

Jeanette S. Moody, ISB #11876
NEZ PERCE TRIBE
OFFICE OF LEGAL COUNSEL
P.O. Box 305
Lapwai, ID 83540
208-843-7355 | Phone
208-843-7377 | Fax
jeanettem@nezperce.org

THE HONORABLE DAVID C. NYE

Attorney for the Nez Perce Tribe

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CHERE SOUTHER - POWER OF
ATTORNEY FOR MATTHEW SOUTHER,

Plaintiff,

v.

NEZ PERCE TRIBE JUDICIAL SERVICES
AKA NEZ PERCE TRIBAL COURT,

Defendant.

Civ. No. 3:23-CV-246-DCN

NEZ PERCE TRIBE'S MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION AND RELIEF REQUESTED

This Memorandum is filed in support of the Nez Perce Tribe's ("Tribe") Motion to Dismiss Plaintiff's Complaint for Violation of Civil Rights pursuant to Federal Rule of Civil Procedure 12(b)(1) as the Tribe has sovereign immunity from suit and this Court lacks subject matter jurisdiction over Plaintiff's claims against the Tribe. For this reason, the Tribe respectfully requests this Court to issue an order dismissing Plaintiff's complaint against the Tribe with prejudice.

BACKGROUND

Plaintiff's claim that the Nez Perce Tribe Judicial Services AKA Nez Perce Tribal Court deprived Plaintiffs' right to a fair trial. There are two separate Nez Perce Tribal Court ("Tribal Court") cases that warrant explanation. The first is a probate case and the second is an eviction proceeding. Another case was also filed in the United States District Court for the District of Idaho with the same parties as the Tribal Court eviction case that also necessitates explanation.

The first case that is relevant to Plaintiff's claim is the Petition To Initiate Probate of Non-Trust Estate filed by Kathy Taylor, as heir to the estate of her mother, Mary Jane Souther, that requests Kathy Taylor be appointed Personal Representative and begin the probate process. This case was filed October 6, 2021 in Nez Perce Tribal Court.¹ The father of Matthew Souther, Edward J. Souther, husband to Chere Souther, was provided notice to the hearing appointing personal representative. Edward Souther was provided notice as heir and son to the decedent.² Notice to Matthew Souther of this hearing was not necessary as he was not an heir.

The second relevant case to the Plaintiff's claim is a civil case for eviction, also filed in Nez Perce Tribal Court, *Kathy Taylor v. Matthew Souther*, CV. 22-022.³ A Civil Complaint and Summons was served upon Matthew Souther by Nez Perce Tribal Police on March 29, 2022. (See Exhibit A.)⁴ This service of process is in accordance with Nez Perce Tribal Code.⁵ Service was provided to Matthew Souther as he was living in the home prior to the death of the decedent, and he was being asked to leave by the Personal Representative. Mr. Souther was provided notice to vacate prior to the filing of the eviction hearing, a letter provided to him by the Personal

¹ Nez Perce Tribal Court Case Number PR.22-001.

² Siblings of Kathy Taylor were provided notice by Nez Perce Tribal Court Clerk on October 12, 2021, by U.S. Mail that a hearing to appoint the personal representative of Mary Jane Souther would be held October 20, 2021, at 1:30 PM.

³ Complaint filed by Kathy Taylor on March 2, 2022.

⁴ A Certificate of Service was also submitted into the Court file under CV.22-022 (Civil Eviction).

⁵ N.P.T.C Rules of Civil Procedure, Rule 4 (c)(1)-(2); (e); and (k).

Representative of the decedent. (See Exhibit B.) Matthew Souther was given twenty (20) days to respond to the complaint, which he failed to do.⁶ Therefore, a hearing was scheduled, notice of the hearing sent to the Respondent, and Respondent appeared personally before the Nez Perce Tribal Court.

Yet, another case is relevant to the case before this Court. Matthew Souther initiated his own case against Kathy Taylor in the U.S. District Court, District of Idaho, CV 22-186, filed April 26, 2022.⁷ Mr. Souther faxed notice of this summons and complaint to Nez Perce Tribal Court on April 26, 2022.⁸ However, this date was past the date to answer to the Tribal Court summons for the eviction. Both parties consented to proceed before a U.S. Magistrate Judge on June 28, 2022. However, after a Litigation Order and Notice of Telephonic Scheduling Conference was issued, the case did not progress.⁹ Additionally, an Order was entered that the Court may dismiss the action for lack of prosecution and the pending emergency motion for assistance was moot.¹⁰ After this Order was entered, the Plaintiff did not provide anything further to the Court and the last Order was entered that finalized this matter.¹¹

STANDARD OF REVIEW

The United States Supreme Court has held that “As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its [sovereign] immunity.” *Kiowa Tribe of Oklahoma. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

⁶ Twenty days from the date of service would have been April 18, 2022. A hearing was then scheduled for April 27, 2022, and the notice mailed to Matthew Souther on March 30, 2022.

⁷ The civil cover sheet states the cause of action as unlawful eviction.

⁸ The fax cover sheet states, “In Regards to Case number: CO.22-022 I have filed in Federal Court to challenge the Jurisdiction in this matter.”

⁹ July 11, 2022.

¹⁰ August 5, 2022.

¹¹ Dismissed with Prejudice on January 3, 2023.

Fed. R. Civ. P. 12(b)(1) provides the procedural avenue to raise a challenge to a court's subject matter jurisdiction. *Tobar v. United States*, 639 F.3d 1191, 1195 (9th Cir. 2011).

The parties asserting jurisdiction bear the burden of establishing that a claim falls within the federal courts' limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Therefore, the Plaintiffs bear this burden. The party asserting jurisdiction "bears the burden of pointing to such an unequivocal waiver of immunity." *Levin v. United States*, 663 F.3d 1059, 1063 (9th Cir. 2011). (quoting *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983)).

ARGUMENT

I. PLAINTIFF'S COMPLAINT AGAINST THE NEZ PERCE TRIBE MUST BE DISMISSED BECAUSE THE TRIBE HAS SOVEREIGN IMMUNITY FROM SUIT.

The Nez Perce Tribe possesses sovereign immunity from suit if there is not an explicit waiver by Congress or the Tribe itself. This serves as a jurisdictional bar to the Plaintiffs' claims against the Tribe. Due to the settled doctrine of tribal sovereign immunity, this Court must dismiss Plaintiffs' claims against the Tribe.

The doctrine of tribal immunity stems in part from the recognition that tribal sovereignty predates the U.S. Constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Explicit waiver by Congress or explicit waiver by the Tribe itself are the only exceptions within this doctrine. The United States Supreme Court has held, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its [sovereign] immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) (citing *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. U. S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940)). A congressional waiver of tribal immunity cannot be

implied but must be express and unequivocal. *Santa Clara Pueblo*, 436 U.S. at 58–59 (quotations and citations omitted). Also, a tribe’s waiver of sovereign immunity must be clean and cannot be implied. *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991); *see also C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (citing *Oklahoma Tax Comm’n*).

A. The Nez Perce Tribe is a federally recognized Indian Tribe that possesses sovereign immunity from suit.

The Nez Perce Tribe’s sovereignty predates the U.S. Constitution. It is also reflected in the three treaties with the United States. *Treaty with the Nez Percés*, June 11, 1855, 12 Stat. 957; *Treaty with the Nez Percés*, June 9, 1863, 14 Stat. 647; *Treaty with the Nez Percés*, August 13, 1868, 15 Stat. 693. The Nez Perce Tribe is a federally recognized Indian tribe. *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 75 Fed. Reg. 60810, 60812 (Oct. 1, 2010). The Tribe’s state as a federally recognized Tribe establishes that the Tribe possesses immunity from suit. 25 C.F.R. § 83.2.

The Supreme Court has recognized Congress’s commitment to a “policy of supporting tribal self-government and self-determination.” *Nat’l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). The Nez Perce Tribe is no exception, its governing council is responsible to promote and protect the health, education, and general welfare of members of the Tribe. The Nez Perce Tribe Constitution authorizes this responsibility, it was adopted on May 6, 1961, and approved by the Acting Commissioner of Indian Affairs on June 27, 1961.

Sovereign immunity does not simply apply to the Tribe itself, but it extends to services or entities that act as “an arm of the Tribe.” *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). The Nez Perce Tribe Executive Committee (NPTEC) is the governing council of the

Nez Perce Tribe. One way it promotes and protects the general welfare of its members is by the creation of the Nez Perce Tribal Court, several other programs or entities, its tribal code, etc. The NPTEC has authorized the Tribal Court to act on its behalf, therefore, Tribal Court is an extension or arm of the Nez Perce Tribe and should be provided sovereign immunity from suit. Therefore, this case should be dismissed against the Tribal Court.

B. Congress has not waived the Nez Perce Tribe's sovereign immunity from suit.

A congressional waiver of tribal immunity cannot be implied but must be express and unequivocal. *Santa Clara Pueblo*, 436 U.S. at 58–59.

In the current case, Plaintiff alleges a violation of civil rights by Tribal Court. A congressional act that may allow this claim would be the Indian Civil Rights Act.¹² However, the Indian Civil Rights Act explains the rights of criminal defendants, not civil defendants that may have a right to appeal a case.¹³ The Nez Perce Tribe does abide by the Indian Civil Rights Act and has incorporated it into its tribal code.¹⁴ Therefore, since Congress has not explicitly waived tribal immunity here, this case should be dismissed.

C. The Nez Perce Tribe has not waived its sovereign immunity from suit.

The Nez Perce Tribe has not waived its sovereign immunity from suit. A tribe's waiver of sovereign immunity cannot be implied and must be clear. *Oklahoma. Tax Comm'n*, 498 U.S. at 509. The Tribe has waived its sovereign immunity in limited circumstances, such as in certain contracts. These are express, precise, and limited. The Tribe has not entered any contract with Matthew Souther or Chere Souther or for any purposes related to evictions.

¹² 25 U.S.C. §§ 1301-1304.

¹³ 25. U.S.C § 103. Habeas Corpus, right to appeal a detention ordered by a Tribal Court.

¹⁴ N.P.T.C §1-6 Nez Perce Tribal Civil Rights Act.

II. The proper avenue of remedy of the concerns for error in trial procedures should have been an appeal.

The Plaintiff had opportunity to file an appeal for any errors in trial procedures. Filing of an appeal would have been the proper avenue for the claim alleged of lack of service.¹⁵ The Nez Perce Tribe has its own Appellate Court.¹⁶ If the Tribal Appellate Court found error, it would have ruled accordingly. However, due to Matthew Souther's failure to take advantage of this opportunity his rights were waived. Therefore, this case should be dismissed as the proper avenue for correction should have been an appeal in Tribal Court.

III. Chere Souther lacks standing to file this claim as the Power of Attorney for Matthew Souther is invalid as he filed his own claim attempting to dismiss the Tribal Court case in 2022.

There is question as to the validity of the Power of Attorney that Chere Souther appears to hold over Matthew Souther as no proof has been provided with the complaint. In Idaho, a person who holds power of attorney of another person may have the standing to proceed on another's behalf, if that person has been authorized to do so in the power of attorney.¹⁷ However, in 2022 Matthew Souther filed a case on his own behalf to claim that the Nez Perce Tribal Court did not have jurisdiction over him since he is not an enrolled tribal member. (See Exhibit C). This case was dismissed with prejudice not for lack of competency or for the need for a power of attorney. Matthew Souther has proven he can file and appear in Court on his own behalf.

Without proof of the power of attorney submitted to the Court it is difficult to move forward on behalf of Matthew Souther or to determine if there is a need for this claim. If the power of attorney is necessary on Matthew Souther's behalf his entering his appearance in

¹⁵ Fed R. Civ. P. 60(a), Relief from Judgment or Order for corrections based on clerical mistake, oversight, and omissions.

¹⁶ N.P.T.C § 1-1-20 established Court of Appeals.

¹⁷ Idaho Code § 15-12-301.

several cases causes concern. However, to this date there has been nothing filed in Tribal Court of this need for him to have a power of attorney. Therefore, it may be interpreted that the lack of proof of the need for Chere Souther to be Matthew Souther's power of attorney is to circumvent the prior Dismissal with Prejudice of his prior case, Case No. 3:22-CV-00186-DKG. For that reason, this case should also be dismissed.

IV. Matthew Souther failed to respond to the Summons in a timely manner, did appear at the hearing in Nez Perce Tribal Court, and failed to exhaust all tribal remedies.

Matthew Souther is the original and only Respondent in the Nez Perce Tribal Court Case, Case No. CV.22-022, *Kathy Taylor v. Matthew Souther*. The claim by Chere Souther states that Matthew Souther did not receive notice of the hearing against him and his right to a fair trial was not followed by The Nez Perce Tribal Court. These claims are unfounded and inaccurate. The Nez Perce Tribe has its own tribal code and court process that protects the rights of individuals involved in its Court System.

In his earlier case in this Court, Matthew Souther stated that the Tribe lacked jurisdiction over him. However, that issue has not been brought up again and was dismissed with prejudice. Instead of arguing jurisdiction here, that matter would have been best brought up in Tribal Court, prior to the expiration of the time for an answer to the summons. However, Matthew Souther failed to do so, and personally appeared in Tribal Court on his own behalf. Matthew Souther appeared during the civil eviction proceedings on at least two occasions, which is proven by two separate orders entered in Tribal Court. (See Exhibit D and E). He did file his Federal Court Motion in Tribal Court but there is no mention of him arguing this in the initial hearing on April

27, 2022. (See Exhibit D). Matthew Souther's personal appearance in Tribal Court waives his argument that the Court lacked personal jurisdiction.¹⁸

Matthew Souther failed to appeal the civil eviction in Tribal Court. The matter was brought back to Tribal Court a second time for correction of damages owed.¹⁹ Yet again, this case came back to Tribal Court for recovery of damages to the decedent's property that Matthew Souther possessed.²⁰ Matthew Souther had ample opportunity to file an appeal to any of these judgments. Instead, this case was filed by his power of attorney, Chere Souther. Matthew Souther failed to exhaust all tribal remedies and this case should be dismissed.

Since Matthew Souther was properly served, Tribal Court has proper jurisdiction, and Matthew Souther did not file an appeal in Tribal Court, this case should be dismissed as proper authority lies with Nez Perce Tribal Court.

CONCLUSION

The Nez Perce Tribe has sovereign immunity from suit. The Tribe has not waived its right to this suit nor has Congress explicitly allowed. Matthew Souther has filed a previous suit that has been dismissed with prejudice. We cannot discern whether there is a valid power of attorney on his behalf that is held by Chere Souther, which could be interpreted as an attempt to circumvent the prior dismissal. Matthew Souther had the opportunity to appeal either the Tribal Court eviction judgments or the prior District Court judgment and he failed to take advantage of

¹⁸ Matthew did not object to personal jurisdiction of Tribal Court in Tribal Court. He did file his own case in District of Idaho asserting Tribal Court lacked jurisdiction over him, however, on April 27, 2022, he personally appeared in Tribal Court and failed to object to Tribal Court's lack of jurisdiction. His lack of objection after being served with the summons, and his personal appearance in Tribal Court waives his challenge to personal jurisdiction. Fed. R. Civ. P. 12(b)(2).

¹⁹ Amended Judgment from hearing held May 16, 2022, both parties appeared in Tribal Court and award was amended.

²⁰ Amended Judgment from hearing held November 15, 2022, for non-payment and damages, and again award was amended. Notice of hearing was given to Respondent but he failed to appear.

those avenues. Therefore, this case should be dismissed with prejudice, the relief requested by Chere Souther denied, and relief this Court see proper and justified granted.

Dated: July 11, 2023

Respectfully submitted:

/s/

Jeanette S. Moody
NEZ PERCE TRIBE
OFFICE OF LEGAL COUNSEL
P.O. Box 305
Lapwai, ID 83540
208-843-7355 | Phone
208-843-7377 | Fax
jeanettem@nezperce.org

Attorney for the Nez Perce Tribe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of July 2023, I filed the foregoing electronically through the CM/ECF system and served the following non-CM/ECF Registered Participant in the manner indicated:

Via first class mail, postage prepaid addressed as follows:

Chere Souther, Power of Attorney
for Matthew Souther
P.O. Box 112
Kamiah, Idaho 83536

/s/

Anjee Toothaker