CASE NO. 04-35210

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN MARCEAU; et al.,
Plaintiffs-Appellants,

v.

The BLACKFEET HOUSING AUTHORITY, and
Its Board Members; et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
The Honorable Sam Haddon, District Judge
District Court No. CIV 02-073-GF-SEH

AMICUS CURIAE BRIEF OF NATIONAL AMERICAN INDIAN HOUSING COUNCIL IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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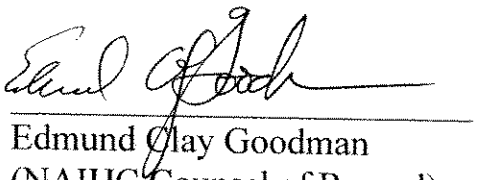
CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Amicus National American Indian Housing Council (NAIHC), a Nevada non-profit corporation, discloses that it is not a publicly held corporation or other publicly held entity and it has no parent corporations. No publicly held corporation or other publicly held entity owns 10% or more of NAIHC.

Dated: May 8th, 2008

Respectfully Submitted,



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I. Statement of Amicus Curiae National American Indian Housing Council

Amicus Curiae National American Indian Housing Council ("NAIHC") is a non-profit incorporated in 1975. NAIHC's 267 voting members are American Indian tribes and "tribally-designated housing entities" ("TDHEs") that provide housing for 460 federally recognized Indian tribes. As authorized by its membership, acting through the Board of Directors, NAIHC respectfully submits this amicus brief in support of Blackfeet Housing Authority's petition for rehearing *en banc*. All parties have consented to the filing of this brief.

As tribal governments or TDHEs, NAIHC's members possess immunity from suit. NAIHC's members have an interest in determining whether, and under what circumstances, to waive such immunity. The ability to protect their immunity and their discretion as to waiver is particularly acute given the very limited funding available to address the desperate, often third-world housing conditions in Indian country. NAIHC's members thus have a strong and compelling interest to ensure that these limited resources remain available for trying to meet the overwhelming demand for affordable housing in Indian country.

Moreover, NAIHC's members have an interest in ensuring that the United States is held liable for breach of its trust obligations to Indian people for its failure to provide safe and adequate housing. Because of the limited resources of tribes and TDHEs, and in order to provide an effective remedy, it is essential that the

United States be held responsible for breach of its responsibilities regarding Indian housing.

The erroneous holdings of the panel's decision on these two critical issues have the potential to result in a direct and adverse impact on nearly all of NAIHC's members, particularly the 131 members located within the Ninth Circuit.

II. The Panel's Decision Will Detrimentally Impact the Ability of Tribes and TDHEs to Assert their Immunity from Suit, and is Contrary to Ninth Circuit Precedent on Tribal Law

A. Tribal Sovereign Immunity Is Needed to Protect the Limited Assets of Tribes and TDHEs, Especially Their Limited Resources Available for Housing

Because of its sovereign status, an Indian tribe is immune from suit, except where the United States has abrogated the tribe's immunity or the tribe has consented to suit. *Allen v. Gold County Casino*, 464 F.3d 1044, 1047-1048 (9th Cir. 2006). "Such immunity is necessary to preserve the autonomous political existence of the tribes, and to preserve tribal assets." *Chemehuevi Indian Tribe v. Calif. State Bd. of Equalizat'n*, 757 F.2d 1047, 1051 (9th Cir.) (citations omitted), *reversed on other grounds*, 474 U.S. 9 (1985). Such immunity extends to tribal entities, like TDHEs. *See Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 86-87 (2d Cir. 2001).

The resources available to Indian tribes and TDHEs for the development of affordable housing are scarce, despite enactment of the Native American Housing

Assistance and Self-Determination Act of 1996 ("NAHASDA"). 25 U.S.C. §§ 4101-4243 (1996). NAHASDA was enacted in part to ensure that tribal housing programs and TDHEs[1] would have their own specific appropriation, separate from and not in competition with other housing programs under the HUD umbrella.[2] Congress did provide steady increases for the first few years of NAHASDA,[3] but beginning in FY 2002, Congress kept the appropriations flat, and in FY 2005 it decreased the annual appropriation by $27.1 million.[4] The annual appropriation has remained essentially flat at this lowered amount since then.[5] As the Senate Committee on Indian Affairs recently acknowledged, "over the last several years, Indian housing programs under NAHASDA have been significantly underfunded,

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[1] Prior to 1996, nearly all Indian housing programs were operated through Indian Housing Authorities ("IHA") established by the various tribes. In 1996, with the passage of NAHASDA, tribes could choose to operate the program as a division or department of the tribe, or they could continue to operate it through the existing IHA or some other entity. NAHASDA's term for such entity is "tribally designated housing entity," or "TDHE," 25 U.S.C. § 4103(21).

[2] NAHASDA, Pub. L. No. 104-330, §§ 501-508, 110 Stat. 4042-4045 (1996).

[3] The FY 1998 appropriation was $600 million (Pub. L. No. 105-65, 111 Stat. 1355); for FY 1999 (Pub. L. No. 105-276, 112 Stat. 2474) and FY 2000 (Pub. L. No. 106-74, 113 Stat. 1059) this was increased to $620 million; and in FY 2001 it was increased again to $650 million (Pub. L. 106-377, 114 Stat. 1441A-14).

[4] The FY 2002 appropriation was $648.5 million (Pub. L. No. 107-73, 115 Stat. 662); FY 2003 was $649 million (Pub. L. No. 108-7, 117 Stat. 488); FY 2004 was $654.1 million (Pub. L. No. 108-199, 118 Stat. 376); and FY 2005 was reduced to $627 million (Pub. L. No. 108-447, 18 Stat. 3298).

[5] The FY 2006 (Pub. L. No. 109-115, 119 Stat. 2445) and FY 2007 (Pub. L. No. 110-5, 121 Stat. 52) appropriations were $630; the FY 2008 appropriation was $630 million (Pub. L. No. 110-161, 121 Stat. 2418).

and [ ] funding levels have not kept up with inflation." Report on S. 2062, NAHASDA Reauthorization, S. Rep. No. 110-238, at 4 (December 7, 2007).

B. The Panel's Decision Would Severely and Negatively Impact NAIHC's Members and Other Tribal Housing Providers

In this light, the ability of NAIHC's 267 member tribes and TDHEs to protect these scarce resources is even more pressing. Yet the panel's erroneous decision may have exactly the opposite impact. Many of NAIHC's members are longstanding Indian Housing Authorities ("IHAs") now serving as TDHEs, which were established by their respective tribes using the same model HUD ordinance as was used to establish the Blackfeet Indian Housing Authority. These ordinances therefore contain the same "sue and be sued" language construed in the panel decision. Many of these members have, like the Blackfeet Tribe, amended or repealed this "sue and be sued" language following enactment of NAHASDA. Many other NAIHC members dissolved their IHAs and either created a new TDHE or simply began to operate housing as a department of the tribal government.

By ruling that the "sue and be sued" language contained in the HUD model ordinance in and of itself constitutes a waiver of immunity, the panel's reasoning retroactively imputes to tribes and TDHEs an intention to waive immunity where such an intention did not exist. Before the panel's ruling, the clear weight of existing authority from other circuits indicated that this language was not a

waiver.[6] The majority view, as set out in the Eighth Circuit decision in *Dillon v. Yankton Sioux Tribe Housing Authority,* was that the "sue and be sued" clause authorizes an IHA to waive its immunity, for example by contract, but that the clause itself did not constitute a waiver. *Dillon,* 144 F.3d 581. Tribes and TDHEs operated for years in reliance on this majority view. The panel decision now appears to inform the 131 NAIHC members in the Ninth Circuit that the language they had believed preserved their discretion to waive their immunity may not do so, and may put their scarce housing dollars at risk.

If this were the extent of the panel decision, tribes could respond by amending the applicable ordinances if they so chose. However, the decision takes the further step, without analysis or explanation, of holding that where, as here, the tribe changes the language of its ordinance, or even dissolves the entity that had operated under the old ordinance, it "makes no difference"[7] to the analysis. In other words, once certain language is deemed to be a waiver (whether intended or not), that waiver exists in perpetuity and follows the tribe's housing money, no

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[6] *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.,* 207 F.3d 21, 30 (1st Cir. 2000); *Dillon v. Yankton Sioux Tribe Housing Authority,* 144 F.3d 581 (8th Cir. 1998); *Buchanan v. Sokaogon Chippewa Tribe,* 40 F.Supp.2d 1043, 1047 (E.D.Wis.1999). *See also Garcia,* 268 F.3d at 86-87 (sue and be sued clause waives immunity, "if at all," only for suits brought in tribal court; clause authorizes TDHE to consent to suit in other courts).

[7] *Marceau v. Blackfeet Housing Authority,* 455 F.3d at 974, 977 n. 2 (9th Cir. 2006). While this was language from the original, June 2006 opinion, the amended opinion of March 2008 employs this same reasoning. *Marceau v. Blackfeet Housing Authority,* 519 F.3d 838, 841, 842-43 (9th Cir. 2008).

matter what the tribe does to the language or to its organization, even if a tribe has dissolved its old housing entity and has either created a new entity or has incorporated the NAHASDA funding into a tribal department. Under the panel's reasoning, a supposed waiver of immunity as to a defunct IHA operating pre-NAHASDA applies to a new TDHE or tribal program that receives NAHASDA funding.

C. Specific Examples of the Adverse Impacts

This two-staged stripping of tribal self-governance impacts nearly all of NAIHC's 131 members in the Ninth Circuit. We provide the following merely as illustrative examples; there are many NAIHC members in the Ninth Circuit and across the country in similar situations.

Karuk Tribal Housing Authority ("KTHA"). KTHA is the TDHE of the Karuk Indian Tribe, located in California. KTHA serves approximately 380 tribal families every year, providing low-rent, affordable homeownership, rental vouchers, and financial counseling and other services. KTHA relies exclusively on its NAHASDA grant as the source of funding to provide these critical services. Yet the Tribe still faces a severe shortage of housing.

The Tribe established the KTHA in 1984 to administer federal appropriations received from HUD. As directed by HUD at that time, the Tribe used the HUD model ordinance with the "sue and be sued" language. On October

23, 1997, after NAHASDA was passed, the Tribe designated KTHA as the Tribe's TDHE, and the Tribe amended the authorizing ordinance to maximize the flexibility inherent under NAHASDA. The Tribe, among other changes, modified the sue and be sued clause, to make clear that the Tribe did not and had never intended to waive KTHA's sovereign immunity. Yet under the panel's reasoning in this case, KTHA might face potential liability on the grounds of a purported waiver that was never intended, based on language that is no longer in the controlling ordinance.

Makah Tribal Housing Department ("MTHD"). MTHD is a department of the Makah Tribe, not a separate TDHE. The Makah Reservation in Northwestern Washington is remote, unemployment and poverty rates are well above the averages, and housing opportunities are very limited. The MTHD provides housing services to approximately 230 low-income Indian families annually. Like Karuk, MTHD relies exclusively on its NAHASDA grant to fund these services.

The Tribe has had a housing program on its Reservation since 1977, when it established the Makah Housing Authority under Section 11b of the Makah Tribal Code, using HUD's model ordinance. The Tribe had assumed, based on the weight of existing authority, that the "sue and be sued" language was merely a grant of authority to the MHA to waive its immunity, and not a waiver. In fact, the Housing Authority has had suits brought against it dismissed by the Makah Tribal

Court, after the MHA successfully argued that the "sue and be sued" clause was not a waiver.[8]

In April 2007, the Makah Tribal Council dissolved the Makah Housing Authority, rescinding Ordinance 11b and adopting An Act Creating the Makah Tribal Housing Department (Resolution #52-07, as amended by Resolution #87-07) under which the Tribe assumed direct responsibility for housing and the administration of the NAHASDA grant. Yet under the panel's reasoning, any plaintiff suing the Tribe could assert that the "sue and be sued" clause of rescinded Ordinance 11b, which applied only to the now-dissolved Makah Housing Authority, and which the Tribe's own court held was not a waiver, could expose Tribal resources to potential liability.[9]

Puyallup Tribal Housing Authority ("PTHA"). PTHA is the TDHE for the Puyallup Tribe of Indians, whose reservation includes parts of the City of Tacoma, Washington, and other cities. Many of the Tribe's members must grapple with the harsh conditions of urban poverty, including drugs, gangs, absentee landlords, a

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[8] *E.g., Cheryl Clark v. Makah Housing Authority*, No. 0072-CIV-05/05, Order of Dismissal (Makah Tribal Court, June 6, 2005).

[9] While the panel's Amended Opinion of March 2008 appears to take the position that Tribal law governs the question of whether language in a Tribal ordinance is a waiver, *Marceau,* 519 F.3d at 843-44, it is unclear—given the continuing validity of the initial opinion and from the independent analysis of this question in the Amended Opinion—whether Tribal law that goes counter to the panel's analysis of this language will be treated as controlling. This question, among the other concerns set out herein, requires clarification in an *en banc* review.

tight homebuyer's market, and unsafe housing conditions. PTHA provides housing services to approximately 120 Tribal families each year.

The Puyallup Tribe has had a housing program in place since the early 1980's, when it established the Puyallup Nation Housing Authority through the adoption of the HUD model ordinance. In 1999, the Tribe dissolved the Puyallup Nation Housing Authority, rescinding its authorizing Ordinance and making the housing program a division of the Tribe. Four years later, in September 2003, the Tribe adopted a housing ordinance establishing the Puyallup Tribal Housing Authority, a new, distinct entity. The new ordinance did not contain the "sue and be sued" language. Despite the various self-governing choices the Tribe has made over the years regarding the structure and organization of its housing program, the initial "sue and be sued" language now may be able to migrate—against the Tribe's express will—following the housing program into the Tribe and then back out into the entirely new, entirely separate Puyallup Tribal Housing Authority.

D. The Panel's Decision Conflicts with Ninth Circuit Precedent and Applicable Tribal Law

In its two decisions, the panel found a waiver of immunity against the Blackfeet Housing Authority ("BHA") based on the "sue and be sued" clause in Blackeet Tribal Ordinance No. 7. 455 F.3d at 978-979; 519 F.3d at 843-844. In so ruling, the panel misconstrued or ignored governing law of the Blackfeet Indian Tribe, and created conflicts with several decisions of this Circuit.

Whether the immunity of BHA has been waived is a question of tribal law. "Determining whether the tribe has waived immunity . . . requires 'a careful study of the application of tribal laws, and tribal court decisions.'" *Sharber v. Spirit Mountain Gaming Inc.*, 343 F.3d 974, 976 (9th Cir. 2003) (per curiam) (quoting *Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992)). Thus, this Circuit has held that under the doctrine of exhaustion of tribal remedies, an action against a tribe or tribal agency must first be heard in tribal court. *Sharber*, 343 F.3d at 976; *Stock West*, 964 F.2d at 920; *Sibley v. IHS*, 1997 U.S.App. LEXIS 6709 (9th Cir. 1997) (requiring exhaustion in suit against an IHA).

In its first decision on BHA's immunity, which the panel adopted on rehearing, 519 F.3d at 843-844, the panel did not consider the issue one of tribal law. Rather, it discussed the "two main lines of authority [that] have emerged" on whether "sue and be sued" clauses waive tribal sovereign immunity, and adopted the line that it agreed with. 455 F.3d at 979. It mentioned the Blackfeet Tribal Court of Appeals decision in *DeRoche v. Blackfeet Indian Housing Authority*, 17 Indian L. Rptr. 6036, 6042 (Blackfeet Trib. Ct. App. 1989), but only as an example of a decision following one line of authority—not as the controlling legal authority. 455 F.3d at 979. On rehearing, however, the panel cited *DeRoche* as being authoritative on the issue:

> *DeRoche* is the only Blackfeet appellate decision, and it is on point. Even if exhaustion in tribal court were warranted, abstention would

> not be required. *DeRoche* is binding tribal precedent, and we would defer to the tribal court's extant interpretation. *See Hinshaw v. Mahler*, 42 F.3d 1178, 1180 (9th Cir. 1994) ("The Tribal Court's interpretation of tribal law is binding on this court.").

519 F.3d at 843 (footnote omitted).

The panel decision erred in applying *DeRoche* to the case at bar. The BHA was not the defendant in *DeRoche*, nor was it chartered under Ordinance No. 7, the ordinance construed in *DeRoche*. That ordinance established the Blackfeet Indian Housing Authority ("BIHA"), the defendant in *DeRoche*. In 1999, following the enactment of NAHASDA, the Blackfeet Tribal Council repealed Ordinance No. 7, dissolved BIHA, and chartered "Blackfeet Housing," also known as Blackfeet Housing Authority, or BHA. Record at 000024. The panel treated BIHA and BHA as the same entity, 455 F.3d at 977 n. 2; 519 F.3d at 841, 842-43, and applied the sue and be sued clause in Ordinance No. 7, notwithstanding that the applicable tribal resolution forming BHA treated BIHA as a different entity and dissolved it, and repealed Ordinance No. 7. Record at 000024, ¶¶ 2, 3.[10]

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[10] If the sue and be sued clause in Ordinance No. 7 did apply to BHA, this Court should follow a post-*DeRoche* case in the Blackfeet Tribal Court that held that the clause did not in and of itself waive BIHA's sovereign immunity. *See White Man v. Blackfeet Indian Housing Auth.*, No. 99-AP-37 p.4 (Blackfeet Tribal Ct. App. Nov. 23, 2004) (adopting reasoning of *Dillon v. Yankton Sioux Tribe Housing Auth.*, 144 F.3d 581 (8th Cir. 1998)), Appendix, Exh. A. Although that decision was later vacated on other grounds, *see White Man v. Blackfeet Indian Housing Auth.*, No. 99-AP-37 p.1 (Blackfeet Tribal Ct. App. March 13, 2007) (vacating earlier decision because Ordinance No. 7 had been repealed, and a charter had been issued to BHA in 1999 that was in effect), Appendix, Exh. B., it

The panel's decision conflicts with this Circuit's decision in *Linneen v. Gila River Indian Community*, 276 F.3d 489 (9th Cir. 2002). There, this Court ruled that a "sue and be sued" clause in the charter of a tribal organization chartered under Section 17 of the Indian Reorganization Act, 25 U.S.C. § 477, did not waive the tribal government's sovereign immunity because the tribal government and the tribal corporation were distinct entities. 276 F.3d at 492-93. *Linneen* stands for the proposition that a tribe's waiver of immunity as to one entity does not extend to another. The conflict between *Linneen* and the panel decision warrants rehearing.

Contrary to the panel's amended decision, *DeRoche* is inapposite to BHA's immunity to the present suit. BHA's Charter, which is the governing tribal law, provides that nothing in the charter waives BHA's immunity. Charter, Art. V, § 2. Record 000030. Moreover, on April 3, 2008 — subsequent to the panel's amended decision — the Blackfeet Tribal Court ruled that "BIHA and BH are separate and distinct entities and are not the same entities for any purposes," and that "[t]here has been no explicit waiver of BH's immunity from suit in this case by the Blackfeet Tribal Council as the charter for BH requires." *White Man v. Blackfeet Indian Housing Auth.*, No. 97-CA-474, p.2 (Blackfeet Tribal Ct. April 3, 2008)

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remains authoritative as to how the Blackfeet Tribal Court construes the "sue and be sued" clause in Ordinance No. 7.

(*White Man II*) (emphasis added), Appendix, Exh. C.[11]

This post-panel decision of the Tribal Court contradicts the panel's decision in three respects: it treats BIHA and BHA as separate entities; it holds that BHA's immunity is governed by its charter and not by the BIHA charter containing the sue and be sued clause; and it holds that under BHA's charter, there must be a separate explicit waiver by the Blackfeet Tribal Business Council. The Tribal Court decision therefore requires rehearing of the panel decision.[12] Although the decision is by the Tribal Court, and not the Tribal Court of Appeals, it is the best evidence of Blackfeet Tribal law, and should be accorded respect.

III. The Panel's Decision Barring the Breach of Trust Claim Against the United States Will Have Significant Adverse Impacts

Prior to the enactment of NAHASDA, HUD exercised pervasive and often highly paternalistic control over Indian housing programs. As noted in Judge Pregerson's dissent to the panel decision:

> The federal government controlled the design of the houses, set the building standards, approved all the designs and contracts, and

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[11] This case was decided on remand from *White Man v. Blackfeet Indian Housing Auth.*, No. 99-AP-37 (Blackfeet Tribal Ct. App. March 13, 2007), discussed *supra* at n. 10.

[12] When a federal circuit court of appeals decides a case based on the application and interpretation of state law, and following its decision the state court decides the legal issue differently, on petition for *certiorari*, the Supreme Court will grant *certiorari*, vacate the decision and remand it for further consideration in light of the state court ruling. *See e.g., Lords Landing Village v. Continental Ins. Co.*, 520 U.S. 893 (1997); *Thomas v. American Home Prods.*, 519 U.S. 913 (1996) (Scalia, concurring).

> provided funding. HUD's control of housing on tribal land and the Homeownership Program was pervasive.

Marceau, 519 F.3d 860 (Pregerson, J., dissenting). In fact, it was the burdens and restrictions of such control, and its offensiveness to the concept of self-governance, that led NAIHC and others to push for the legislation that eventually became NAHASDA. Under the new law, tribes are permitted to exercise a degree of self-governance, control, and autonomy over their housing programs that did not exist prior to 1996. Yet tribes or their TDHEs still have the responsibility of managing a substantial number of housing units constructed under the HUD-dominated, pre-NAHASDA regime. These are the units that are at issue in the present suit against *Blackfeet Housing Authority*, units that were constructed under specific guidelines dictated and enforced by HUD.

The impacts of the panel's misreading of the trust obligation established by the Supreme Court's decisions in the two *Mitchell* cases,[13] as well as in *White Mountain Apache*[14] and *Navajo Nation*,[15] extend far beyond the Blackfeet Tribe. Nationwide, there are 56,954 units managed by tribes and TDHEs that were constructed under the pre-NAHASDA regime, over 25,000 of which are managed by NAIHC's members located in the Ninth Circuit.

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[13] *United States v. Mitchell*, 445 U.S. 535 (1980); *United States v. Mitchell*, 445 U.S. 206 (1983).
[14] *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).
[15] *United States v. Navajo Nation*, 537 U.S. 488 (2003).

Denying recourse against HUD for damages arising from conditions in these units means that the scarce and dwindling NAHASDA appropriations for tribes and TDHEs will often be the only source of funds available to address problems in housing stock developed under HUD's pervasive oversight and control. This means programs like Karuk Tribal Housing Authority (172 units of old housing), Makah Tribal Housing Department (104 units), and the Puyallup Tribal Housing Authority (59 units), among many others, may be forced to spend their limited dollars to fix mistakes mandated by HUD, and which under the existing law of trust obligation should be addressed by HUD.

IV. Conclusion

For the reasons set out herein, the National American Indian Housing Council respectfully supports the request of the Blackfeet Housing Authority for rehearing *en banc*.

Submitted this 8th day of May, 2008:

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CERTIFICATE OF COMPLIANCE
Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1
for Case Number 04-35210

Amicus Brief

I certify that the foregoing brief is not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)-(5) and Circuit Rule 29-2(c)(2).

Dated: May 8th, 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of May, 2008, a true and accurate copy of the foregoing Amicus Curiae Brief for National American Indian Housing Council was duly served by U.S. First Class Mail, postage prepaid, upon the following counsel of record:

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The original and 50 copies of the Amicus Curiae Brief for National American Indian Housing Council were also sent on the above date to:

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By: _____
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CASE NO. 04-35210

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APPENDIX TO BRIEF OF AMICUS CURIAE

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EXHIBIT A

***White Man v. Blackfeet Indian Housing Auth.*, No. 99-AP-37 (Blackfeet Tribal Ct. App. Nov. 23, 2004) (Tribal Court certified copy)**

IN THE COURT OF APPEALS

FOR THE BLACKFEET INDIAN RESERVATION

KEVIN TALL WHITE MAN, on behalf Of WILBUR MOUNTAIN CHIEF, deceased and his estate on and behalf of his children KARLEETA, NATHAN, VANESSA and ADRIAN MOUNTAIN CHIEF, and PATSY CROSS GUNS,	)	Blackfeet Tribal Court Cause No. 97- CA- 474
Plaintiffs,	)	Blackfeet Court of Appeals Cause No. 99-AP-37
vs.	)	
BLACKFEET INDIAN HOUSING AUTHORITY,	)	
Defendant.	)	

BLACKFEET INDIAN HOUSING AUTHORITY,	)
Third-Party Plaintiff,	)
vs.	)
SIMPSON DURA-VENT COMPANY, INC,	)
Third-Party Defendant	)

DECISION AND ORDER

BACKGROUND

This is an appeal from an order of the Blackfeet Tribal Court dismissing the above plaintiffs/appellants' action against the Blackfeet Indian Housing Authority [BIHA] on the ground that BIHA as an agency of the Blackfeet Tribe is immune from suit.

THE FACTS

Plaintiffs brought the above action against BIHA alleging negligence on the part of BIHA in failing to maintain the furnace in Blackfeet Tribal Housing Unit 1210 in a safe working condition. As a result, plaintiffs allege, plaintiff Wilbur Mountain Chief died due to carbon monoxide poisoning and plaintiff, Patsy Cross Guns, sustained serious injury due to the same carbon monoxide poisoning.

BIHA was created through Tribal Ordinance # 7, effective January 7, 1977. Article V, paragraph 2 of the Ordinance provides as follows:

> The Council hereby gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be liable for the debts or obligations of the Authority.

THE ISSUE

Whether the above quoted "sue and be sued" provision effectively waived BIHA's immunity from suit.

DISCUSSION

Plaintiffs rely on *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma [C & L Enterprises]*, 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001) for the proposition that the foregoing "sue and be sued" provision constitutes a waiver of the Blackfeet Tribe's and, therefore, BIHA's immunity from suit. In that case the U.S. Supreme Court said that "[t]o abrogate tribal immunity, Congress must 'unequivocally' express that purpose, *Santa Clara Pueblo v. Martinez* [citation omitted]. Similarly, to relinquish its immunity, a tribe's waiver must be 'clear' [citation omitted]." There the U.S. Supreme Court found the arbitration clause in that contract between the parties effectively waived the Tribe's immunity.

Defendant, BIHA, on the other hand, cites *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F. 3d 581, C.A.8, (SD, 1998) for the proposition that a housing authority's "sue

and be sued" provision does not waive a Tribe's sovereign immunity. In *Dillon* the "sue and be sued" provision was identical to the one in Ordinance # 7 here. In *Dillon* the Eight Circuit Court of Appeals said:

> In *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668, 670 (8th Cir.1986), we stated that "[i]t has been held that a housing authority, established by a tribal council pursuant to its powers of self-government, is a tribal agency." Id. (citation omitted). In *Weeks*, the housing authority was created in a similar fashion to the Authority created here. Therefore, we must treat the Authority as a tribal agency rather than a separate corporate entity created by the tribe.
>
> Having determined that the Authority is a tribal agency, we must decide whether it enjoys sovereign immunity. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), the United States Supreme Court reaffirmed its long-held view that, as it relates to tribes, "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." Id. (internal quotation and citation omitted). Citing this language, the district court determined that the Authority did not unequivocally waive its right to be sued.
>
> Dillon argues that our court has explicitly held that the "sue and be sued" provision quoted above automatically constitutes a waiver of sovereign immunity. Dillon cites *Weeks* for the proposition that "[a] 'sue and be sued' clause such as is set forth in the tribal ordinance ... has been recognized as constituting an express waiver of sovereign immunity." *Weeks*, 797 F.2d at 671 (citations omitted). Dillon's argument fails, however, *because in Weeks, and the cases cited therein, an express waiver of sovereign immunity was found in a written contract* [emphasis supplied].
>
> The tribal resolution quoted above specifically states that "the Authority [may] agree by contract to waive any immunity from suit it might otherwise have." (J.A. at 30.) In this case, the Authority never explicitly waived its sovereign immunity through a written contract. The Authority did not have a written contract with Dillon and could not have waived its sovereign immunity through an implied agreement.

Another case also closely akin to the facts here is *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, C.A.8 (S.D. 2000) [charter granted to community college by Indian tribe, indicating college could "sue and be sued in its corporate name in a competent court to the extent allowed by law," providing that tribe consented to allowing college to sue and be sued upon any contract, and authorizing college to waive any immunity from suit which it might

otherwise have, did not waive college's sovereign immunity]. As was the case *Dillon* and *Hagen, supra*, here there is no "express waiver of sovereign immunity . . . in a written contract" as there was in *C & L Enterprises, supra*, and that fact distinguishes *C & L Enterprises* from the case here.

Plaintiffs point out that BIHA had liability insurance and that even if this Court upholds BIHA's immunity from suit it should be allowed to proceed against BIHA up to the limits of its insurance coverage. That, however, is not for us to decide rather it is for the Blackfeet Tribal Business Council to make that determination. We take Tribal Ordinance # 7 the way we find it.

ORDER

The Tribal Court's order dismissing the above action on grounds that the Tribe has not waived its sovereign immunity as to the plaintiffs herein is affirmed.

Dated this 23rd day of November, 2004.

Chief Justice

Associate Justice

Associate Justice

FILED

JAN 19 2005

Blackfeet Tribal Court

By

EXHIBIT B

***White Man v. Blackfeet Indian Housing Auth.*, No. 99-AP-37 (Blackfeet Tribal Ct. App. March 13, 2007) (Tribal Court certified copy)**

IN THE BLACKFEET COURT OF APPEALS
FOR THE BLACKFEET INDIAN RESERVATION

IN THE MATTER OF:

Kevin Tall White Man, on behalf
Of Wilbur Mountain Chief, deceased
And his estate on and behalf of his children
Karletta, Nathan, Vanessa and
Adrian Mountain Chief, and Patsy
Crossguns,

PLAINTIFFS

v.s.

Blackfeet Indian Housing Authority

DEFENDANTS

CASE NO.

97-CA- 474
99-AP- 37

O R D E R

Blackfeet Indian Housing Authority,

Third Party Plaintiff

v.s.

Simpson Dura-Vent Company, Inc.

Third Party Defendant

IT HAS COME to the attention of the Blackfeet Tribal Court of Appeals that Ordinance 7 was terminated on March 4, 1999 by Resolution 100-99. This case was filed September 1, 1999. At that time Tribal Ordinance 7 was not in effect, but rather a Charter for Blackfeet Housing was adopted on March 4, 1999 and is in effect.

This fact has now been discovered by the Blackfeet Court of Appeals. In order

To prevent manifest injustice the order issued by this Court on November 23, 2004 and filed in the Blackfeet Tribal Court on January 19, 2005, which cited Ordinance 7, is hereby vacated.

This cause is remanded to the Blackfeet Tribal Court for further proceedings; but caution is given to the Tribal Court to ascertain whether or not the correct procedure was followed by both parties.

The request for re-hearing in the Blackfeet Court of Appeals is hereby denied.

DATE: 3-13-07

Jackie Parsons, Chief Judge

Justice

Justice

FILED

APR 0 4 2007

Blackfeet Tribal Court

By

EXHIBIT C

***White Man v. Blackfeet Indian Housing Auth.*, No. 97-CA-474 (Blackfeet Tribal Ct. April 3, 2008) (Tribal Court certified copy)**

Stephen A. Doherty
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Telephone: (406) 721-1070
Facsimile: (406) 721-1799
Attorneys for Blackfeet Housing

IN THE BLACKFEET TRIBAL COURT
FOR THE BLACKFEET INDIAN RESERVATION

KEVIN TALL WHITE MAN, on behalf of WILBUR MOUNTAIN CHIEF, deceased and his estate on and behalf of his children KARLEETA, NATHAN, VANESSA and ADRIAN MOUNTAIN CHIEF, and PATSY CROSS GUNS, Plaintiffs, v. BLACKFEET HOUSING, Defendant.	Blackfeet Tribal Court Cause No. 97-CA-474 Blackfeet Court of Appeals Cause No. 99-AP-37
BLACKFEET HOUSING, Third-Party Plaintiff, v. SIMPSON DURA-VENT COMPANY, Inc. Third-Party Defendant.	**ORDER**

The Court convened in Browning, Montana on January 15, 2008. Present in the Courtroom were attorneys Cameron Ferguson and Steve Doherty. Appearing telephonically were attorneys Roberta Cross Guns and Paul Haffeman. The Court heard oral arguments and after due consideration of the issues raised, the briefs and pleadings

herein, enters the following Findings, Conclusions and Order.

1. Blackfeet Housing (BH) was created by the Blackfeet Tribal Business Council on March 4, 1999 when Ordinance 100-99 was passed, adopting a charter for BH and terminating Ordinance 7, ending the existence of Blackfeet Indian Housing Authority (BIHA).
2. BIHA and BH are separate and distinct entities and are not the same entity for any purposes.
3. There has been no explicit waiver of BH's immunity from suit in this case by the Blackfeet Tribal Business Council as the charter for BH requires. BH is thus immune from suit.
4. BH is not liable for any of the alleged acts giving rise to the allegations of the complaint in this matter.
5. BH is therefore dismissed, with prejudice, from this lawsuit.
6. Blackfeet Indian Housing Authority is not immune from suit in this proceeding brought by the above captioned Plaintiffs.
7. Blackfeet Indian Housing Authority is now the defendant in this action.
8. The captions for this case should be changed as indicated below and used by all parties for the remainder of this case.

KEVIN TALL WHITE MAN, on behalf of WILBUR MOUNTAIN CHIEF, deceased and his estate on and behalf of his children KARLEETA, NATHAN, VANESSA and ADRIAN MOUNTAIN CHIEF, and PATSY CROSS GUNS,

Plaintiffs,

v.

BLACKFEET INDIAN HOUSING AUTHORITY,

Defendant.

BLACKFEET INDIAN HOUSING AUTHORITY,

Third-Party Plaintiff,

v.

SIMPSON DURA-VENT COMPANY, Inc.

Third-Party Defendant.

Blackfeet Tribal Court
Cause No. 97-CA-474

9. The parties in this action may not agree with the characterizations, findings and conclusions of this Order; the parties recognize and reserve their respective rights to maintain and proffer any and all claims, defenses and appeals available to them.

IT IS SO ORDERED this 3 day of April, 2008

Don Sollars
Blackfeet Tribal Court Judge

cc: Roberta Cross Guns
Stephen Doherty
Cameron Ferguson
Paul Haffeman

FILED
APR 11 2008
Blackfeet Tribal Court
By