due  
4 process claim was never litigated in Tribal Court and raised on appeal for the first time.

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6 The Court has never been presented with a case where the Tribe claims that the Court, Casino,  
7 and Tribe are all indivisible merely to eviscerate the rights of Plaintiffs. The Court has likewise never  
8 been faced with a fact pattern where a Tribe deliberately fails to provide a venue for ICRA claims  
9 merely to frustrate the statute, as it is contended here.

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11 **IV. LEGAL ARGUMENT**

12 **a) Plaintiff's Claim is an Original Due Process Claim and Litigated to its conclusion in**  
13 **Tribal Court**

14 The Plaintiff's original claim that gives rise to this action is an ICRA due process claim.  
15 While the Plaintiff has pursued Tribal Remedies for personal injury, wrongful termination, and  
16 retaliation, that is not what brings the Plaintiff into Federal Court.

17  
18 The thrust of the Complaint is that the Tribe's procedures in ruling on medical evidence in a  
19 demurrer, making factual assertions, having unconscionable statutes of limitations (including five  
20 days for wrongful termination), and failure to establish a forum in Tribal Court for his ICRA claim  
21 violates the Plaintiff's due process rights.

22 While the Tribe has attempted to ignore these claims by mischaracterizing them as appeals,  
23 this misses the point. The Plaintiff already submitted an appeal which the Tribal Court disposed of  
24 *before* bringing his due process claim. The Tribe has repeatedly affirmed, that the due process claim  
25 is distinct, but that it has no forum for it to be heard. Allowing the Tribe to do this violates the intent  
26 of ICRA. Nothing in Defendant's motion, declarations, or stated case law addresses this fact. The  
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1 Tribe should not be allowed to escape this lawsuit by mischaracterizing the complaint or nature of the  
2 proceedings.

3 **b) ICRA Serves as a Valid Waiver of Sovereign Immunity in this Case**

4 No principle of ICRA or this court prevents this lawsuit from being heard. Congress has  
5 clearly abrogated Tribal Sovereignty to make ICRA effective. This is shown by the explicit text of  
6 the statute and the implications of case law.  
7

8 Tribes are already subject to ICRA for Habeas Corpus actions. In addition, the analysis of the  
9 case law cited shows that while the Court has been quite clear on some points, it has never been faced  
10 with a deliberate action to frustrate ICRA.  
11

12 The Defense might claim that Plaintiff's original lawsuits were disposed of, and so they were.  
13 However, the Tribe has yet to do anything beyond acknowledging that the Plaintiff has raised a valid  
14 ICRA claim. Had the tribe heard the ICRA case this lawsuit might well be moot. However, the Court  
15 is not testing the sufficiency of Tribal remedies, merely accepting the Tribe's assertion that it has  
16 none.  
17

18 Likewise, the Tribal Court is a valid target for a lawsuit. Since, in the view of the Defendant,  
19 the Tribal Court cannot be separated from the Tribe itself the suit should be allowed to prevent  
20 further interference with the rights of potential Plaintiffs.  
21

22 **b) Existing Case Law does not Preclude this Lawsuit.**

23 Defendant has attempted to avoid this lawsuit by claiming multiple cases preclude the suit  
24 including *Johnson River*, *Demontiney*, *Pink*, and of course *Santa Clara Pueblo*. However  
25 Defendant's analysis misses the central point of all these cases. The Court has never analyzed when a  
26 Tribal remedies is nonexistent before. The Court has never analyzed a case where the Plaintiff made  
27 an original due process claim with the Tribal Court.  
28

1 In *Santa Clara Pueblo* the Court analyzed whether it was proper under the circumstances to  
2 grant a Federal Cause of action for civil claims other than Habeas Corpus. In ruling against the  
3 Plaintiff the Court acknowledge both that Congress had the authority to waive the Tribe's sovereign  
4 immunity and that it was within the discretion of the Court to find a cause of action for all civil  
5 claims.  
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7 The Court then decided against such a decision because, among the foundations for its  
8 decision, it found in general that existing Tribal Remedies were sufficient, (Plaintiff had not claimed  
9 that Tribal Remedies were nonexistent, and the exact nature of the rule was left unanalyzed). *Santa*  
10 *Clara Pueblo* at 95.  
11

12 In *Johnson River*, a Plaintiff filed an ICRA claim directly in Federal court after losing his  
13 contract lawsuit in Tribal court. *Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032, 1034 (9th Cir.  
14 1999). The Court ruled against the Plaintiff and acknowledged that the Plaintiff made no attempt to  
15 vindicate his ICRA rights in Tribal Court, that is not the case here.  
16

17 The Plaintiff here has attempted twice to bring an ICRA claim before the Tribal Court only to  
18 be told by the Defendant that there is no forum for due process claims. Thus the Plaintiff has proven  
19 that he has exhausted his Tribal Remedies.  
20

21 Defendant's reliance on *Demontiney* likewise is unfounded. While the *Demontiney* Court  
22 mused that an existing inadequate forum would not waive sovereign immunity it was unable to fully  
23 analyze the issue because the Plaintiff had, again, not attempted to bring a Due Process claim in  
24 Tribal Court first; much less be told that there was no forum for his claim. *Demontiney v. U.S. ex rel.*  
25 *Dep't of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 814 (9th Cir. 2001) (Recognizing the  
26 Plaintiff's lack of effort in pursuing Tribal Remedies). The Court conjectured that there would be no  
27 waiver of immunity if the Tribal Remedies were insufficient, but did not definitively analyze or rule  
28



1 on the issue. The Court instead relied on the holding of *Santa Clara Pueblo v. Martinez*, which does  
2 not address what happens when a Tribe refuses to establish a forum. *Id.* (Citing *Santa Clara Pueblo*).

3 The Defendant also relies on *Pink v. Modoc* as a basis to dismiss this suit. However, this  
4 misses the fact that the Court in *Pink* relied directly on the reasoning of *Santa Clara Pueblo* which  
5 only held that Tribal Remedies provided are effective. *Pink v. Modoc Indian Health Project, Inc.*, 157  
6 F.3d 1185, 1189 (9th Cir. 1998) (citing *Santa Clara Pueblo*). The Court has not analyzed a fact  
7 pattern such as this namely: what happens when a Tribe refuses to establish a forum?  
8

9 There is no case on record where a Defendant has willfully refused to establish a forum for  
10 due process claims merely to frustrate potential Plaintiffs. The Defendant's Tribal Court might  
11 provide remedies for personal injury, but it does not provide a remedy for claims under ICRA.  
12 Therefore, the case should be allowed to proceed.  
13

14 **c) This lawsuit should be allowed on Public Policy grounds.**

15 Finally this lawsuit should be allowed for public policy reasons. There is no protection  
16 afforded a Plaintiff under ICRA when a Defendant Tribe refuses to establish a venue merely to  
17 frustrate their claims.  
18

19 While the purpose of the Indian Civil Rights Act was partly to further tribal sovereignty, it  
20 was also to strengthen a protected class (those under the Tribe's jurisdiction) in their relationship viz-  
21 a-viz the tribe.

22 The Plaintiff has made every effort to vindicate his due process rights in Tribal Forums. He  
23 has brought original claims for his permanent injury, unlawful firing, and worker's comp retaliation.  
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25 The Tribe has belittled these claims by refusing even to allow Plaintiff to bring medical  
26 evidence into discovery as to the extent of his injuries. Defendant's hand-waving of the personal  
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1 injury claim and wrongful termination claim might escape the scrutiny of this Court, but it should not  
2 overlook that there was no forum for Plaintiff's due process claim.

3 ICRA affords no protection when a Tribe can escape liability merely by refusing to establish a  
4 forum. This cannot have been Congress' intent. Furthermore, the rights of Indian Tribes will not be  
5 frustrated by allowing such a suit. The Defendant can easily allow future due process claims in Tribal  
6 Court to avoid further interference. Allowing this suit to proceed will serve as a moderate deterrent  
7 and protect future Plaintiffs.

9 **d) The Plaintiff has Successfully Alleged that a Federal Law has been Violated**

10 Defendant's third argument to preclude this lawsuit also fails. The Tribe claims that the  
11 Plaintiff has failed to state a claim because he has not alleged a violation of Federal Law. Indeed the  
12 complaint clearly states that it is for violations of the Indian Civil Rights Act, and clearly states in its  
13 fact pattern why this is so.

14 Defendant further claims that the suit is precluded because it includes money damages. This is  
15 likewise unconvincing. The lawsuit asks for multiple things including injunctive relief. The purpose  
16 in asking for multiple remedies was to allow the Court use its discretion to find an appropriate  
17 deterrent for future actions by Tribes. It is undesirable for future Defendants to frustrate a Plaintiff's  
18 claim by failing to establish a forum. This would eviscerate the purpose of ICRA to strengthen those  
19 under Tribal authority, including Tribal members viz-a-viz the tribe. Without the ability to seek  
20 redress in Tribal Court, or in Federal Court if the Tribe fails to comply, nothing prevents other Tribes  
21 from eliminating their forums in an attempt to likewise frustrate potential Plaintiffs.

22 Nothing in ICRA prevents awarding money damages in this case. There is no case cited by  
23 the Defense to preclude money damages as a means for Courts to secure ICRA's purpose. However,  
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1 if money damages are unacceptable, this Court has the discretion to strike that part of the complaint  
2 while allowing the case to proceed as the complaint also requests injunctive relief.

3  
4 **V. CONCLUSION**

5 For the above reasons, the Plaintiff requests this court deny the motion to dismiss the  
6 complaint in its entirety and allow the case to proceed. Or, in the alternative, allow the complaint to  
7 be amended to only include the Tribal Court.

8 Dated: November 13, 2017

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