

No. _____

In The
Supreme Court of the United States

—————◆—————
OMAHA TRIBE OF NEBRASKA,
also known as OMAHA NATION,

Petitioner,

v.

STOREVISIONS, INC.,

Respondent.

—————◆—————
**On Petition For Writ Of Certiorari
To The Nebraska Supreme Court**

—————◆—————
PETITION FOR WRIT OF CERTIORARI

—————◆—————
BENJAMIN W. THOMPSON
Counsel of Record
THOMPSON LAW OFFICE, PC, LLO
13906 Gold Circle, Suite 201
Omaha, NE 68144
Telephone: (402) 330-3060
Facsimile: (402) 330-3060
E-mail: litigation@thompson.law.pro

Counsel for Petitioner

QUESTION PRESENTED

Is apparent authority sufficient to bind an Indian tribe to a waiver of the tribe's federally protected sovereign immunity, when the purported waiver is executed by a tribal official acting outside the scope of his actual authority?

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PETITION FOR WRIT OF CERTIORARI

The Omaha Tribe of Nebraska respectfully petitions for a writ of certiorari to review the judgment of the Nebraska Supreme Court holding that tribal officials had apparent authority sufficient to waive the Tribe's sovereign immunity from suit. The Nebraska decision applies general agency principles to a federally protected immunity waiver analysis and ignores contrary decisions of this Court, decisions of U.S. Courts of Appeals, and other state courts in finding that a governmental official's apparent authority, rather than actual authority, is sufficient to bind the sovereign and waive sovereign immunity.

**OPINION BELOW**

The Nebraska Supreme Court's supplemental opinion modifying the former opinion, after considering a motion for rehearing, is reported at *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 978, 802 N.W.2d 420 (2011), and appears at App. 1.

The former opinion of the Nebraska Supreme Court is reported as *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011), and appears at App. 4.



JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a). A federally protected tribal sovereign immunity defense was raised in a motion to dismiss a claim filed against a federally recognized tribe in a state court, which immunity was found to have been waived by tribal officials in the March 25, 2011, opinion of the Nebraska Supreme Court. The opinion was modified by the Nebraska Supreme Court following a motion for rehearing and became final on release of a supplemental opinion on July 22, 2011.



STATUTORY AND COMMON LAW PROVISIONS INVOLVED

1. The Indian Reorganization Act, specifically section 476(e), Title 25 of the United States Code, provides in part:

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of . . . tribal assets without the consent of the tribe. . . .

2. Federal common law, as enunciated by this Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), provides:

Indian tribes, as sovereign powers, possess federal common law immunity from suit.

3. Federal common law, as enunciated by this Court in *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 756 (1998), provides:

Tribal immunity is a matter of federal law and is not subject to diminution by the States.

4. Federal common law, as enunciated by this Court in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), provides:

Only the Federal Government may limit a tribe's exercise of its sovereign authority.

5. Federal common law, as enunciated by this Court in *Whiteside v. United States*, 93 U.S. 247, 257 (1876), provides:

Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public.



STATEMENT OF THE CASE

The Petitioner Omaha Tribe of Nebraska is a federally recognized Indian tribe. See Indian Entities Recognized and Eligible To Receive Services From the

United States Bureau of Indian Affairs, 75 Fed. Reg. 60810 (October 1, 2010). The Omaha Tribe is organized pursuant to a written constitution and bylaws adopted with the approval of the federal government under the Indian Reorganization Act of June 18, 1934, 25 U.S.C. § 461 *et seq.* The constitution of the Omaha Tribe of Nebraska provides the Omaha Tribal Council with various enumerated powers. The bylaws of the Omaha Tribe of Nebraska impose various duties on the officers of the Tribal Council. Neither the constitution nor the bylaws provide any officers of the Tribal Council with authority to exercise the Tribal Council's powers except as they may be delegated by the Tribal Council.

The Respondent StoreVisions filed an action for damages against the Omaha Tribe in state court, alleging breaches of contract. The complaint describes a number of transactions between StoreVisions and the "Tribe" and suggests that the unauthorized actions of several individual council members represent the actions of the Omaha Tribe. Numerous documents are attached to the complaint purportedly bearing the signature of the chairman or vice-chairman of the Omaha Tribal Council. StoreVisions did not reference or include any motions, resolutions or ordinances showing where the Omaha Tribal Council authorized either the chairman or vice-chairman to enter into any contracts, let alone waive the Omaha Tribe's sovereign immunity from suit. Indeed, such authorizations do not exist because the documents were never approved by the full Tribal Council by resolution or motion supported by any official meeting minutes.

According to the principals of StoreVisions, in January 2008, the chairman and vice chairman of the Omaha Tribe signed a one-page document on StoreVisions letterhead that StoreVisions intended to represent a waiver of the Omaha Tribe's sovereign immunity with respect to any contracts with StoreVisions. The authenticity of this document or these signatures has not been confirmed by the Omaha Tribe. Both now and at the time these signatures were allegedly obtained, the Omaha Tribe's constitution and bylaws did not provide any tribal officers with actual authority to waive the Omaha Tribe's sovereign immunity. Neither the constitution nor the bylaws provide any officers of the Tribal Council with authority to exercise the Tribal Council's powers except as they may be delegated by the Tribal Council.

The Omaha Tribe's constitution gives enumerated powers to a seven-member Tribal Council. These powers include negotiating with federal, state, and local governments; approving the disposition of tribal assets; managing the Omaha Tribe's economic affairs; and regulating trade and commerce. The Tribal Council also has the power "[t]o adopt resolutions regulating the procedure of the Tribal Council itself . . . and tribal officials [and] . . . [t]o delegate to subordinate boards, or tribal officials . . . any of the foregoing powers, reserving the right to review any actions taken by virtue of such delegated powers." While the constitution does not list the specific protocol for waiving the Tribe's sovereign immunity, it does give the Tribal Council the power to approve, manage, and regulate the disposition of tribal assets and economic affairs. *Id.*

The Omaha Tribe's constitution also indicates that resolutions adopted by the Tribal Council regulate procedures that the Tribal Council and tribal officers must adhere to. *Id.* The Tribal Council did not adopt any resolutions delegating the authority to waive the Tribe's sovereign immunity to tribal officers. Nor did the Tribal Council adopt any resolutions allowing tribal officers to waive the Omaha Tribe's sovereign immunity via contract with StoreVisions. The Tribal Council body was neither aware of the terms of purported contracts with StoreVisions, nor did the Tribal Council itself approve contracts with StoreVisions by resolution or motion. Indeed, no formal action was taken by the Tribal Council to waive the Tribe's sovereign immunity with respect to StoreVisions.

In 2009, StoreVisions filed suit in state court against the Omaha Tribe for breaches of contract. The Omaha Tribe filed a motion to dismiss for lack of jurisdiction on the basis of its tribal sovereign immunity. A hearing was held and the trial court received evidence and heard oral arguments on the motion to dismiss. At the hearing, StoreVisions claimed, based on the contents of its affidavits, that tribal officers misrepresented their authority to waive the Tribe's immunity or that it would be unjust not to subject the Tribe to suit. The issue actually tried in the court below was whether the Tribe was immune from suit or whether that sovereign immunity had been waived. The trial court entered an order denying the Tribe's motion to dismiss, finding that the tribal

officers that purportedly signed a written waiver of sovereign immunity had “apparent authority” to do so. App. 26.

The Nebraska Supreme Court affirmed the trial court’s ruling, choosing to “apply agency principles, specifically the principles of apparent authority, to the waiver in this case.” App. 17. It was undisputed that no actual authority existed for the tribal officials to bind the Tribe through contract or waive the Tribe’s sovereign immunity – the purported meeting was unofficial, no motion was ever made or resolutions passed that would delegate authority to the officials. In its supplemental opinion, the Nebraska Supreme Court stated that the record suggests that “the action of the chairman and vice chairman, both members of the tribal council, were, on these facts *essentially* the action of the tribal council itself.” (emphasis supplied) App. 2. The court further stated, “because the tribe’s constitution and bylaws were silent as to the method of waiving sovereign immunity, it was reasonable for appellee to rely upon the words and actions of *the tribe* with respect to the waiver of immunity.” App. 19. The Nebraska Supreme Court affirmed the trial court’s ruling. App. 4.



REASONS FOR GRANTING THE WRIT

I. AN OPINION FROM THIS COURT IS NECESSARY TO ENSURE NATIONAL UNIFORMITY AND PROTECT THE FEDERAL DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY FROM DIMINUTION BY STATES ON IRRELEVANT POLICY GROUNDS

Indian tribes, as sovereign powers, possess federal common law immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 115, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106, 115 (1978). This principle “has long been part of our jurisprudence.” *American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1377-78 (8th Cir. 1985), citing *United States v. Kagama*, 118 U.S. 375, 382, 6 S. Ct. 1109, 30 L. Ed. 228 (1886); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519, 8 L. Ed. 483 (1832). “[I]mmunity is thought necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy.” *Id.*, citing F. Cohen, Handbook on Federal Indian Law 324-28 (1982); Note, In Defense of Tribal Sovereign Immunity, 95 Harv. L. Rev. 1058, 1073 (1982).

This Court has taken the firm position that “tribal immunity is a matter of federal law and is not subject to diminution by the States.” *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 756, 118 S. Ct. 1700, 1703, 140 L. Ed. 2d 981, 986 (1998) (emphasis supplied) (rejecting Oklahoma Supreme Court’s holding that tribal immunity for off-reservation commercial activity is solely a matter of comity); citing

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 890, 106 S. Ct. 2305, 90 L. Ed. 2d 881, 891 (1986); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 154, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980). Only the Federal Government may limit a tribe's exercise of its sovereign authority. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147, 102 S. Ct. 894, 907, 71 L. Ed. 2d 21, 36 (1982).

“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 immunity.” *Kiowa Tribe*, 523 U.S. at 754, 118 S. Ct. at 1702, 140 L. Ed. 2d at 985; see *Three Affiliated Tribes*, 476 U.S. at 890, 106 S. Ct. at 2313, 90 L. Ed. 2d at 891; *Santa Clara Pueblo*, 436 U.S. at 58, 98 S. Ct. at 1677, 56 L. Ed. 2d at 115; *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512, 60 S. Ct. 653, 656, 84 L. Ed. 894, 899 (1940). Congress has not acted to abrogate tribal sovereign immunity where a tribe or tribal entity enters into a commercial contract with a non-tribal entity. *Kiowa Tribe*, 523 U.S. at 758-60, 118 S. Ct. at 1704-05, 140 L. Ed. 2d at 985-88.

A waiver of sovereign immunity “cannot be implied but must be unequivocally expressed.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978), quoting *United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 953-54, 47 L. Ed. 2d 114, 121 (1976). If Congress has not abrogated a tribe's immunity in a particular circumstance, “the requirement that a waiver of tribal immunity be ‘clear’ and ‘unequivocally expressed’ is

not a requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved.” *Ute Distributing Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998); see *Native Am. Distrib. v. Seneca-Cayuga Tobacco, Co.*, 491 F. Supp. 2d 1056, 1069 (N.D. Okla. 2007) (“[T]he ‘unequivocally expressed’ standard for waiver of immunity is not to be flexibly applied. . . .”).

The inflexible requirement that a tribe’s waiver of immunity must be clear and unequivocally expressed in order to be effective cuts against allowing apparent authority alone to waive a tribe’s immunity. Indeed, the clear and unequivocal expression standard is so ingrained in our common law tradition that “[it] is true even if application of sovereign immunity leaves a party without any judicial remedy.” *Native Am. Distrib.*, 491 F. Supp. 2d at 1069. For this reason, the *Native American Distributing* court rejected the notion that a tribe could waive its immunity based on a reasonable belief or inequity of misrepresentation standard. *Id.*

The Nebraska Supreme Court’s opinion states: “Moreover, because the Tribe’s constitution and by-laws are silent as to the method of waiving sovereign immunity, it was reasonable for StoreVisions to rely upon the words and actions of the Tribe with respect to the waiver of sovereign immunity.” App. 19. This conclusion, however, is a flexible application of sovereign immunity that has been repudiated by the common law. *Native Am. Distrib.*, 491 F. Supp. 2d at 1069 (N.D. Okla. 2007). The courts cannot rely on equitable, discretionary, or policy rationales to allow the apparent authority of two tribal officials to waive

a tribe's sovereign immunity. See *id.* (“[C]ourts may not find a waiver of immunity based on ‘perceived inequities arising from the assertion of immunity, or the unique context of a case.’”).

In *Native American Distributing*, the court refused to recognize a tribal waiver of immunity based on the “reasonable belief” of a contracting party and alleged misrepresentations by a manager at a tribal enterprise. 491 F. Supp. 2d at 1068-69. The court upheld the tribe's sovereign immunity where the party contracting with the tribal enterprise “was highly aware of the possible application of tribal immunity, inquired about it, and was told by [a tribal enterprise manager] that [the opposing contracting party] did not need additional waivers of sovereign immunity beyond those in the Corporate Charter.” *Id.*

In doing so, the *Native American Distributing* court aligned itself with precedent set forth by this Court, which commands tribal sovereign immunity to be upheld, even in the face of equitable or policy rationales that might counsel otherwise. *Id.* at 1068; see *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. at 758 (“In [an] economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter. . . .”).

Finally, in light of the cumulative evidence . . . Plaintiffs make several policy arguments against a finding of waiver of immunity in this case. (See, e.g., Plfs.' Resp. to SCTC's Mot. to Dismiss (“Th[e] purpose [of tribal immunity] is not served, however,

when a sophisticated, multi-million dollar tobacco company cynically uses tribal sovereign immunity as a shield to protect itself from prosecution for illegal business conduct, rather than a shield to protect limited . . . tribal resources.”). While Plaintiffs make some compelling arguments that tribal immunity is not, in this case, furthering the policy goals. . . . The Court has no authority to find a waiver of immunity based on policy concerns regarding whether Congress’ intent is being furthered in a given case.

Native Am. Distrib., 491 F. Supp. 2d at 1070 (emphasis added). Therefore, the equities of a particular situation – in which a party purporting to contract with a tribe believed or was misled to believe that the tribe had waived its immunity – are immaterial in determining whether the tribe’s immunity has actually been waived.

The Court may not rely on StoreVisions’ claims that tribal officers misrepresented their authority to waive the Tribe’s immunity or that it would be unjust not to subject the Tribe to suit. See *Native Am. Distrib.*, 491 F. Supp. 2d at 1068-70 (finding reasonable belief of contracting party and misrepresentation of tribal enterprise irrelevant to the question of whether tribal immunity had been waived). To the extent that the Nebraska Supreme Court relied on such conduct by tribal officers, its decision was in error. See *Native Am. Distrib.*, 491 F. Supp. 2d at 1070 (“The Court has no authority to find a waiver of immunity based on policy concerns.”).

Significantly, as an Indian tribe operating under a constitution adopted pursuant to the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, the *Omaha Tribe itself*, not individual council members, must consent to the disposition of any assets. See 25 U.S.C. § 476(e) (“In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of . . . tribal assets ***without the consent of the tribe.*** . . .”) (emphasis added). The purported waiver of sovereign immunity and contracts unquestionably involve the disposition of tribal assets, and tribal officials operating without the Omaha Tribe’s actual consent run afoul of this important qualification of tribal powers governed by the federal Indian Reorganization Act. Federal law requires the Omaha Tribe’s consent, and it is improper to read anything less from the “silence” in the Omaha Tribe’s constitution and bylaws as to the procedure for waiving the *Tribe’s* sovereign immunity.

There was no waiver of the Omaha Tribe’s sovereign immunity by the Tribe itself in this case. The Nebraska Supreme Court erred in allowing Store-Visions to rely on the representations of two tribal council members, attribute those actions as being those of the Tribe, and conclude the Tribe had waived sovereign immunity. See *Native Am. Distrib.*, 491 F. Supp. 2d at 1068-69. “It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it

would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible.” *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S. Ct. 653, 657, 84 L. Ed. 894, 899 (1940).

The Court should hear this case on the merits and reverse and vacate the Nebraska Supreme Court’s holding that a tribal official may waive a tribe’s sovereign immunity based on apparent authority alone. Letting the decision stand invites all manners of novel arguments in state court lawsuits against Indian tribes, with the ultimate consequence that the federal tribal immunity doctrine will be diminished in unpredictable and irreversible ways.

II. THE NEBRASKA SUPREME COURT’S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND FEDERAL CIRCUIT COURTS BY APPLYING APPARENT AUTHORITY PRINCIPLES TO A GOVERNMENTAL ENTITY

The decision of the Nebraska Supreme Court applied the principles of apparent authority to the purported waiver of tribal sovereign immunity by the tribal officials. By loosening the requirement of actual authority to bind a sovereign entity, the Nebraska Supreme Court has set off upstream against a current of federal jurisprudence to the contrary.

This Court and federal circuit courts have long held that a party contracting with a government

agency may not rely on the agent's assertion of authority if such authority does not exist. See, e.g., *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384, 68 S. Ct. 1, 3, 92 L. Ed. 10 (1947) ("Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409, 37 S. Ct. 387, 391, 61 L. Ed. 791 (1917) ("[T]he United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."); *United States v. Stewart*, 311 U.S. 60, 70, 61 S. Ct. 102, 108, 85 L. Ed. 40, 48 (1940) ("An officer or agency of the United States to whom no administrative authority has been delegated cannot estop the United States even by an affirmative undertaking to waive or surrender a public right."); *U.S. v. Ellis*, 527 F.3d 203, 207 (1st Cir. 2008) ("When a private party seeks performance of a promise allegedly made by the government, it must show that the government representative alleged to have entered into the agreement had actual authority to bind the United States."); *Doe v. United States*, 100 F.3d 1576, 1584 (Fed. Cir. 1996) ("Absent actual authority on the part of the Government's agent to bind the Government in contract, no binding contract can exist, regardless of the agent's representations."); *Thomas v. INS*, 35 F.3d 1332, 1339-40 (9th Cir. 1994) ("Apparent authority . . . generally will not suffice to bind the government.");

National Audubon Soc. v. Watt, 678 F.2d 299, 307-08 (D.C. Cir. 1982) (“[A] government official may not bind the United States by entering into a contract to perform unauthorized acts.”).

The rationale for this refusal to apply apparent authority to a sovereign was succinctly stated by the Court in *Whiteside v. United States*:

Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, *the rule as to the effect of the like act of a public agent is otherwise*, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the *detriment and injury of the public*.

Whiteside v. U.S., 93 U.S. 247, 257, 23 L. Ed. 882 (1876) (affirming a dismissal of complaint against U.S. where official did not have authority to enter into contract) (emphasis added). See also Restatement (Third) of Agency § 2.03, comment g (2006) (“[T]hird parties who deal with national governments, quasi-governmental entities, states, counties, and municipalities take the risk of error regarding the agent’s authority to a greater degree than do third parties dealing through agents with nongovernmental principals.”).

The Omaha Tribe of Nebraska, as a sovereign entity organized pursuant to the Indian Reorganization Act, deserves the benefit of this exception to the rule of apparent authority like any other sovereign. By subjecting the Omaha Tribe as a government to suit in state court, based on the unauthorized actions of individuals, the entire tribal membership suffers by putting the tribal treasury at risk. The Nebraska Supreme Court's failure to consider this very important exception to the doctrine of apparent authority in determining whether the Omaha Tribe's federal right to sovereign immunity had been effectively waived conflicts with decisions of this Court and should be reversed after consideration on the merits.



CONCLUSION

The U.S. Supreme Court has long recognized and respected the federal common law doctrine of tribal sovereign immunity. This doctrine is well-defined and insists that before a tribal government can be forced to defend itself in any court, there must be either a congressional abrogation or a clear, express, and unequivocal waiver of immunity by the tribal government itself. Federal law requires actual authority to bind the government. The decision below uniquely deprives tribal governments of this important sovereign right and relegates tribes to a status on par with private organizations. For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari,

hear the merits, and reverse the decision of the Nebraska Supreme Court.

Respectfully submitted,

BENJAMIN W. THOMPSON
THOMPSON LAW OFFICE, PC, LLO
13906 Gold Circle, Suite 201
Omaha, NE 68144
Telephone: (402) 330-3060
Facsimile: (402) 330-3060
E-mail: litigation@thompson.law.pro

OPINION OF THE SUPREME COURT
OF NEBRASKA

Case Title

STOREVISIONS, INC., APPELLEE,

v.

OMAHA TRIBE OF NEBRASKA, ALSO KNOWN AS OMAHA
NATION, APPELLANT.

Case Caption

STOREVISIONS v. OMAHA TRIBE OF NEB.

Filed July 22, 2011. No. S-10-280.

SUPPLEMENTAL OPINION

Appeal from the District Court for Thurston
County: DARVID D. QUIST, Judge. Supplemental opinion:
Former opinion modified. Motion for rehearing over-
ruled.

Ben Thompson and Amanda J. Karr, of Thomp-
son Law Office, P.C., L.L.O., for appellant.

Michael J. Whaley and Elizabeth M. Skinner, of
Gross & Welch, P.C., L.L.O., for appellee.

STOREVISIONS v. OMAHA TRIBE OF NEB.

Filed July 22, 2011. No. S-10-280.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN,
MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

Case No. S-10-280 is before this court on the motion for rehearing filed by the appellant regarding our opinion reported at *StoreVisions v. Omaha Tribe of Neb.*, ante p. 238, 795 N.W.2d 271 (2011). We overrule the motion, but modify the opinion as follows:

In the section of the opinion designated “*Waiver of Sovereign Immunity*,” we withdraw the 12th and 13th paragraphs, *id.* at 248, 796 N.W.2d at 280, and substitute the following:

The situation presented by this appeal is virtually identical to the one presented in *Rush Creek Solutions*. One difference is that, in this appeal, the Tribe and StoreVisions entered into a separate waiver prior to entering into the underlying contracts. As noted, this separate waiver was signed in the presence of five of the seven members of the tribal council and lends even more weight to an appearance that the signatories to the document – the chairman and vice chairman – were vested with the authority to waive the Tribe’s sovereign immunity. Indeed, the presence of five of the seven members of the tribal council in the tribal meeting room at the Tribe’s headquarters, along with the tribal council’s vote on resolution No. 08-74, strongly suggest that the action of the chairman and the vice chairman, both members of the tribal council, were, on these facts, essentially the action of the tribal council itself. Unlike those cases wherein the agent was a party removed from the principal by time, place, and/or organizational structure,

the agent and the principal in this case, if not actually one and the same, are very nearly one and the same.

We conclude that based upon these undisputed facts, the chairman and vice chairman had the requisite authority to waive the Tribe's sovereign immunity. The Tribe's first assignment of error is without merit.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

WRIGHT, J., not participating.

OPINION OF THE SUPREME COURT
OF NEBRASKA

Case Title

STOREVISIONS, INC., APPELLEE,

v.

OMAHA TRIBE OF NEBRASKA, ALSO KNOWN AS
OMAHA NATION, APPELLANT.

Case Caption

STOREVISIONS V. OMAHA TRIBE OF NEB.

Filed March 25, 2011. No. S-10-280.

Appeal from the District Court for Thurston
County: DARVID D. QUIST, Judge. Affirmed.

Ben Thompson and Amanda J. Karr, of Thomp-
son Law Office, P.C., L.L.O., for appellant.

Michael J. Whaley and Elizabeth M. Skinner, of
Gross & Welch, P.C., L.L.O., for appellee.

1. **Jurisdiction: Appeal and Error.** A jurisdic-
tional question which does not involve a factual dis-
pute is determined by an appellate court as a matter
of law.

2. **Motions to Dismiss: Jurisdiction: Appeal
and Error.** Aside from factual findings, the granting
of a motion to dismiss for a lack of subject matter
jurisdiction is subject to a de novo review.

3. Jurisdiction: Final Orders: Appeal and Error. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.

4. Final Orders: Appeal and Error. An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.

5. Actions: Statutes. A special proceeding includes every special statutory remedy which is not in itself an action.

6. Actions: Judgments. A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding.

7. Actions: Statutes. A special proceeding entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.

8. Actions. Examples of special proceedings include juvenile court proceedings, probate actions, and workers' compensation cases.

9. Motions to Dismiss: Actions. A motion to dismiss is merely a step or proceeding within the overall action, and is not a civil statutory remedy, such as a juvenile court proceeding, a probate action, or a workers' compensation case.

10. ___: ___. The denial of a motion to dismiss does not occur within a special proceeding.

11. **Final Orders: Appeal and Error.** To fall within the collateral order doctrine, an exception to the final order rule, an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.

12. **Principal and Agent.** Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an agent's apparent authority.

13. ___. Apparent authority gives an agent the power to affect the principal's legal relationships with third parties. The power arises from and is limited to the principal's manifestations to those third parties about the relationships.

14. **Principal and Agent: Proof.** Apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the agent's acts, declarations, or conduct. Manifestations include explicit statements the principal makes to a third party or statements made by others concerning an actor's authority that reach the third party and the third party can trace to the principal.

15. **Principal and Agent.** For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her.

16. _____. Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

StoreVisions, Inc., brought an action alleging that the Omaha Tribe of Nebraska (the Tribe) breached several contracts entered into between the parties. The Tribe filed a motion to dismiss, arguing that it had not waived its sovereign immunity. The district court denied the motion to dismiss, and the Tribe appealed.

We conclude that we have jurisdiction over this appeal under the collateral order doctrine. We further conclude that the Tribe waived its sovereign immunity, and therefore we affirm the district court's denial of the Tribe's motion to dismiss.

FACTUAL BACKGROUND

Between April 4 and July 21, 2008, StoreVisions, a general contractor, and the Tribe entered into 11 different agreements related to plans the Tribe had to expand its casino operations. Per those agreements, StoreVisions agreed to provide certain material and labor to the Tribe in return for payment. Prior to the execution of the contracts, StoreVisions requested that the Tribe execute a document waiving its sovereign immunity. That document was signed by the Tribe's council chairman and vice chairman at a meeting held on January 7, 2008. The meeting included representatives of StoreVisions and five of the seven members of the Tribe's tribal council.

On October 9, 2009, StoreVisions sued the Tribe in Thurston County District Court, alleging 11 causes of action related to the breach of 11 different agreements. On November 19, the Tribe filed a motion to dismiss, which indicated that the Tribe was appearing "for the limited purpose of this motion," and further alleged that "[t]he Court does not have jurisdiction of the subject matter of the action because the action is against a sovereign tribal government that has not waived its immunity from suit in this action. . . ."

Following a hearing at which the district court permitted both parties to admit affidavits into evidence, the district court denied the Tribe's motion to dismiss, concluding that the chairman and vice chairman had apparent authority to act on behalf of the

Tribe and that therefore the Tribe had waived its sovereign immunity. The Tribe appealed.

Initially, the Nebraska Court of Appeals dismissed without opinion the Tribe's appeal, concluding that the denial of a motion to dismiss was not a final order. The Tribe filed a motion for rehearing, contending that the district court's order was reviewable because it raised the issue of the Tribe's sovereign immunity. The Court of Appeals reinstated the Tribe's appeal, reserving the jurisdictional issue. We then moved this case to our docket pursuant to our authority to regulate the dockets of this court and the Court of Appeals.¹

ASSIGNMENTS OF ERROR

The Tribe assigns, restated and consolidated, that the district court erred in (1) concluding that the Tribe was not entitled to sovereign immunity and (2) converting the Tribe's motion to dismiss into a motion for summary judgment without proper notice to the Tribe.

¹ See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.²

[2] Aside from factual findings, the granting of a motion to dismiss for a lack of subject matter jurisdiction is subject to a de novo review.³

ANALYSIS

Jurisdiction: Final Order.

We are first presented with a jurisdictional question. On appeal, StoreVisions contends that the Tribe's appeal is not from a final order, and further argues that contrary to the Tribe's assertions, the collateral order doctrine is inapplicable. We consider each in turn.

[3] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.⁴

[4] An order is final for purposes of appeal if it affects a substantial right and (1) determines the

² *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

³ See *City of Fremont v. Kolas*, 279 Neb. 720, 781 N.W.2d 456 (2010).

⁴ *Williams v. Baird*, *supra* note 2.

action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.⁵

We note that the order denying the Tribe's motion to dismiss did not determine the action or prevent a judgment, because the denial allowed StoreVisions' action to proceed. In addition, the order was not made on summary application in an action after judgment was rendered. Thus, the initial question presented in this case is whether the district court's order was made during a special proceeding.

[5-8] A special proceeding includes every special statutory remedy which is not in itself an action.⁶ A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding.⁷ Generally, a "special proceeding" entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.⁸ Examples of special proceedings include juvenile court proceedings, probate actions, and workers' compensation cases.⁹

[9,10] A motion to dismiss is merely a step or proceeding within the overall action, and is not a civil

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

statutory remedy, such as a juvenile court proceeding, a probate action, or a workers' compensation case.¹⁰ The Court of Appeals has specifically concluded that the denial of a motion to dismiss does not occur within a special proceeding).¹¹ We agree and conclude that this appeal does not present us with a final order for the purposes of § 25-1902.

Jurisdiction: Collateral Order.

[11] Indeed, the Tribe appears to be in agreement that the district court's order is not final. Instead, the Tribe asks this court to address its appeal under the collateral order doctrine, an exception to the final order rule.¹² To fall within the doctrine, an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.¹³ We set forth these elements in *Hallie Mgmt. Co. v. Perry*.¹⁴

Applying the above factors to the order denying the Tribe's claim of sovereign immunity, we initially

¹⁰ See, *Qwest Bus. Resources v. Headliners-1299 Farnam*, 15 Neb. App. 405, 727 N.W.2d 724 (2007); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

¹¹ See *id.*

¹² See *Williams v. Baird*, *supra* note 2.

¹³ *Id.*

¹⁴ *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

note that the first two factors are met in this case. The order in question was an order denying the Tribe's motion to dismiss on the ground that the Tribe was entitled to sovereign immunity. In denying the Tribe's order, the district court explicitly concluded that the Tribe had waived its immunity in this case. In addition, the district court's order is separate from the merits of the case, which deals with whether the Tribe breached a series of contracts entered into between the Tribe and StoreVisions.

We also conclude the third factor – that the order be effectively unreviewable on appeal from a final judgment – is met in this case. Federal courts, including the U.S. Supreme Court, which have addressed this issue have concluded that like claims of qualified or absolute immunity, a claim of sovereign immunity is based in immunity from suit and is not simply a defense against liability.¹⁵ As such, those courts have concluded that such orders are immediately reviewable.¹⁶

¹⁵ *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993); *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007); *Osage Tribal Council v. U.S. Dept. of Labor*, 187 F.3d 1174 (10th Cir. 1999); *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030 (11th Cir. 1995). Cf., *Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004); *Sault Ste. Marie Tribe v. State of Mich.*, 5 F.3d 147 (6th Cir. 1993).

¹⁶ *Id.*

StoreVisions relies on our decision in *Williams v. Baird*¹⁷ to argue that this court should not review a nonfinal order under the collateral order doctrine if questions of fact must be decided and that this case presents such issues. The basis for this portion of our holding in *Williams* was the Supreme Court's conclusion in *Mitchell v. Forsyth*¹⁸ and *Johnson v. Jones*¹⁹ that immunity appeals interfere less with the final judgment rule when limited to issues of law.

While the propositions StoreVisions cites are properly stated, this case does not present any disputed questions of fact. The parties are in general agreement about *what* happened; the issue is whether that set of facts gave rise to a waiver of immunity. Thus, this court is presented with a question of law and not a question of fact. As such, this court has jurisdiction under the collateral order doctrine to consider the Tribe's appeal.

Waiver of Sovereign Immunity.

Having concluded that the district court's order overruling the Tribe's motion to dismiss is reviewable under the collateral order doctrine, we turn next to the question of whether the Tribe waived its sovereign

¹⁷ *Williams v. Baird*, *supra* note 2.

¹⁸ *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

¹⁹ *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995).

immunity so as to make it amenable to suit by StoreVisions.

In its brief, the Tribe focuses on the fact that it is a separate sovereign with immunity from suit. But contrary to the Tribe's discourse in its brief, there is no dispute that the Tribe is a separate sovereign and generally entitled to immunity from suit.²⁰ Nor is there any dispute that this immunity exists unless limited by Congress²¹ or waived by the Tribe.²² And no one disputes that any waiver of that immunity must be expressly made.²³ The only question in this case is whether such waiver was made.

The Tribe's primary contention is that its sovereign immunity can be waived only by a resolution of the tribal council and not by the independent acts of the chairman and vice chairman of the council. The Tribe contends that its bylaws provide no authority to the officers of the Tribe, save those delegated by the tribal council. As a result, according to the Tribe, the document signed in January 2008 purporting to act as a waiver was ineffective since the chairman and vice chairman cannot waive the Tribe's immunity.

²⁰ See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

²¹ *Id.*

²² *Native American Distrib. v. Seneca-Cayuga Tobacco*, 546 F.3d 1288 (10th Cir. 2008).

²³ *Santa Clara Pueblo v. Martinez*, *supra* note 20.

Rush Creek Solutions v. Ute Mountain Tribe,²⁴ a case cited by the district court in its order, is instructive. In that case, Rush Creek Solutions, Inc., and the Ute Mountain Ute Tribe (Ute Tribe) entered into a contract wherein Rush Creek Solutions would provide the Ute Tribe with computer software and support. The Ute Tribe's chief financial officer (CFO) signed the contract on behalf of the Ute Tribe. The contract included a provision in which the Ute Tribe waived its immunity from suit.

The Ute Tribe later allegedly breached the contract, and Rush Creek Solutions brought suit. The Ute Tribe filed a motion to dismiss, alleging that although the CFO had the authority to enter into the contract, he lacked authority to waive the Ute Tribe's immunity. The Ute Tribe's constitution and bylaws were similar to those in this case; namely, the Ute Tribe's council had the authority to prescribe the duties of the Ute Tribe's officers, but was silent concerning the authority regarding the waiver of sovereign immunity.

The trial court did not reach the issue of whether the CFO actually had the authority to exercise a waiver of the Ute Tribe's immunity, instead concluding that at the very least, the CFO had the apparent authority to do so. The court noted that

²⁴ *Rush Creek Solutions v. Ute Mountain Tribe*, 107 P.3d 402 (Colo. App. 2004).

[a]t all relevant times, the CFO was authorized to enter into contracts on behalf of the [Ute] Tribe. The contract at issue here designates the [Ute] Tribe as the customer. The CFO signed the contract on behalf of the customer on a line above the statement, “authorized signature.” The [Ute] Tribe’s Constitution and personnel policy are silent concerning procedures for signing contracts, waiving sovereign immunity, or authorizing persons to sign waivers.²⁵

On this basis, the district court concluded that the Ute Tribe’s motion to dismiss should be denied.

In arguing that *Rush Creek Solutions* is inapplicable, the Tribe contends that it is not appropriate to apply agency principles in a sovereign immunity analysis. While the Tribe cites to cases purporting to support that proposition, we have reviewed those cases and find them inapplicable. We adopt the reasoning of *Rush Creek Solutions* and apply agency principles, specifically the principles of apparent authority, to the purported waiver in this case.

[12-14] Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an agent’s apparent authority.²⁶ Apparent authority gives an agent the power to affect the

²⁵ *Id.* at 407.

²⁶ *Koricic v. Beverly Enters. – Neb.*, 278 Neb, 713, 773 N.W.2d 145 (2009).

principal's legal relationships with third parties. The power arises from and is limited to the principal's manifestations to those third parties about the relationships.²⁷ Stated another way, apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the agent's acts, declarations, or conduct.²⁸ Manifestations include explicit statements the principal makes to a third party or statements made by others concerning an actor's authority that reach the third party and the third party can trace to the principal.²⁹

[15,16] For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her.³⁰ Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction.³¹

The record in this case shows that the separate waiver signed by the chairman and vice chairman was entered into in the presence of five of the seven members of the tribal council at the Tribe's headquarters. In addition to the waiver, the Tribe's chairman,

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

vice chairman, or both, executed all other contracts between the Tribe and StoreVisions. And a review of the record shows that in resolution No. 08-74, the tribal council acknowledged that it had entered into these previous contracts with StoreVisions. Moreover, because the Tribe's constitution and bylaws are silent as to the method of waiving sovereign immunity, it was reasonable for StoreVisions to rely upon the words and actions of the Tribe with respect to the waiver of immunity.

We note that no source of tribal law beyond the constitution and bylaws was presented to the district court, nor was the district court asked to take judicial notice of any sources. As such, this court will not judicially notice, or otherwise seek out, any authority that might support either position in this litigation.

The situation presented by this appeal is virtually identical to the one presented in *Rush Creek Solutions*. One difference is that, in this appeal, the Tribe and StoreVisions entered into a separate waiver prior to entering into the underlying contracts. As noted, this separate waiver was signed in the presence of five of the seven members of the tribal council and lends even more weight to an appearance that the signatories to the document – the chairman and vice chairman – were vested with the authority to waive the Tribe's sovereign immunity.

Like the *Rush Creek Solutions* court, we decline to address the question of whether the chairman and vice chairman had actual authority to waive the

Tribe's sovereign immunity, instead concluding that the two had apparent authority to do so based upon the undisputed facts. The Tribe's first assignment of error is without merit.

Conversion of Motion to Dismiss to Motion for Summary Judgment.

In its second and final assignment of error, the Tribe contends that the district court erred in converting its motion to dismiss into a motion for summary judgment without proper notice. The Tribe cites to Neb. Ct. R. Pldg. § 6-1112(b) and *Crane Sales & Serv. Co. v. Seneca Ins. Co.*³² in support of this argument. Both are inapplicable, and the Tribe's argument is without merit.

The basis of the Tribe's assignment of error is § 6-1112(b), which provides in relevant part:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in §§ 25-1330 to 25-1336, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute.

³² *Crane Sales & Serv. Co. v. Seneca Ins. Co.*, 276 Neb. 372, 754 N.W.2d 607 (2008).

The Tribe's motion to dismiss is not based in § 6-1112(b)(6), but instead on § 6-1112(b)(1) for lack of jurisdiction over the subject matter. Thus, this language in § 6-1112(b) and this court's opinion in *Crane Sales & Serv. Co.* are inapplicable.³³

We additionally note that when the Tribe filed its motion, that motion indicated it would be supported by affidavit, and in fact, such affidavits were presented by the Tribe. We therefore question whether the Tribe was truly without notice as to whether the motion to dismiss would be converted to a motion for summary judgment.

The Tribe's final assignment of error is also without merit.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

³³ Cf. *Washington v. Conley*, 273 Neb. 908, 734 N.W.2d 306 (2007).

IN THE DISTRICT COURT OF
THURSTON COUNTY, NEBRASKA

STOREVISIONS, INC.,)	Case No. CI09-116
)	
Plaintiff,)	ORDER ON
)	DEFENDANT'S
v.)	MOTION TO
)	DISMISS
OMAHA TRIBE OF)	
NEBRASKA A/K/A)	(Filed Mar. 10, 2010)
OMAHA NATION,)	
)	
Defendant)	

The matter came before the Court on the 13th day of January, 2010 on the Defendant's Motion to Dismiss the Plaintiff's Complaint pursuant to Neb. Ct. R. Pldg. §6-112. Elizabeth M. Callaghan appeared on behalf of the Plaintiff. Ben Thompson appeared on behalf of the Defendant. Exhibits were received into evidence and counsel made oral arguments. Briefs of law were submitted by both parties subsequent to the hearing and have been considered by the Court.

Defendant asserts that this Court does not have subject matter jurisdiction over this action because the action is against a sovereign tribal government that has not waived its sovereign immunity. Defendant further asserts that the waiver of sovereign immunity signed by Defendant's Chairman and Vice Chairman is not a valid waiver of sovereign immunity by Defendant.

Plaintiff asserts that general laws of agency govern the case, and that the Defendant's Chairman

and Vice Chairman had apparent authority to sign the waiver of sovereign immunity on behalf of the Defendant in favor of Plaintiff.

Having now fully reviewed the evidence, the arguments of counsel, and the law, the Court finds the authority presented in *Rush Creek Solutions, Inc.*, *infra*, to be persuasive, and that the Defendant's Motion to Dismiss should be denied.

In *Rush Creek Solutions, Inc.*, a case similar to the one at bar, the Colorado Court of Appeals examined the issue of apparent authority and held that a tribe's chief financial officer had apparent authority to sign a contract and waive the tribe's sovereign immunity. In that case, Rush Creek and the Ute Tribe had signed a contract in which Rush Creek agreed to provide the tribe computer software and maintenance support. The contract, which contained a default clause waiving the tribe's sovereign immunity, was signed on the tribe's behalf by its CFO.

Rush Creek alleged that the tribe failed to make payments under the contract and filed an action against the tribe. The tribe filed a Motion to Dismiss, challenging subject matter jurisdiction based on sovereign immunity. The tribe asserted that its CFO did not have authority to waive the tribe's sovereign immunity.

Rush Creek asserted that the tribe's constitution contained no provision concerning the tribal officials' authority to waive sovereign immunity of the tribe. Because nothing in the tribe's constitution expressly

addressed authority to waive sovereign immunity and nothing expressly refuted or prohibited it, the Court found that general laws of agency governed the case. *Id.* at 407 citing *Richmond v. Sheahan*, 270 F.3d 430 (7th Cir. 2001) (finding agency principals are applicable in determining sovereign immunity issues); *Finnie v. Jefferson County Sch. Dist. R-1*, 79 P.3d 1253 (Colo. 2003). The Colorado Court of Appeals went on to state that “an agency ‘results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.’” *Rush Creek* at 407 quoting *City and County of Denver v. Fey Concert Co.*, 960 P.2d 657, 660 (Colo. 1998); *Restatement (Second) of Agency*, §1(1) (1958).

Such authority, the Court found, is established by evidence of “written or spoken words by other conduct of the principal which, reasonably interpreted, causes a person to believe that the principal consents to have the act done on his behalf by a person purporting to act for him.” *Id.* at 407 quoting *Lucero v. Goldberger*, 804 P.2d 206, 209 (Colo. App. 1990) (emphasis omitted). The Court continued: “Apparent authority is created to protect third parties who, in good faith, rely upon their belief that an agency relationship exists between the apparent principal and agent. *Id.* at 407 quoting *Sigel-Campion Livestock Comm’n Co. v. Ravohain*, 71 Colo. 410, 207 P.82 (1922); *In Re Marriage of Robbins*, 8 P.3d 625 (Colo. App. 2000). More important, the Court stated that “An agent can make the principal responsible for his or her actions

if the agent is acting pursuant to apparent authority, regardless of whether the principal has knowledge of the agent's conduct." *Id.* at 407 citing *Willey v. Mayer*, 876 P.2d 1260 (Colo. 1994); *Life Investors Ins. Co. v. Smith*, 833 P.2d 864, 868 (Colo. App. 1992); *Restatement (Second) of Agency* §§26-27.

The Court concluded:

The words, actions, and other described conduct of the tribe, reasonably interpreted, would and did cause Rush Creek to believe that the tribe consented to have the contract and waiver signed on its behalf by the CFO. The CFO held himself out as the tribe's agent and acted at least with apparent authority in assenting to contract and the waiver therein. Rush Creek relied to its detriment upon the apparent authority of the CFO. Hence, we conclude as a matter of law that the CFO had apparent authority to sign the contract and waive the tribe's sovereign immunity.

Id. at 408.

Turning back to the facts of the case at bar, it is undisputed by the parties that the Defendant's constitution and bylaws are silent on the issue of the protocol for waiver of sovereign immunity by the Tribe. Because nothing in the constitution or bylaws speaks to the issue or refutes or prohibits it, the Court finds that general laws of agency govern here.

The Court further finds that here, just as in *Rush Creek*, the Defendant's Chairman and Vice Chairman acted with apparent authority in signing the waiver of sovereign immunity on behalf of the Defendant. The affidavits received into evidence at hearing on this matter establish that the words, actions, and conduct of the Defendant, reasonably interpreted, would and did cause Plaintiff to believe that the Defendant consented to have the waiver signed on the Defendant's behalf by its Chairman and Vice Chairman. The Court therefore concludes as a matter of law that the Defendant's Chairman and Vice Chairman had apparent authority to sign the waiver and that the Defendant's sovereign immunity has been waived.

IT IS THEREFORE ORDRED [sic] that the Defendant's Motion to Dismiss is denied. Defendant is ordered to file an answer of [sic] otherwise plead to the Plaintiffs Complaint within ten (10) days of the date of this Order.

BY THE COURT:

/s/ Darvid Quist
Darvid D. Quist, District Judge

cc: Elizabeth Callaghan
Ben Thompson
