No. _____

In The

Supreme Court of the United States

DON WALTON,

Petitioner,

v.

TESUQUE PUEBLO et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Santa Clara Pueblo v. Martinez*, 436 U.S. 39 (1978) precludes federal review, other than *habeas* review pursuant to 25 U.S.C. 1303, of deprivations without due process of law by Indian tribes of liberty or property of non-tribal persons.

2. Whether, on a 12(b)(1) challenge to *habeas* jurisdiction under 25 U.S.C. 1303, hotly disputed facts may be resolved against the party opposing the challenge absent a fact inquiry.

3. Whether 25 U.S.C. 450f(c) of the Indian Self Determination and Education Assistance Act (ISDEAA) requiring the waiver of sovereignty defenses in insurance coverage for the benefit of third parties aggrieved by ISDEAA-funded agencies; 25 U.S.C. 450*l*(c) [ISDEAA Model Contract] (b)(13) requiring that the laws, policies and procedures of the contractor shall provide for administrative due process or its equivalent; or 25 U.S.C. 450*l*(c) [ISDEAA Model Contract] (c)(5) requiring a forum for grievances brought by program beneficiaries are operative.

PARTIES TO THE PROCEEDINGS

Petitioner is Don Walton, an individual.

Defendant Tesuque Pueblo is a federally recognized Indian tribe. Defendant Tesuque Pueblo Flea Market is an agency of the tribe. Defendant Tesuque Tribal Court is an agency of the tribe and a federal contract agency. Defendants Marvin Herrera, Clarence Coriz, Norbert Leno, Michael Albert Vigil, Harold Samuel, Gary Moquino, Allen Duran, Robert Dorame, Jr., Clifford Moquino and Duane Silva are officers of the tribe sued in their individual and official capacities.

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JURISDICTION

(i) The judgment or order sought to be reviewed was entered April 10, 2006.

(ii) The order denying rehearing was entered June 14, 2006.

(iii) The Supreme Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Amendment 5 [pertinent part]

No person shall be . . . deprived of life, liberty or property without due process of law. . . .

25 U.S.C. 450f(c)(3)(A)

Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or

otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

25 U.S.C. 450*l*(c) [Model Contract] (c)(5)

Fair and uniform services – the Contractor shall . . . provide access to an administrative or judicial body empowered to adjudicate or otherwise resolve complaints, claims, and grievances brought by program beneficiaries against the Contractor arising out of performance of the Contract.

25 U.S.C. 450*l*(c) [Model Contract] (b)(13)

Pursuant to the Indian Civil Rights Act of 1968 (25 U.S.C. 1301 *et seq.*), the laws, policies and procedures of the Contractor shall provide for administrative due process (or the equivalent of administrative due process) with respect to the programs, services, function, and activities that are provided by the Contractor pursuant to this Contract.

25 U.S.C. 1302 [pertinent part]

No Indian tribe in exercising powers of self government shall –

. . . .

(8) . . . deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder. . . .

25 U.S.C. 1303

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to

test the legality of his detention by order of an Indian tribe.

42 U.S.C. 1981

(a) Statement of equal rights.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined.

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. 1985 [pertinent part]

(3) If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . ; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, and act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of

damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. 1988

(a) **Applicability of statutory and common law.** The jurisdiction in civil and criminal matters conferred on the district courts . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adopted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Tesuque Tribal Resolution #1999-03-03 [pertinent part]

FLEA MARKET RULES AND REGULATIONS

WHEREAS, The Pueblo of Tesuque is a federally recognized sovereign Indian Tribes;

WHEREAS, The Pueblo of Tesuque has from time immemorial exercised its inherent rights and powers of self-government as a sovereign Nation;

WHEREAS, The Pueblo of Tesuque Tribal Council is vested with the authority and duty to provide for the protection of the health, safety, welfare, security and property of its agencies, businesses, tribal members, residents, guests, and visitors;

WHEREAS, The Pueblo of Tesuque Tribal Council assumed management and operation of the Tesuque Pueblo Flea Market on the 1st day of July, 1998, in addition to its ownership of the Flea Market business;

WHEREAS, The Pueblo of Tesuque Tribal Council sees a paramount need to establish rules and regulations governing the operation and management of the Tesuque Pueblo Flea market;

WHEREAS, The Pueblo of Tesuque Tribal Council has established the Tesuque Pueblo Flea Market Management to oversee the operation, management and maintenance of the business;

NOW WHEREBY, The Pueblo of Tesuque Tribal Council hereby establishes the Tesuque Pueblo Flea Market vendor Rules and Regulations. . . .

. . . .

NOW THEREFORE BE IT RESOLVED THAT, THE TESUQUE PUEBLO FLEA MARKET VENDOR RULES AND REGULATIONS BE HEREBY ESTABLISHED AND SHALL BECOME EFFECTIVE THE DATE OF THIS RESOLUTION.

BE IT FURTHER RESOLVED THAT, THE ABOVE STATED RULES SHALL BE INCORPORATED INTO THE TESUQUE PUEBLO FLEA MARKET VENDOR PERMIT AGREEMENT AND ALL VENDOR PERMIT

HOLDERS SHALL COMPLY WITH ALL RULES AND REGULATIONS.

BE IT FURTHER RESOLVED THAT, THE PUEBLO OF TESUQUE RESERVES THE RIGHT TO AMEND, ADD, DELETE AND TERMINATE ALL TESUQUE PUEBLO VENDOR PERMITS AT ANY AND ALL TIMES, PURSUANT TO THE AUTHORITY OF THE PUEBLO OF TESUQUE TRIBAL COUNCIL.

[2002 REGULATIONS OF THE TESUQUE PUEBLO FLEA MARKET] [Repealed]

[Part IV. Procedures. Repealed]

[**2. Issuance of Civil Citations:** Upon its receipt of a report alleging a violation of these regulations, the Management shall conduct an investigation to determine whether a violation has occurred. If Management determines that a violation has occurred or if the Management observes a violation directly, the management may issue a verbal warning or written Civil Citation to the offending party. The Citation shall contain the name, mailing address of the offending Party, a brief description of the allegedly was committed, and shall indicate that, within seven (7) days of the date the Citation was issued, the Offending Party may request in writing an administrative hearing before the management to challenge the facts alleged in the Citation.]

[APPEALS FROM DECISION OF THE MANAGEMENT] [Repealed]

2003 REGULATIONS OF THE TESUQUE PUEBLO FLEA MARKET PART III. PROHIBITED ACTIVITIES AND CIVIL SANCTION

2. GENERAL CIVIL SANCTIONS:

c.

iii. immediate removal of the person(s) or vendor(s) from the Flea Market.

6. EXCLUSION: In addition to any other civil sanction(s) authorized by these regulations, any person that violates these regulations may be excluded from the Flea Market and/or Pueblo Lands in accordance with the Pueblo Laws; provided that members of the Pueblo shall be exempt from such regulations.

ITEMS NOT LISTED or FOUND IN THESE RULES AND REGULATIONS CAN BE DELETED OR ADDED AT ANY TIME, AT THE DISCRETION OF the FLEA MARKET MANAGEMENT.

Tesuque Tribal Resolution #10/102-1022 [*Walton v. Pueblo* barred] [pertinent part]

NOW, THEREFORE, BE IT RESOLVED THAT, The Pueblo of Tesuque Tribal Council hereby establishes that the Pueblo possesses and enjoys sovereign immunity and has not waived it by Resolution, tribal law or any other lawful authority or document. The tribe asserts that sovereign immunity bars the suit pending in tribal court captioned Walton v. Tesuque Pueblo, Case No. CV-03-137.

STATEMENT OF THE CASE

Tesuque Pueblo is an Indian reservation contiguous to the city of Santa Fe, New Mexico, roughly equal in geographic area but startlingly different in form of government. The Pueblo is a theocracy governed by a religious official, the *cacique*, who appoints all other officers of the executive, judicial, and legislative branches and at whose pleasure they serve. Strict division of governmental function is not observed. The tribal council, for instance, sits as the tribal court of appeals. Regulations promulgated by the tribal council for the Tesuque Pueblo Flea Market, a tribal enterprise at the boundary of the reservation adjoining the Santa Fe Opera, grant the market Manager quasi-judicial powers to impose punishments on vendors from which there is no appeal. The range of punishment includes, for non-Native vendors, exclusion from Pueblo lands.

For fourteen years Don Walton, an anglo (non-Indian) vendor operated Big Don's Trading Company at the Tesuque Pueblo Flea Market. He lived on the Pueblo for seven of those fourteen years. On May 8, 2003, with his tribal vendor's license current and his rent paid in advance, he was shocked with eviction, forcible removal from his business premises and exclusion from the territory of the Pueblo, all without prior notice or opportunity to be heard, on an uninvestigated charge of "racism to a fellow vendor."

Mr. Walton's search for a hearing began.

The former tribal administrative remedy providing administrative due process (bracketed excerpt from 2002 Flea Market Rules and Regulations set forth *supra*) had been abolished in January, 2003, when the flea market

manager was also granted the power to issue indefinite expulsions from the Pueblo. (Judge Brack's district court opinion, while it did not rely on the supposed fact, is incorrect in its statement that an administrative remedy was available to Walton. The 2003 overhaul removed every vestige of due process. Judge Duran's Tesuque Tribal Court opinion states the matter correctly at App. 38. See also App. 52.) With an administrative remedy unavailable, Walton sought his hearing in Tesuque Tribal Court.

The theocratic Tesuque Tribal Court whose judge serves at the pleasure of the *cacique* is a federal contract agency funded pursuant to the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. 450 *et seq.* See *Pourier v. U.S.*, 138 F.3d 1267 (8th Cir. 1998) (ISDEAA employees are federal contract agents.) The Tribal Court was asked first, to provide Mr. Walton a merits hearing pursuant to tribal customary due process, and second, only in the event there was no tribal tradition of notice and hearing prior to imposition of severe penalty, to apply the federal protections extended to persons in Mr. Walton's position.

While Mr. Walton's case was pending before the Tesuque Tribal Court, the tribal council passed a "Resolution on Tribal Sovereignty" barring it by name. The Tesuque Tribal Court thereafter denied a merits hearing, App. 25-41, and the tribal council sitting as court of appeals forthwith denied appeal, App. 23-24.

Tribal remedies exhausted, Walton sought a federal forum, invoking the court's federal question and habeas jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 2241, citing 42 U.S.C. 1981, 1985, and 1988, 25 U.S.C. 1302(8) and 1303, and (having learned that the Tesuque Tribal

Court was an ISDEAA program) the rarely invoked due process and waiver of defense provisions of the ISDEAA at 25 U.S.C. 450f(c), 450*l*(c) [Model Contract] (c)(5), and 450*l*(c) [Model Contract] (b)(13).

Defendants moved pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss all counts as barred by tribal sovereignty, citing *Santa Clara v. Martinez*, 436 U.S. 39 (1978).

The federal district court for the District of New Mexico denied the Defendants' motion to dismiss on the basis of *Dry Creek Lodge Inc. v. U.S.*, 515 F.2d 926 (10th Cir. 1975) (*Dry Creek I*), 623 F.2d 682 (10th Cir. 1980) (*Dry Creek II*), *cert. den.*, 449 U.S. 1118, 66 L.Ed.2d 847, 101 S.Ct. 931 *sub nom. Shoshone & Arapahoe Tribes v. Dry Creek Lodge, Inc.* (1981), *reh. den.*, 450 U.S. 960, 67 L.Ed.2d 385, 101 S.Ct. 1421 (1981).

At the same time, however, finding the hotly contested fact of Petitioner's banishment against Petitioner without a fact hearing as Petitioner requested, the district court dismissed his petition for writ of *habeas corpus* pursuant to 25 U.S.C. 1303.

It also denied his claim to a due process forum pursuant to 450*l*(c) [Model Contract] (c)(5) and 25 U.S.C. 450*l*(c) [Model Contract] (b)(13) and dismissed his claim that the Pueblo had waived immunity pursuant to the separate insurance contract mandated at 25 U.S.C. 450f(c)(1), all on the basis of *De Montiney v. United States, et al.*, 255 F.3d 801 (9th Cir. 2001).

Defendants appealed the finding of *Dry Creek* jurisdiction to the Tenth Circuit under the doctrine of *Cohen v. Beneficial Indus. Loan Corp*, 337 U.S. 541, 546 (1949).

Walton cross-appealed his inextricable intertwined dismissed jurisdictional claims.

The Circuit sustained the appeal and denied the cross appeal.

These are the underlying facts:

Walton is a Wyoming cowboy and Vietnam combat veteran, neighboring vendor Ismail Abayhan an ethnic Chechen who translated Ayatollah Khomeini for Iran's Turkish embassy in the first year of the Islamic Republic. In the early days of the Iraq war, Abayhan was amused by the comment of Iraqi foreign minister Tariq Azis that troops expecting flowers thrown at them were getting bullets thrown at them. Walton took it as laughing at American service personnel under fire and stopped talking to his neighbor. After two weeks of silent treatment Abayhan denounced Walton to the Manager. The new Manager was from another tribe, may have had Walton confused with another cowboy and apparently didn't even read the entire denunciation, only the heading of which speaks to "racism." See App. 54-55, 59-67.

Abayhan, like Walton, is Caucasian. His deposition, included in the Appendix of materials needed to understand the issues, was taken by agreement of counsel in the tribal court case in a brief period after the tribal defendants were dismissed for sovereign immunity and before Abayhan was peremptorily dismissed by a new tribal judge.[1] It was produced to all parties and listed in the proposed Initial Pre-Trial Report circulated to Defendants

[1] Walton appealed that ungrounded dismissal to the tribal council as well. His appeal has been pending for two years with no action.

but not filed because Defendants chose that day to take their *Cohen* doctrine appeal.

REASONS FOR GRANTING THE WRIT

1. It goes against all civilized norms that after fourteen years of honest effort Don Walton should be banished and have his business seized without ever being allowed an opportunity to confront the charges. That is not supposed to happen in America. The question presented is whether and to what extent due process of law obtains for non-Indian Americans in Indian country today.

The seminal modern Supreme Court decision on civil rights in Indian country, *Santa Clara Pueblo v. Martinez*, 436 U.S. 39 (1978) does not consider the issue of non-Natives, on whose rights the circuits differ. See, e.g., *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), finding jurisdiction under 42 U.S.C. 1981 (pled by Petitioner but not addressed by the panel below). Ever increasing economic ties and general intercourse between Indians and non-Indians cry out for authoritative resolution of this basic question.

The issue of civil rights of Indians *vis a vis* tribal governments first arose in *Talton v. Mayes*, 163 U.S. 376 (1896), decided in the same term as *Plessy v. Ferguson*, 163 U.S. 537 (1896) ("separate but equal") by a Court that was clearly not attuned to modern concepts of civil rights. Reasoning that tribal governments are not federal, the Court declined to extend federal *habeas* to a prisoner on Cherokee death row.

At the beginning of the modern civil rights era, the federal district court in *Toledo, et al. v. Pueblo of Jemez, et al.*, 119 F.Supp. 429 (D.C. N.M. 1954) brought similar analysis to a civil action by tribal members complaining of interference with their free exercise of religion. The court held that the powers of Jemez Pueblo over its members did not derive from hence were not limited by the Constitution of the United States in the various dispossessions and other punitive measures visited on complainants.

Without then making any inquiry into what were actually and traditionally the powers of Jemez Pueblo over its members, the *Jemez* court simply imposed a rule of English common law sovereign immunity from suit.

Jemez was roundly criticized by commentators including the dean of American Indian law, Felix Cohen, who saw it as illustrating an "anomaly." Felix Cohen, *Federal Indian Law*, "Special Groups and Laws: Pueblos of New Mexico," (Association on American Indian Affairs, 1966 ed., reprinting U.S. Department of Interior 1958 ed.), at 916. "Interposed Federal power which forecloses the operation of state law yet affords little or no protection of rights of individual Indians is graphically demonstrated." Cohen, 917. (Cohen's treatise has been posthumously rewritten and the criticism eliminated along with the entire chapter on the Pueblos. Little if anything of Felix Cohen remains in the current edition of the work that bears his name.)

In response to *Jemez* and its ilk, Congress voted to extend basic civil rights to Indian country through the Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.* (ICRA).

Santa Clara v. Martinez, 436 U.S. 39 (1978) overruled several circuits to hold that while the ICRA extended civil rights to Indian country, a tribal member seeking to enforce equal protection against her tribe could do so only through tribal institutions, because Congress in ICRA had not explicitly provided a federal remedy other than the *habeas* remedy in 25 U.S.C. 1303. The Court noted that Martinez (a Santa Clara woman who married outside the tribe seeking membership for her children) had access to political as well as judicial machineries of her tribe and that membership determinations are utterly central to sovereignty.

The *Santa Clara* majority did not specifically address the question of whether non-Indians have civil rights enforceable in the federal court where, as here, the sovereign immunity of an Indian tribe is interposed to cover up deprivations of liberty or property without due process of law.

In *National Farmer's Union Ins. v. Crow Tribe*, 468 U.S. 1315 (1985), Chief Justice Rehnquist, who joined in *Santa Clara*, opined that the question of federal jurisdiction for non-Indians remained open.

In *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), the Ninth Circuit held 42 U.S.C. 1981, 1985 and 1988 applicable in Indian country. 42 U.S.C. 1981, 1985 and 1988 were raised in this case but not passed on; the panel simply ignored them. The law of the Tenth Circuit should be harmonized with the law of the Ninth Circuit.

The law of the Tenth Circuit is anomalous. In the pre-*Santa Clara* era, *Dry Creek I* was a leading authority on the substantive limitations ICRA imposed on tribal government: no longer could a defense of sovereignty

immunize deprivations of liberty or property without due process of law. After *Santa Clara*, the *Dry Creek* defendants renewed their jurisdictional challenge. In *Dry Creek II* the circuit ruled that *Santa Clara* did not absolutely foreclose federal review for civil rights of non-Indians. *Certiorari,* which three Justices would have granted, was denied by this Court and rehearing was likewise denied.

But the circuit has never again followed *Dry Creek II.* Instead, panels consistently rule that *Dry Creek II* is not to be relied on. The case is no longer collected in West's USCA. In fact, the reversed portion of the district court opinion in this case is the only time *Dry Creek II* has ever been affirmatively followed.

The undecided issue of civil rights of non-Indians in Indian country, on which the circuits differ, affects a large and ever increasing number of citizens, and it remains for this court to declare.

2. In addition to implicit statutory and common law federal civil rights jurisdiction, Walton sought jurisdiction under the explicit grant of the *habeas* remedy in 25 U.S.C. 1303.

Walton made his life with the Tesuques for more than a decade before he suffered exclusion by the reflexive action of an insecure racism-obsessed manager and the tribe's follow-on equally reflexive defense against a perceived threat to sovereignty. As in *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996), the banishment severely infringes Petitioner's liberty.

In fact, Walton was actually, physically removed from the reservation, not once but twice, an indignity with which the *Poodry* plaintiffs were only threatened. The

court below was not impressed because Walton had not since returned to be rearrested. Compare *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495 (10th Cir. 1995). As the Tenth Circuit recognized in that context but not here, "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights," citing *Babbitt v. Farm Workers*, 442 U.S. 289 (1979) quoting *Steffel v. Thompson*, 415 U.S. 452 (1974).

Habeas jurisdiction was denied Walton on a 12(b)(1) challenge that relied entirely on a self-serving letter, App. 68, signed by litigation counsel and manifestly created for purposes of litigation, opining that only the tribal council has banishment power under tribal procedures.[2] The letter is flatly contradicted not only by the subsequent evidentiary declarations and affidavits of Walton but by the Tribal Council Authorizing Resolution authorizing the Rules and Regulations of the Flea Market and the tribe's 2003 Rules describing the powers of the Flea Market manager:

> **2. GENERAL CIVIL SANCTIONS:**
>
> c.
>
> iii. immediate removal of the person(s) or vendor(s) from the Flea Market.
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> **6. EXCLUSION:** In addition to any other civil sanction(s) authorized by these regulations, any person that violates these regulations may be excluded from the Flea Market and/or Pueblo Lands in accordance with the Pueblo Laws; provided that members of the Pueblo shall be exempt from such regulations.

[2] The letter speaks of "our" conversation – i.e., the conversation between lawyers, since there was no conversation with the Pueblo client. The Pueblo governor is a ceremonial official appointed by the *cacique* for a one year term.

The issue is not that the court below got the facts wrong but that it did so without the inquiry Walton sought. The Court should reaffirm the rule in *Land v. Dollar*, 330 U.S. 731 (1947). If an assertion in a lawyer's letter can without inquiry elevate itself into an irrebuttable fact denying jurisdiction, whether under FRCivP 12(b)(1) or any other rule, then there is no justice. *Habeas* jurisdiction should not be so easily shed where there is no other avenue to a forum.

3. The majority of governmental programs formerly administered by the federal Bureau of Indian Affairs and Indian Health Service are now administered by the tribes themselves acting as federal contract agencies pursuant to the Indian Self Determination and Education Assistance Act, 25 U.S.C. 450 *et seq*. The contracting scheme, in its infancy in 1978 and never considered by the *Santa Clara* court, encompasses the Tesuque Tribal Court.

When the tribe's ISDEAA court refused to recognize due process as a limit on tribal sovereignty, it breached Petitioner's rights as third party beneficiary of the ISDEAA contract.

ISDEAA was enacted at a time when federal jurisdiction over ICRA claims was the law of several circuits and generally presumed to be the law. See Senate Report 93-682, Appendix A, Letter of August 1, 1973 from Solicitor Kent Frizzell, responding to a query from Senate committee chair Henry M. Jackson in connection

with a USDC-NM ruling that ICRA suspended tribal immunity and the tribe further waived immunity by contracting:

> The Indian Civil Rights Act of 1968, 25 U.S.C. 1301-1303, represents a second Congressional waiver of tribal immunity. Unlike section 17 of the Indian Reorganization Act, the Civil Rights Act permits a court to review tribal governmental actions. Although the Civil Rights Act specifically grants only habeas corpus jurisdiction to the federal courts, **it appears settled** that the Courts feel free to fashion any appropriate remedy.

Senate Report 93-682, at 49-50. (Emphasis supplied.)

The three ISDEAA provisions on which Plaintiff relies are clear and explicit waivers of tribal sovereignty for purposes of lawsuits like Plaintiff's. They represent a balancing determination by Congress between the presumed reach of ICRA as of 1975 and the rollback sought by certain tribes and achieved three years later in *Santa Clara*. They give Plaintiff ample basis to seek a federal remedy. It is not required that Congress use a particular form of words or make a specific literal reference to waive tribal immunity. *Osage Tribal Council v. United States Dept. of Labor*, 187 F.3d 1174 (10th Cir. 1999).

Relying on the holding in *Cherokee v. Leavitt*, 125 S.Ct. 1172 (2005) that ISDEAA contracts are real contracts, interpreted according to normal contract law, Plaintiff does not accept that *De Montiney*, a case considering the claim of an ISDEAA subcontractor to a jurisdictional provision reserved exclusively to the contractor itself, resolves the question of a third party beneficiary

seeking to enforce contract provisions clearly enacted for his benefit.[3]

If the provisions plainly designed to give rights to third party litigants cannot be enforced by those litigants, they are without meaning, surplus verbiage in the Congressional enactment. The courts should not without deeper analysis send the work of Congress down the drain. *De Montiney* no more resolves the issue of third party beneficiaries than *Santa Clara* resolves the issue of non-Indians.

4. There is another great reason the Court should hear this matter. With or without gaming, Native America remain the most impoverished, underserved segment of American society, with health, education and longevity below those of any other group. See, e.g., "A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country," U.S. Commission on Civil Rights, July 2003; "Income, Poverty, and Health Insurance Coverage in the United States: 2005," U.S. Census Bureau, August, 2006. The lack of normal standards of law, discouraging legitimate enterprise, is a significant factor contributing to the plight of Indian country. The affirmation of basic legal norms would contribute to alleviating a national disgrace.

Don Walton's case presents fundamental commercial and civil liberties issues that under the Constitution and laws of the U.S. *or any other rule of law* should not be nullified by an invocation of sovereign immunity. Neither should mercantile obligations be set aside by act of state, nor should banishment be a first resort in the mercantile

[3] Petitioner's counsel was on the amicus brief of *Ramah* class representatives in support of the tribe in *Cherokee*.

setting. The Indian nations within the boundaries of the United States need not observe the same legal standards as other governmental entities but their sovereignty in respect to commercial enterprise with non-tribal members should not trump fundamental rights. Due process is not merely a quaint Anglo custom. The right to notice and hearing before imposition of penalty is the essence of the rule of law from the Code of Hammurabi to the Universal Declaration of Human Rights, and the framers of the United States Constitution held it natural law.

Petitioner cites *Franconia Associates et al. v. United States*, 536 U.S. 129 (2002) (U.S. must cut square corners in its commercial dealings), *United States v. Winstar*, 518 U.S. 839 (1996) (same), and *Cherokee v. Leavitt*, 125 S.Ct. 1172 (2005) (ISDEAA contracts are no different from other contracts in regard to the binding nature of contractual obligation). It is beneficial to the American government to be held to a standard. The Indian nations deserve the same.

CONCLUSION

For the foregoing reasons, Petitioner prays this Court grant his Petition for Writ of Certiorari to the Tenth Circuit.

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