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Winner, Best Appellate Brief in the 2002 Native American Law Student Association Moot Court Competition

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SPECIAL FEATURE

WINNER, BEST APPELLATE BRIEF IN THE 2002 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION

Michelle A. Carr & Cara Hair***

Questions Presented

1. Whether the Tribal Court erred in denying summary judgment to the Atokan Housing Authority and Atokan Tribal Officials, as sued in their official and individual capacities, on the basis of sovereign immunity.

2. Whether the Tribal Court correctly denied Appellants' motion for a preliminary injunction because the power to determine the scope of tribal membership is vested solely in the sovereign Atokan Nation and because the Tribal Court has no authority to review membership legislation.

Statement of the Case

A. Statement of the Proceedings Below

Appellants Cynthia Many Horses and Isaac Walker together and on behalf of their minor son, Tim Walker, commenced suit in the Tribal Court of the Atokan Indian Nation against Appellees, Atokan Indian Nation Housing Authority, Atokan Tribal Council in both their official and individual capacities, Elmer Many Horses, Director of the Atokan Indian Nation Housing Authority, in both his official and individual capacity, and Anita Lebeaux, Enrollment Officer of the Atokan Tribe, in both her official and individual capacity. (R. at 1.) In their Complaint Appellants alleged various violations of the Atokan Constitution and the Indian Civil Rights Act of 1968 and sought declaratory and injunctive relief. (R. at 1, 7-9.) Appellees responded, asserting as an affirmative defense that they are immune from suit under the doctrine of tribal sovereign immunity. (R. at 20.) Appellants moved for a preliminary injunction pending the outcome of the proceeding, and Appellees moved for summary judgment. (R. at 21, 23.) The Tribal Court of the Atokan Indian Nation denied Appellants' Motion for a Preliminary Injunction, granted the Appellees Motion for Summary Judgment as to the Atokan Indian Nation, and denied the motion

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as to all other Appellees. (R. at 26-27.) Appellants filed an appeal to this Court based on the denial of the preliminary injunction. (R. at 29.) The Atokan Indian Nation Housing Authority and the Tribal Officials filed a cross-appeal insofar as the lower court denied their Motion for Summary Judgment. (R. at 31.)

B. Statement of the Facts

The Atokan Indian Nation ("Tribe"), located on the Atokan Indian Reservation, is a sovereign nation federally recognized under the provisions of the Indian Reorganization Act of 1934. (R. at 2.) As a sovereign, the Tribe's governing body, the Tribal Council ("Council") is recognized by the United States as the Tribe's legitimate government. (R. at 2.) The Tribe created the Council through Article I of the Tribal Constitution. (R. at 2.) The Tribe provides services to its members, including housing. (R. at 2.) In addition to these services, members also share in the profits of the Tribes' highly successful gaming operation. (R. at 2.) This profit sharing is accomplished through a system of per capita payments to all Tribal members residing on the reservation or away from the reservation for reasons of school or military service. (R. at 6.) Currently, adult members receive $72,500 annually and a payment increase to over $150,000 is projected for the 2001 calendar year. (R. at. 6.) Children receive half of the adult per capita distribution and this is held in trust by the Tribe until they reach the age of majority. (R. at 6.)

Cynthia Many Horses is a formerly enrolled member of the Tribe. (R. at 2.) Ms. Many Horses lives in a single family home located at Lot 217 of the Atokan Manor Housing owned by the Atokan Housing Authority ("Housing Authority"). (R. at 4.) In June of 1996, in the face of strong traditional religious and cultural bars to marrying outside of the Atokan people, Ms. Many Horses married Isaac Walker, a non-Atokan. (R. at 4-5.) Mr. Walker moved into the home with Ms. Many Horses. (R. at 5.) Ms. Many Horses and Mr. Walker have a minor son, Tim Walker. (R. at 1.)

Pursuant to Atokan Tribal Resolution 87-9, codified as Section 12-1-5 of the Atokan Tribal Code ("Code"), Tribal housing is available only to enrolled members and their families. (R. at 2-3.) The term family is not defined. (R. at 3.) In exercising his duties as the Director of the Housing Authority, Appellee Elmer Many Horses undertook in late 1999, to early 2000, to evict either Isaac Walker or the family from the tribally owned house. (R. at 5.) Mr. Many Horses sent two letters requesting that either Mr. Walker or the family vacate the premises. (R. at 5.) Appellants refused to comply and the Housing Authority commenced no further legal proceedings. (R. at 5.)

In April 2000, Tribal Council Resolution 2000-16 was introduced to replace the previous Tribal Membership Ordinance. (R. at 5.) Pursuant to Tribal tradition, the vote on Resolution 2000-16 was deferred until the next meeting

of the Tribal Council. (R. at 5.) The prior Atokan Membership Ordinance provided that "any person of one-quarter or more Atokan ancestry shall be eligible for enrollment in the Atokan Indian Nation if born to parents or a parent who either resided on the Atokan Indian Reservation or was descended from an ancestor who resided on the Atokan Indian Reservation on June 1, 1934." *See* (R. at 5.); Atokan Const. art. I, §2. Resolution 2000-16, codified as Chapter 8-1 of the Code, replaced the prior membership ordinance and provides:

> any person of one-quarter or more ancestry of any of the historic southern bands of the Atokan people, including the Two Kettles Band, the Temoak Band, the medicine Lodge Band, and the Heaven's Gate band, shall be eligible for enrollment in the Atokan Indian Nation if born to a mother who either resided on the Atokan Indian reservation or was descended from any ancestor who resided on the Atokan Indian Reservation on June 1, 1934. For purposes of this section the Black Kettle Band of the Atokan people shall not be considered one of the southern bands of the Atokan people.

(R. at 13.)

The recent intermarriage of Tribal members with non-members and the subsequent increased demand on Tribal resources and entitlements prompted the new membership ordinance. (R. at 13.) Past lax enrollment practices, increasing demand on tribal resources, also created the need for new enrollment requirements. (R. at 13.)

Under the new membership requirements, Ms. Many Horses and her minor son, Tim Walker, are no longer eligible for enrollment. (R. at. 15.) Pursuant to Section 8-1-83 of the Code, Anita Lebeaux, the Enrollment Officer of the Tribe, notified Ms. Many Horses of her removal from the Tribe's rolls. (R. at 5.) Because Ms. Many Horses and her minor son are no longer eligible for Tribal enrollment, they have no continuing legal right to live in Tribally owned housing or to receive per capita distributions from the Tribe. (R. at 19.)

Argument

I. The Tribal Court Clearly Erred When It Denied Summary Judgment to the Atokan Housing Authority Because Under the Doctrine of Sovereign Immunity, the Housing Authority Is Immune from Suit and that Immunity Has Not Been Waived.

A. The Atokan Housing Authority Is Immune From Suit Under The Doctrine Of Sovereign Immunity.

"Indian tribes are distinct, independent political communities retaining their original natural rights in matters of local self-government." *Santa Clara*

Pueblo v. Martinez, 436 U.S. 49, 55 (1978). "They have [the] power to make their own substantive law in internal matters and to enforce that law in their own forums." *Id.* As distinct political entities, Indian tribes also possess "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at 58.

The doctrine of sovereign immunity, long recognized by both tribal and federal courts in protecting the tribe itself, has been extended by tribal courts to include agencies of the tribe. *Colville Bus. Council v. George*, 1 CCAR 15, ¶ 34 (Colville Ct. App. 1984) (holding that the tribal business council is immune from suit). Although this is a case of first impression for the Atokan Tribal Courts, Colville Tribal Court rulings indicate the importance of protecting tribal agencies from suit. *Id.* The Colville Constitution and sovereign immunity provision of the Colville Tribal Code are worded identically to the Atokan Constitution and Sovereign Immunity Provision of the Atokan Tribal Code. *See George* 1 CCAR at ¶ 32-33; Atokan Const.; Atokan Code §1-1-6. Therefore, Colville tribal cases provide persuasive tribal authority for granting summary judgment to the Housing Authority on the basis of sovereign immunity.

In *George*, the plaintiff filed a civil complaint against the Colville Tribal Business Council alleging, inter alia, violations of his civil rights under the equal protection guarantees of the Indian Civil Rights Act ("ICRA"). *Id.* at ¶ 13. The Colville Confederated Tribes Court of Appeals held that the tribal business council was analogous to the Congress of the United States and that there was no meaningful distinction between the business council as sued and the tribe itself. *Id.* at ¶ 34. Because there was no meaningful distinction, the court held that the same rules should apply as if the tribe itself were sued. Consequently, under the Colville Code's sovereign immunity provision, the business council was immune from suit. *Id.*

The Atokan Housing Authority is an agency of the Tribe, created by the Council. (R. at 2-3.) Like the business council in *George*, the Housing Authority is responsible for carrying out Tribal business. The only difference is that the Housing Authority deals solely with housing issues, whereas a business council conducts more general business. Therefore, the rule announced in *George* relating to the sovereign immunity of tribal agencies should be applied in the case at bar and this Court should find that the Housing Authority is immune from suit.

Appellants may attempt to argue that a business council is closer to being the tribe itself than a housing authority is and that *George* should not apply to the case at bar. However, this argument is flawed because it ignores the important function of Indian housing authorities. "The provision of adequate housing is expressly declared to be a governmental function of Tribal concern to the tribal council, and the property of the Indian Housing Authority is

deemed to be public property used for essential public and governmental purposes." Mark K. Ulmer, *The Legal Origin and Nature of Indian Housing Authorities and the HUD Indian Housing Programs*, 13 Am. Indian L. Rev. 109, 122 (1988). Being so intricately tied to the government and its purposes, an Indian housing authority is not sufficiently distinguishable from a business council so as to make *George* inapplicable to the case at bar. In fact, other tribal courts hold that tribal agencies even less related to tribal government functions enjoy tribal sovereign immunity. *See Schock v. Mashantucket Pequot Gaming Enter.*, 3 Mash. 258, ¶ 26 (Mash. Pequot Tribal Ct. 1999) (holding that as an "arm of the tribal government" the tribe's gaming enterprise shared the Tribe's sovereign immunity).

In addition to tribal law that grants sovereign immunity to tribal agencies, the federal government has recognized that tribal agencies, as an arm of the tribe, are entitled to sovereign immunity. *See Confederated Tribes of The Colville Reservation Tribal Credit v. White*, 139 F.3d 1268, 1271 (9th Cir. 1998) (holding that Colville Tribal Credit, as an administrative arm of the tribe, enjoyed immunity from suit); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 898 (2nd Cir. 1996) (holding that Indian tribes and their governing bodies possess common law immunity from suit); *Brown v. Rice*, 760 F. Supp. 1459, 1464 (D. Kan. 1991) (holding that tribal council possessed common-law immunity from suit).

The sovereign immunity of tribal agencies has been held to specifically include tribal housing authorities. In *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, the Eight Circuit held, "that a housing authority, established by a tribal council pursuant to its powers of self-government, is a tribal agency" and that "as an arm of tribal government, a tribal housing authority possesses attributes of tribal sovereignty, and suits against an agency like the Housing Authority normally are barred absent a waiver of sovereign immunity." 797 F.2d 668, 670-671 (8th Cir. 1986). In the present case, the Council established the Housing Authority pursuant to its powers of self-government and there has been no express waiver of the Housing Authority's sovereign immunity. Thus, this case fits squarely within the holding of *Weeks Construction* and this Court should grant summary judgment to the Housing Authority based on its sovereign immunity. *See also Wilson v. Turtle Mountain Band of Chippewa Indians*, 459 F. Supp. 366, 369 (N.D. 1978) (holding that suit under the ICRA against tribal housing authority is barred by sovereign immunity).

B. The Housing Authority's Sovereign Immunity Has Not Been Waived.

Under both tribal and federal law, a waiver of sovereign immunity must be express, not implied. *See Stone v. Somday*, 1 CCAR 9, ¶ 18 (Colville Ct. App. 1984) (holding that sovereign immunity must be clearly waived); *Santa*

Clara, 436 U.S. at 49 ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed."); *Stock W. Corp. v. Taylor*, 942 F.2d 655, 664 (9th Cir. 1991) (stating that absent clear waiver by the tribe, suits against tribes are barred by sovereign immunity); *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 862 F. Supp. 995, 1001 (W.D.N.Y. 1994) (declaring that suits against tribes are barred by sovereign immunity "absent a clear waiver by the tribe or congressional abrogation"); *Weeks Constr.* 797 F.2d at 671 ("a tribe's waiver of sovereign immunity must be unequivocally expressed").

Section 1-1-6 of the Code, addressing sovereign immunity, provides:

> Except as required by a federal law, or the Constitution of the Atokan Indian Nation, or as specifically waived by a resolution or ordinance of the Atokan Tribal Council specifically referring to such, the Atokan Indian Nation shall be immune from suit in any civil action, and their officers and employees immune from suit for any liability arising from the performance of their official duties.

Atokan Code §1-1-6. The Code does not expressly waive the Housing Authority's immunity, nor does the Constitution or any ordinance of the Council; all are silent as to sovereign immunity of Tribal agencies. *See* Atokan Const.; Atokan Code. Because a waiver of sovereign immunity must be express, the Code's silence cannot imply a waiver. This Court should find that the Housing Authority has not waived its sovereign immunity and that the Housing Authority is entitled to summary judgment.

II. The Tribal Court Clearly Erred When It Denied Summary Judgment to the Tribal Officials, as Sued in Their Official Capacities, Because They Are Immune from Suit Under the Doctrine of Sovereign Immunity.

A. A Tribe's Sovereign Immunity Includes Tribal Officials Acting In Their Official Capacity.

Tribal courts recognize that tribal sovereign immunity includes tribal officials acting within their official capacity, so long as those officials act within the scope of their authority. *Stone*, 1 CCAR at ¶ 22. In *Stone*, the Colville Confederated Tribes Court of Appeals looked at case law and tribal customary law and concluded that tribal officials enjoy a "qualified immunity" under Colville Code Section 1.1.6. This section of the Colville Code is identical to Atokan Code Section 1.1.6, therefore Colville case law, including *Stone*, is particularly persuasive in the case at bar. *See Stone*, 1 CCAR at ¶ 22; Atokan Code § 1-1-6. According to the Colville court, a tribal official is immune from suit so long as he acts within the scope of his authority and the

tribe properly delegated that authority to him. *Stone*, 1 CCAR at ¶ 22. *See also Grant v. Grievance Comm. of the Sac & Fox Tribe of Indians of Okla.*, 2 TCR A-39, A-40 (Sac & Fox Ct. Indian Offenses 1981) (holding that a lawsuit may not be brought indirectly against a tribe by suing tribal officers); *Moses v. Joseph*, 2 TCR A-51, 54 (Suak-Suiattle Tribal Ct. 1980) (holding that tribal officers are immune from suit unless they act outside their statutory limits or act pursuant to an unconstitutional grant of power).

Federal courts also recognize tribal officials' immunity from suit. *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997) ("tribal immunity protects tribal officials against claims in their official capacity"); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (holding that when tribal officials act in their official capacity and within the scope of their authority they are immune from suit); *Stock W. Corp.*, 942 F.2d at 664 (same).

The *Fletcher* court articulated the main reason for extending tribal immunity to tribal officials; that is, plaintiffs should not be allowed to evade tribal immunity by suing tribal officers. 116 F.3d at 1324. This reasoning applies to the case at bar. The lower court correctly held that Appellants' suit against the Tribe is barred, but that ruling will be of no consequence if Appellants are allowed to maintain their suit against the named Tribal Officials ("Officials") because Appellants' will accomplish indirectly what they could not do directly. For that reason, this Court should follow the Colville Courts and the Ninth and Tenth Circuits and hold that sovereign immunity bars Appellants' claim against the Officials.

Despite strong policy reasons for including tribal officials acting in their official capacity under the umbrella of the tribe's sovereign immunity, some courts have allowed a suit to be maintained against tribal officials. However, those courts did so under unique circumstances that are distinguishable from the case at hand. For instance, in *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 168 (1977), the Washington Department of Game filed suit against members of the Puyallup Tribe who were fishing extensively in the Puyallup River. Tribe members claimed they were immune from the state's conservation laws and the Department sought a declaration that these laws did indeed bind these members. *Id.* The court allowed the suit to proceed against the tribal members, some of whom were officials. *Id.* at 171. However, the members were sued under state law in their *individual* rather than official capacity. *Id.* (emphasis added). In other words, the members, sued in their individual capacities just coincidentally happened to be tribal officials. *Id.* Therefore, *Puyallup* is not applicable to the present case because, unlike *Puyallup*, Appellants here are seeking to hold the Officials liable for official, not private, actions.

In *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma*, the Tenth Circuit allowed suit against tribal officials sued in their official capacities 725 F.2d 572, 575 (10th Cir.1984). However, *Tenneco Oil* is also distinguishable from the case at bar. In *Tenneco Oil*, the complaint alleged that the officers acted outside the amount of authority that the tribe is capable of bestowing. *Id.* at 574. The court reasoned that because the complaint alleged that the tribe did not have the power to make the law in question, the official must necessarily have acted outside the scope of his authority, which is one of the recognized exceptions to sovereign immunity. *Id.* Appellees do not dispute that *had* the Officials acted outside their scope, they would not be entitled to summary judgment based on their sovereign immunity. However, the Officials acted within the scope of their authority and Appellants' complaint does not allege otherwise. (R. at. 1-10.) Therefore, the holding in *Tenneco Oil* is not applicable to the present case.

Thus, under applicable case law, for Appellants' to sue the Officials in their official capacity, they must show one of three things: 1) that the Tribe did not have the power to delegate membership decisions to the Council, 2) the Officials were acting outside the scope of their delegated authority, or 3) the sovereign immunity of the Officials was expressly waived. As discussed below, Appellants cannot show any of these things. Therefore, this Court should grant summary judgment to the Officials sued in their official capacities.

1. The Atokan Tribe Has The Power To Delegate Membership Decisions To The Tribal Council.

In order for tribal officials to enjoy the protection of sovereign immunity, they must be acting pursuant to a power properly delegated to them by the tribe. *Stone*, 1 CCAR at ¶ 22. In addition, it must be a power that the tribe has the authority to delegate. *Id.* In other words, if it is a power that the tribe itself may not exercise then it may not be delegated to tribal officials. *Id.*

As discussed *infra*, Indian tribes are distinct political entities with the power to regulate their internal and social relations. *Santa Clara*, 436 U.S. at 55. Determining membership is one of the most important matters that Indian tribes are still allowed to regulate internally. *Id. See also Poodry*, 85 F.3d at 880 (recognizing that tribes retain certain aspects of sovereignty, including the power to determine questions of membership). Because "tribal membership is a sensitive issue closely connected to the sovereignty of the tribe," tribes must certainly have the power to delegate membership decisions to their tribal councils and by logical extension, to members of that council. *Ordinance 59 Ass'n v. Babbitt*, 970 F. Supp. 914, 925 (D. Wyo. 1997).

The case at hand involves a decision by the Council members, acting in their official capacity, to revise the Tribal Membership Ordinance, and other

Officials, specifically Appellees Elmer Many Horses and Anita Lebeaux, who carried out official duties in response to the revised Membership Ordinance. Under applicable case law, the power to determine membership is clearly within the Tribe's authority to delegate, and holding otherwise would undermine the Tribe's right to determine issues of membership. Therefore, the Officials' sovereign immunity cannot be considered waived on the basis that the Tribe had no authority to delegate such powers.

2. The Tribal Officials Acted Within The Scope Of Their Delegated Authority.

In order for a tribe's immunity to protect an official, in addition to the requirement that tribal officials must act only under authority properly delegated to them, officials must also act within the scope of that authority. *Stone*, 1 CCAR at ¶ 22. In *Village of Hotvela Traditional Elders v. Indian Health Services*, a group of Hopi elders filed an action seeking declaratory and injunctive relief against the Hopi Tribal Council. 1 F. Supp. 2d 1022, 1024 (D. Ariz. 1997). The elders argued, inter alia, that tribal officials acted outside the scope of their authority, thus waiving their sovereign immunity defense. *Id.* at 1028. The court looked at the powers of the council and determined that because they had acted within the powers set forth in the Hopi Constitution, none of their actions could be construed as outside the scope of their authority. *Id.* at 1028-29.

The Atokan Tribal Council has the power to act for the welfare of the Tribe and its members, including the power to make membership decisions and to vote on resolutions. Atokan Const. art I, §2. The Tribe has a strong traditional religious and cultural bar to marrying outside of the Atokan people. (R. at 4.) With that in mind, and a desire to preserve the Tribe's bloodline and resources, James R. Runs Above introduced Tribal Council Resolution 2000-16, now codified as the ordinance in question. (R. at 5, 13.) As a member of the Council, he was well within his power to do so. Pursuant to Tribal tradition, the vote on Resolution 2000-16 was deferred until the next meeting, when it was voted on and passed. (R. at 5.) Again, all Council members acted well within the powers delegated them by the Atokan Constitution. Nothing in Appellants' complaint alleges that the Council members acted outside the scope of their authority in introducing or voting on the resolution in question. Membership decisions fall squarely within the Council's powers and in passing the resolution at issue, the Council followed proper procedure.

Elmer Many Horses is the Director of the Housing Authority and is also sued in his official capacity. (R. at 3.) As the Director, Mr. Many Horses has the power to address Tribal housing issues, including evictions. Appellants' complaint regarding Mr. Many Horses involves two letters he sent, requesting that either Isaac Walker, a non-member of the Tribe, vacate the home or that

the family vacate the premises. (R. at 5.) Tribal housing is available only to enrolled members and their families. (R. at 3.) The term family is neither defined in the resolution nor in the applicable section of the Atokan Tribal Code. (R. at 3.) Because the Code is silent as to the definition of family, it was within Mr. Many Horses' authority, as the Director, to interpret the term family. It was also within his authority to carry out Atokan Tribal Code Section 12-1-5, which limits the availability of tribal housing to enrolled members and their families. This constitutes the extent of Mr. Many Horses' actions and he was not outside the scope of his authority in doing so. Even if Mr. Many Horses' interpretation of the term family is incorrect, that alone does not constitute acting outside the scope of his authority. *See Niagara Mohawk Power Corp.*, 862 F. Supp. at 1002 (holding that "merely being wrong or otherwise actionable does not take an action outside the scope of immunity").

Finally, Appellants are also suing Anita Lebeaux, the Enrollment Officer of the Tribe, in her official capacity. (R. at 3.) As the Enrollment Officer, Ms. Lebeaux has the power to carry into force any and all laws of the Tribe pertaining to the enrollment or disenrollment of members. (R. at 3.) Ms. Lebeaux's only involvement in this case was to send Ms. Many Horses a letter on April 28, 2000, notifying her that pursuant to Resolution 2000-16, both her and her son's enrollment were cancelled immediately, and that they were no longer eligible for tribal benefits. (R. 5-6.) As the Enrollment Officer of the Tribe, it was clearly Ms. Lebeaux's responsibility to send such a letter. In fact, *not* sending the letter would have been in direct conflict with her duties. Ms. Lebeaux acted within the scope of her power as the Enrollment Officer and the facts cannot support any other conclusion.

B. The Tribal Officials Did Not Expressly Waive Their Sovereign Immunity.

Because Appellants cannot show that the Officials' waived immunity by acting under an authority improperly delegated to them or by acting outside the scope of their power, they must prove an express waiver of immunity. Section 1-1-6 of the Atokan Tribal Code expressly states that tribal officials are immune from suits for "liability." (R. at 26-27.) The lower court construes this language very narrowly, excluding any actions for injunctive or declaratory relief from the definition of "liability." (R. at 27.)

Appellees respond twofold. First, the definition of "liability" does include "debts and obligations" as the lower court indicates, but it is not limited merely to suits seeking monetary damages as the lower court incorrectly holds. (R. at 27.) "Liability" is a "broad legal term" that has been "referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely." *Black's Law Dictionary* 823 (5th ed. 1979). Therefore, this Court should find that Section

1-1-6 of the Code's express provision of immunity to Tribal officials extends to all causes of action, including suits for injunctive and declaratory relief as sought in the present case.

Second, even if this Court finds that the term "liability" is limited to actions for monetary damages, the Code's express provision of immunity from such suits cannot and does not constitute a waiver of the Officials' immunity from other suits. Expressly stating that Tribal officials are immune from suits for liability cannot constitute an implied waiver through omission, of immunity from other kinds of suits. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1224-25 (11th Cir. 1999) (holding that waiver of immunity regarding one cause of action is not an effective waiver of other causes of action). In fact, even if it could conceivably be construed as an implied waiver of immunity from causes of action for injunctive and equitable relief, it is not sufficient to waive immunity because any waiver of sovereign immunity must be express not implied. *See Stone*, 1 CCAR at ¶ 18 (waiver of immunity must be expressed); *Santa Clara*, 436 U.S. at 49 ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed."); *Weeks Constr.* 797 F.2d at 671 ("a tribe's waiver of sovereign immunity must be unequivocally expressed"); *Niagara Mohawk*, 862 F. Supp. at 1001 (suits against tribes are barred by sovereign immunity "absent a clear waiver by the tribe or congressional abrogation"); *Stock W.*, 942 F.2d at 664 (same).

III. The Tribal Court Clearly Erred When It Denied Summary Judgment to the Tribal Officials, as Sued in Their Individual Capacities, Because Neither the Indian Civil Rights Act Nor the Atokan Constitution Provide a Private Cause of Action Against Individual Tribe Members.

A. The Indian Civil Rights Act Does Not Provide A Private Cause Of Action.

Both tribal and federal courts hold that the Indian Civil Rights Act ("ICRA") does not provide a private cause of action. *See Grant*, 2 TCAR at A-42 (holding that "as a matter of law, no cause of action exist[ed] under the ICRA" as to members of a tribal agency as they were sued in their individual capacity); *Ordinance 59*, 970 F. Supp. at 925 (holding that section 1302(8) of the ICRA speaks only to tribal action and cannot form the basis for a suit against members of the tribe in their individual capacity).

The Eighth Circuit reached the same conclusion in *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975). In *Means*, supporters of a candidate for tribal council president and opponents of the incumbent president brought an action against tribal council members, some in their individual capacities, under Section 1302(8) of the ICRA, for damages and injunctive and declaratory relief on the basis of allegations that tribal election irregularities deprived them

of their rights to a fundamentally fair election. *Id.* at 836-37. Reasoning that the statute states, "[n]o Indian *tribe* in exercising its powers of self-government shall . . .", the Eighth Circuit dismissed the individual capacity claims holding that § 1302 "provides rights only against the tribe and governmental subdivisions thereof, and not against tribe members acting in their individual capacities." *Id.* at 841. (emphasis added). Appellants may cite *Puyallup* for the proposition that tribal officials may be sued in their individual capacity. 433 U.S. at 171. However, *Puyallup* involved a state law cause of action, not an action under the ICRA. *Id.* Thus, *Puyallup* is not applicable to the case at bar.

Applicable tribal and federal case law clearly supports Appellees' position that no private cause of action against individual tribal members exists under § 1302(8) of the ICRA. Therefore, this Court should find that Appellants' cause of action against the Tribal Officials in their individual capacity cannot be sustained and grant Appellees' motion for summary judgment.

B. The Atokan Constitution Does Not Provide A Private Cause Of Action.

The Atokan Constitution provides the same protections to individual tribe members as the ICRA; in fact, the two are worded identically. *See* Atokan Const. art. V, § 2; 25 U.S.C. § 1302 (2001). Because the Atokan Constitution and the ICRA provide the same rights and protections, Appellants' suit under the Atokan Constitution against the Tribal Officials sued in their individual capacities, must fail for the same reasons that it fails under the ICRA. That is, the Constitution, like the ICRA, provides no private cause of action. Both speak to *tribal* action, not individual action. *Id.* Therefore, this Court should grant summary judgment to Appellees, sued as individuals, because there is no private cause of action under the ICRA or the Atokan Constitution.

IV. The Tribal Court Properly Denied the Preliminary Injunction Based on Appellants Inability to Show Some Probability of Ultimate Success on the Merits.

The Tribal Court properly consulted Atokan law to determine if Appellant's situation warranted a preliminary injunction. (R. at 26.) Under Atokan law, the relevant factors to consider when a party requests a preliminary injunction are; "(1) [t]he probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on the interested parties; and (4) whether the issuance of an injunction is in the public interest." *Lebeaux v. Good*, No. 00-SC-07 (Atokan S. Ct. 2000), quoting *Entergy Ark. Inc., v. Nebraska*, 210 F.3d 887, 898 (8th Cir. 2000). Applying these factors, the Tribal Court determined that Appellants failed to demonstrate a probability of success on the merits or that

the issuance of the injunction is in the public interest. (R. at 26.) The Tribal Court based this decision on principles of sovereignty and the ability of an Indian Nation to determine its own membership. (R. at 26.) The court correctly determined that because principles of sovereignty bar judicial review of membership legislation delineating the scope of membership, the Appellants did not meet the burden necessary for a preliminary injunction. (R. at 26.)

When a preliminary injunction will grant the movant the relief she would ultimately obtain if successful on the merits, there is a strong burden on the movant to show that the balance of equities weighs in her favor. *Sanborn Mfg. Co. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 486 (8th Cir. 1993). In the case at hand, granting Appellants' request would restore Appellants' Tribal memberships revoked by Resolution 2000-16 ("Ordinance") and the right to live in tribal housing. Because this is essentially the relief Appellants would receive if they succeeded on the merits of their claim, they are required to demonstrate at least some probability of prevailing at trial. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981) (discussing that probability of success on the merits is not a mathematical calculation, and that the moving party must demonstrate that there are merits to the case and that justice requires preserving the status quo until the case is considered). Because under Atokan law membership ordinances are not subject to judicial review, Appellants are unable to demonstrate even the slimmest probability of success at trial. The Tribal Court then considered Appellants' request to enjoin their eviction from tribal housing. In light of the fact that the court is not vested with the authority to determine the legality of Council membership legislation, the court determined that success on the merits of this claim is also unlikely. (R. at 26.)

Section 12-1-5 of the Code reads: "[T]ribal housing constructed and assigned under this Resolution shall only be made available to enrolled members of the Atokan Indian Nation and their families." Atokan Code § 12-1-5. The Tribal Court correctly determined that under the Ordinance none of the Appellants qualify as members of the Atokan Nation and as such have no right to continue living in tribal housing. (R. at 26.) Even if the Tribal Court examined the word "families" more closely, Appellants are still not entitled to remain in tribal housing based on principles of construction contained in the Code.

Section 12 of the Code does not define "families," but applying the Code's Principles of Construction, Appellants do not qualify as "family" of enrolled tribal members for purposes of tribal housing. Section 1-1-7(b), Principles of Construction, reads: "[W]ords shall be given their plain meaning . . . ." Atokan Code § 1-1-7(b). According to Webster's Dictionary, a "family" is "[a] social unit consisting esp. of a man and woman and their offspring." *Webster's II* 251 (2nd ed. 1984). While one of the Appellants is the child of an enrolled tribal member, she is an adult child with a family of her own and falls outside of the plain meaning definition of a "family."

Looking at "family" under Section 1-1-7(c) that reads; "Whenever a term is defined for a specific part of this Code, that definition shall apply to all parts of this Code unless a contrary meaning is clearly intended." Atokan Code § 1-1-7(c). The word "family" is included in the definition of Closely Related/Immediate Family within the section pertaining to Elections. Atokan Code § 8-3-3. The individuals designated as family under this provision include in-laws, nephews, and first cousins. *Id.* The broad meaning of "family," utilized to preserve the integrity of tribal elections, is clearly contrary to the more specific definition of "family" with regards to who is eligible for tribal housing. *See* Atokan Code § 8-3-30. The modifiers of closely related and immediate to the word "family" clearly express intent for the word to be used in a much broader sense in the election provisions of the Code than in the Housing provisions. Under the Ordinance, Appellants are neither enrolled members of the Tribe, nor are they "family" for purposes of determining housing benefits and have no right to continue living in Tribal housing. Because the Ordinance and Atokan law deprives Appellants of a right to live in Tribal housing, the Appellants can not demonstrate a probability of success on the merits of their claim. Consequently, the court below correctly denied the motion. (R. at 26.)

Following authority cited by this Court, a denial or grant of a motion for preliminary injunction is within the broad discretion of the lower court and is only reversed by the reviewing court for "clearly erroneous factual determinations, an error of law, or an abuse of . . . discretion." *Entergy Ark. Inc. v. Neb.*, 210 F.3d 887, 898 (8th Cir. 2000) citing *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998). Appellees contend that because under Atokan law the Tribal Court has no discretion in matters of judicial review over membership ordinances, the lower court judge did not abuse any discretion in denying the Motion for a Preliminary Injunction. Because Atokan law does not grant the Tribal judiciary the power of judicial review over membership legislation, the lower court committed no legal error.

V. The Tribal Court Properly Denied the Preliminary Injunction Because Under Atokan Law the Tribal Court Does Not Have the Authority to Review Tribal Council Legislation Pertaining to Membership.

A. It Is A Well Established Principle Of Indian Law That Among The Powers An Indian Nation Holds Is The Right To Determine Its Own Membership.

Indian tribes retain certain inherent powers they possessed as sovereign nations existing prior to European contact. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). The United States Constitution did not establish the various tribes and consequently, tribal power as a sovereign does not flow from the federal government but rather arises from the European concept of

sovereignty itself. *See Fletcher v. Mashantucket (W.) Pequot Tribe*, 3 Mash 265 (Mash. Pequot Tribal Ct. 1998) *citing Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985); *United States v. Wheeler*, 435 U.S. 313 (1978). Because tribes are not subject to the United States Constitution, that government may not justify incursions into the area of tribal sovereignty based upon federal constitutional restrictions. *Ordinance 59 Ass'n v. United States Dep't of the Interior Sec'y*, 163 F.3d 1150, 1154 (10th Cir. 1998). However, case law from the United States interprets the Indian Commerce Clause as granting Congress plenary power over tribes. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). The Indian Commerce Clause provides that "[t]he Congress shall have Power . . . To Regulate Commerce . . . with the Indian Tribes." U.S. Const. art. 1, § 8, cl. 3. The United States Supreme Court holds that any exercise of congressional power over tribal governance must be directly expressed and courts may not find limitations on tribal self-government where none exist. *Santa Clara*, 436 U.S. at 60.

The United States Supreme Court acknowledges that tribes are "distinct, independent political communities, retaining their original natural rights." *Worcester v. Georgia*, 31 U.S (6 Pet.) 515, 559 (1831). Among these natural rights is the power to regulate "internal and social relations." *See United States v. Kagama*, 118 U.S. 375, 381-381 (1886). The United States consents that absent express congressional legislation, tribes have the authority to regulate internal relations through tribal legislation, including the power to create laws concerning membership. *Martinez v. S. Ute Tribe*, 259 F.2d 915 (10th Cir. 1957).

In *Santa Clara*, the Supreme Court reiterated its position that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." 436 U.S. 49, 72 (1978). In *Santa Clara*, the Court recognized that unauthorized judicial intervention in tribal civil matters could "substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity." *Id.* The civil matter at issue in *Santa Clara*, the power of a tribe to regulate the scope of its membership, is also what is at issue in the case at hand. Because it is clearly established that, unless Congress deems otherwise, the power to determine tribal membership lies with a tribe itself, the Atokan Nation is the only entity authorized to establish membership requirements.

B. As The Governing Body Of The Atokan Nation, The Tribal Council Is Vested With All Powers Of The Nation, Including Determining Membership Requirements, And The Ability To Delegate Such Powers.

Through a vote of Tribal members, the Atokan Indian Nation adopted the Constitution and By-laws as its governing document. Atokan Const. Certification of Adoption. In Article I of the Constitution, authority to govern vests

in an elected Tribal Council. Atokan Const. art. I. As its representative governing body, the Council acts on behalf of and speaks for the Tribe. *See Wiley v. Colville Confederated Tribes*, 2 CCAR 60, ¶ 45 (Colville Ct. App. 1995).

In order for the Council to properly act for the Tribe, members delegated certain enumerated powers to the Council in Article V of the Constitution, including the power to "protect the health, security, and general welfare" of the Atokan Nation. Atokan Const. art. V, § 1, cl. a. It is only logical that along with its duties, the Council is vested with the implied power to carry out these duties. *See Wiley*, 2CCAR 60 at ¶ 46. Among the implied powers necessary to carry out the duties of the Council is the ability to create legislation aimed at protecting the security and general welfare of the Tribe. *Id.*

This broad grant of authority to the Council is restricted only by "statutes or the Constitution of the United States, . . . express restrictions . . . contained in this Constitution and attached By-Laws." Atokan Const. art. V, § 1. The United States Constitution does not prohibit the Atokan Nation from determining its own membership. *Santa Clara*, 436 U.S. at 72 (1978). United States statutes restricting tribal authority to enact legislation are limited. The ICRA is the most sweeping act of congressional limitation on a tribe's ability to make "its own . . . law . . . and to enforce that law in their own forums." *Santa Clara*, 436 U.S. at 55-56. Even within the ICRA, no express limitations on a tribe's ability to govern membership provisions are included. *See* 25 U.S.C. § 1302 (2001). Without an express intent by Congress to limit a specific tribal power, the tribe retains that power. *See Wiley*, at ¶ 55.

Within the Atokan Constitution and By-Laws there is a general membership provision. Atokan Const. art. I, § 2. This section contains no express limitation on the Council's ability to enact membership legislation designed to protect the security and general welfare of the Tribe. Because the Tribe, through its Constitution, delegated broad authority to the Council, and no "express restrictions" on this authority are found in the Constitution, the Council has the power to enact legislation regulating membership. Atokan Const. art. V, § 1. Just as the Tribe delegates its power as a sovereign to the Council, the Council may delegate power to a Tribal judiciary. Atokan Const. amend. X, § 1. Because established principles of a sovereign Indian tribe's power to regulate membership and the authority to delegate such power vests in the Tribe, and subsequently in the Tribe's governing body, the Council, the membership decision made by the Council is within their proper authority. The exercise of this authority through Resolution 2000-16 is proper and unless the power to review this decision is delegated to the Tribal judiciary, the Tribal Court may not do so.

C. Neither the Constitution Nor The Tribal Council Delegated The Power Of Reviewing Membership Legislation To The Tribal Courts.

Amendment X of the Constitution instructs the Council to establish a "separate branch of government consisting of . . . the Atokan Tribal Court . . . ." Atokan Const. amend. X, § 1. The duties of the Courts established by the Council are to "interpret and enforce the laws of the Atokan Nation as adopted by the governing body." *Id.* The judiciary is indeed a branch of government separate from that of the governing body, but this does not automatically grant the judicial branch the power of judicial review. *See Satiacum v. Sterud*, No. 82-1157, 1982 NAPU 0000001, ¶ 18 (Puyallup Nation Ct. April 23, 1982) (Versus Law) (discussing the fact that in England the constitutionality of Parliament's actions are not subject to court review). The power of judicial review in the United States governmental system is justified in part by the fact that the Constitution establishes a Supreme Court with specific judicial powers that Congress may neither limit nor expand. *See* U.S. Const. art. III. In comparison, the *Council* established the Atokan judiciary under authority of the Constitution. *See* Atokan Const. amend. X, § 1. Thus, Atokan courts are similar to legislative courts created by the United States Congress by virtue of that body's power as the sovereign's representative. *See Satiacum*, at ¶ 22 (VersusLaw). As a court created by the Council, the Tribal Court, absent a specific grant of other powers, may exercise only these powers granted it; to interpret and enforce laws enacted by the Council. Because the Council did not grant the power to review membership legislation to the Tribe's judiciary, the Tribal Court correctly determined that it has no authority to review the Ordinance. (R. at 26.)

Appellants may argue that because the Navajo Nation allows for judicial review of legislation enacted by its tribal council, this persuasive precedent should allow the Atokan judiciary to do the same. *See Bennett v. Navajo Bd. of Election Supervisors*, No. A-CV-26-90, 1990 NANN 0000016, ¶ 32 (Navajo Jan. 12, 1990). This case is not applicable to the case at bar because the Navajo Nation amended its code to limit and define the powers of the nation's different branches of government. *Bennett*, at ¶ 37 (VersusLaw). The Atokan Nation has yet to expand the power of its judiciary through either an ordinance or a constitutional amendment. Because Appellants have identified no Atokan or United States law that supports allowing the Tribe's judiciary to review Council membership ordinances, The Tribal Court correctly determined that it could not question the validity of the Ordinance. *See Hoffman v. Colville Confederated Tribes*, 4 CCAR 4, ¶ 108 (Colville Ct. App. 1997).

The Tribal Council is vested with the powers of the sovereign Atokan Indian Nation including the ability to regulate membership. The Council did not delegate its power to determine the scope of membership to the judiciary and

as such, the Tribal Court has no legal authority to review the Ordinance. The Tribal Court correctly determined that because the probability of Appellant's success on the merits hinges on whether the Ordinance is valid and the court has no legal power to review this legislation, the court properly denied Appellant's petition for a preliminary injunction.

Conclusion

For the foregoing reasons, this Court should overturn the decision of the Atokan Tribal Court and grant Appellees' Request for Summary Judgment because, under the doctrine of sovereign immunity, they are immune from suit. This Court should uphold the decision of the Atokan Tribal Court to deny Appellants' request for a preliminary injunction because the power to determine Tribal membership rests with the Council and that power was not delegated to the Tribal Court.