No. 12-372

NOV 26 2012

IN THE

Supreme Court of the United States

CONTOUR SPA AT THE HARD ROCK, INC.

Petitioner,

v.

SEMINOLE TRIBE OF FLORIDA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

DONALD A. ORLOVSKY
Counsel of Record
KAMEN & ORLOVSKY, PA
P.O. Box 19658
West Palm Beach, FL 33416
561-687-8500
dao4law@aol.com

Counsel for Respondents

244164

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

BLANK PAGE

QUESTIONS PRESENTED BY PETITIONER

1. Does *Lapides v. Board of Regents of the University System of Georgia* 535 U.S. 613 (2003), provide a basis for finding a waiver of tribal sovereign immunity where an Indian Tribe has expressly waived sovereign immunity, is sued in state court, removes to federal court, and then asserts sovereign immunity based on the Tribe's concealment of the fact that the Tribe did not comply with the Secretary of the Interior's lease approval requests?

2. Does Justice Brandeis' opinion in *Turner v. United States*, 248 U.S. 354 (1919) support the concept of tribal sovereign immunity or should that accidental doctrine, questioned in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), be revisited and discarded?

3. Does the *Indian Civil Rights Act*, Title 25 U.S.C. § 1302 (a) (5) and (a) (8) create an implicit cause of action permitting the Tribe to be sued for the taking of property without due process of law?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

STATUTES AND OTHER AUTHORITIES

Cited Authorities

Respondents, Seminole Tribe of Florida, a federally recognized Indian tribe and Mitchell Cypress, the then duly elected Chairman of the Tribal Council of the Seminole Tribe of Florida, hereby respond to the Petition for a Writ of Certiorari filed by Contour Spa at the Hard Rock, Inc. and each of the questions raised and presented in Contour's petition. Respondents also respond to Contour's broader suggestion as a basis for reversing the Circuit Court of Appeal: that this Court abandon entirely, the doctrine of tribal sovereign immunity and overturn the well settled law developed and refined by the Court over nearly a century.

The Tribe and Chairman Cypress respectfully submit that, for the reasons set forth below, Contour's petition should be denied and dismissed as Contour has not presented in its petition compelling reasons which warrant the re-examination of the doctrine of tribal sovereign immunity, either globally or on each of the questions presented, since each of these reasons have been adequately addressed and rejected by the Court from 1978 through the present.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions referenced in the Petition, provisions of the *Indian Long-Term Leasing Act*, 25 U.S.C.§ 415 (a) and the regulations promulgated thereunder at 25 C.F.R. § 162.604 are also involved.

25 U.S.C. § 415(a) provides:

> (a) Any restricted Indian lands, whether tribally, or individually owned, may be

> leased by the Indian owners, with the approval of the Secretary of the Interior for...business purposes....

25 C.F.R. § 162.604 provides:

> (a) All leases made pursuant to the regulations in this part shall be in the form approved by the Secretary and subject to his written approval.

STATEMENT OF THE FACTS AND OF THE CASE

The Facts:

The Seminole Tribe of Florida is a federally recognized Indian tribe that owns and operates the Seminole Hard Rock Hotel and Casino Hollywood located on the Hollywood Reservation of the Tribe in Hollywood, Broward County, Florida. Mitchell Cypress was the duly elected Chairman of the Tribal Council of the Seminole Tribe of Florida.[1] Contour Spa at the Hard Rock, Inc. was a Florida corporation that owned and operated a spa facility located within the Hard Rock complex under a putative long term lease agreement with the Tribe from July 18, 2003 until March 17, 2010. Contour opened its spa on May 17, 2004, and soon began generating large revenues. *Petitioner's Appendix B at 29a-30a.*

The putative lease was signed in November 2003. It called for an initial term of ten years followed by four

1. Since June, 2011, the duly elected Chairman of the Tribal Council of the Seminole Tribe of Florida has been James E. Billie.

renewal terms of five years each. The putative lease called for the Tribe to expressly waive its tribal sovereign immunity from suit as to certain lawsuits that Contour might bring. Under section 415 (a) of Title 25 of the United States Code, Congress made the lease's validity expressly conditioned upon the signed written approval of the United States Secretary of the Interior. The lease and the approving resolution assigned to the Chairman of the Seminole Tribal Council the duty of submitting the lease for approval to the Secretary. The Chairman did submit an application for lease approval to the Secretary; however, written Secretarial approval of the lease was not obtained. *Id.*

Contour contends that it was not until June 29, 2007, when the Tribe first disclosed that it had not obtained secretarial approval of the lease. *Id.* at 31a. Contour, through its counsel, then wrote to the Secretary to verify this representation. In October 2007, the Secretary confirmed that although the Tribe had submitted an application for lease approval, the Secretary did not approve it. Instead, the Secretary sent a reply letter to the Tribe noting several deficiencies in the lease and requested that the application for lease approval be resubmitted after the deficiencies were remedied. Contour has asserted that it then spent the ensuing two or more years repeatedly cajoling the Tribe to re-submit its application, but to no avail. *Petitioner's Appendix B at 31a.* Notwithstanding Contour having learned that the lease had not been approved, Contour continued to operate its spa business at the Hard Rock for more than two and one half years without taking any steps of its own to obtain written lease approval from the Secretary. *Petitioner's Appendix A at 5a-6a.*

On March 17, 2010, at approximately 10:00 p.m. – nearly three years after Contour claims it first became aware that the lease had not been approved by the Secretary in the form submitted by Chairman Cypress- the Tribe, through counsel, e-mailed a letter to Contour informing it that the Tribe had elected to permanently close Contour's business. On March 18, 2010, the Tribe locked the premises and used its security personnel to deny Contour further access to the premises. *Id.*

The Case:

Contour commenced this civil action on March 19, 2010 in state court. The claims asserted by Contour against the Tribe each arise from the putative long term lease agreement between the Tribe, as landlord, and Contour, as tenant, relative to the long term possession and use of restricted tribal trust land in reservation status for the operation of a spa facility at the Seminole Hard Rock Hotel & Casino Hollywood, located on the Tribe's Hollywood Reservation. The Tribe holds the sole proprietary interest in the hotel and casino and all related ancillary facilities. Shortly after being served with the summons and complaint, the Tribe timely removed the case to the United States District Court for the Southern District of Florida. *Petitioner's Appendix B at 31a-32a.*

On May 10, 2010, Contour filed and served an amended complaint through which additional claims were asserted against the Tribe, Chairman Cypress and two additional unknown parties designated as the John Doe and Richard Roe defendants, against whom state law claims were asserted. *Id. at 32a.*

In its amended complaint, Contour asserted the following claims for relief, each of which presume the validity of the putative long term lease of federally restricted tribal trust land in reservation status: **Count I**: declaratory judgment and further relief under the *Indian Civil Rights Act*, 25 U.S.C. § 1301-1302 (the ICRA); **Count II**: injunctive relief; **Count III**: wrongful eviction; **Count IV**: unlawful entry and detention; **Count V**: fraud; **Count VI**: promissory estoppel; and **Count VII**: unjust enrichment. *Id.*

Contour's claim for declaratory judgment sought, among other things, a declaration of the relative rights, duties and obligations of the parties under and in connection with the long-term lease of restricted tribal trust land in reservation status located on the Tribe's Hollywood Reservation within the confines of Broward County, Florida. The restricted tribal trust land in issue is legally titled in the name of the United States of America. The validity of the lease, as well as Contour's entitlement to use and occupy the restricted tribal trust land, are exclusively governed by federal statute and associated federal regulation. 25 U.S.C. § 415 (a) and 25 C.F.R. § 162.604. Moreover, Contour's declaratory relief claim as to the rights, duties and obligations of the parties and the underlying validity of the putative lease are governed by and arise under the Constitution and laws of the United States. See, U.S. CONST. art. I § 8 cl. 3 and 25 U.S.C. §§ 81(b), 177 and 415(a).

The terms and conditions of a long-term lease of Indian lands and the validity thereof are governed by the provisions of 25 U.S.C. § 415(a) and 25 C.F.R. Part 162 "Leases and Permits", including 25 C.F.R. § 162.604,

which is specifically referenced in Section 22.30 of the lease at page 30. These federal laws, regulations and lease provisions expressly require written approval by the U.S. Secretary of the Interior, or his delegated representative, as a condition precedent without which no valid lease may exist. *Id. at 47a-48a.*

In addition, the "Incorporating Clause" contained in Section 22.33 of the lease incorporates all applicable laws and regulations prescribed by the Secretary of the Interior under 25 U.S.C. §81 and 415(a) as well as 25 C.F.R. Part 162. Moreover, the provisions of 25 C.F.R. § 162.604(a) expressly require that **all leases made under Part 162 be subject to the Secretary's written approval as a condition precedent to lease validity, something that is completely lacking in this case.** As a result, the unapproved lease between the parties was and remains void *ab initio* as are all of its terms, including the severability clause and the express waiver of tribal sovereign immunity. *Id. at 30a, 32a, 47a-48a.*

The district court found that the Tribe never validly waived its sovereign immunity, and, accordingly, granted the Tribe's motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). For the same reason, the district court also granted Chairman Cypress' motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), or in the alternative, under Fed. R. Civ. P. 12(b)(6). The district court also remanded the remaining state law claims back to state court. *Id. at 48a.*

On appeal to the United States Court of Appeals for the Eleventh Circuit, Contour claimed that the

comprehensive final order of dismissal entered by the district court should be reversed because: (a) the Tribe waived its tribal sovereign immunity from suit and submitted itself to the jurisdiction of the district court by removing the case from state court to federal court; (b) Contour is entitled to maintain an implicit cause of action against the Tribe under the *Indian Civil Rights Act*, 25 U.S.C .§ 1301, *et seq* under the claimed authority of *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F. 2d 682, 685 (10th Cir. 1980) and (c) the Tribe should be equitably estopped from relying upon the lack of written secretarial approval of the lease and from asserting tribal sovereign immunity as a jurisdictional bar to Contour's claims based upon alleged misrepresentations (which Contour took no steps to question or to verify during the extended period of time between June 2007, when Contour acknowledges that it first became aware that the lease had not been approved in writing by the Secretary until March 17, 2010, when Contour was dispossessed from the premises). *Id at 1a-3a.*

Following a straightforward analysis based upon well settled legal authority, the Eleventh Circuit rejected each of the points raised and argued by Contour and affirmed the order of dismissal entered by the district court. *Id. at 2a.*

In its petition, Contour makes clear that what it is ultimately seeking is the complete abolishment of the doctrine of tribal sovereign immunity by this Court.

REASONS FOR DENYING THE PETITION

1. RESPONSE TO QUESTION 1

The Eleventh Circuit Court of Appeals properly declined to extend the holding in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2003), as a basis to find a waiver of tribal sovereign immunity where an Indian tribe voluntarily removes a case filed against it in state court to federal court because "[s]imply put, an Indian tribe's sovereign immunity is not the same thing as a state's Eleventh Amendment immunity..."

In *Lapides,* the question presented was "whether a 'state waive[s] its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court...." *Id.* at 617-618. The Court answered this question in the affirmative but clarified that its decision was limited solely to "... state-law claims, in respect to which the state has explicitly waived its immunity from state-court proceedings." *Id.*

The Court's holding in *Lapides*-that the State's removal of a case from state to federal court constituted a waiver of the State's Eleventh Amendment immunity-was necessary to prevent the State from making an end run around state judicial power by removing the case from state court, where the State is subject to suit, to federal court, where it is not, only to have the State later claim in federal court that it is immune under the Eleventh Amendment from the judicial power of the federal court. This concern does not exist in cases where a tribal defendant removes an action arising under federal law

to federal court since the Tribe's entitlement to tribal sovereign immunity would be the same in either forum.[2] In this respect, the difference between the constitutional principle of State Eleventh Amendment immunity and the doctrine of tribal sovereign immunity are vast. Thus, conveniently, Contour leaves out of its analysis the following language in *Lapides*:

> The State makes several other arguments, none of which we find convincing. It points to cases in which this Court has permitted *the United States* to enter into a case voluntarily without giving up immunity or to assert immunity despite a previous effort to waive. See *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *United States* v. *Shaw*, 309 U.S. 495 (1940); see also *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991). Those cases, however, do not involve the Eleventh Amendment–a specific text with a history that focuses upon the State's sovereignty vis-à-vis the Federal Government. And each case involves special circumstances not at issue here, for example, an effort by a sovereign (*i.e.*, the United States) to seek the protection of its own courts (*i.e.*, the federal courts), or an effort to protect an Indian tribe.

Id. at 623.

---

2. Although Contour frames its question presented here with the presumption that the Tribe waived its sovereign immunity, clearly there was no waiver since the lease and all terms thereunder were never approved by the Secretary and are void.

The court of appeals addressed the fact that tribal immunity is more analogous to the sovereign immunity of foreign countries, which do not waive their sovereignty by removing cases to federal court. The court of appeals next pointed to *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), which, in this regard, stated:

> In considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries. As with tribal immunity, foreign sovereign immunity began as a judicial doctrine....
>
> Like foreign sovereign immunity, tribal immunity is a matter of federal law. [citation omitted]. Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation. See, *e.g.*, *Santa Clara Pueblo*, 436 U.S., at 58, 98 S.Ct., at 1676-1677.
>
> In both fields, Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area. Congress "has occasionally authorized limited classes of suits against Indian tribes" and "has always been at liberty to dispense with such tribal immunity or to limit it." [citation omitted] It has not yet done so.

> In light of these concerns, we decline to revisit our case law and choose to defer to Congress. Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.

Id. at 759.

Finally, the court of appeals' observation that a Tribe's interests in adjudicating tribal immunity claims in a federal forum are considerable and do not justify the mechanical application of *Lapides* suggested by Contour with respect to the Tribe's removal of this case from state to federal court. To apply *Lapides* to the removal of cases against Tribes, in a case such as this, would relegate Tribes to the untenable and undesirable choice of having tribal sovereign immunity in cases arising under federal law filed and litigated exclusively in state court, or suffer the hardship of being compelled to forego tribal sovereign immunity-itself a matter of federal law- as a consequence of removing such cases to federal courts which are better equipped to provide a consistent and uniform application of federal principles to actions arising under federal law. The Eleventh Circuit addressed this situation as follows:

> **We can discern no sound basis in law or logic for forcing an Indian tribe to make this choice. The Court's holding in Lapides was based in no small measure on the obvious "problems of inconsistency and unfairness"**

> **that the procedural posture of the case presented.** 535 U.S. at 622. If the Supreme Court had declined to find a waiver in Lapides, then Georgia's removal of the case to federal court would have effectively operated as an end-run around its waiver of immunity in state court. Indeed, it is hard to ignore entirely the Supreme Court's express limitation of its holding "to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." Id. at 617. **In sharp contrast, here the Seminole Tribe has in no way consented to be sued on any of the claims in this case in any forum, whether federal or state. Plainly, the Tribe's act of removal was not an attempt to obtain "unfair tactical advantage[]." Id. at 621. This further cautions against extending Lapides to our case. (Emphasis Added)**

Petitioner's Appendix A at 16a-17a.

In support of its position, Contour points to only one case adopting its reasoning. In *State of New York v. The Shinnecock Indian Nation*, 523 F. Supp. 2d 185 (E.D.N.Y. 2007), the district court found that the Shinnecock Indian Nation waived its sovereign immunity by removing a state court action to federal court. Contour contends that the district court reached this result by extending the holding in *Lapides* to Indian tribes and tribal sovereign immunity based solely upon the Tribe's removal of the case from state to federal court.[3]

3. Contour points to what it terms is a conflict between the views of two district courts as a basis for the Court's review of this case. While a conflict arising between two circuit courts of appeal

Shinnecock, supra, does little, if anything, to aid Contour's position in this case. At the time that the case was decided, the Shinnecock Indian Nation, which has since been granted federal recognition, was not a federally recognized tribe, and was not entitled to tribal sovereign immunity to which the Tribe and other federally recognized tribes are entitled. Additionally, unlike this case, which arises from Contour's failure to comply with a federal statute governing long-term leasing of restricted tribal trust lands, the real property in issue in *Shinnecock* was not federally restricted tribal trust land and was not subject to federal statutes relating to Indian lands. In reality, the Shinnecock Indian Nation had no sovereign immunity to waive and the case is not authoritative in any way that supports an extension of the holding in *Lapides* to cases in which a federally recognized Indian tribe removes a case from state to federal court.

Based upon the foregoing, it is respectfully submitted that no compelling reason exists to warrant consideration of extending the holding in *Lapides* to the doctrine of

---

on the same issue may furnish a compelling reason for review, in many instances, a conflict between the viewpoints of two district courts does not appear compelling at all, particularly in view of considerable differences that exist between the two cases.

In *Ingrassia v. Chicken Ranch Bingo & Casino,* 676 F. Supp. 2d 953 (E.D.Cal. 2009) the district court declined to extend the holding in *Lapides* to a case where a federally recognized tribe operating on tribal trust land removed a case arising under federal law from state to federal court. In *New York v. Shinnecock Indian Nation,* 523 F. Supp. 2d 185 (E.D. N.Y. 2008), the district court was dealing with a then unrecognized Indian tribe, seeking to operate on state land (as opposed to tribal trust land) to which Title 25 of the United States Code does not apply.

tribal sovereign immunity in cases where, as here, an Indian tribe properly removed a case based upon violations of federal law from state to federal court.

2. RESPONSE TO QUESTION 2

There is no compelling reason that warrants either a wholesale examination or the abolition of the doctrine of tribal sovereign immunity which the Court and Congress have carefully developed and refined over the course of nearly a century. Contour's request is not new to the Court which has, in each case, declined to limit or abolish the doctrine of tribal sovereign immunity, and has, instead, historically deferred to the plenary power of Congress regarding this fundamental aspect of a dependent sovereign tribe.

The doctrine of tribal sovereign immunity was described by the Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) as follows:

> **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....[citations omitted]To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred.** In one case, a state court had asserted jurisdiction over tribal fishing "both on and off its reservation." *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 167, 97 S.Ct. 2616, 261853 L.Ed.2d 667 (1977) We held the Tribe's claim of

> immunity was "well founded," though we did not discuss the relevance of where the fishing had taken place... [citation omitted] **Nor have we yet drawn a distinction between governmental and commercial activities of a tribe....** [citations omitted] Though respondent asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions.
>
> Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. **We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country....**[citations omitted] To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi,* for example, we reaffirmed that **while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes,... There is a difference between the right to demand compliance with state laws and the means available to enforce them.... (Emphasis Added)**

The *Kiowa* Court provides a thorough analysis of the doctrine, its development, its limitations and its nuances. In this regard, the Court carefully distinguished tribal sovereign immunity from other forms of governmental immunity, stating as follows:

> **We have often noted, however, that the immunity possessed by Indian tribes is not coextensive with that of the States....**[citation omitted] In *Blatchford,* we distinguished state sovereign immunity from tribal sovereign immunity, as tribes were not at the Constitutional Convention. They were thus not parties to the "mutuality of . . . concession" that "makes the States' surrender of immunity from suit by sister States plausible."...[citations omitted] So **tribal immunity is a matter of federal law and is not subject to diminution by the States...** [citations omitted] (Emphasis Added)

In the Court's discussion of the origins of the doctrine, reference is made to *Turner v. United States,* 248 U.S. 354 (1919) where the Court noted that the doctrine developed "almost by accident," a point emphasized by Contour. It is respectfully submitted that after nearly a full century of judicial development and refinement, the doctrine is more important for its modern application and the protections that it affords to tribes than for the uniqueness of its origin. The Tribe would further submit that the almost "accidental" development of the doctrine is less surprising when considered in the context of how tribes were viewed in the first quarter of the twentieth century, approximately fifty years after the status of tribes shifted from that of independent or foreign sovereign governments with the recognized power to enter into treaties, to the newly created status of dependent sovereign entities which are subject to the plenary power of Congress and a government-to-government relationship with the "dominant sovereign." To characterize the legal status of Indian tribes as being unique in the law seems an understatement.

In its discussion of the early development of the doctrine of tribal sovereign immunity from a passing reference to immunity in *Turner*, the Court described the following as the "slender reed" which supports the principle of tribal sovereign immunity:

> ...Though *Turner* is indeed cited as authority for the immunity, examination shows it simply does not stand for that proposition. The case arose on lands within the Creek Nation's "public domain" and subject to "the powers of [the] sovereign people."... Congress ...passed a law allowing Turner to sue the Creek Nation in the Court of Claims. The Court of Claims dismissed Turner's suit, and the Court, in an opinion by Justice Brandeis, affirmed. The Court stated: "The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." ..."No such liability existed by the general law."
>
> The quoted language is the heart of *Turner*. It is, at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine...." ...The fact of tribal dissolution, not its sovereign status, was the predicate for the legislation authorizing suit.

***Turner's* passing reference to immunity, however, did become an explicit holding that tribes had immunity from suit. We so held in *USF & G*, saying: "These Indian Nations**

> **are exempt from suit without Congressional authorization."...As sovereigns or quasi-sovereigns, the Indian Nations enjoyed immunity "from judicial attack" absent consent to be sued. ...** (Emphasis Added)

Contour's suggestion that the doctrine of tribal sovereign immunity be revisited and discarded is not unlike the position taken by the State in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 510 (1991) in which Oklahoma urged the Court to limit or abandon altogether the doctrine of tribal sovereign immunity. In addressing this suggestion, the unanimous Court rejected this course of action and instead deferred to the plenary power of Congress–precisely the course of action that is warranted here.

In its analysis of the issue, the Court first looked to whether Congress approves of the immunity doctrine, the manner in which Congress has exercised its plenary power over Indian tribes and their immunity and the goals that Congress has attempted to encourage and advance through legislation pertaining to Indian tribes, stating:

> **Congress has always been at liberty to dispense with such tribal immunity or to limit it.** Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. **Instead, Congress has consistently reiterated its approval of the immunity doctrine.** See, *e.g.,* Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.,* and the Indian Self-Determination and

> Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.* **These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."...[citation omitted] Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.** (Emphasis Added)

Id.

In *Potawatomi*, *supra*, Oklahoma alleged that by filing a claim for injunctive relief, the Tribe waived its tribal sovereign immunity from suit with respect to the state's counterclaim to enforce collection of a tax upon cigarette sales. This position was addressed and rejected by the Court, without dissent or equivocation, as follows:

> **Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories.** *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831). **Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.** *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). Petitioner acknowledges that Indian tribes generally enjoy sovereign immunity, but argues that the Potawatomis waived their sovereign immunity by seeking an injunction against the Commission's proposed

> tax assessment. It argues that, to the extent that the Commission's counterclaims were "compulsory"...the District Court did not need any independent jurisdictional basis to hear those claims.
>
> We rejected an identical contention over a half-century ago in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-512, 60 S.Ct. 653, 655-656, 84 L.Ed. 894 (1940). In that case,...[w]e held that a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe. *Id.*, at 513, ... **"Possessing... immunity from direct suit, we are of the opinion [the Indian nations] possess a similar immunity from cross-suits."** ***Ibid....*** **[T]he case is...controlled by *Fidelity & Guaranty*. We uphold the Court of Appeals 'determination that the Tribe did not waive its sovereign immunity merely by filing an action for injunctive relief.**

498 U.S. at 509 (Emphasis Added)

In evaluating the Tribe's entitlement to tribal sovereign immunity, the Court was careful to note that this did not excuse the Tribe from all efforts to assist the State in the collection of taxes on cigarette sales made on the reservation. On this point, the Court stated:

> Although the doctrine of tribal sovereign immunity applies to the Potawatomis, that

> doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes....[citation omitted] Oklahoma argues that the Potawatomis' tribal immunity notwithstanding, it has the authority to tax sales of cigarettes to nonmembers of the tribe at the Tribe's convenience store. We agree....
>
> * * *
>
> **In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy.** There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but **we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State.** See *Ex parte Young,* 209 U.S. 123...(1908).

Id. at 512-514. (Emphasis Added).

Despite the fact that the doctrine of tribal sovereign immunity was created "almost by accident" in *Turner, supra,* the cases addressing the application of the doctrine and waivers thereof reflect Congress' ongoing approval of the doctrine as well as its willingness to use its plenary power over the doctrine's existence and the dimensions of its exercise. The judicial attention given to this

important doctrine together with the Court's continuing refinement and development of it has provided sovereign tribal governments with an important protection against economic and litigation predation while tribes continue the slow recovery from decades, if not centuries, of unspeakable abuse that came to light following the implementation of the Removal policy of the Jackson era and the years that followed. From the days of the Marshall Court to the present, the Court has not hesitated to hear and consider those cases involving the sovereignty of Indian tribes; their right and the right of their members to preserve inviolate, their heritage, traditions and culture; the emerging development of Indian commerce and the important role of tribes and Native American Indians in a diversified America.

Tribal sovereign immunity is a vital protection for Indian tribes; however, with the expansion of Indian commerce, the doctrine of tribal sovereign immunity, its assertion and the willingness of tribes, on occasion, to negotiate waivers thereof in commercial transactions between tribes and non-Indians has and will continue to play an important and expanding role in the establishment, development and maintenance of mutually beneficial business relationships between tribal governments and non-Indians. The doctrine of tribal sovereign immunity is best tested against market forces in a highly competitive marketplace that encourage open communication, flexibility and the willingness to negotiate terms in structuring commercial and governmental transactions between sovereign Indian tribes and non-Indian vendors. The plenary power over Indian commerce exclusively consigned to Congress in the Indian Commerce Clause provides an effective legislative alternative for addressing the doctrine on a statute by statute basis, should that

become necessary. U.S. CONST. art I, § 8, cl. 3. Simply put, there is no practical need to relegate to history this important protection.

In the Indian gaming industry, for example, Indian tribes and the states in which they are located are challenged by the *Indian Gaming Regulatory Act*, 25 U.S.C. § 2701, et seq. to find, through negotiation, the common ground necessary to provide tribal governments with economic gaming opportunities which, when successfully realized, inure to the mutual benefit of the states and the tribes in the form of significant additional revenue, the expansion of employment opportunities, commercial establishments and entertainment venues that are uniquely positioned to stimulate local non-tribal growth among other benefits-a potentially winning formula for all interested parties. In the negotiation of a gaming compact both the states and the tribes are mindful of the need to address tribal sovereign immunity. In fact, many gaming compacts contain negotiated limited waivers of tribal sovereign immunity, particularly with regard to tort remedies that are made available to injured patrons.

The role occupied by Congress in regulatory and other legislation affecting Indian tribes reflects approval of tribal immunity tempered by the complete authority of Congress to abrogate tribal sovereign immunity when necessary. Historically, Congress has balanced its approval of tribal immunity with the periodic need for abrogation of tribal sovereign immunity on a limited basis. Congress' restrained and careful approach to the abrogation of tribal sovereign immunity evidences its awareness of the dangerous threat to tribal existence that would present itself without this vital protection.

As well settled as the doctrine of tribal sovereign immunity itself is the power of a tribal government, at its highest governmental level, to waive this protection on a limited basis. In its many decisions on the issue of waiver and abrogation of tribal sovereign immunity, the Court has made clear the need for waivers to be clear, express and unequivocal. While no magic words are necessary to effectuate a waiver or an abrogation of tribal sovereign immunity, the intention to do so must be unmistakable since neither a tribal waiver nor a congressional abrogation may arise by inference or by implication. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-60 (1978).

Santa Clara Pueblo, supra, involved a claim arising under the *Indian Civil Rights Act*, 25 U.S.C. § 1301, et seq. (the ICRA) and the extent to which Congress, in enacting the ICRA, intended to abrogate tribal sovereign immunity. After thoroughly examining the plain language of the statute and the Congressional intent reflected in the ICRA and its legislative history, the Court determined that the only provision of the ICRA in which Congress intended to abrogate immunity was that provision pertaining to writs of *habeas corpus*. 25 U.S.C. § 1303. In this regard, the Court stated:

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers....[citations omitted] This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." *United States v. United States Fidelity & Guaranty Co., supra*, 309 U.S., at 512,....

> **It is settled that a waiver of sovereign immunity " 'cannot be implied but must be unequivocally expressed.'** "*United States v. Testan*, 424 U.S. 392, 399, quoting, *United States v. King*, 395 U.S. 1, 4,...(1969).

Id. at 58-59 (Emphasis Added).

There is no subtlety in Contour's suggestion that the Court re-examine and discard the doctrine of tribal sovereign immunity. Contour's suggestion ignores not only the critical role of Congress and the historical and future need of this important protection, but also the vital role that tribal sovereign immunity plays in ensuring the continuing existence of Indian tribes, which do not have the taxing power of independent sovereign governments. Without tribal sovereign immunity protection, an onslaught of ill-timed lawsuits could lead to the demise of tribal governments, their heritage, their traditions and their culture, to the detriment of more than just native Americans.

Contour's far-reaching suggestion overlooks less intrusive and better measured means for addressing its concerns about tribal sovereign immunity. Contour and its own lawyers could have contacted the Bureau of Indian Affairs in the Department of the Interior, by telephone, in writing or through both means, to make inquiry regarding the status of the approval process and what needed to be done to ensure its completion instead of taking no action for nearly a three year period.[4] Despite its complaints

4. The district court found that Contour "...did not exercise reasonable diligence to discover the truth...." (Emphasis in the original). *Plaintiff's Appendix B at 39a.*

about alleged failures on the part of the Tribe, Contour has shown little, if any, interest in conforming its own conduct to the requirements of federal law regarding the written Secretarial approval required to validate the lease.

The purpose of 25 U.S.C. §415(a) is for the protection of tribal interests and not for the protection of those parties with whom tribes contract; hence, both the burden and the risk fell on Contour alone to obtain written lease approval from the Secretary, despite Contour's urgings to the contrary. *Nulankeyutmonen Nkihtaqmikon v. Impson,* 503 F.3d 18, 29 (1st Cir. 2007); *Utah v. United States Dep't of Interior,* 45 F. Supp. 2d 1279, 1283 (D. Utah 1999); *Saguaro Chevrolet, Inc. v. United States,* 77 Fed. Cl. 572, 577-78 (Fed. Cl. 2007) ("[T]he Unites States' approval of a lease involving Indian land is consistent with the long-standing relationship between Indians and the government in which the government acts as a fiduciary with respect to Indian property.") **Even if the United States acts as a trustee in approving leases of Native American tribes, its obligation is solely for benefit of the Tribes. It owes nothing whatsoever to the parties with whom the tribes contract.** *Sangre De Cristo Dev. Co. v. United States,* 932 F.2d 891, 895 (10th Cir. 1991).

In view of the fact that lack of secretarial approval resulted in the lease to becoming null and void *ab initio,* the express waiver of sovereign immunity contained in the lease also failed, thereby resulting in Contour's claims against the Tribe being jurisdictionally barred by tribal sovereign immunity, a situation which Contour could have easily prevented. The result of Contour's inaction and complete lack of diligence, unfortunate as it may be for Contour, does not provide a compelling circumstance warranting favorable action on Contour's petition.

Based on the foregoing, it is respectfully submitted that Contour's suggestion that the Court revisit and discard the doctrine of tribal sovereign immunity should be rejected in favor of exercising deference to the plenary power of Congress on this issue, as the Court has done in the past.

3. RESPONSE TO QUESTION 3

The *Indian Civil Rights Act*, 25 U.S.C. § 1302(a)(5) and (a)(8) does not create an implicit cause of action permitting the Tribe to be sued for the alleged taking of property without due process of law. Under the authority of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Tribe is immune from suit under those portions of the ICRA relied upon by Contour. As the Court made clear in *Santa Clara Pueblo, supra*, Congress abrogated tribal sovereign immunity only with respect to that portion of the ICRA pertaining to *habeas corpus* proceedings. 25 U.S.C. § 1303.

Notwithstanding the foregoing, Contour nevertheless argues that even if the Tribe's waiver of sovereign immunity was void or otherwise ineffective, this does not bar a claim for a violation of the ICRA. Contour contends that the ICRA was enacted in 1968 to "insure that the American Indian is afforded the broad constitutional rights secured to other Americans" and to "protect individual Indians from arbitrary and unjust actions of tribal governments." *Santa Clara Pueblo, supra*, 436 U.S. at 72-73 (White, J., dissenting) (*quoting* S. Rep. No. 841, 90th Cong., 1st Sess., 6 (1967)). Contour has also alleged violations of Sections 1302(a)(5) and 1302(a)(8) which respectively provide: "No Indian tribe in exercising powers of self-government shall...(5) take any private

property for a public use without just compensation;... (8) deny to any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without *Tribes,* due process of law."

Notwithstanding the fact that the ICRA does not provide an express cause of action to enforce its provisions against a sovereign tribal government, with the sole exception of *habeas corpus,* Contour contends that the Court should allow it to bring and maintain against the Tribe, an implied cause of action under the ICRA. In support of its position, Contour relies upon the questionable authority of *Dry Creek Lodge v. Arapahoe and Shoshone Tribes, 623 F. 2d 682 (10th Cir. 1980),* which, historically, has been followed sparingly and only in the Tenth Circuit. Contour has taken this position knowing full well that *Dry Creek Lodge, supra,* runs contrary to the authority laid down by the Court in *Santa Clara Pueblo.* The Court has long held that tribal waivers and Congressional abrogation of tribal sovereign immunity must be clear, express and unequivocal and may not arise by inference or by implication. *Santa Clara Pueblo, supra,* 436 U.S. at 59.

In *Dry Creek Lodge, supra,* the plaintiffs were non-Indians who owned a tract of land on the Reservation of the Shoshone and Arapahoe Tribes in Wyoming. *Id.* at 683-684. After obtaining a construction license from the Tribes, plaintiffs built a guest lodge for their hunting clientele. *Id.* at 684. The day after they opened their lodge for business, the Tribes barricaded the access road that led from plaintiffs' lodge to the main highway because that road crossed the land of a tribal family which objected to plaintiffs' use of it. *Id.* The plaintiffs sought relief from the Tribes' Business Council which, like the Seminole Tribal

Council served as an executive, legislative, and judicial body. **Unlike the Seminole Tribal Council,** the Tribes in *Dry Creek Lodge* denied plaintiffs any opportunity to present their claim. Instead, the Tribes advised both the plaintiffs, and the objecting Indian family, to resolve their differences by exercising "self-help." Thereafter, the non-Indian plaintiffs sued in federal court, alleging, among other things, that the Tribes had violated their due process and equal protection rights under the ICRA.

While the *Dry Creek Lodge* litigation was ongoing, the Court decided *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). At issue in *Santa Clara* was a tribal ordinance preventing children born to mixed marriages (one Santa Claran, one non-Santa Claran) from joining the Tribe and from enjoying associated rights such as the right to vote in tribal elections and the right to hold tribal office. *Id.* at 52-53. Martinez, a Santa Claran who had married a non-Santa Claran, and her daughter brought a class-action suit alleging that the ordinance violated the equal protection guarantee of the ICRA. *Id.* at 53-54. Following a full trial, the district court ruled that although 28 U.S.C. § 1343(4) provided a jurisdictional basis for plaintiffs' action under Title I of the ICRA, plaintiffs were unable to prove an equal protection violation on the merits. *Id.* The Tenth Circuit agreed that Section 1343 provided a cause of action, but reversed on the merits because it held that the ordinance did violate the equal protection provision of ICRA. *Id.* at 54-55.

This Court reversed. ***Writing for the majority, Justice Marshall held that the ICRA does not expressly or impliedly authorize a cause of action against Indian tribes or tribal officers.*** *Id.* at 72. While acknowledging

that the Court frequently infers a federal cause of action to enforce civil rights, Justice Marshall placed great emphasis on protecting tribal sovereignty in cases of intra-tribal disputes. *Id.* at 59-60.

Santa Clara Pueblo was binding law by the time the *Dry Creek Lodge* plaintiffs' appeal reached the Tenth Circuit for the second time. Nevertheless, the Tenth Circuit declined to apply it. The Tenth Circuit distinguished *Santa Clara* as relying heavily on two factors: (1) the tribal court relief available to the *Santa Clara* plaintiffs; and (2) the "intratribal nature of the problem sought to be resolved." *Dry Creek Lodge, supra,* 623 F. 2d at 685. By contrast, the Tenth Circuit held that the *Dry Creek Lodge* plaintiffs had "no remedy within the tribal machinery," nor did they have any remedy in state or federal court.

Finding that there had to be a forum where the dispute could be settled, the Tenth Circuit reversed the district court's order dismissing the plaintiffs' complaint, and remanded for a new trial on the issue of damages. *Id.* Thus, the Tenth Circuit created an **extremely limited and questionable exception** to *Santa Clara Pueblo* whereby it held that ICRA can impliedly authorize a cause of action against an Indian tribe under certain limited circumstances. Those circumstances are: (1) involvement of a non-Indian in the action; (2) the alleged deprivation of an individual's real property interests; (3) an attempt by the plaintiff to seek a remedy within the tribal system; and (4) the absence of an adequate tribal remedy. *Id.* In this case, those factors cannot be met and no other factors exist to allow this questionable and restricted case law to be applied to create an implicit cause of action against the

Tribe. **At no time did Contour ever attempt to obtain a hearing before the Seminole Tribal Council which possesses the adjudicatory power necessary to resolve disputes.**

Contour argues that it meets all of the *Dry Creek Lodge* criteria and thus urges the Court to apply *Dry Creek Lodge* to this case. While the district court did agree that Contour met the first two criteria, the Court found that it did not meet the third criterion because Contour never sought a remedy within the Seminole Tribal Council following the Tribe's dispossession of Contour from the property.

As to the fourth criterion, Contour argued the that Tribe has never established a judicial system, despite the fact that its own Constitution and Bylaws provide for one.. It also asserted that the Seminole Tribal Council, which purports to exercise both legislative and adjudicatory functions, is not a competent adjudicatory forum. In response, the Tribe and its Chairman argued that similar tribal forums have been recognized as a competent and sufficient adjudicatory body, *See, e.g., White v. Pueblo of San Juan*, 728 F. 2d 1307, 1312-1313 (10th Cir. 1984).

The Eleventh Circuit has stated that the lack of an adequate tribal forum does not necessarily waive tribal immunity, nor does it confer jurisdiction upon federal courts. *See, State of Florida v. Seminole Tribe v. Florida*, 181 F. 3d 1237, 1243-44 (11th Cir. 1999) ("...[I]t is far from clear that 'tribal [sovereign] immunity [must give way to] federal jurisdiction when no other forum is available for the resolution of claims."). The Eleventh Circuit has also considered it relevant that the plaintiff in that case

could have also brought an action in state court. *Id.* The court of appeals also noted that Contour acknowledged that it has a remedy under Florida Statutes. *Petitioner's Appendix B at 45a.*

After balancing the *Dry Creek Lodge* criteria, the district court properly declined to apply the so-called *Dry Creek Lodge* exception to the jurisdictional bar imposed by tribal sovereign immunity. The district court reached this result in part because the Tenth Circuit has subsequently narrowed the *Dry Creek Lodge* exception. *See, Ramey Construction Company, Inc. v. Apache Tribe Of The Mescalero Reservation*, 673 F. 2d 315, 319 (10th Cir. 1982) (distinguishing *Dry Creek Lodge* as involving "particularly egregious allegations of personal restraint and deprivation of personal rights"); *White v. Pueblo of San Juan*, 728 F. 2d 1307 (10th Cir. 1984); *Walton v. Tesuque Pueblo*, 443 F. 3d 1274, 1278-79 (10th Cir. 2006); *Ordinance 59 Assc'n v. U.S. Dept. of Interior Secretary*, 163 F. 3d 1150, 1158-59 (10th Cir. 1998); *Olguin v. Lucero*, 87 F. 3d 401, 404 (10th Cir. 1996); *Nero v. Cherokee Nation of Oklahoma*, 892 F. 2d 1457, 1460 (10th Cir. 1989). As the Tenth Circuit stated in *White v. Pueblo of San Juan*, respect for the supremacy of the Supreme Court's decision in *Santa Clara Pueblo* obligates lower federal courts to narrowly interpret *Dry Creek Lodge* which has been acknowledged in courts in the Tenth Circuit as having become *a case of very questionable precedential value. White v. Pueblo of San Juan, supra,* 728 F. 2d at 1313.

Based on the foregoing, it is respectfully submitted that Contour's claimed entitlement to maintain an implicit cause of action against the Tribe arising under the non-*habeas corpus* provisions of the ICRA should

be rejected. The so-called *Dry Creek Lodge* exception to tribal sovereign immunity is contrary to the authority of the Court's decision in *Santa Clara Pueblo, supra,* which prohibits waivers of tribal sovereign immunity from arising by inference or implication; and Contour could have, but never did, take its case before and be heard by the Seminole Tribal Council, sitting as an adjudicatory body. *Petitioner's Appendix B at 45a.*

CONCLUSION

For each of the reasons set forth above, it is respectfully submitted that Contour's Petition for Writ of Certiorari should be denied and dismissed.

Respectfully submitted,

DONALD A. ORLOVSKY
Counsel of Record
KAMEN & ORLOVSKY, PA
P.O. Box 19658
West Palm Beach, FL 33416
561-687-8500
dao4law@aol.com

Counsel for Respondents

BLANK PAGE