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THE HONORABLE DAVID C. NYE

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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.

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

NEZ PERCE TRIBE'S REPLY TO  
PLAINTIFF'S RESPONSE OPPOSING  
MOTION TO DISMISS

**INTRODUCTION**

This reply is in direct response to Plaintiff's Motion and Memorandum in Opposition to Defendant's Motion to Dismiss with Prejudice filed on August 1, 2023 (Dkt. 8, 8-1). This reply 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) filed on July 11, 2023 (Dkt. 4). The Tribe has sovereign immunity from suit and this Court lacks subject matter jurisdiction over Plaintiff's claims against the Tribe. For these reasons, the Tribe respectfully requests this Court to issue an order dismissing Plaintiff's complaint against the Tribe with prejudice.

**The Tribe disagrees with Plaintiff’s reasons for objecting to dismissal.**

1. The Tribe denies that it is in violation of the Indian Civil Rights Act, whether federal law or its own Nez Perce Tribal Code (“Tribal Code”). The Nez Perce Tribal Court (“Tribal Court”) has not deprived Matthew Souther of his civil rights as on March 29, 2022, he was personally served with a summons and complaint by the Nez Perce Tribal Police in the civil case for eviction.<sup>1</sup>
2. Actions brought under 42 U.S.C. § 1983 must allege deprivation of constitutional rights under color of state law, as opposed to under color of tribal law. *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983). There have been no allegations that the Tribe or the Tribal Court were acting under color of state law, therefore, allegations of deprivation of rights are unfounded.
3. 28 U.S.C. § 1331 does not apply in this matter. Plaintiff is correct that district courts have original jurisdiction of all civil actions arising under the Constitution, laws, and treaties of the United States. However, Plaintiff’s assumption that what has originated in Tribal Court automatically should be handled in District Court is misplaced. Mr. Souther did not exhaust the process available to him in Tribal Court. The Tribal Court has proper process, it was followed, and jurisdiction in the Tribal Court should remain.

**REPLY TO ANSWER: BACKGROUND**

It is not the Tribal Court’s responsibility to ensure that Matthew Souther or any plaintiff/petitioner or respondent/defendant, other than a criminal defendant, have counsel.<sup>2</sup> Nor

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<sup>1</sup> *Kathy Taylor v. Matthew Souther*, No. CV.22-022 (Nez Perce Tribal Court).

<sup>2</sup> N.P.T.C. 1-6-2(g), Tribal Code states criminal defendants may at their own expense obtain an attorney. However, the Nez Perce Tribe pays for a public defender to represent nearly all criminal defendants. They do not pay for an attorney for any civil matters.

is it the Tribal Court's responsibility to recommend to a plaintiff/petitioner or respondent/defendant that they retain an attorney to represent them in their case, whether that be in a criminal or civil action. This would be the responsibility of Mr. Souther. Plaintiff states that her son, Matthew Souther did not receive notice of the April 27, 2022 hearing, this is factually incorrect. Mr. Souther was personally served the summons and complaint and personally appeared at this hearing. Once served, Mr. Souther was aware he had 20 days to respond, which he failed to do. In fact, Mr. Souther did not file any paperwork in any court until April 26, 2022 when he filed a complaint in District Court for unlawful eviction.<sup>3</sup> Mr. Souther's response to the Tribal Court was due on April 18, 2022. Despite the response deadline having passed, the Tribal Court granted him an opportunity to submit his evidence of payment of rent. As for Plaintiff's accusations that Tribal Court staff and/or the Nez Perce Tribe Public Defender's office did not return phone calls, there is no evidence other than hearsay that this is true.

It is Plaintiff's responsibility to hire counsel or not.

Mr. Souther failed to submit a response by the deadline in Tribal Court. Mr. Souther failed to submit any reason to the District Court by the deadline ordered and that case was dismissed with prejudice.<sup>4</sup> Mr. Souther failed to follow deadlines set by the Courts in both cases.

#### **REPLY TO ANSWER TO: STANDARD OF REVIEW**

The United States Supreme Court has held that "[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). 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).

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<sup>3</sup> No. 3:22-cv-00186-DKG (D. Idaho Apr. 26, 2022) ECF. No. 1.

<sup>4</sup> Order, No. 3:22-CV-00186-DKG (D. Idaho Jan. 3, 2023) ECF. No. 12.

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 Plaintiff bears 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)).

The appropriate step would have been for Matthew Souther to have filed his own appeal in Tribal Court, however, he neglected to do so. Plaintiff also proposes this case proceed for a violation of Mr. Souther's constitutional rights and under a § 1983 claim, this is also inappropriate as the Tribal Court in *Taylor v. Souther* was in no way acting under the color of state law.

### **REPLY TO PLAINTIFF'S ANSWER**

#### **I. DISMISSAL IS WARRANTED BECAUSE THE TRIBE HAS SOVEREIGN IMMUNITY FROM SUIT.**

The Nez Perce Tribe possesses sovereign immunity from suit unless there exists an explicit waiver by Congress or the Tribe itself.<sup>5</sup> There is no waiver. Tribal Court forum was available to Matthew Souther, and he availed himself from it. The Tribal Court is not in violation of the Tribal Code. Mr. Souther was personally served with a summons and complaint in *Taylor v. Souther* by the Nez Perce Tribal Police on March 29, 2022.

The Tribal Court did not act with premeditation or malice at any time during this matter. Plaintiff claims that Mr. Souther's father, Edward Souther, should have been given notice of the April 27, 2022 hearing, however, the Tribal Court matter is between Matthew Souther—not Edward Souther—and Kathy Taylor. Any notice given to Edward Souther was not mandatory but rather a courtesy as a person of interest in the property of his mother, Mary Jane Souther.

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<sup>5</sup> *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

Regarding Plaintiff's argument that she has power of attorney of Matthew Souther, no power of attorney document has been filed in Tribal Court or District Court. There continues to be no evidence that Plaintiff has Mr. Souther's permission to proceed in this matter. Further, the issues in this case have already been decided. Mr. Souther's prior District Court case involved the same matter, and that case was dismissed with prejudice.<sup>6</sup> Therefore, this case should be dismissed.

**A Tribal Court proceeding is an exercise of tribal sovereignty.**

A § 1983 Civil Rights Act claim is a color of state law violation. Tribal Court proceedings do not violate the color of state law when it is proceeding according to tribal statute.<sup>7</sup>

The Tribal Court does follow the Indian Civil Rights Act for actions brought against them if a **criminal defendant** wants to file a habeas corpus action if they feel their rights have been wronged regarding their detention.<sup>8</sup> Matthew Souther does not have any ability to bring forth a habeas corpus claim when he was not criminally detained in Tribal Court. So, this case should be dismissed.

Every defendant or respondent in Tribal Court is afforded due process. Due process was afforded to Mr. Souther throughout the civil court case against Kathy Taylor. The Tribal Court was more than fair and did not act in malice nor deprive Mr. Souther of his rights. The Tribal Court allowed Mr. Souther more time to submit his evidence when he requested more time. The Tribal Court also lowered the amount Mr. Souther owed to Kathy Taylor even though he should have provided information earlier. The case continued to come back to the Tribal Court for

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<sup>6</sup> Order, No. 3:22-CV-00186-DKG (D. Idaho Jan. 3, 2023) ECF. No. 12.

<sup>7</sup> Actions brought under 42 U.S.C. § 1983 must allege deprivation of constitutional rights under color of state law, as opposed to under color of tribal law. *See R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983).

<sup>8</sup> 25 U.S.C. § 15 § 1303. Habeas corpus. The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe. "Legality of his detention" to mean his sentencing order from an Indian tribe or court.

hearings due to the damage to the home caused by Mr. Souther and the costs necessary to repair those damages. Mr. Souther was provided notice of each hearing and the Tribal Court allowed him to present his evidence and speak about his needs. The process was fair.

For the reasons stated above, Plaintiff's complaint should be dismissed.

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

Mr. Souther once attempted to state that the Tribal Court did not have jurisdiction over him, and he failed to bring that forward. Mr. Souther did not file an appeal after the judgment or after the amended judgment was entered. Rather he filed a complaint in District Court which was dismissed.<sup>9 10</sup> It is not the Tribal Court nor its staff's responsibility to ensure that Mr. Souther knew how to file an appeal. He had 30 business days<sup>11</sup> to appeal in Tribal Court after the judgment and the amended judgment were entered and he failed to do so.

**II. PLAINTIFF 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.**

Plaintiff claims to be power of attorney of Matthew Souther, but no proof has been presented. Mr. Souther has appeared in Tribal Court and filed in District Court. In fact, he has represented himself.

**Matthew Souther failed to exhaust all Tribal remedies.**

While Tribal Court proceedings were ongoing, Matthew Souther filed in District Court. He copied the Tribal Court with his District Court filing, which was in fact dismissed.<sup>12</sup> Plaintiff claims that Mr. Souther feared he would not get a fair trial in the Tribal Court. Yet, the Tribal

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<sup>9</sup> No. 3:22-cv-00186-DKG (D. Idaho Apr. 26, 2022) ECF. No. 1.

<sup>10</sup> Order, No. 3:22-CV-00186-DKG (D. Idaho Jan. 3, 2023) ECF. No. 12.

<sup>11</sup> N.P.T.C. § 2-9-2(a).

<sup>12</sup> Order, No. 3:22-CV-00186-DKG (D. Idaho Jan. 3, 2023) ECF. No. 12.

Court at the April 27, 2022 hearing allowed Mr. Souther more time to submit evidence on his case. The Tribal Court took the evidence into consideration and allowed for a lower judgment to be entered against him.

It is unknown with the evidence presented how Matthew Souther came to be at the April 27, 2022 hearing, however, he was present. Further, he spoke on his own behalf at that hearing.

Mr. Souther did not appear at the November 15, 2022 hearing and a judgment was mailed to him on December 7, 2022. Plaintiff lists what purports to be her son's frustrations with the Tribal Court, then makes the leap to conclude that those frustrations equal unfair treatment or civil rights violations. Not only is there a huge lack of factual information, but the leap is also too great to be sustainable.

### **CONCLUSION**

The Nez Perce Tribe has sovereign immunity from suit. The Tribe has not waived its immunity nor has Congress explicitly allowed a waiver of immunity. Matthew Souther has filed a previous District Court suit that was dismissed with prejudice.<sup>13</sup> That suit was filed during the on-going Tribal Court proceedings. Finally, we cannot discern whether there is a valid power of attorney on his behalf that is held by Plaintiff.

Mr. Souther had the opportunity to appeal both the Tribal Court eviction judgments and the prior District Court dismissal, and he failed to take advantage of those avenues. The Tribal Court has not violated the rights of Mr. Souther in any manner. Therefore, this case should be dismissed with prejudice, the relief requested by Plaintiff denied, and any further relief this Court deems proper and just should be granted to the Nez Perce Tribe.

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<sup>13</sup> *Id.*

Dated: August 14, 2023

Respectfully submitted:

/s/

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 14th day of August 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/

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Lori F. Picard