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UNITED STATES DISTRICT COURT
For The
DISTRICT OF ARIZONA

WATER WHEEL CAMP RECREATIONAL AREA, INC. *et al.*,	)	CIV 08-474-PHX-DGC
Plaintiffs,	)	**PLAINTIFFS' REPLY BRIEF CONCERNING THE LACK OF TRIBAL COURT JURISDICTION PURSUANT TO THE RULE OF *MONTANA v. UNITED STATES***
v.	)	
THE HONORABLE GARY LARANCE, *et al.*,	)	
Defendants.	)	

I. INTRODUCTION

Both the Defendants and the proposed *amicus* Colorado River Indians Tribes ("CRIT") propose that Plaintiffs are seeking a wider adjudication than is the fact. As Plaintiffs repeatedly have stated, they only are contesting CRIT Tribal Court jurisdiction over the underlying eviction action prosecuted by CRIT. The matter is now before this Court because the CRIT Tribal Court

entered its final judgment that it has jurisdiction for the eviction action, which judgment was affirmed and made final for the CRIT court system by the Tribal Appellate Court. Water Wheel now has exhausted its Tribal Court remedies and the issues before this Court are now ripe for adjudication.

The Parties agree that the terms of the 1975 Lease control this case. Indeed, this principle was affirmatively conceded and then reiterated in Defendants' Response Memorandum in Opposition of March 24 ("Resp."). They stipulate at page 10 that any inherent tribal exclusionary power "was necessarily constrained by the terms of the [Lease]" and further acknowledge at page 13 that any consensual relationship between CRIT and the Plaintiffs must be found in the Lease.

The foundation for Defendants' defense to this action is stated at page 14 of their Response: "*there is no lease condition or provision* which is changed or altered by the application of the CRIT eviction ordinance" (emphasis in the original). And so, Defendants have challenged Plaintiffs to show otherwise. As discussed herein, Plaintiffs only have to quote the Lease to so do.

In a nutshell, the Lease specifically provides that only the Secretary of the Interior may take legal action to enforce its terms for any breach by Water Wheel, including failure to make rental payments and holding over on the leasehold after expiration. This provision is clear and unequivocal and directly contradicted by the CRIT Property Code/Eviction Ordinance pursuant to which the Defendant and Tribal Court Judge Gary LaRance adjudicated the Tribal Court eviction action and ruled that he had jurisdiction to do so. And to emphasize the lack of jurisdiction, it is not disputed that Plaintiffs never consented to the Property Code/Eviction Ordinance which was enacted after the date of Lease execution; the absence of written consent

goes directly to the restriction in Lease Section 34 requiring Water Wheel's written acceptance of any subsequently-enacted tribal laws, regulations or ordinances that "have the effect of changing or altering the express conditions and provisions of this lease."

To eliminate any doubt as to the terms of the Business Lease pursuant to which Water Wheel occupies the land at issue, Section 21 specifically provides that only the Secretary of the Interior may commence any legal action for disputes arising thereunder, including any default or breach. Pointedly, CRIT has no role in this regard. That provision is central to the Lease and makes clear that Water Wheel consented to Secretarial enforcement exclusively; CRIT has no rights to do so under the Lease under an after-adopted tribal ordinance purporting to usurp the Secretary's exclusive role of enforcer. The only legal remedy available to CRIT for actions of Water Wheel arising through the Lease is to request the Secretary to do something – the Tribe cannot unilaterally pursue, and the Tribal Court cannot adjudicate, remedies created by the Eviction Ordinance.[1]

Defendants continue to insist that Plaintiffs are asking the court to adjudicate Indian title and/or reservation status of the leasehold currently occupied by Water Wheel Camp Recreation

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[1] *Cf. Arizona Public Service Company v. Aspaas*, 77 F.3d 1128, 1130-32, 1134-35 (9th Cir. 1995) (enjoining tribal court's jurisdiction to enforce employment ordinance against nonmember business entity that leased tribal trust land with approval of Secretary pursuant to 25 U.S.C. 415 when terms of lease and amendments thereto provided certain tribal laws would not apply to business and provided for Secretarial involvement in lease disputes and alternative dispute resolution; rejecting tribal court's jurisdiction because lease agreements "demonstrated parties' understanding that the [tribe] would not regulate [business] . . . beyond enforcement of the contractual commitments" and remarking that "[o]f particular significance to [the Court was] the parties' establishment of a special dispute resolution mechanism in order to resolve any disputes . . . " and "record . . . reflect[ed] that the [Tribe] refused to abide by contractual mechanisms and resorted to passage and enforcement of [tribal ordinance] in order to bypass them").

Area, Inc. Again, this is not the case before this Court.[2] The sole focus of Plaintiffs' challenge is whether there was any consent by Water Wheel to the Tribal Court jurisdiction under the law of *Montana* and its progeny.

There may be other unresolved legal issues going to various tribal rights and entitlements, but they are not at issue in this litigation and, thus, not part of the judicial review under *Montana*.

Finally, this Reply does not address the proposed CRIT *Amicus Curiae* Brief since the CRIT Motion for Leave has not been granted and, thus, the Brief is not formally before this Court. However, it is worth noting CRIT's startling and total disdain for this Court's jurisdiction, as evidenced by the Proposed *Amicus* Brief's two declarations that CRIT is free to pursue execution of the Tribal Court's final judgment immediately and in derogation of this Court's Stay of that judgment pending its *Montana* review. *See* Pls. Opp. to CRIT's Req. for Leave to File Amicus Curiae Br., dated Apr. 29, 2009. CRIT's articulation of the law is arrogant and wrong.

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[2] Curiously, Defendants seem intent on refuting matters not directly relevant to the question of whether Water Wheel consented to the CRIT Tribal Court jurisdiction for the matter at issue below. To this end, they even contend at page 26 that the unambiguous Act of April 30, 1864, 78 Stat. 188, never applied to the CRIT Reservation with the obvious implication that a law limiting to four the number of reservations in California did not preclude an Arizona tribe's staking a claim in California. Justice Blackmun apparently missed that unstated exception to the law in deciding *Mattz v. Arnett*, 412 U.S. 481, 489 (1973), and confirming the strict four reservation limitation. The four reservations have long-since been selected and the CRIT Reservation is not one of them. Similarly, Defendants appear to have overlooked the requirement of Public Law 88-302's Section 5 that a legal "determination" must be rendered before the Secretary had leasing authority for any land in California claimed by CRIT. *See Arizona v. California,* 460 U.S. 605, 630 (1983).

II. DISCUSSION

A. Defendants Have Misstated The Standard Of Review.

Defendants contend that this Court must give deference to the decisions of the Tribal Court. To the contrary, it is settled law that this Court should review *de novo* whether the Tribal Court had jurisdiction over these Plaintiffs for the eviction action. It is not required to defer to the Tribal Court's findings and conclusions.

In support of their standard of review position, Defendants cite *FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311 (9th Cir. 1990), *cert. denied,* 499 U.S. 943 (1991), for the proposition that this Court must (1) show deference to the Tribal Court's determination of its own jurisdiction and (2) accept Judge LaRance's findings of fact unless Plaintiffs can show those findings are "clearly erroneous." *See* Resp. at 2. And they further seem to suggest that this Court's review should be confined to the Tribal Court record unless Plaintiffs can show the findings are "clearly erroneous." Simply stated, this argument sidesteps the law applicable to this case.

The question of whether a tribe has jurisdiction over a non-member is one that may only be resolved by reference to federal law. *See FMC v. Shoshone-Bannock Tribes, supra,* 905 F.2d at 1313-14 (*citing Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985)) ("question of tribal court jurisdiction is *a federal question*"). It is well-established that "federal courts are the final arbiters of federal law." *Id.* Accordingly, the scope of a tribe's ability to regulate or adjudicate matters affecting non-Indians is a federal legal question that federal courts review *de novo*. *See Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1132 (9th Cir. 1995); *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000) ("questions about tribal jurisdiction over non-Indians is an issue of federal law reviewed *de*

novo"); s*ee also Ex. Rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 905 (9th Cir. 1994).

At the same time, federal courts show deference to tribal courts by allowing them the first opportunity to determine their own jurisdiction by generally requiring exhaustion of tribal remedies prior to federal review. *Nevada v. Hicks*, 533 U.S. 353 (2001). Alleged inadequacy or incompetence of a tribal forum does not, by itself, limit the exceptions to the exhaustion requirement. *See FMC*, 905 F.2d at 1313. The exhaustion principal allows the tribal court an opportunity to fully explain its purported basis for jurisdiction,[3] but not to form a record for "appeal" to the federal court as Defendants ostensibly propose. As for the notion that exhaustion establishes some record of tribal court expertise, the federal courts have "no obligation" to recognize that purported expertise as dispositive of any matter determined. *Id.* at 1313-14.

By requiring these plaintiffs to exhaust their Tribal Court remedies, this Court already has deferred to the Tribal Court and arguments of Defendants' counsel in favor of exhaustion by staying this litigation until the Tribal Court determined its own jurisdiction. Plaintiffs have exhausted their tribal remedies and are now back before this Court seeking the independent and *de novo* review of jurisdiction to which they are entitled. Remarkably, Defendants now suggest that this Court should *again defer to the Tribal Court* by applying a deferential "clearly erroneous" standard to the Tribal Court's findings and limiting the review of its own jurisdiction to the Tribal Court record. Such is neither the law nor appropriate.

Initially, it must be noted that the sole issue before this Court is whether the Tribal Court's assertion of jurisdiction over these Plaintiffs was lawful from the beginning pursuant to

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[3] *See Nat'l Farmers*, 471 U.S. at 857 ("[e]xhaustion . . . encourage[s] tribal courts to explain . . . precise basis for accepting jurisdiction").

Montana. In advancing this argument, Defendants cite extensively to the full Tribal Court and Tribal Appellate Court records, almost all of which pertain to factual matters they claim must be "disproven" under their proposed "clearly erroneous" standard of review.

Plaintiffs' counsel is unaware of any case law even suggesting that a federal court must confine its review of a tribal court's jurisdiction determination to the Tribal Court record. Yet, this is the precise argument advanced by the Defendants that this Court's scope of review is so limited unless Plaintiffs can prove the Tribal Court findings are "clearly erroneous." Federal judicial review of a tribal court's findings and record simply is not required for this Court's assessment of whether the Tribal Court had jurisdiction over the eviction action below. The threshold issue is not whether the CRIT Tribal Court made correct findings of fact, but rather whether it ever had the right to render them at all.

To reiterate, the only issue before this Court is whether the Tribal Court had jurisdiction over these Plaintiffs under the Lease executed by Water Wheel. This Court has no obligation to follow the CRIT Tribal Court's determination of its own jurisdiction. *Arizona Pub. Sevr. Companies*, 77 F.3d at 1134 (emphasis added).

B. The Rights Of The Parties To The Lease When It was Executed in 1975.

It is undisputed that the terms of the 1975 Lease control this case, and this principle was affirmatively accepted by the Defendants in their Opposition at pages 10 and 13, as discussed above.

With this, it is critical to fully explain the applicable Lease provisions and their specific and limited effect in the establishment of any consensual relationship sufficient to sustain Tribal Court jurisdiction under *Montana.* And, also discussed above, the Lease provides that the Secretary has exclusive enforcement for any breach, and specifically for the breaches upon

which Judge LaRance found jurisdiction: failure to make rental payments and holding over on the leasehold after expiration.

The Lease actually consists of two parts: the **Business Lease** (consisting of Sections I-IX at pages i-vii) and the **Lease Addendum** (consisting of Sections 1-36 at pages 1-23). The sections providing for the Parties' rights relevant to the *Montana* issues are discussed below in the order in which they appear in the two parts.

BUSINESS LEASE

1. The Lease was entered into pursuant to the provisions of 25 *Code of Federal Regulations* Part 131 ("25 CFR"), but CRIT's repeated violations were never acted on by the Department of the Interior.

The **Lease Preamble** states that the Lease was entered into pursuant to the terms of 25 CFR part 131 ("25 CFR"), which is Exhibit C to Plaintiffs' Brief on *Montana* filed on March 27, 2009. The 25 CFR provides that Water Wheel had a right to appeal to the Secretary to contest actions or inactions of employees of the Department of the Interior concerning the Lease. Water Wheel filed its 25 CFR Appeal on May 10, 2001 (discussed below in this Section II.B.1),[4] with the Department of the Interior in a formal submission which never was acted on and still is pending. The substance of that appeal is that the Lease provides that Water Wheel shall have the right to provide a general plan and design for the "complete development of the entire leased premises." The appeal was the result of CRIT's arrogating to itself the review and approval role of Lease Addendum Section 5 (discussed below) and then refusing to approve any development proposals submitted by Water Wheel. This activity followed CRIT's directing both the State of California and Riverside County, CA that it would be the exclusive party to review and approve

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[4] The 25 CFR Appeal is before this Court as Exhibit A to Plaintiffs' Second Application and Motion for Temporary Retraining Order and Preliminary Injunction filed herein on May 10, 2008 as Docket #26.

all of Water Wheel's development plans and designs, directly contradicting the specific provisions of Section 5 that the State and County would have that role, as well as CRIT interference with Water Wheel's ability to secure electrical service through Southern California Edison Company. *See* Second Decl. of Robert Johnson ¶ ¶ 6-11, Ex. B to Pls. Br. on *Montana,* Docket #50 at pages 8-10 of 36 pages.

Section 5 pointedly ignores CRIT in identifying the parties to conduct review and approval for Water Wheel development plans and specifications, yet CRIT self-declared itself as having that authority and forcing withdrawal of the State and County from the review and approval. This is directly contrary to the agreement of Water Wheel and the federal signatories that those activities were exclusively vested in the State of California and Riverside County.

Defendants so mischaracterize Plaintiffs' 25 CFR Appeal as an appeal of "an alleged tribal breach of a lease" (Resp. at 16) that the distortion could only be intentional. Using that distortion as a springboard, they argue that the Bureau of Indian Affairs ("BIA") could not act on the appeal because the 25 CFR appeals process "does not contemplate appeals *from tribal actions*." *Id.* at 17. While the 25 CFR Appeal is the product of CRIT's long-standing and intentional breaches of the Lease, it did not "appeal" those breaches, as such. Rather, Water Wheel sought corrective action for the BIA's failure to take any action whatsoever in response to Plaintiffs' repeated notices of the lease violations. 25 CFR § 131.5 (g)(1) is incorporated into the Lease by reference, and it provides that "all of the lessee's obligations under . . . [the] lease . . . are to the United States as well as to the owner of the land." *See also* 25 CFR § 162.604(g)(1). Plaintiffs respectfully submit that the Lease obligations are reciprocal and, therefore, the United States owes obligations to the Lessee as well.

As for the BIA's failure to respond to Water Wheel's repeated requests for relief from CRIT's Lease violations, it is well-established that agency inaction can be the equivalent of agency action. *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) ("agency inaction may represent effectively final agency action that the agency has not frankly acknowledged: when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief").

Inaction by the Secretary and the BIA was the focus of the 25 CFR Appeal. Following the adjudicated principle that inaction can equal action, 25 CFR § 2.8 provides that any "person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded *by the failure of an official to act on a request to the official, can make the official's inaction the subject of appeal*" (emphasis supplied).

Had Defendants even scanned the 25 CFR Appeal which is at Docket #26 herein and, thus, at their fingertips, they would have known that the 25 CFR Appeal went exclusively to the BIA's failure – or even refusal – to protect Water Wheel's Lease-guaranteed rights to develop its leasehold. And CRIT's unlawful breaches of the Lease over many years were well-known to the BIA officials who simply ignored the facts. *See* Second Decl. of Robert Johnson ¶ ¶ 6-19, Ex. B to Pls. Br. on *Montana,* Docket #50 at pp. 8-13 of 36 pages, in which he documents the actions of CRIT to curtail all development by Water Wheel[5] and the failure of the BIA to take steps to insure that all Lease obligations are being satisfied.

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[5] Indeed, Water Wheel's ability to develop its leasehold was flatly terminated by CRIT in 2002. The tribal Building Inspector advised Water Wheel by letter dated April 4, 2002, that "the [CRIT] Tribal Council had [recently] denied your request to allow any new building Projects within Water Wheel Resort. Therefore, the Colorado River Indian

Footnote continued on next page …

As a result of this continuing CRIT harassment and BIA inaction, Water Wheel filed the 25 CFR Appeal on May 4, 2001 (Second Decl. of Robert Johnson ¶ 17), which appeal is still pending before the Department of the Interior. The BIA's failure to act has directly led to extensive financial damage suffered by Water Wheel which is documented in the 25 CFR Appeal, which is before this Court as Exhibit A to Plaintiffs' Second Application and Motion for Temporary Retraining Order and Preliminary Injunction filed herein on May 10, 2008 as Docket #26. The Exhibit A is Docket #26-2. Page 11 of the Appeal reports the financial damages suffered by Water Wheel as of that filing eight years ago as $968,304, and a copy of that page is attached to this Reply as Exhibit B for the Court's convenience. It goes without saying that the total financial damages caused by CRIT and ignored by the BIA is much higher today than the sum recorded eight years ago.

As Johnson's Second Declaration also makes clear, Water Wheel and its Chief Executive Johnson were forced to deal with CRIT because of CRIT's directing California utilities and government offices to deal with the Tribes and not Water Wheel. These facts demonstrate that any "consensual relationship" between Water Wheel and the other Lease signatories did not go beyond the Lease itself. The correspondence cited by Defendants to show some consensual relationship above and beyond the Lease terms confirms the "gun to Water Wheel's head" tactics employed by CRIT for more than 20 years. And after years of having to endure this treatment and BIA inaction, Water Wheel pursued the only option it had under the Lease, which was an appeal to the Department of the Interior pursuant to 25 CFR.

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Tribes Department of Building & Safety will not issue any Building Permits to you." A copy of that letter is Exhibit B to this Reply.

2. 25 CFR § 131.5 addresses "Special requirements and provisions" and makes clear that any tribal power over a leasehold is subservient to that of the Secretary, Lease payments shall be made only to the Bureau of Indian Affairs and not CRIT.

Section 131.5(a) requires Secretarial approval of all leases which shall be in a form approved by the Secretary and each lease approval shall be conditioned on his written approval. This makes clear that any tribal power over the leasehold premises is subservient to the Secretary and his approval. Thus, CRIT has no inherent tribal power allowing unilateral decisions to manage or govern the leasehold premises beyond the Lease terms and conditions. This provision is directly relevant to *Montana* in that any tribal jurisdiction over the Water Wheel leasehold is restricted by 25 CFR and the Lease terms approved by the Secretary.

Section 131.5 (f) requires the Lease to identify whether payment of rentals is to be made directly to the land owner or the BIA. As discussed below, this regulatory requirement is manifested at Lease Section IV which identifies the BIA as the exclusive entity to receive rental payments from Water Wheel.

3. 25 CFR § 131.8 requires written approval by the Secretary for any increase in rental payments and precludes unilateral increases being imposed by CRIT.

Section 31.8 concerns the duration of leases and states that any adjustments of rental may be made by the Secretary where he has the authority to grant leases and otherwise can only be made with the approval of the Secretary.

4. Lease Section IV follows Section 135.5(f) and directs that rental payments shall be made only to the BIA and not CRIT.

Section IV. Rentals establishes that the BIA's Colorado River Agency is the exclusive recipient for Water Wheel's rental payments. There is no provision for payments to be made to CRIT or any other entity.

5. Lease Section IX requires Secretary approval of any modification or amendment to the Lease.

Section IX-VALIDITY provides that no modification or amendment to the Lease shall be "valid or binding upon either party" until approved by the Secretary. It is undisputed that there have been no Secretarial approvals of any CRIT laws, regulations or ordinances relied on by CRIT and the Tribal Court. Thus, to the extent that such tribal enactments were adopted after the date of Lease execution constitute modifications or amendments to the Lease, then they are not valid on any party to the Lease. As documented throughout this Reply, the Eviction Ordinance at the very least would constitute a modification of the Lease.

LEASE ADDENDUM

6. Water Wheel was to work exclusively with the State of California and Riverside County for approval of construction plans and designs.

Section 5. PLANS AND DESIGNS provides that all Water Wheel construction plans and specifications shall be approved by the State of California and Riverside County, CA. Nowhere in the Lease is there a provision that CRIT shall have any role in review and approval of construction plans and specifications. Yet, as discussed at Section II.B.1 above, CRIT strong-armed the State and County into relinquishing their role in these approvals and directing Water Wheel and Johnson to seek them from CRIT in derogation of Lease Section 5.

7. Only the Secretary has the right to take legal action against Water Wheel in response to a Default of any Lease terms, including holding over without an extension of the term or failing to vacate the leasehold upon expiration of the Lease term. CRIT has no legal authority to evict Water Wheel from the leasehold premises.

Section 21. DEFAULT is the only section of the Lease authorizing enforcement and legal action against Water Wheel for breaches of the Lease, and it specifically reserves the right to pursue any legal action to the Secretary. Nowhere does Section 21 even suggest that CRIT

has a right – or Water Wheel consent – to commence any legal action against Water Wheel for disputes arising from a perceived default or breach or even for eviction upon expiration of the Lease.

This section strictly limits legal action arising from any default including failure to comply with the Section 29 requirement that a lessee vacate the leasehold upon termination or expiration of the Lease. The only remedy is at Section 21 and it restricts recourse for defaults to action taken by the Secretary, who shall first give notice to Water Wheel requiring some remedial action within a specified time, after which only the Secretary may either: (A) proceed by suit or otherwise to enforce any other provision of the lease; or (B) enter the premises and remove the defaulting parties. No provision of Section 21 is ambiguous and no provision even suggests there could be a predicate upon which CRIT could assert any right to initiate action for a default. The Secretary, and only the Secretary, has enforcement authority.

Water Wheel has not consented to any enforcement provision outside of the Lease, meaning that CRIT has no legal jurisdiction over Water Wheel to seek eviction in its own name. As the following Section II.B.8 explains, only the Secretary has that right.

8. Once the Lease term expired and Water Wheel was perceived by CRIT as a holdover tenant, the only removal remedy provided by the Lease was in the hands of the Secretary and not CRIT.

Section 23. HOLDING OVER provides for the situation when the Secretary and/or CRIT determines that a tenant is holding over beyond the Lease term. This section provides that when a lease is terminated prior to its expiration date, the lessee shall have 30 days after termination in which to remove "all property removable" under the Lease terms. The only enforcement participation available to CRIT arises after the Lease is terminated by the Secretary prior to the expiration date, and that participation is limited to tribal removal and disposal of

property not timely removed by the lessee and still on the leasehold. However, that right is carefully limited to the situation when the "lease is terminated prior to the expiration date" and notably does not extend to a leasehold and lessee when there is a holding over after expiration of the Lease term. Once the Lease expiration date passed, CRIT was left without any further role in dealing with Water Wheel's tenancy because removal at that point was delegated to the Secretary by Section 21.

This means that there is only one shot at a holdover tenant under the Lease and it is a weapon only in the hands of the Secretary.

9. Failure of a tenant to vacate upon termination or expiration of the Lease is a Default for which Section 21 provides the applicable remedies.

Section 29. DELIVERY OF PREMISES provides that the lessee will peaceably and without legal process deliver up the possession of the leased premises upon termination or expiration of the Lease. However, it provides no remedy when a lessee fails to do so, which in turn leads back to the default provisions of Section 21.

10. Water Wheel has never consented in writing to be subject to the CRIT Property Code and Eviction Ordinance and, accordingly, it is not bound by them because they are tribal laws, regulations and ordinances which have the effect of changing or altering the express provisions and conditions of the Lease.

Section 34. RESERVATION LAWS AND ORDINANCES requires the lessee to abide by all tribal laws, regulations and ordinances then in effect. Any subsequently-enacted tribal laws, regulations and ordinances which "have the effect of changing or altering the express provisions and conditions" of the Lease shall not apply to Water Wheel unless consented to "in writing." This provision protected Water Wheel from being subject to arbitrary actions of CRIT which would change the deal. It is undisputed that Water Wheel has never executed the written

consent required for its being subject to any tribal laws, regulations and ordinances enacted subsequent to the date of Lease execution.

The CRIT Property Code and Eviction Ordinance were enacted subsequent to the applicable date, followed by CRIT and applied by Judge LaRance to order Water Wheel's eviction for failure to make rental payments and holding over after expiration of the Lease.

C. The CRIT Property Code/Eviction Ordinance Changes and Alters Water Wheel's Rights Under The Lease And, Thus, There Is No Consent To The Tribal Court Eviction Process Established Thereby.

Defendants contend that Lease Section 34 clearly manifests the Plaintiffs' consent to be bound by tribal law because "no lease condition or provision . . . is changed or altered by the application of the CRIT eviction ordinance." Resp. at 14. That statement raises a question of whether Defendants have even read their own Eviction Ordinance, the Lease or the relevant federal regulations. Even a cursory review of those materials reveals that they are irreconcilably at odds with each other.

As described in detail above, the Lease and the leasing regulations make clear that the Secretary alone has the right to manage and enforce the Water Wheel lease. Defendants assert that "[n]either the BIA regulations nor anything cited by the Plaintiffs address the issue of lease enforcement by an Indian tribe." Resp. at 16. While that statement is incorrect, Plaintiff's assert that it is beyond dispute that neither the Lease nor the BIA regulations affirmatively grant CRIT the authority to enforce a lease approved and administered by the Secretary and the BIA when that lease is governed by a comprehensive federal regulatory scheme which mandates

enforcement by the Secretary and the lessee has not consented in writing to an alternative enforcement vehicle.[6]

In fact, the regulations affirmatively address tribal lease enforcement and the plain language of 25 CFR part 162 makes clear that CRIT has no such authority. More specifically, regulation Section 162.108(b) contradicts Defendants' assertion that the Tribal Court has jurisdiction to enforce the Lease pursuant to the Eviction Ordinance. That Section is entitled "BIA's responsibilities in administering and enforcing leases" and it provides the BIA – and not any tribe or individual Indian landowner – has the responsibility to police and enforce compliance with leases, with the power to litigate enforcement actions as are appropriate to protect the interests of the Indian landowners. *Id.* That section further provides that the BIA – and not any tribe or individual Indian landowner – is authorized to recover possession from occupants operating without a lease. *Id.*

Regulation Section 162.110 says that tribes may not grant, approve or enforce leases provided for or governed by the regulations. Thus, only the BIA or the Secretary may do so in the absence of a specific written consent of a lessee in favor of a tribe. CRIT's unilateral assumption of Lease enforcement under the unconsented-to Eviction Ordinance is in

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[6] As noted in *Nat'l Farmers*, *supra*, "the Federal government has plenary power over Indian Tribes and Federal law, implemented by . . . administrative regulations . . . provides significant protection of individual, territorial and political rights of [] Indian Tribes." 471 U.S. at 851. Accordingly, the Supreme Court has recognized that, in some instances, federal law has significantly diminished the inherent powers of Indian tribes. *Id.* at 853 n. 14; *see e.g. United States v. Wheeler*, 435 U.S. 313, 326 (1978) ("[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe" and "[t]hus Indian tribes can no longer freely alienate to non-Indians the land they occupy") (*citing Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668 (1974)).

irreconcilable conflict with the Lease and applicable regulations specifically mandating that only the Secretary and BIA are to administer and enforce leases.

Defendants' claims that no Lease terms or applicable regulations conflict with the Eviction Ordinance (Resp. at 14) are contrary to fact, and application of the Eviction Ordinance certainly would have the effect of changing or altering the deal that Water Wheel agreed to. For the purposes of the following discussion, this Court should regard any reference to a conflict between the Eviction Ordinance and the Leasing Regulations as a simultaneous conflict between the Ordinance and the Lease, as the Regulations are incorporated by reference therein.

1. The Eviction Ordinance conflicts with Section 162.612 of Leasing Regulations because only the Lease does not provide for resolution of disputes filed by CRIT in Tribal Court but rather states that only the Secretary may seek judicial relief under the Lease.

The Lease does not provide for resolution of lease disputes in CRIT Tribal Court pursuant 25 C.F.R. § 162.612. The amended Leasing Regulations at 25 CFR part 162 (2001), unlike its predecessor 25 CFR part 131 which was in effect when the Lease was executed, permit a lease to provide for negotiated remedies in the event of a lease violation. 25 CFR § 162.612(a). But Section 162.612(b) confirms that any negotiated remedies must be provided for in a lease and are in addition to the Secretarial enforcement authorized by Part 162. Section 162.612(c) states that "a lease may provide for lease disputes to be resolved in tribal court or any other court of competent jurisdiction" but adds that the BIA is not bound by agreements as to forum by the parties to a lease. Significantly, the regulations authorizing negotiated remedies to be provided for in a lease did even not exist when the Lease was executed and 25 CFR part 131 contains no such provision. In any event, the Lease does not provide for the resolution of lease disputes in Tribal Court as a matter of fact, meaning that the CRIT courts never could have jurisdiction over disputes arising under the Lease.

2. The Eviction Ordinance allows CRIT to enforce the Lease in direct conflict with the terms of the Lease and 25 CFR leasing provisions both of which reserve all enforcement for the Secretary.

CRIT's eviction action was filed pursuant to the authority ostensibly established by Sections 1-102 ("Jurisdiction") and 1-304 ("Summons and Complaint") of the Eviction Ordinance. In his final Opinion and Judgment, Judge LaRance ruled that he had jurisdiction over CRIT's action to recover possession of the leasehold and other related relief which ultimately included a money damage award of millions of dollars. Defendants argue that the final judgment and award was proper, declaring that the Tribal Court had jurisdiction under the Eviction Ordinance to enforce both the "Holding Over" provision in Lease Section 23 and other terms of the Lease including Water Wheel's additional "obligation to pay rent." Resp. at 10. This argument presumably rests on the jurisdictional authorization of Ordinance Sections 1-304 and 1-102 but ignores the Lease's only remedy for responding to holding over (Section 23) and making lease payments (Section V): Secretarial enforcement and litigation pursuant to Section 21.

The Eviction Ordinance has the effect of changing the Lease terms because it empowers the Tribe – and not the Secretary – to prosecute an enforcement action in eviction. As discussed above, Section 29 of the Lease provides for and governs Water Wheel's duty to deliver the property at the expiration of the lease. If a perceived Water Wheel default as to any covenant is not cured within 60 days after written notice from the Secretary,[7] then the Secretary – and only

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[7] *But cf.* Eviction Ordinance, Section 1-302 (describing when a "Notice to Quit" possession of premises is necessary before a landlord may file a Tribal Court eviction action; providing that in some circumstances no Notice to Quit is necessary if "any reasonable demand to leave" has been made; and setting the time frames in which tenants must vacate premises if served such notice, depending on the circumstances, from three days to "no less than 14 days").

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the Secretary – has authority to take any action to deal with a perceived default and that authority is plainly stated in Lease Section 21.

To reiterate the Lease's clear authorization and Water Wheel's consent thereunder plainly provide that the only responses in the event of a perceived default are delegated to the Secretary. In particular, CRIT and the Defendants here ignore 25 CFR Section 162.623 which states that the BIA will treat an unauthorized use as a trespass and take such action to recover possession as may be deemed appropriate.[8] And this clear and unambiguous delegation is directly contradicted by Sections 1-301 and 1-304 of the Eviction Ordinance which provide that CRIT by itself can pursue the very eviction action reserved for the Secretary by the Lease. As such, the Eviction Ordinance authorizes CRIT to enforce any Lease default without deferring to the restrictions imposed on CRIT by the Lease and applicable regulations and in derogation of the exclusive power of enforcement reserved for the Secretary at Section 21.

3. The Eviction Ordinance purports to govern the rights and duties of the Parties to the Lease, in conflict with the comprehensive federal regulatory scheme under which the Lease was executed and which clearly govern the rights of the parties thereto.

Beginning with *Property Code/Article I. Evictions*, Defendants proclaim the purpose of the Article is to provide authority for CRIT to "regain possession" of real property. Eviction Ordinance, § 1-101. But 25 CFR § 162.100(a)(4) makes clear that the purpose of the Leasing Regulations is to establish the policies and procedures to govern the administration and

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[8] Similarly, Section 21 provides for Secretarial enforcement of rental obligations, and this tracks the regulation's provision that the BIA is the entity which has the authority to require that lessees pay their rents and, where appropriate, pursue enforcement actions. Again, CRIT's purported rights of enforcement are in irreconcilable conflict with the Lease and regulations.

enforcement of leases.[9] Moreover, the Lease provides a number of covenants which control, including provisions authorizing the Secretary and no other entity to take possession in the event of breach of the Lease, provisions that are wildly at odds with the Eviction Ordinance which proposes to give CRIT an eviction role denied it by the Lease.[10] Indeed, the Eviction Ordinance enumerates nine expansive grounds upon which a landlord may base an eviction action (Eviction Ordinance, § 1-301) but the only possible basis for "eviction" under the terms of the Lease is breach of a covenant therein and Secretarial enforcement pursuant to Section 21.

Therefore the applicable Leasing Regulations and the terms of the Lease control and, in turn, govern the rights of the parties thereto, and they dictate the Secretary's plenary power of administration and enforcement. CRIT's attempt to impose its own laws, ordinances and regulations is both unconsented-to and illegal.

4. The Defendants' argument regarding the applicability of tribal law pursuant to Section 162.109(b) is wrong because that section conflicts with the Lease, thus the Lease controls.

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9 While the Eviction Ordinance purports that the "provisions of this Article shall govern relationships between all landlords and tenants and over all property whether private or public real property within the exterior boundaries of CRIT," this can not be squared with the 25 CFR leasing regulations or the Lease. The leasing regulations represent a comprehensive federal regulatory system that "describe[s] the authorities, policies and procedures the BIA uses to grant, approve and administer surface lease and permits on certain Indian lands," these regulations govern the relationship between the parties. *See* 66 Fed. Reg. 7079 (Jan. 22, 2001).

10 *See, e.g.,* Eviction Ordinance, § 1-201 (providing for the "Use Of Self-Help Evictions" by authorizing the Tribe to utilize self-help evictions); *Id.* at § 1-205 (describing the process of self-help eviction including "forcing locks, breaking open doors, windows, or other parts of a dwelling . . . or using whatever reasonable force is necessary to retake possession of and reoccupy the premises"); *Id.* at § 1-319 ("Forcible Eviction"); *Id.* at §1-320 ("Immediate Possession").

Defendants contend that 25 CFR § 162.109(b) makes tribal law applicable to the Lease (Resp. at 17), but they fail to recognize that the regulations provide an exception for leases executed prior to the promulgation of the new leasing regulations and that exception controls here. Indeed, 25 CFR § 162.100(c) makes clear that the regulations apply to all leases in effect when the regulations are promulgated, but cautions that "unless otherwise agreed by the parties, these regulations will not affect the validity or terms of any existing lease." As mentioned throughout Plaintiffs' filing in this matter, Lease Section 34 provides that tribal laws, regulations and ordinances enacted subsequent to the Lease's execution that would alter or change the terms of the Lease are only applicable if agreed to in writing by Water Wheel. Consequently, application of tribal laws as contemplated by 25 CFR § 162.109(b) in this instance is in direct conflict with Section 34. Pursuant to 25 CFR § 162.100(c), the Lease terms control in the absence of Water Wheel's written consent to something else.

5. The eviction process for failure to pay rent established by the Eviction Ordinance directly conflicts with the process provided for in the Lease and the leasing regulations.

With regard to rental payments, the Eviction Ordinance provides that CRIT may serve a tenant with a Notice to Quit for rental payments that are 10 calendar days past due. Eviction Ordinance, § 1-301(b), § 1-302 ("Notice to Quit Requirements"). Once a Notice to Quit for non-payment is served, the tenant may be given no less than seven days to vacate the premises for non-payment (*Id.* at § 1-302(d)(1)) and, if the tenant has not vacated the premises within the specified time, CRIT may proceed with an eviction action in Tribal Court. *Id.* at § 1-304. Again, this is in direct conflict with the provisions of Lease Section 21 prescribing the manner in which a perceived default shall be handled: if Water Wheel defaults on rental payments and that

default remains uncured for 15 days after notice from the Secretary, then the Secretary and not CRIT may take one of the two actions available for default.[11]

6. The Eviction Ordinance mandates the forum, process and substantive procedure for eviction actions all of which clearly conflict with the Lease and leasing regulations and thus substantially alter the Lease as well as Plaintiffs' legal right to due process.

In any event, a decision or enforcement action by the Secretary under the Lease would be subject to the appeal under 25 CFR part 2. *See* 25 CFR § 131.14, *as amended* by 25 CFR § 162.113 (2001) ("appeals from decisions by the BIA under this part may be taken pursuant to 25 CFR part 2"). The final agency actions resulting from a Secretarial decision on appeal would be subject to judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* In direct contrast and contradiction, the Eviction Ordinance only provides for Tribal Court review of CRIT's Complaint and Tribal Appellate review if available under Section 1-322 of the Eviction Ordinance.

In fact, the Eviction Ordinance establishes substantive procedural rules to govern the Tribal Court proceedings including – but by no means limited to – establishing the burden of proof (Eviction Ordinance, § 1-314), foreclosure of right to a jury trial (Eviction Ordinance, § 1-315); and form and execution of judgment (Eviction Ordinance, §§ 1-317, 1-318). The Eviction Ordinance also strictly limits the defenses a tenant may offer in response to a landlord's eviction action. Eviction Ordinance, § 1-311. Unless the Court finds that the tenant has established one or more of the nine defenses specifically enumerated in the Eviction Ordinance, then the

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[11] Although not entirely relevant to the specific eviction action brought against Plaintiffs, it should be noted that the Section 21 Default provisions of the Lease provide a detailed regulatory scheme that governs default in the event of bankruptcy, notice to encumberers and Secretarial "re-letting" of the premises. None of these procedures are included in the Eviction Ordinance and none provides for adjudication in tribal court.

Ordinance mandates that the Court grant the landlord the remedies requested. Eviction Ordinance, § 1-311. Neither the Lease nor any Leasing Regulation limits the defenses the Plaintiffs might offer in response to an enforcement action taken thereunder. This is a major alteration of the lease terms and substantially changes the deal to which these Plaintiffs agreed.

The Eviction Ordinance's provisions allowing for an entirely different venue, limitation of the defenses the Plaintiffs might offer in response to an action and the establishment of different procedural rules, burdens and appellate process are utterly irreconcilable with the Leasing Regulations' mandate of Secretarial enforcement and federal administrative review. A Tribal Court eviction process not only interferes with the Lease and regulations but would effectively deny Water Wheel the exclusive remedies guaranteed by the Lease to which it consented.

D. The CRIT Property Code/Eviction Ordinance Modified Or Amended The Lease But Those Modifications Were Never Approved By The Secretary And, Thus, Are Invalid.

In addition, to the conflicts between the CRIT Property Code/Eviction Ordinance and the Lease, it also can be said that they purported to modify the Lease by giving CRIT powers and rights, including Tribal Court jurisdiction, wildly at odds with the specific powers and rights vested exclusively in the Secretary by the Lease. Such not only conflicts with the Lease, but clearly constitutes a modification or amendment for which Section IX-VALIDITY requires Secretary approval. No such approval has even been asserted by CRIT, let alone documented.

E. There Is No Tribal Court Jurisdiction Over Plaintiff Robert Johnson.

Defendants concede that Johnson's actions in this matter were in his capacity as an agent of the corporation. (Resp. at 18.) Yet, Judge LaRance found him personally liable for all of the

damages he awarded against Water Wheel. In doing so, he pierced the Water Wheel corporate veil.

The absence of any notion of tribal jurisprudential responsibility is demonstrated by that order, and makes clear that Judge LaRance was determined to do whatever it took to hold Johnson personally liable for the multi-million dollar award he was ordering against Water Wheel. Since Johnson acted exclusively in his capacity as a corporate official and agent, Judge LaRance ordered the corporate veil as a sanction and not on law or fact. *See* J. at Def. Tribal Ct. R. 2, Ex. 1 to Resp. The veil piercing is ordered at pages 11-12 of the Judgment, and that section openly concedes this remarkable determination. It is entitled **"WATER WHEEL AND JOHNSON ARE DEEMED TO BE ALTER EGOS AS A SANCTION FOR VIOLATING THE COURT'S ORDER COMPELLING DISCOVERY."**

There may be appropriate sanctions for violations of court orders, but piercing a corporate veil is not among them. To this point, Plaintiffs' counsel have searched for any precedent for such an action and found none. Judge LaRance did not cite a legal predicate for this order and Defendants' counsel certainly has not identified it. With this finding, Judge LaRance then entered a multi-million dollar award. Even if the Tribal Court did have jurisdiction over the Lease signatory Water Wheel, a multi-million dollar sanction against the corporation's official and agent for violating a discovery order is outrageous. Such a sanction is neither grounded on law nor consistent with due process of law.

Finally, Plaintiffs reiterate that Defendants seem to concede the point with their statement that "[t]here is little doubt that Mr. Johnson was an agent of his corporation." Resp. at 18 (emphasis supplied). They probably could do little else since every item of contact and

correspondence they cite evidences that Johnson indeed was acting in his capacity as a corporate official and agent of Water Wheel Camp Recreational Area, Inc.

To repeat, there is nothing cited by Defendants to show that Johnson acted in his individual capacity in any activity concerning CRIT. Judge LaRance's Judgment piercing the corporate veil is both disingenuous and pettifogging.[12]

F. Plaintiffs Are Not Seeking an Adjudication of Indian Title Or Reservation Status.

The Defendants continue to argue that this case requires the Court to consider and decide the issues of Indian title and reservation status for the leasehold land to which the Lease pertains. As the foregoing discussion makes clear, the Plaintiffs are carefully presenting a case that the CRIT Tribal Court had no jurisdiction over Water Wheel for the purposes of an action under the Property Code/Eviction Ordinance. This case deals exclusively with whether the Plaintiffs have consented to Tribal Court jurisdiction for the eviction action prosecuted below. It is clear that they have not.

It is no secret from the pleadings that there may be legitimate legal issues concerning the land status, but they are not at issue here. Indeed, Plaintiffs have repeatedly stated that they do not contest Indian title and reservation status for the purposes of this *Montana* review. This Court is not being asked to rule on those issues. For this reason, Plaintiffs opposed the CRIT

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[12] Defendants cite another remarkable finding by Judge LaRance that Johnson "has occupied the premises since expiration of the Lease." Resp. at 6. The authority for this is TCR-12, which was an Order rendered by LaRance on motions and not testimony. Indeed, the Order was dated March 18, 2008, which was long before the trial and the presentation of actual testimony. Curiously, Defendants did not cite any such "finding" from the final Opinion and Judgment. A reckless statement in an Order on motions is not an adjudication.

Motion for Leave to Participate as *Amicus Curiae*, since its focus is exclusively on land title and reservation status. For the case at bar, CRIT has nothing to offer.

III. CONCLUSION

In closing, Plaintiffs again respectfully request this Honorable Court to enter judgment in their favor and against the Tribal Court Officials by (1) declaring that no tribal court jurisdiction exists over Water Wheel or Robert Johnson for any action under the CRIT Property Code/Eviction Ordinance and (2) enjoining the Tribal Court Officials from exercising jurisdiction over Water Wheel or Robert Johnson in both the underlying Tribal Court Action or any subsequent action arising from a dispute under Water Wheel's Lease.

Respectfully submitted this 8th day of May 2009.

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