**CASE NO. 04-35210**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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MARTIN MARCEAU; et al.,
Plaintiff- Appellants,

vs.

BLACKFEET HOUSING AUTHORITY, and
its Board Members, et. al., and HUD
Defendants – Appellees.

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On Appeal from the United States District Court
District of Montana, Great Falls Division
No. CV 02-00073-GF-SEH – Honorable Sam E. Haddon, Presiding

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# BLACKFEET HOUSING and its Board Members, et.al., COMBINED PETITION FOR REHEARING AND REHEARING EN BANC

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## I. INTRODUCTION AND RULE 35(b) STATEMENT OF COUNSEL

Blackfeet Housing seeks rehearing or rehearing *en banc* of the July 21, 2006, Three Judge Panel decision in this case. *Marceau v. Blackfeet Hous. Auth.*, No. 04-35210, slip. op. 8071 (9th Cir. July 21, 2006); 2006 U.S. App. LEXIS 18318. Counsel asserts that rehearing or rehearing *en banc* is necessary as the Opinion creates issues of national significance and exceptional importance because it conflicts with settled legal principles governing the waiver of tribal sovereign immunity by tribal housing authorities, tribal corporations incorporated under 25 U.S.C. § 477 (2006), and other tribal entities.

The Opinion directly conflicts with two Ninth Circuit cases. In *Sibley v. Indian Health Service and Fort Peck Housing Authority*, No. 95-35939, 1997 U.S. App. LEXIS 6709 (9th Cir. Apr. 9, 1997) (Judges Browning, Rymer and T.G. Nelson),[1] this Circuit held that federal courts should abstain from ruling on the issue of a tribal housing authority's immunity from suit and possible waiver until tribal court has done so. In *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492-93 (9th Cir. 2002), this Circuit held that a "sue and be sued" provision, alone, does not waive tribal immunity when a tribe acts in its constitutional, rather than corporate,

[1] Ninth Circuit local rules allow parties to cite to unpublished decisions "in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of conflict among opinions, dispositions, or orders." *See*, 9th Cir. R. 36-3(b)(III). In accordance with 9th Cir. R. 36-3(c), a copy of this decision is attached, Appendix A.

capacity.

In addition, the Three Judge Panel Opinion creates a clear split between the Ninth and the First, Second and Eighth Circuits on how and what waives a tribal entity's sovereign immunity. The overriding need for national uniformity on this subject justifies a rehearing or rehearing *en banc*. *See,* 9th Cir. R. 35-1. Such a clear disagreement among the Circuit Courts of Appeal justifies a rehearing of this matter because that split in authority presents an issue of exceptional importance within the meaning of Federal Rules of Appellate Procedure Rule 35(a). Furthermore, the decision conflicts with the United States Supreme Court's holdings in *C&L Enterprises, Inc., v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001).

The Three Judge Panel Opinion should also be revisited because of clear factual errors that confuse existing law. The Opinion held that Blackfeet Housing was a Section 17 corporation. It is not. The Opinion also wrongly interpreted a terminated Blackfeet Tribal ordinance.

The Ninth Circuit covers vast areas of Indian country. This Three Judge Panel Opinion has national significance because this Court arguably impacts more tribal governments than any other federal circuit.[2] Finally, the Opinion creates a

[2] The Montana/Wyoming Tribal Leaders Council, an organization comprised of the ten tribal governments in the two states passed Res. 08-01-2006-07 (Aug. 1, 2006) in support of this petition because of its far reaching effects. *See, http://mtwytlc.com.*

loophole which absolves HUD of any responsibility by misapplying the tribal trust doctrine outlined in *United States v. Mitchell ("Mitchell II")*, 463 U.S. 206 (1983).

## II. ARGUMENT

### A. *En Banc* Rehearing is Necessary Because the Opinion Creates a Morass of Conflicts.

The Three Judge Panel's conclusion that the "sue and be sued" clause of the Enabling Ordinance is a clear and unambiguous waiver of tribal immunity upsets the uniformity within this Circuit itself, and conflicts with the weight of authority found in other circuits and the authority of the U.S. Supreme Court.

#### 1. The Three Judge Panel Disrupts Uniformity Within the Ninth Circuit for the Tribal Exhaustion Doctrine.

The Ninth Circuit has held that a federal court must abstain from exercising jurisdiction over an action until the appropriate tribal court has had the opportunity to resolve colorable questions of tribal sovereign immunity. *Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) (*en banc*). A federal court must not "consider any relief" until the parties have exhausted tribal remedies. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). "The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) (*internal quotation omitted*). In *Marceau*, the Three Judge Panel disregarded uniformity and plunged ahead, deciding immunity without any exhaustion analysis, in clear contradiction of Ninth

Circuit rulings.

In a crystal clear statement on exhaustion of tribal remedies, this Circuit has held that it should dismiss a tribal entity from a lawsuit when colorable questions of tribal jurisdiction exist. *See, Sibley v. Indian Health Service and Fort Peck Hous. Auth.*, No. 95-35939, 1997 U.S. App. LEXIS 6709 (9th Cir. Apr. 9, 1997). In *Sibley*, a tribal member died on the reservation and his estate sued both the tribal housing authority and the Indian Health Service. *Id.* at *2. The Ninth Circuit reversed the district court's grant of summary judgment in favor of Fort Peck Housing Authority, *Id.*, and then found that the district court was "without discretion to exercise jurisdiction" until the parties had exhausted tribal court remedies. *Id.* at *3, *quoting Burlington N. R. R. Co. v. Red Wolf*, 106 F.3d 868, 871 (9th Cir. 1997).

*Sibley* also holds that waiver of immunity questions must be "resolved in the first instance in tribal court." 1997 U.S. App. LEXIS 6709, at *3. *Sibley* requires dismissing the tribal party from a federal action until the tribal court rules. *Id.* In the Ninth Circuit, the Blackfeet Tribal Court should first decide whether the "sue and be sued" language was a waiver of immunity.

The Opinion neglected tribal exhaustion analysis and failed to examine its jurisdiction in this wholly tribal matter. The Opinion also contradicts *Sibley* by tackling the immunity question, rather than allowing the tribal court to rule first. The conflict with Ninth Circuit authority warrants rehearing.

2. Uniformity Within the Ninth Circuit Distinguishing Waivers of Immunity Between Tribes Acting in Their Constitutional Capacity and Acting as a Business Is Lost.

The Three Judge Panel Opinion creates havoc with established Ninth Circuit law on tribal governmental waivers of immunity. It recognizes Blackfeet Housing as an arm of the tribal government, yet invokes the immunity analysis applicable to tribal businesses. The Opinion thus conflicts with the Ninth Circuit decision in *Linneen v. Gila River Indian Community*, 276 F.3d 489 (9th Cir. 2002).

In *Linneen*, the Ninth Circuit held that a bare "sue and be sued" clause waives sovereign immunity only with respect to a tribe's corporate activities, not with respect to its governmental activities. 276 F.3d at 492-93 (holding that the behavior of a tribal employee was "clearly governmental rather than corporate in nature"). The "sue and be sued" clause alone is not the "clear" waiver needed to find an immunity waiver. *Id.*

The Opinion finds that a housing authority performs governmental functions and shares in the tribal government's sovereign immunity. *Marceau,* slip. op. at 8087, 8080. A housing authority is a tribal agency, acting in a governmental capacity.

By recognizing the governmental nature of a tribal housing authority, yet finding the "sue and be sued" clause to constitute a waiver, the Three Judge Panel

Opinion appears to overrule *Lineen*.[3] This conflict within the Circuit compels rehearing.

3. The Opinion Conflicts with Other Circuits on the Standard for Waivers of Immunity for a Tribal Housing Authority.

The Three Judge Panel Opinion contradicts three other federal circuits which have interpreted identical "sue and be sued" provisions in enabling ordinances of tribal housing authorities. The First Circuit in *Ninigret Development Corp. v. Narragansatt Indian Wetuomuck Housing Authority*, 207 F.3d 21, 30 (1st Cir. 2000), the Second Circuit in *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 87 (2nd Cir. 2001), and the Eighth Circuit in *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583 (8th Cir. 1998), held that "sue and be sued" clauses are not clear waivers of a tribal agency's sovereign immunity. The Three Judge Panel stands the Ninth Circuit alone by finding such language to be a waiver.

Inexplicably, the Opinion relies heavily on the outdated Minnesota case *Namekagon*, which was overruled by its own circuit in *Dillon*, 144 F.3d 581. This lack of inter-circuit uniformity demands a rehearing so the Ninth Circuit can better examine if it means to veer so far from existing, carefully reasoned law.

[3] The Opinion attempts to get around this conflict with *Linneen* by asserting, without any support or facts, that housing authorities are Section 17 tribal corporations engaged in business activities and thus not subject to *Linneen's* reasoning.

4. The Three Judge Panel Opinion Conflicts with U. S. Supreme Court Rulings.

The Opinion recognizes as "pervasive" HUD's previous all-encompassing control of Indian housing programs in general, and the Mutual Help Home Ownership projects at Blackfeet Housing in particular. *Marceau*, slip op. 8090. HUD provided tribes a boilerplate enabling ordinance, which tribes were required to adopt as a condition precedent of participating in federally developed and funded housing programs.[4] *Id.* slip op. at 8077; *see also,* 24 C.F.R. § 805.109(c) (1981). The HUD-drafted ordinance included the provision that a housing authority could "sue and be sued."

The Blackfeet Tribe was forced to include the "sue and be sued" clause in the 1977 ordinance, Ordinance 7, creating the Blackfeet Indian Housing Authority. The Panel's decision conflicts with the U.S. Supreme Court, which holds that waivers of tribal immunity "cannot be implied but must be unequivocally expressed," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), and must be clear, *C&L Enterprises, Inc., v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) and *Okla.Tax Comm'n.* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991).

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[4] HUD's control is further evidenced by its regulations which state that "[n]o substantive change may be made in the form of tribal ordinance except as indicated by footnotes in Appendix I or with specific written approval from HUD." 24 C.F.R. § 805.109(d)(1981).

In *C&L Enterprises,* the U.S. Supreme Court held that arbitration provisions in a contract between an Indian tribe and private construction company constituted the necessary clear waiver of the tribe's sovereign immunity. It provides important guidance for what is required to support a "clear" waiver finding. The Court examined the contract language and determined that the contract evinced, with the requisite clarity, a waiver of immunity. 523 U.S. at 418-419. The tribe's contract contained express provisions on dispute resolution, forum selection, choice-of-law and enforcement of arbitral awards. *Id.* at 415, 418-419. That the tribe proposed the contract was key to the Court's analysis. *Id.* at 415.

> "The contract, as we have explained, is not ambiguous. Nor did the Tribe find itself holding the short end of an adhesion contract stick: The Tribe proposed and prepared the contract; *C&L* foisted no form on a quiescent Tribe."

*Id.* at 423.

In contrast with *C&L Enterprises*, the Blackfeet Tribe never proposed the "sue and be sued" language of its old enabling ordinance, Ordinance 7. HUD required it, foisting the provision on a quiescent tribe. The other key *C&L Enterprises* factors for a clear waiver were not present: the Opinion does not follow *C&L Enterprises* analysis. Further, the weight of authority, is that such a "sue and be sued" proviso in an enabling charter alone does not waive tribal sovereign immunity. *See, Cohen's Handbook of Federal Indian Law* § 7.05[1][c], at 643 *(2005 ed.).*

To reach a converse interpretation, the Opinion exaggerates the importance of a handful of cases that find "sue and be sued" language to be a clear waiver of tribal sovereign immunity. *Marceau,* slip op. at 8081. The cases the Panel cites in support of its holding are few and far between, poorly reasoned and stale. Moreover, the few courts that have reached this conclusion have not applied the U.S. Supreme Court standard for finding "clear" sovereign immunity waivers.[5] At most, divergent interpretations only reinforce that the "sue and be sued" language is not clear. The Opinion departs from U.S. Supreme Court precedent and should accordingly be reheard *en banc.*

### B. Rehearing is Necessary Because Tribal Housing Authorities Are Not Section 17 Corporations but Arms of Tribal Governments.

The Three Judge Panel Opinion confabulates tribal housing authorities with Section 17 corporations, thus requiring a rehearing. The Opinion justifies its use of reasoning from *Namekagon*, by declaring, "[h]ousing authorities are Section 17 organizations." *Marceau,* slip. op. at 8086. That designation allows the Opinion to

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[5] For example, in *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 395 F. Supp. 23 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975), the court failed to apply any particular standard in finding that the tribal housing authority had waived its sovereign immunity through the "sue and be sued" clause. It also wrongly concluded that sovereign immunity waivers may be implied. *Id.* at 29 ("the limited waiver involved here may be implied from the actions of Congress...."). The U.S. Supreme Court holds that waivers of sovereign immunity must be unambiguous and unequivocal, certainly not implied. *Santa Clara Pueblo*, 436 U.S. at 58. *Namekagon* can hardly be recognized as representing one of two "main lines of cases". *Marceau,* slip op. at 8081.

ignore precedent on waivers of immunity for tribal governments and their agencies, because waivers of sovereign immunity for Section 17 corporations, when acting as a business, are often subject to another standard. *See, Cohen's* § 4.04[3][a][ii], at 256.

The Opinion is mistaken. Tribal housing authorities are neither businesses nor Section 17 corporations. Section 17 of the Indian Reorganization Act, 25 U.S.C. § 477 (2006), allows the Secretary of Interior to issue corporate charters to tribes to carry out corporate business. To obtain such a charter, a tribe must petition the Secretary. *Id.* This process is complicated and time-consuming and is not automatically done for any or all tribal entities.

Blackfeet Housing is not now and never has been a Section 17 corporation. Blackfeet Housing has never submitted an application to the Secretary of the Interior to gain approval of a corporate charter and has not been issued such a charter.

Furthermore, the Three Judge Panel Opinion supports its incorrect statement by citing *Cohen's* § 4.04[3][a], at 256, stating that it, in turn, cites housing authority cases as examples of Section 17 organizations. *See, Marceau*, slip op. at 8086. This reference to *Cohen's* leads to a wild goose chase. The page and provision of *Cohen's* referenced by the Opinion does discuss Section 17 corporate charters but does not reference housing authorities:

> "Drafted by the Bureau of Indian Affairs, these charters often contain a clause allowing the corporation to sue and be sued. Some courts have held this language to be a waiver of the immunity of the tribal corporations, and others have not. But any such waiver is limited to

actions involving the business activities of the section 17 corporation." *Cohen's* § 4.04[3][a][ii], at 256.

Closer examination of that page reveals a footnote, which in turn references Section 7.05[1][c] of *Cohen's*. This section addresses issues of tribal waivers of sovereign immunity:

> "There has been some difference of opinion as to whether the 'sue and be sued' proviso contained in charters issued by the Secretary of the Interior to tribal corporations formed under § 17 of the Indian Reorganization act constitutes a waiver of sovereign immunity. The weight of authority indicates the clauses are not a waiver."

*Cohen's* § 7.05[1][c], at 643. *Cohen's* never states that tribal housing authorities are Section 17 corporations. However, a footnote lists *Garcia, Ninigret, Dillon,* and *Boe v. Ft. Belknap Indian Community,* 455 F. Supp. 462, 463 (D. Mont. 1978), as examples of cases holding that the bare "sue and be sued" phrase does not waive tribal sovereign immunity. *See, Cohen's* §7.05[1][c], at 643 n.376. The Opinion mistakes *Cohen's* reference to these cases not as illustrations of how courts interpret the clause but rather as proof that housing authorities are Section 17 corporations. This "proof" is not reality.

The Three Judge Panel Opinion's reliance on *Cohen's* to support its bald statement is flawed. Furthermore, by equating a low income tribal housing authority with a business, the distinction between an immunity waiver of a tribe acting as a government and one acting as a business is hopelessly muddled. The Panel's attempt

to cloak the housing authority in the fabric of a Section 17 corporation is erroneous and confusing, justifying a rehearing *en banc.*

### C. Rehearing is Necessary Because the Three Judge Panel Opinion Interpreted the Wrong Ordinance.

The Opinion found an immunity waiver in a rescinded ordinance for the now-defunct Blackfeet Indian Housing Authority ("BIHA"). However, the appropriate enabling ordinance for Blackfeet Housing carefully avoids waiving the Tribe's sovereign immunity.

BIHA grew out of the Housing Act of 1937, as amended, 42 U.S.C. §§ 1401 *et seq.* and the Indian Housing Act of 1988. The Tribe enacted Ordinance 7, which was drafted by HUD and endowed BIHA with powers, including to "sue and be sued." In 1996, Congress radically changed the legal landscape for Indian housing with the passage of the Native American Housing and Self-Determination Act, 25 U.S.C. §§ 4101 *et seq.* (2006)("NAHASDA"). One of NAHASDA's many groundbreaking provisions terminated all the old HUD Indian housing programs. 25 U.S.C. § 4182. In 1999 the Tribe terminated Ordinance 7, dissolved BIHA, adopted Resolution100-99 and chartered Blackfeet Housing, directing it to assume the assets of BIHA. *See,* Blackfeet Nation Res. 100-99 (1999)(enacted).

The Three Judge Panel Opinion glosses over the difference between the two, distinct, legally separate housing entities: "This fact makes no difference to our analysis and we use 'Housing Authority' to refer to this entity in both its iterations."

*Marceau*, slip op. at 8077, n. 2. This is not a meaningless difference because the existing charter's immunity section differs greatly from Ordinance 7.[6] But the Opinion never analyzes the waiver of immunity section of Blackfeet Housing's enabling charter. Rather, it waives the existing Blackfeet Housing's immunity based on discarded language from the dead entity's ordinance. The impacts of wrongly deciding the wrong ordinance for the wrong Tribal entity thunder throughout Indian country.

### D. Rehearing or Rehearing *en banc* is Necessary Because the Opinion's Interpretation of the "Sue and be Sued" Clause as a Waiver Affects Other Tribal Entities.

The enabling ordinances or charters of many tribal entities – tribal housing authorities, colleges, and tribally chartered Head Start programs – contain the phrase "sue or be sued." Prior to the Opinion, courts, including the Ninth Circuit, held that such language alone, when applied to tribes or tribal entities acting in a governmental capacity, was not a waiver of tribal sovereign immunity. *Linneen v. Gila River Indian Cmty*, 276 F.3d 489, 492-93 (9th Cir. 2002); *see also, Cohen's* § 7.05[1][c], at 643 ("The weight of authority indicates the clauses are not a waiver."); and William

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[6] Blackfeet Housing Charter, Art. V., § 2, provides:

> "Nothing in this charter shall constitute, either explicitly or impliedly a waiver of any aspect of sovereign immunity attributable to either the Blackfeet Tribe or Blackfeet Housing, unless any such waiver is specifically provided for by the Blackfeet Tribe on a case by case basis."

C. Canby, Jr., *American Indian Law in a Nutshell,* 95-96 (4th ed. 2004). Some further action or expression is required to constitute the clear waiver required by the Supreme Court.

After the Three Judge Panel Opinion, tribal entities maybe subject to unintended waivers of their immunity. The choice when and if to be sued, in which forums, and on what grounds is an aspect of sovereignty that tribes share with their federal and state counterparts. When creating tribal agencies that perform governmental functions, tribes have long relied on settled immunity law as a shield against unlimited costs of litigation. This Opinion strips them of protection, sovereign decision making abilities and endangers their limited resources: these broad impacts justify a second look.

### E. Rehearing is Needed Because the Opinion Wrongly Finds HUD Has No Trust Responsibilities To Tribal Members.

The Three Judge Panel Opinion absolves the federal government and HUD from any accountability by misreading tribal trust doctrine. Such a result emasculates the doctrine and diminishes fiduciary duties that the federal government has to tribal peoples.

In *United States v. Mitchell*, 463 U.S. 206 (1983)("*Mitchell II*"), the U.S. Supreme Court found when the federal government takes comprehensive, pervasive control of a tribal resource, the general trust responsibility it has towards members rises to greater fiduciary responsibility. *Id.* at 225. Under this fiduciary relationship,

the government is liable upon breach to tribal members. *Id.* at 226.

The Opinion identifies the pervasive, elaborate control HUD had over BIHA and its housing projects, yet determines that the resource which fails to give rise to a *Mitchell II* duty is the grant of HUD funds. *Marceau,* slip op. at 8091. But the true tribal resource that creates the *Mitchell II* duty is housing,[7] which until NAHASDA passed, HUD had absolute control over.

The Three Judge Panel Opinion amazingly fails to find a tribal resource, and thus fails to find an actionable fiduciary duty. This issue should be given a second and closer look at rehearing.

## III. CONCLUSION

For the foregoing reasons the combined Petition for Rehearing and/or Rehearing *en banc* should be granted.

DATED this 31st day of August, 2006.

STEPHEN A. DOHERTY
PATRICK L. SMITH
HEATHER L. CORSON
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Counsel for Defendants/Appellees

By: Stephen A. Doherty
Stephen A. Doherty

[7] Housing required by the treaty with the Blackfeet Tribe. *See*, Treaty with Blackfoot Indians, Oct. 17, 1855, art. 10, 11 Stat. 657, 659.

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 9th Cir. R. 32, I hereby certify that the foregoing **Blackfeet Housing, and its Board Members; et.al., Combined Petition for Rehearing and Rehearing En Banc** is proportionally spaced, has a 14-point typeface, and as determined by the undersigned's word processing program, contains 3,187 words, not including the Table of Contents, Table of Authorities, and Certificate of Service.

DATED this 31st day of August, 2006.

By: Stephen A. Doherty
Stephen A. Doherty

## CERTIFICATE OF SERVICE

This is to certify that on the 31st day of August, 2006, a true and accurate copy of the foregoing **Blackfeet Housing, and its Board Members; et.al., Combined Petition for Rehearing and Rehearing En Banc** was duly served by U. S. First Class Mail, postage prepaid, upon the following counsel of record:

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The original and 51 copies of the **Blackfeet Housing, and its Board Members; et.al., Combined Petition for Rehearing and Rehearing En Banc** were also Federal Expressed on the above date to:

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Ninth Circuit local rules allow parties to cite to unpublished decisions "in a petition for Petition for Panel Rehearing or Rehearing en banc, in order to demonstrate the existence of conflict among opinions, dispositions, or orders." *See*, 9th Cir. R. 36-3(b)(III). In accordance with 9th Cir. R. 36-3(c), a copy of this decision is attached, as Appendix A.

Appendix A.

*Sibley v. Indian Health Service and Fort Peck Hous. Auth.*, No. 95-35939, 1997 U.S. App. LEXIS 6709 (9th Cir. Apr. 9, 1997) (Judges Browning, Rymer and T.G. Nelson)

1 of 3 DOCUMENTS

**WANDA SIBLEY, individually and as surviving spouse, and as personal representative of the Estate of Norman Lee Sibley, deceased, and on behalf of Norman Lee Sibley, Jr., a minor est Norman Lee Sibley, Plaintiff-Appellant, v. INDIAN HEALTH SERVICES, of the United States of America; FORT PECK HOUSING AUTHORITY, Defendants-Appellees.**

**No. 95-35939**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**1997 U.S. App. LEXIS 6709**

**February 7, 1997, Argued and Submitted, Seattle, Washington**
**April 9, 1997, FILED**

**NOTICE:** [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

**SUBSEQUENT HISTORY:** Reported in Table Case Format at: 111 F.3d 138, 1997 U.S. App. LEXIS 13461.

**PRIOR HISTORY:** Appeal from the United States District Court for the District of Montana. D.C. No. CV-94-00014-JDS. Jack D. Shanstrom, District Judge, Presiding.

**DISPOSITION:** Order granting summary judgment to IHS AFFIRMED. Order granting summary judgment to the FPHA VACATED and the action as to the FPHA DISMISSED, without prejudice.

**COUNSEL:** For WANDA SIBLEY, individually and as surviving spouse, and as personal representative of the Estate of Norman Lee Sibley, deceased, and on behalf of Norman Lee Sibley, Jr., a minor est Norman Lee Sibley, Plaintiff - Appellant: Barbara J. Haley, ROBINS, KAPLAN, MILLER & CIRESI, Minneapolis, MN. Tyrone P. Bujold, Esq., Minneapolis, MN. David L. Irving, Esq., Glasgow, MT.

For INDIAN HEALTH SERVICES, of the United States of America, Defendant - Appellee: Victoria L. Francis, USMO - OFFICE OF THE U.S. ATTORNEY, Billings, MT. For FORT PECK HOUSING AUTHORITY, Defendant - Appellee: John Fredericks, III, Esq., FREDERICKS PELCYGER HESTER & WHITE, Boulder, CO.

**JUDGES:** Before: BROWNING, RYMER, and T.G. NELSON, Circuit [*2] Judges.

**OPINION:**

MEMORANDUM *

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

The district court erred in reaching the merits of Wanda Sibley's claim against the Fort Peck Housing Authority (FPHA). The FPHA is a tribal agency created and governed by tribal law. Norman Sibley died on the Fort Peck Indian Reservation. Tribal courts have "inherent power to adjudicate civil disputes affecting the interests of Indians and non-Indians which are based upon events occurring on the reservation." A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411, 1415 (9th Cir.) (collecting cases), cert. denied, 476 U.S. 1117, 90 L. Ed. 2d 659, 106 S. Ct. 2008 (1986). "The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." Crawford v. Genuine Parts Co., 947 F.2d 1405, 1407 (9th Cir. 1991) (internal quotation omitted), cert. denied, 502 U.S. 1096, 117 L. Ed. 2d [*3] 419, 112 S. Ct. 1174 (1992). "The court lacks discretion to exercise its jurisdiction until tribal remedies have been exhausted or an exception to the exhaustion requirement makes exhaustion unnecessary." Burlington N. R.R. Co. v. Red Wolf, 106 F.3d 868, 871 (9th Cir. 1997).

Because colorable questions of tribal jurisdiction exist here and none of the exceptions to mandatory deference are applicable, see Crawford, 947 F.2d at 1407, the tribal court must be allowed to determine whether it has subject matter jurisdiction over the dispute. Stock West Corp. v. Taylor, 964 F.2d 912, 919-20 (9th Cir. 1992) (en banc). Sibley's contention that the FPHA waived its immunity to being sued in federal court should be resolved in the first instance in tribal court. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856-57, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985); Stock West, 964 F.2d at 920.

The district court could not relieve the parties of their obligation to exhaust tribal remedies, Crawford, 947 F.2d at 1407, nor could it "consider any relief" until the parties exhausted tribal remedies. National, 471 U.S. at 857. We therefore vacate the grant of summary [*4] judgment in favor of FPHA.

We affirm the grant of summary judgment in favor of Indian Health Services (IHS). Although Sibley argues that she was entitled to conduct discovery pursuant to Federal Rule of Civil Procedure 56(f) before summary judgment was entered against her, she did not satisfy Rule 56(f) requirements. Sibley never made clear what information was sought or how it would preclude summary judgment. n1 See Fed. R. Civ. P. 56(f); Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443 (9th Cir. 1986) ("Rule 56(f) requires affidavits setting forth the particular facts expected from the movant's discovery.") Nor were Sibley's requests for discovery, made at and after the hearing on the motions to dismiss or for summary judgment, timely. See Ashton-Tate Corp. v. Ross, 916 F.2d 516, 520 (9th Cir. 1990).

n1 Although Sibley contends that discovery was precluded pending FPHA's motion for protective order and that evidence concerning IHS was in the sole possession of FPHA, she did not come forward with affidavits regarding the particular facts expected from this discovery, or any evidence described in her own pre-discovery disclosure relating to non-defendant witnesses and documents.

[*5]

There was no functional equivalent to a Rule 56(f) motion in this case. "Failure to comply with the requirements of Rule 56(f) is a proper ground for denying discovery and proceeding to summary judgment." Brae, 790 F.2d at 1443.

We disagree with Sibley's contention that she was not given proper notice of the court's conversion of the Rule 12 motions to dismiss to Rule 56 motions for summary judgment. As the district court observed, IHS designated its motion as a motion to dismiss or, alternatively, for summary judgment. Materials outside the pleadings, including the Dibella and Bruner affidavits, as well as Sibley's affidavit in response to FPHA's motion to dismiss, were submitted and not excluded by the court. As IHS notes, Sibley even filed a document entitled "Memorandum of Law in Opposition to the Motion to Dismiss or in the Alternative for Summary Judgment of Defendant [IHS]" and referred to the motion as an alternative request for summary judgment at three other places in her memorandum. The court's order setting oral argument on the motions also refers to the alternative motion for summary judgment. Compare Whiting v. Maiolini, 921 F.2d 5, 7 (1st Cir. 1990) (first [*6] notice of conversion came in defendant's Rule 12(b)(6) motion reply brief, filed four days before summary judgment was granted by court, and before defendant had even answered the complaint).

The captions of the relevant documents and the submission of affidavits afforded adequate notice to Sibley that summary judgment was contemplated. See Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan, 662 F.2d 641, 645 (9th Cir. 1981), cert. denied, 469 U.S. 1229, 84 L. Ed. 2d 368, 105 S. Ct. 1230 (1985); Fed. R. Civ. P. 12(b). The hearing on IHS's alternative motions was some three months after the motions were filed. The hearing was two months after IHS filed its reply to Sibley's opposition and included the Bruner affidavit. Sibley could have served opposing affidavits as late as the day before the hearing under Fed. R. Civ. P. 56(c).

CONCLUSION

We AFFIRM the order granting summary judgment to IHS. We VACATE the order granting summary judgment to the FPHA and DISMISS the action as to the FPHA, without prejudice.