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June 24, 2015

Clerk of Court
Rosebud Sioux Tribe Supreme Court
P.O. 129
Rosebud SD 57570

Re: *Scott v. Kindle, et al.*, CA 2015-01/CV 2014-71

Dear Clerk of Court:

Please find for filing Appellees' Brief and Certificate of Service.

Please contact me if there are any questions.

Sincerely,

STEVEN D. SANDVEN
Attorney for Appellees

Enclosures

Cc: Gary Montana

# ROSEBUD SIOUX TRIBE
# SUPREME COURT

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CV 2014-71
CA 2015-01

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**CYRIL SCOTT,**

Appellant

vs.

**WILLIAM KINDLE, et al,**

Appellee.

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ON APPEAL FROM THE TRIBAL COURT
FOR THE ROSEBUD SIOUX TRIBE

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## APPELLEES' BRIEF

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June 24, 2015

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## TABLE OF CONTENTS



EXHIBITS

1. April 14, 2015 Order in *Scott v. Kindle, et al.*, CV 15-71
2. Stipulation to Dismiss With Prejudice and Order in *Scott v. Walking Eagle, et al.*, CV 14-490, filed on March 18, 2015
3. March 4, 2015 hearing transcript in *Scott v. Walking Eagle, et al.*, CV 14-490.
4. Matrix comparing the complaints filed in *Scott v. Walking Eagle, et al.*, CV 14-490 and *Scott v. Kindle, et al.*, CV 15-71
5. August 8, 2007 U.S. Department of the Interior approving amendments to the Tribe's Constitution (Amendment U)
6. Tamelon Wilcox's October 30, 2013 ethics complaint against Cyril Scott
7. July 30, 2014 memorandum from the RST Ethics Commission to Cyril Scott
8. Certified mail receipt 7014 0510 0001 8414 7763

9. August 18, 2014 memorandum from the RST Ethics Commission to Cyril Scott
10. RST Certified Mail Log for article 7014 0510 0001 8414 7878.
11. RST Ethics Commissioner High Pipe's October 10, 2014 notes.
12. RST website page on December 2, 2014
13. October 9, 2014 motion to schedule a hearing on November 14, 2014
14. October 9, 2014 fax cover sheet from the RST Ethics Commission to Attorney Al Arendt
15. Affidavit of Lorraine Walking Eagle dated December 3, 2014
16. November 14, 2014 ethics hearing before Tribal Council
17. Notice for the November 17, 2014 ethics hearing before Tribal Council
18. Orders issued by Judge Warren Arganbright in *Scott v. Walking Eagle, et al.*, CV 14-490
19. Judge Patricia A. Meyers March 16, 2015 email at 11:31 am
20. Memorandum dated April 10, 2015 to Calvin Waln and Gary Montana
21. Notice of the April 14, 2015 ethics hearing
22. Mr. Montana's notice of appearance and motion for continuance dated April 10, 2015 to Hearing Officer Maule
23. Clerk of Court's email dated January 20, 2015
24. Hearing Officer Maule's email dated April 10, 2015 at 3:18 pm
25. Hearing Officer Maule's email dated April 10, 2015 at 4:27 pm
26. Gary Montana's motion to disqualify Hearing Officer Maule dated April 12, 2015
27. Cyril Scott's April 14, 2015 letter to Tribal Council
28. Exhibits submitted by Calvin Waln at the April 14, 2015 ethics hearing
29. Complaint submitted by Calvin Waln and the subject of the April 14, 2015 ethics hearing
30. April 14, 2015 motion excerpt of Tribal Council removing Cyril Scott
31. Affidavit of RST Tribal Secretary Julie Peneaux dated March 16, 2015
32. Defendants' Notice of Motion and Motion to Dismiss dated March 12, 2015
33. Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss dated March 17, 2015
34. Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss dated March 24, 2015
35. Plaintiffs' Sur-Reply to Defendants' Reply to Response Filed in Opposition to Motion to Dismiss dated March 27, 2015
36. Plaintiff's Motion to Bar Steven Sandven from Representation of Defendants in their Individual Capacities dated March 10, 2015
37. Defendants' Memorandum in Opposition to Motion to Bar Representation of Defendants in their Individual Capacities dated March 12, 2015
38. Defendants' Motion for Judicial Notice of Tribal Court Proceeding DV 14-490 dated March 18, 2015
39. Defendants' Second Motion for Judicial Notice dated March 18, 2015
40. Defendants' Third Motion for Judicial Notice dated March 26, 2015
41. Plaintiff's Motion to Disqualify Judge Meyers dated April 6, 2015
42. Defendants' Memorandum in Opposition to Plaintiff's Motion to Disqualify Judge Meyers dated April 6, 2015
43. Plaintiff's Motion to Reinstate/Restore Restraining Order dated April 9, 2015
44. Defendants' Memorandum in Opposition to Plaintiff's Motion to Reinstate/Restore Restraining Order dated April 9, 2015
45. Plaintiff's Amended Motion to Stay Pending Appeal filed on April 17, 2015

## TABLE OF AUTHORITIES

***Supreme Court***



***Eighth Circuit Court of Appeals***

***Other Court of Appeals***

***Tribal Constitution***



***Tribal Bylaws***



***Tribal Law***



***Tribal Cases***



***South Dakota District Court***



***Other District Court Cases***

***Legal References***

Comes now, the Rosebud Sioux Tribal Council ("Appellees"), by and through their attorney, Steven D. Sandven, and hereby submits their Appellees' Brief in accordance with the Court's Ex Parte Order dated April 21, 2015.

## PRELIMINARY STATEMENT

Tribal members vest in their governing bodies' enumerated authorities as delineated in the Tribe's Constitution. Accordingly, Rosebud Sioux Tribal members opted via Secretarial election to allow the governing body to discipline its own membership while retaining the ability to effectuate recall when necessary. Specifically, Appellees' authorities are enumerated in Article VII, Section 4 of the Constitution to include:

> Tribal Council may by a two-thirds vote of the total members of the Tribal Council, after due notice and an opportunity to be heard, remove any Tribal Council member for neglect of duty or gross misconduct. ***The decision of the Tribal Council shall be final.*** (Emphasis added).[1]

Pursuant to the foregoing, Tribal Council initiated disciplinary procedures against the Appellant, who in turn, filed two cases with the lower court therein contesting the Council's authority to impose discipline upon him as President of the Tribe. In the first case, *Scott v Kindle, et al.,* CV 15-71, the Court dismissed Appellant's complaint "on the grounds of sovereign immunity" on April 14, 2015. *Sandven Affidavit Ex. 1.* Additionally, the Appellant requested that the Tribal Court interfere in a Tribal Council hearing scheduled for April 14, 2015, during which Council was to hear evidence on different matters as those the subject of Appellant's court cases. His request was denied. In the second case, *Scott v. Walking et al.*, CV 14-490, Appellant challenged the applicability of Article VII, Section 4 of the Constitution to the position of President. His requested relief was denied and the underlying case was dismissed with prejudice

[1] *Sandven Affidavit Ex. 31-5.*

on March 18, 2015.[2] *Sandven Affidavit Ex. 2* The vast majority of the underlying facts in *Scott v. Walking Eagle, et al.*, CV 14-490 were identical to the facts alleged by Appellant in *Scott v Kindle, et al.*, CV 15-71 that was dismissed on April 14, 2015. *Sandven Affidavit Ex. 4*

During the lower court proceedings in both cases, Appellant was unable to refute the following black letter law of the Rosebud Sioux Tribe:

1. The Tribal President Was Excluded from Removal Proceedings Before 2007 But Not Thereafter. Prior to the 2007 Constitutional amendments, Article VII, Section 2 of the Constitution read: "Section 2. The tribal council may, by a two-thirds vote, expel any member, ***except the President or Vice-President,*** for neglect of duty or gross misconduct, after due notice of charges and an opportunity to be heard. (Amendment No. XVII - September 23, 1985)(Emphasis added)."

2. The President is Subject to Removal Proceedings After the Adoption of Amendment U. On July 26, 2007, Tribal members participated in a Secretarial Election and adopted Amendment U which now deleted the language "except the President or Vice-President."[3]

3. Removal Authority Subsumes the Authority to Suspend. In *Valandra v. Rosebud Sioux Tribe, et al.*, CIV 09-183, a member of the Tribal Council brought an action against the Tribe and Tribal Council seeking to enjoin them from suspending him from his elected position. *Id.* at 1. Therein, Plaintiff argued that that the newly-enacted Constitution did not allow the Tribal Council to suspend an elected official. *Id.* at 3. The Court upheld both the Council's right to suspend and remove one of its members: "The Plaintiff also argues that the RST Constitution does not permit suspension of elected officials and even if it does it requires the same level of due process as a removal. This Court is permitted to resolve this issue under Article VI, Section 3 of the RST Constitution. This Court finds that the right to remove an elected official subsumes the right to suspend him pending removal. There are two methods of removal of elected councilpersons under the new RST Code – removal by the Tribal Council and recall by tribal members who put Councilpersons into office. However, the RST Constitution also directs that the Council may prescribe its own rules governing the procedure of the Council, Article IV, Section 1(t). This right, coupled with the right of removal under VII, Section 4, are broad enough to justify the right of the Council to suspend an elected official pending removal proceedings." *Id.* at 7.

4. The Constitution Trumps any Conflicting Provisions in Ordinances 86-04 and 87-05 . In *Norman Running Jr. v. Ed Clairmont*, CA2014-04, the Court held: "This is especially problematic in that this language was expressly adopted by the voters of the Rosebud

[2] *Sandven Affidavit Ex. 2*
[3] *Sandven Affidavit Ex. 5*

Sioux Tribe in a Secretarial election to amend the Constitution. The Tribal Constitution is not a tribal ordinance, but the direct voice of the people. This is quite different from an error or conflict in ordinances drafted and passed by the Rosebud Sioux Tribal Council. Therefore, as written, Tribal Ordinance 86-10 is unconstitutional ...[i]nasmuch as this Court's decision indicates that Rosebud Sioux Tribal Ordinance #86-10 is constitutionally flawed, the Court requests that the Rosebud Sioux Tribal Council draft a new or revised ordinance that avoids these constitutional pitfalls. The Court's opinion includes one (but not necessarily the only) way to approach this problem."

## STANDARD OF REVIEW

An appellate court reviews motions to dismiss *de novo*. *Springdale Education Association v. Springdale School District*, 133 F.3d 649 (8th Cir. 1998); *Gardner v. First American Title Ins. Co.*, 294 F.3d 991 (8th Cir. 2002).

## STATEMENT OF LEGAL ISSUES

WHETHER THIS APPEAL SHOULD BE DISMISSED ON THE GROUNDS OF MOOTNESS?

WHETHER THIS APPEAL SHOULD BE DISMISSED ON THE GROUNDS OF SOVEREIGN IMMUNITY?

WHETHER THIS APPEAL SHOULD BE DISMISSED ON THE GROUNDS OF INDIVIDUAL IMMUNITY?

WHETHER ARTICLE VII, SECTION 4 OF THE RST CONSTITUTION APPLIES TO THE PRESIDENT?

WHETHER CALCULATING THE TWO-THIRDS REQUIREMENT FOR REMOVAL INCLUDES THE EXECUTIVE COMMITTEE?

WHETHER TRIBAL COUNCIL HAS THE AUTHORITY TO SUSPEND THE PRESIDENT PURSUANT TO ORDINANCE NO. 87-05?

WHETHER THE TRIBE'S PAST PRACTICES MUST BE CONSIDERED?

WHETHER APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED?

## STATEMENT OF THE FACTS

***Scott v. Walking Eagle, et al, CV 14-490***

On October 21, 2013, Appellant "directed" the RST Transportation Department to discharge an employee, Tammy Wilcox, for (1) insubordination, misconduct or gross neglect of duty or refusal to comply with lawful instructions and breach of chain of command by employees; (2) using or threatening to use personal or political influence in an effort to secure special consideration as a Tribal employee; (3) harassment, intimidation, using offensive language or, generally being discourteous to another employee, tribal official or the general public; and (4) all other conduct on the job not in keeping with acceptable standards of behavior generally associated with employment. *Sandven Affidavit Ex. 6* Appellant provided no details as to Ms. Wilcox's alleged misconduct but did note that "[i]t has been brought to my attention that one of your employees, a Tammy Wilcox has filed charges against me for making the decision to lay off some of your staff including her." *Id.*

On October 30, 2013, Ms. Wilcox submitted a complaint against the Appellant with the Ethics Commission alleging that "President Scott brought a personal issue into [her] work place creating a hostile work environment me (sic) and used his authority and position as the Tribal President to retaliate against [her]..." *Id.*

On July 30, 2014, the Ethics Commission informed the Appellant via certified mail that an ethics complaint had been received and was under review. *Sandven Affidavit Ex. 7* The letter was received by Shawna Frazier on August 7, 2014. *Sandven Affidavit Ex. 8*

On August 18, 2014, the Ethics Commission provided notice to Appellant that an ethics complaint filed by Ms. Wilcox was reviewed. *Sandven Affidavit Ex. 9* The Commission asked the Appellant to meet with them to discuss the allegations. *Id.* This memorandum was sent via certified mail on August 26, 2014. On August 29, 2014, the August 18th memorandum was hand-

delivered to the President's office and was signed for by the Appellant's aide, Gerri Night Pipe[4]. *Sandven Affidavit Ex. 10* On September 8, 2014, Ms. Night Pipe informed Ethics Commissioner High Pipe that she would speak to the Appellant about scheduling a meeting with the Ethics Commission. *Sandven Affidavit Ex. 11*

On October 6, 2014, Appellant signed an acknowledgement that he received the complaint. *Sandven Affidavit Ex. 15 at p.2*

On October 9, 2014, the Ethics Commission notified the Tribal Council that an ethics complaint had been filed against the Appellant and recommended the Council hold a hearing on the issue. *Sandven Affidavit Ex. 11* On that same day, the Tribal Council adopted the following motion:

> Motion to schedule a hearing on November 14, 2014, at 10:00 a.m. in the Council Chambers and that the Tribal Court provide a Hearing Officer and that both parties be notified and that the Secretary's Office send out notices to the complainant, the defendant, and the Tribal Council. Motion by Calvin Waln Jr., second by Michael Boltz, question by Brian Dillon. Motion carried with eleven in favor, zero opposed and two not voting.

*Sandven Affidavit Ex. 13* Also, on October 9, 2014, Appellant's legal counsel was faxed the complaint. *Sandven Affidavit Ex. 14*

On October 15, 2014, Tribal Secretary Peneaux sent out a Notice of Hearing to Appellant for November 14, 2014. *Sandven Affidavit Ex. 16* Therein, Appellant was informed that he could present witnesses and evidence, be represented by legal counsel and have an opportunity to review the evidence before the Tribal Council. *Id.*

On October 28, 2014, Secretary Peneaux sent out another Notice of Hearing informing the parties that the hearing originally scheduled for November 14, 2014, had been postponed until November 17, 2014. *Sandven Affidavit Ex. 17*

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[4] *Sandven Affidavit Ex. 12*

On November 14, 2014, Appellant filed a Complaint and an Ex Parte Motion[5] for Temporary Restraining Order seeking to enjoin the Tribal Council from proceeding with its legislative functions of holding disciplinary proceedings. On November 14, 2014, the Tribal Court granted Appellant's request for a restraining order thereby enjoining the Tribal Council and the Ethics Commission from conducting a hearing on the alleged ethics charges filed against the Appellant pending further order of the Court.

On November 25, 2014, Appellant's counsel filed a Notice of Postponement rescheduling the hearing in this matter from December 5, 2014 to December 11, 2014. Appellant did not appear at the December 11, 2014 hearing with his attorney Al Arendt, who agreed to dismiss Appellant's request for a temporary injunction with prejudice and obtain a stipulation from his client to dismiss the underlying action with prejudice. Judge Arganbright gave Appellant at least four opportunities to address his executed stipulation to dismiss with prejudice before granting same on March 18, 2015. *Sandven Affidavit Ex. 18*

***Scott v. Kindle, et al, CV 2015-71***

Appellant filed *Scott v. Kindle* on or about February 24, 2015 challenging his suspension associated with the ethics complaint filed by Tamelon Wilcox.[6] Judge Meyers issued an ex parte order restricting any additional ethics hearings until she had sufficient time to review the file and the matter could be heard. *Sandven Affidavit Ex. 19*

Appellees filed their motion to dismiss on March 12, 2015.[7] Appellant filed his motion to bar representation on March 12, 2015.[8] Appellee filed motions for judicial notice.[9]

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[5] Appellant's attorney was Al Arendt in CV 14-490.

[6] Plaintiff's attorney is Gary Montana in CV 15-71.
[7] *Sandven Affidavit Ex. 32-35*
[8] *Sandven Affidavit Ex. 36-37*
[9] *Sandven Affidavit Ex. 38-40*

On April 23, 2015, Appellant's restraining order was denied and the underlying matter was dismissed. Appellant filed a motion to disqualify Judge Meyers after receiving an adverse ruling on April 3, 2015.[10] Appellant filed his motion to reinstate the restraining order on April 9, 2015.[11] Judge Meyers' written order was filed on April 14, 2015 dismissing the matter on sovereign immunity grounds.

## ARGUMENT

### I. THIS APPEAL SHOULD BE DISMISSED ON THE GROUNDS OF MOOTNESS.

The underlying facts in *Scott v. Kindle, et al.*, CV 15-71, are based on an ethics complaint filed by Tamelon Wilcox. Appellant was removed as President for gross neglect/improper conduct on April 14, 2015 after Tribal Council heard a different complaint filed by Calvin Waln.

Without a live case or controversy, this Court is deprived of jurisdiction and lacks subject matter jurisdiction. "A federal court must have subject matter jurisdiction at the time it considers issuing injunctive relief, because '[f]ederal courts are courts of limited jurisdiction and can only hear actual 'cases or controversies' as defined under Article III of the Constitution." *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 194 F.Supp.2d 977, 983 (D.S.D. 2002) (quoting *Hickman v. Missouri*, 144 F.3d 1141, 1142 (8th Cir.1998)) "When a case . . . no longer presents an actual, ongoing case or controversy, the case is moot and the federal court no longer has jurisdiction to hear it." *Hickman*, 144 F.3d at 1142; accord *Yankton Sioux Tribe*, 194 F.Supp.2d at 983. "This requirement applies to all stages of the litigation, and 'applies with equal force to actions for declaratory judgment as it does to actions seeking traditional coercive relief.'" *Hickman*, 144 F.3d at 1142 (quoting *Marine Equip. Management Co. v. United States,* 4 F.3d 643, 646 (8th Cir.1993)).

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[10] *Sandven Affidavit Ex. 41-42*
[11] *Sandven Affidavit Ex. 43-44*

The complaint filed by Calvin Waln and heard by Tribal Council on April 14, 2015 was initially provided to Appellant in October 2014. *Sandven Affidavit Ex. 20* The Complaint was also provided to Appellant's attorneys on March 5, 2015. *Id.* Notice of the April 14, 2015 hearing was provided on or about April 8, 2015. *Sandven Affidavit Ex. 21* Appellant's attorney requested rescheduling of the hearing on April 10, 2015. *Sandven Affidavit Ex. 22* Appellees notified Appellant that teleconference equipment was available. See *Sandven Affidavit Ex. 20* Appellant's rescheduling request was denied by the Hearing Officer[12]. *Sandven Affidavit Ex. 24-25* Appellant moved for disqualification of the Hearing Officer on Sunday, April 12th. *Sandven Affidavit Ex. 26* On April 14, 2015 at approximately 10:00 a.m., Appellee Vice President Kindle opened the Tribal Council meeting and attendance was taken with Appellant present. Complainant Waln and Tribal Councilperson Mary Waln had voluntarily recused themselves from hearing the matter. Tribal Council went into executive session to discuss Appellant's motion for disqualification of Hearing Officer Maule. Tribal Council came out of executive session and made a motion to deny Appellant's request. Appellant expressed concern regarding Tribal Council going into executive session. *Sandven Affidavit Ex. 23* Appellee Vice President Kindle gave Hearing Officer the floor to conduct the hearing. Hearing Officer Maule introduced the hearing and explained that Appellant approached her while she waiting in the Vice-President's office regarding Tribal Council going into executive session. Appellant failed to appear at the hearing and did not call in via teleconference. Complainant Waln presented witnesses and documentary evidence. *Sandven Affidavit Ex. 28* The Tribal Council went into executive session and subsequently made the following motion:

[12] The Tribal Court provided Theresa Maule's availability as a hearing officer. *Sandven Affidavit Ex. 23*

> Motion by Lila Kills In Sight that after providing notice and giving Cyril Scott the opportunity to reply to the ethics complaint filed by Calvin Waln, Tribal Council makes the finding that counts 1 and 3-5 are considered neglect of duty and gross misconduct. Further, the described conduct violates Sections F, K, L and M of Ordinance 86-04. Hence, Cyril Scott is hereby removed as President of the Rosebud Sioux Tribe effective immediately. Cyril Scott is hereby disqualified from again seeking tribal office. Second by Kathy Wooden Knife, questioned by Arnetta Brave. The vote was 16 in favor, 0 opposed and 0 not voting. MOTION CARRIED.
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> *Sandven Affidavit Ex. 30*

Appellant's complaint has been rendered moot by the Tribal Council's decision to remove him from the office of President on a different matter. It has long been settled that a court has no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895). Since this case concerns Appellant's suspension from office on the first complaint, his removal from office based upon the second complaint effectively renders the appeal moot because the Court cannot give the Appellant the relief he has requested. Accordingly, this Court should dismiss the appeal as moot. *Mark v. Nix*, 983 F.2d 138, 140 (8th Cir.1993) (per curiam) (declining to address the merits of a claim where doing so would not affect the rights of the parties and would constitute an advisory opinion).

## II. THIS APPEAL SHOULD BE DISMISSED ON SOVEREIGN IMMUNITY GROUNDS.

Appellant argues that Article XI, Section 3, of the Constitution constitutes an express waiver of sovereign immunity:

> [T]he authority of the Tribal Court shall include but is not limited to the power to review and overturn tribal legislative and executive actions for violations of the Constitution or of the Federal Indian Civil Rights Act of 1968 as well as to perform all other judicial and court functions.

*Appellant's Brief* at p. 6-7. In making his argumento, Appellant fails to take into account Chapter 2, Section 4-24 of the Rosebud Sioux Tribe's Law and Order Code which provides:

> Except as required by federal law or the Constitution and bylaws of the Tribe or specifically waived by a resolution or ordinance of the Tribal Council making specific reference to such, the Rosebud Sioux Tribe and its officers and employees shall be immune from suit in any civil action for any liability arising from the performance of their official duties.

There are no specific references to waivers of sovereign immunity in Article XI, Section 3.

Assuming arguendo that Article XI, Section 3 does constitute a waiver, Appellant simply cannot state, without proof, that the Constitution or his due process rights were violated to bring his claim within the parameters of Article XI. Here, Appellant has made no showing that the Tribe's Constitution was violated nor that he failed to receive adequate due process in his suspension. If the Court allows a plaintiff to simply assert due process violations without some iota of substance, the doctrine of sovereign immunity will be rendered obsolete.

III. INDIVIDUAL TRIBAL COUNCIL MEMBERS ENJOY SOVEREIGN IMMUNITY.

Appellant sued each of the 22 Appellees in their individual and official capacities. However, the Appellees' immunity from the instant action is coextensive with the Tribe's sovereign immunity. Tribal officers are protected and entitled to sovereign immunity in official capacity claims. *Dry v. United States*, 235 F.3d 1249, 1254 (10th Cir. 2000). The doctrine of sovereign immunity "extends to individual tribal officials acting in their representative capacity and within the scope of their authority. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *See also Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Okla.*, 725 F.2d 572, 574 (10th Cir. 1984).

Because a governmental entity can only act through its officials, a lawsuit imposed upon a Tribal official is generally considered to be a lawsuit against the sovereign. Hence, Tribal officials acting in their official capacities share the Tribe's immunity from suit when "acting in their representative capacity and within the scope of their authority." *Evans v. McKay*, 869 F.2d

1341, 1348 n.9 (9th Cir. 1989).[13] A plaintiff cannot circumvent a sovereign's immunity simply by substituting a suit against the sovereign's agents for a direct suit against the sovereign. *Snow v. Quinault Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984)(stating that one cannot avoid "the doctrine of sovereign immunity by the simple expedient of naming an officer of the Tribe as a defendant rather than the sovereign entity.") Hence, a Tribe's immunity extends to its agents and officials when acting in their representative capacity and within the scope of their authority. *Baker Elec. Co-op., Inc, v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994)(stating that if Tribal officers act within their authority, they are "clothed with the Tribe's sovereign immunity").[14]

The Courts have long recognized the importance of extending sovereign immunity to Tribal officials working on the Tribe's behalf. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *United States v. Oregon*, 657 F.2d 1009, 1013 n.8 (9th Cir. 1981)(Tribe's "immunity also extends to tribal officials when acting in their official capacity and within the scope of their authority"). The reason for this rule is clear: the sovereign immunity of individual Tribal officials is founded "on the public need for the performance of public duties untroubled by the fear that some jury might find performance to have been

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[13] *See also Imperial Granite Co. v. Pala Tribe of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1982); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Dry v. United States*, 235 F.3d 1249, 1253 (10th Cir. 2000); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Burlington Northern v. Blackfeet Indian Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *overruled on other grounds*, *Big Horn County Elec. Co-op., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000); *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985).

[14] *See also Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir 1993); *Evans v. McKay*, 869 F.2d 1341, 1348 n.9 (9th Cir. 1989); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1982); *Davis v. Littell*, 398 F.2d 83, 84 (9th Cir. 1968), *cert. denied*, 393 U.S. 1018 (1969).

maliciously inspired." *Davis v. Littell*, 398 F.2d 83, 84-85 (9th Cir. 1968). Accordingly, sovereign immunity attaches to officials who "perform a high level or governing role in the affairs of the tribe" such that they occupy "a discretionary or policymaking position."[15]

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[15]The immunity of Tribal officials is not limited to high level officers or officials who are performing governmental functions and exercising discretion. *Basset v. Mashantucket Pequot Museum & Research Ctr., Inc.*, 221 F.Supp.2d 271, 277-78 (D.Conn. 2002). Instead, Tribal immunity extends to all Tribal employees acting within their representative capacity and within the scope of their official authority. *Id.* at 278. *See E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1304 (10th Cir. 2001)(holding that claims against employees of a Tribal social service agency in their official capacities were barred by sovereign immunity); *Dry*, 235 F.3d at 1252-53 (holding that various Tribal officials, including the Tribe's general legal counsel, prosecutor, director of law enforcement, and seven other law enforcement personnel, were immune from suit in their official capacities); *Hardin*, 779 F.2d at 479-80 (holding that claims against "various tribal officials" were "barred by the Tribe's sovereign immunity"); *Snow*, 709 F.2d at 1322 (holding that claims against a tribal revenue clerk were barred by sovereign immunity). Accordingly, federal district courts across the country have overwhelmingly treated sovereign immunity as a bar to claims against a wide variety of Tribal officials and employees, including: the president of a Tribal college; a boxing promoter; a marketing manager; the Executive Director of a museum; the Projects Director of a museum; Tribal attorneys; members of a Tribal business council; employees responsible for the maintenance of a casino parking lot; and a consultant. *See Cohen v. Winkleman*, 428 F.Supp.2d 1184, 1189 (W.D. Okla. 2006) (dismissing claims against a Tribal college and its president on the basis of sovereign immunity); *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 309-10 (N.D. N.Y. 2003) (dismissing claims for injunctive relief against chief, boxing promoter, and marketing manager for acts taken in their official capacities as agents of the Oneida Nation and its Casino); *Bassett v. Mashantucket Pequot Museum & Research Ctr., Inc.*, 221 F.Supp.2d 271, 277-78 (D. Conn. 2002) (finding that Tribal immunity applied to the Executive Director of a museum and to the Projects Director of the museum); *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 206 F.R.D. 78, 923 (S.D. N.Y. 2002) (holding that a Tribe's sovereign immunity extended to its attorneys); *Ordinance 59 Ass'n v. Babbitt*, 970 F.Supp. 914, 921 (D. Wyo. 1997) (holding that members of Tribal business council were entitled to sovereign immunity); *Romanella v. Hayward*, 933 F.Supp. 163, 167 (D. Conn. 1996), *aff'd on other grounds*, 114 F.3d 15 (2nd Cir. 1997) (characterizing a plaintiff's action against Tribal employees responsible for the maintenance of a casino parking lot as "a suit against the tribe" and holding that "the individual defendants' immunity from suit is coextensive with the Tribe's immunity from suit."); *United States ex rel.Shakopee Mdewakanton Sioux Cmty. v. Pan American*, 650 F.Supp. 278, 281 n.5 (D. Minn. 1986) (Community officials and a consultant hired by the Community would be protected by the Community's immunity if they acted in their official capacities and within the authority granted them).

The series of cases, *Chayoon v. Mashantucket Pequot Tribal Nation*, Docket No. 3:02CV0163 (D.Conn. 2002), *Chayoon v. Chao*, 355 F.3d 141 (2nd Cir. 2004), *cert. denied sub nom. Chayoon v. Reels*, 543 U.S. 966 (2004), and *Chayoon v. Sherlock*, 89 Conn.App. 821(Conn.App. 2005) are directly on point. The plaintiff in these cases, Joseph Chayoon, was an employee of the Foxwoods Casino, a casino owned and operated by the Mashantucket Pequot Gaming Enterprise, an arm of the Mashantucket Pequot Tribe. In his first lawsuit, Plaintiff sued the Tribe and Foxwoods Casino for wrongful termination. The case was dismissed for lack of subject matter jurisdiction, based on the sovereign immunity of the Tribe and the casino. Plaintiff then filed a second lawsuit, naming 18 individual defendants, including seven (7) members of the Tribal Council. Plaintiff's second case was similarly dismissed with the Court explaining:

> Chayoon cannot circumvent tribal immunity by merely naming officers or employees of the Tribe where the complaint concerns actions taken in defendant's official or representative capacities and the complaint does not allege they acted outside the scope of their authority.

*Chayoon v. Chao*, 355 F.3d at 143.

Nevertheless, Chayoon filed a third wrongful termination lawsuit in state court naming eight individuals of the casino. *Chayoon v. Sherlock*, 89 Conn. App. At 824. Plaintiff argued sovereign immunity should not apply because defendants were not Indians and were being sued individually, and because in terminating his employment defendants acted in violation of federal law and therefore beyond the scope of their authority. *Id.* at 825. Defendants argued that at the time plaintiff was terminated they were all casino employees, and plaintiff's claims related to conduct undertaken pursuant to their employment responsibilities. The court agreed with the defendants, affirming dismissal on the basis of sovereign immunity. The court began by

observing that "[t]ribal immunity extends to all tribal employees acting within their representative capacity and within the scope of their official authority." *Id.* at 826.

With that established, the primary issue for the *Chayoon v. Sherlock* court was "whether the plaintiff had made sufficient claim that the defendants acted beyond the scope of their authority so as to denude them of the protection of sovereign immunity." *Id.* at 828. The Court explained:

> To overcome sovereign immunity, plaintiff "must do more than allege the defendants' conduct was in excess of their ...authority; [he] must allege or otherwise establish facts that reasonably support those allegations." *Id.* The court held that nothing alleged by plaintiff suggested that defendants acted "manifestly or palpably beyond their authority in their conduct regarding the termination of his employment."

*Id.* at 829. In language that applies equally well to Appellant's claims here, the *Chayoon v. Sherlock* court stated:

> [T]he complaint against the defendants in the present matter patently demonstrates that in terminating the plaintiff's employment, the defendants were acting as employees of Foxwoods within the scope of their authority. It is insufficient for the plaintiff merely to allege that the defendants violated federal law or tribal policy in order to state a claim that they acted beyond the scope of their authority. *See Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, supra, 221 F.Supp.2d at 280-81. Such an interpretation would eliminate tribal immunity from damages actions because a plaintiff must always allege a wrong or a violation of law in order to state a claim for relief. In order to circumvent tribal immunity, the plaintiff must have alleged and proven, apart from whether the defendants acted in violation of federal law, that the defendants acted "without any colorable claim of authority...."

*Id.* at 281. The court concluded that the Plaintiff had made no proffer of such conduct and that he merely alleged that he sued the defendants in their personal capacities and that they acted outside the scope of their authority. Without more, the court dismissed all claims against the Tribal officials.

Here, as in *Chayoon*, Appellant has failed to plead facts showing that the Defendants acted "without any colorable claim of authority." *Id. See also Native Am. Distributing v. Seneca-Cayuga Tobacco Co.*, 2007 WL 1673535 (N.D.Okla. 2007)("tribal official, even if sued in an individual capacity, is only stripped of tribal immunity when he acts 'without any colorable claim of authority'"); *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th at 644 ("Where the plaintiff alleges no viable claim that tribal officials acted outside their authority, immunity applies")(*citing Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

Nor has the Appellant alleged that the Appellees' acted manifestly or palpably beyond their authority in their conduct regarding their roles in the Tribe's disciplinary proceedings. *Bassett v. Mashantucket Pequot Museum*, 221 F.Supp.2d at 280. In this case, Appellant's complaint is directed at preventing the Tribal Council from adhering to Tribal law. The Appellant's request for relief is not directed at the Appellees in their individual capacities, but rather at the Tribal Council for which Appellant chose not to name as a party. As such, the claims against each of the Appellees in both their individual and official capacity should be dismissed.

## IV. THIS APPEAL SHOULD BE DISMISSED BASED UPON INDIVIDUAL IMMUNITY.

While claims against tribal officials in their individual capacities are occasionally justified, the Appellant here has not successfully supported such a claim against the Appellees in their individual capacities. Even if the Appellant had asserted such a claim, it could not stand alone. Like state and federal agents and officials, tribal agents and officials are generally

protected by the sovereign's immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).[16] A Tribe's immunity extends to its agents and officials when acting in their representative capacity and within the scope of their authority. *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994) (stating that if tribal officers act within their authority, they are "clothed with the Tribe's sovereign immunity").[17]

To be successful in hailing Tribal officials into court, Appellant must prove that the conduct in question is not related to their current or former governmental duties. To overcome an official's sovereign immunity, "a claimant must allege and prove that the officer has acted outside of the scope of his authority." *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir. 1989). The allegation and proof that an official acted outside his or her authority is necessary to convert the action from one against the sovereign to one against the official in their individual capacity. *Malone v. Bowdoin*, 369 U.S. 643, 646-48 (1962). Appellant's complaint must be dismissed based upon his failure to prove, or even attempt to prove, any conduct where the Appellees have acted outside the scope of their authority.

However, even if this Court finds that the Appellant has met his burden of establishing that the Appellees have acted outside the scope of their authority, the allegations are insufficient to strip them of their immunity. "A tribal official—even if sued in his 'individual capacity'—is only 'stripped' of tribal immunity when he acts 'manifestly or palpably beyond his authority.'"

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[16]*See also Dry v. United States*, 235 F.3d 1249, 1253 (10th Cir. 2000); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Burlington Northern v. Blackfeet Indian Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *overruled on other grounds*, *Big Horn County Elec. Co-op., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000); *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985).

[17]*See also Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993); *Evans v. McKay*, 869 F.2d 1341, 1348 n.9 (9th Cir. 1989); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1982); *Davis v. Littell*, 398 F.2d 83, 84-84 (9th Cir. 1968), *cert. denied*, 393 U.S. 1018, Jan. 13, 1969.

*Shenandoah v. Halbritter*, 275 F.Supp.2d. 279, 287 n.5 (N.D. N.Y. 2003) (*citing Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 359 (2nd Cir. 2000). *See also Hardin*, 779 F.2d at 479-80 (holding that various Tribal officials sued in their individual capacities were still entitled to the protection of sovereign immunity because they had acted within the scope of their authority). Further, "an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." *Id.* Finally, a mere claim of error in the exercise of an official's authority is not sufficient. *Larson*, 337 U.S. at 690. *See also Snow*, 709 F.2d at 1322 (holding that Tribal immunity extended to Tribal revenue clerk where there had "been no allegation that [the clerk] exceeded the scope of her authority); *Bassett*, 221 F.Supp.2d at 280 (stating that a claim against a Tribal official "lies outside the scope of tribal immunity only where the complaint pleads—and it is shown—that a Tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe"). If an official's actions relate to the performance of their official duties, they are generally treated as being within the scope of their authority. *See Romanella*, 933 F.Supp. at 168 (holding that Tribal employees responsible for the maintenance of a casino parking lot were entitled to assert the Tribe's immunity from suit in their individual capacities even if they may have been negligent, because the claims related directly to their performance of their official duties). Appellant asserts claims against the Appellees in their individual capacities. However, no allegation in the complaint would support a theory of liability against them as such.

Appellant has failed to make any factual allegations that would support the conclusion that the Appellees exceeded the scope of their authority. To the contrary, the Appellant alleges only actions which would reasonably fall within the scope of the authority of a Tribal official.

As such, the Appellants must not be stripped of their immunity from suit. *See Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991)

A. Article VII, Section 4 of the Rosebud Sioux Tribe's Constitution Applies to the President.

Appellant attempts to circumvent sovereign immunity by arguing that Appellees "acted outside the scope of their authority, in violation of the laws of the Rosebud Sioux Tribe, including the Constitution of the Tribe, Article VII, Section 4" which provides as follows:

> Tribal Council may by a two-thirds vote of the total members of the Tribal Council, after due notice and an opportunity to be heard, remove any Tribal Council member for neglect of duty or gross misconduct. ***The decision of the Tribal Council shall be final.*** (Emphasis added).

*Appellant Brief* at p. 7. Specifically, Appellant contends that the definition of "Tribal Council" should not include the President of the Tribe and the number needed to remove an elected official is seventeen (17) – not fourteen (14). *Id.* at p. 8. Appellant is clearly mistaken.

Prior to the 2007 Constitutional amendments, Article VII, Section 4 read:

> Section 2. The tribal council may, by a two-thirds vote, expel any member, ***except the President or Vice-President***, for neglect of duty or gross misconduct, after due notice of charges and an opportunity to be heard. Procedures for the recall of the President or Vice-President may be initiated by a petition signed by at least fifty (50) per cent of those members who voted in the last tribal election. The Tribal Council shall adopt a recall ordinance with procedures that include, but not be limited to, specific charges for recall, provisions for hearings between the petitioners and the person whom charges at brought against. The Tribal Council shall call for an election of recall if the evidence submitted at the hearing so warrant. (Amendment No. XVII - September 23, 1985)(Emphasis added).

On July 26, 2007, Tribal members participated in a Secretarial Election and adopted Amendment U which now deleted the language "except the President or Vice-President". *Ex. 2* The legislative intent behind the enactment is crystal clear – Tribal members intended to make the removal language of Article VII applicable to the President. Legislative intent is expressed by omission as well as by inclusion of statutory terms. *Chesnut v. Montgomery*, 307 F.3d 698, 701–

02 (8th Cir.2002) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)). *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) (reasoning that the omission of certain language in the statutory scheme is evidence of legislative intent to leave such language out); *Am. Hosp. Ass'n v. N.L.R.B.*, 499 U.S. 606, 613 (1991) (same). The voters of the Rosebud Sioux Tribe expressly adopted Amendment U which omitted reference to the President and Vice-President thereby placing all removal decisions as to same within Tribal Council's jurisdiction.

Next, Appellant contends that removal requires a vote of seventeen members. Appellant makes several errors in his computation of the required vote.

First, Appellant argues that the Tribe's constitutional leaders, i.e., Treasurer, Secretary, Vice-President and President, should be included in calculating the two-third requirement. *Appellant's Brief,* at p. 8. On March 16, 2006, the Tribal Council adopted Ordinance No. 86-13 which provides for its rules of order. Therein, Section J provides that if no Tribal law is on point, Robert's Rules of Order ("RONR") will apply. RONR provides that a two-thirds vote means a two-thirds vote "of those entitled to vote." RONR, 10th Ed., p. 388, lns. 2-4. With the exception of a tie, none of the Tribe's officers are allowed to vote,[18] and therefore, would not be counted in calculating the vote under RONR. Article VII, Section 4 of the Tribe's Constitution requires "a

[18] Secretary and Treasurer: Article III, Section 8 of the Constitution: "The Tribal Secretary and Treasurer officers elected shall have no vote in matters before Tribal Council." Article III, Section 2: "The Secretary and Treasurer of the Rosebud Sioux Tribe shall be elected at large for at term of two years and shall have no vote in matters before the Rosebud Sioux Tribe." President and Vice-President: "Bylaws, Article I, Section 1: "the President shall only vote in case of a tie." Article I, Section 2: "The Vice-President shall not have a vote except in case of a tie when acting as President under Section 1 of this Article."

two-thirds vote of the ***total members of the Tribal Council***" to effectuate a removal. (Emphasis added.) Accordingly, executive officials should not be included in calculating a vote.

Finally, Appellant erred in calculating the two-third requirement as 17. *Id.* With the elimination of executive officials from the vote, that leaves a Tribal Council comprised of twenty (20) members - two-thirds of which is 13.33 or 14 members. And again, the vote on February 17, 2015, was by a vote of 16 in support of the suspension – a vote well above the required limit.

B. Tribal Council Has the Authority to Suspend the President Pursuant to Ordinance No. 87-05.

Appellant makes the wholly unsupported argument that Ordinance No. 87-05 trumps the unambiguous language of the Constitution. Specifically, Appellant contends that the President cannot be subjected to removal – only recall. *Id.* at 10. When Tribal members adopted Amendment U, all contrary language in Ordinance No. 87-05 was invalidated, and the removal process now becomes applicable to the Tribe's constitutional officers.

Despite the invalidation of some provisions in Ordinance No. 87-05, a great number of other provisions survive and are directly applicable to the question of whether or not the President can be removed and/or suspended. See *Watson v. Buck*, 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416 (1941); *Marsh v. Buck*, 313 U.S. 406, 61 S.Ct. 969, 85 L.Ed. 1426 (1941)(it is a longstanding canon of statutory construction that legislative enactments are to be enforced to the extent that they are not inconsistent with the Constitution, particularly where the valid portion of the statute does not depend upon the invalid part).

Section IV(C) of Ordinance No. 87-05 provides that "the Tribal Council shall not suspend a community representative or a constitutional officer while the proceedings for removal from office are taking place." Ordinance No. 87-05 does not say that suspensions are entirely prohibited but can only be imposed after removal proceedings. Additionally, said Section applies

to "constitutional officers" – which includes the President. *See* Section I(B)(1). Section I(B)(1) is not invalidated by Amendment U, and when each word in its structure is given effect, it is clear that the President can be suspended by the Tribal Council. *TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.")

Appellant argues that "[a]t no time during the pendency of this action in briefs or otherwise has the Appellees been able to point to any substantive law that categorizes the President as a member of the Tribal Council and that is because there is no such law exists." *Appellant's Brief* at p. 10. Interestingly, Appellant has not brought the Court's attention to any law that treats the President any different from other members of the Tribal Council. In fact, Appellant has not addressed in any fashion what Tribal members intended when they omitted reference to "except the President or Vice-President" from Article VII, Section 4 of the Constitution.

C. The Lower Court's Dicta is Not Subject to Appeal.

Appellant argues that the Tribal Court "indicated" orally that two thirds of the Tribal Council constituted two thirds of a sitting majority of the Tribal Council. *Appellant's Brief* at p. 10. This statement was neither part of the Tribal Court's final order nor was it an issue utilized by the Court to dispose of the action. As such, it is not an issue subject to appeal.

V. THE TRIBE'S PAST PRACTICES MUST BE CONSIDERED.

At the lower level, Appellant argued that "nowhere contained within the substantive provisions of Ordinance No. 86-04, does there exist a substantive provision that affords the Tribal Council the authority to 'suspend' the Plaintiff from his position as the President of the

Rosebud Sioux Tribe." Complaint, at p. 11. Although Appellant appears to have abandoned this argument, Appellees will address same in the interest of being thorough. Pertinent thereto, Ordinance No. 86-04 provides:

> The Tribal Council shall penalize those whom they find guilty of violation of this Ordinance and it shall impose one or more of the following penalties, provided it is in accordance with the Constitution and By-Laws of the Rosebud Sioux Tribe. (A) Forfeiture of office, removal from office or recall from office; (B) Exclusion from the Rosebud Sioux Tribe Reservation or disqualification from again seeking Tribal Office; (C) Forfeiture of full or partial per diem for any length of time during the term of office or appointment; (D) Public censure.

Admittedly, Ordinance No. 86-04 does not explicitly mention the word "suspension". However, Ordinance No. 87-05 does provide for suspension of the President, and there is no rule of law that holds all remedies must be contained within one ordinance.

Further, the Tribe's past practices support Appellees' position that suspensions are authorized by Tribal law. In *Valandra v. Rosebud Sioux Tribe, et al.*, CIV 09-183, a member of the Tribal Council brought an action against the Tribe and Tribal Council seeking to enjoin them from suspending him from his elected position. *Id.* at 1. Therein, Plaintiff argued that that the newly-enacted Constitution did not allow the Tribal Council to suspend an elected official. *Id.* at 3. The Court upheld both the Council's right to suspend and remove one of its members:

> The Plaintiff also argues that the RST Constitution does not permit suspension of elected officials and even if it does it requires the same level of due process as a removal. This Court is permitted to resolve this issue under Article VI, Section 3 of the RST Constitution. This Court finds that the right to remove an elected official subsumes the right to suspend him pending removal. There are two methods of removal of elected councilpersons under the new RST Code – removal by the Tribal Council and recall by tribal members who put Councilpersons into office. However, the RST Constitution also directs that the Council may prescribe its own rules governing the procedure of the Council, Article IV, Section 1(t). This right, coupled with the right of removal under VII, Section 4, are broad enough to justify the right of the Council to suspend an elected official pending removal proceedings.

*Id.* at 7. *See also* the motion by Edd Charging Elk that President pay the balance of the disallowed cost and that he be suspended for two weeks beginning May 18; and that within two weeks from that date the balance be paid back in full. Seconded by Wayne Ducheneaux. Question by Earl Bordeaux, Sr. The vote count was seventeen (17) in favor, zero (0) opposed, zero (0) not voting. MOTION CARRIED. *Ex. 3* These past practices are determinative in this case.[19]

VI. APPELLANT'S DUE PROCESS ARGUMENTS ARE WITHOUT MERIT.

In arguing for a waiver of sovereign immunity, Appellant relies upon Article XI, Section 3, of the Constitution which authorizes the Tribal Court the power to review and overturn legislative actions for violations of the Constitution or the Indian Civil Rights Act. Assuming that said Article was sufficient to effectuate a waiver of sovereign immunity, Appellant has failed to demonstrate that the Tribal Council violated any Constitutional provision nor that his due process rights were violated in any manner.

To trigger an inquiry into due process, three factors must be considered: (1) some substantive right—life, liberty or property—must be at stake; (2) some deprivation of that substantive right must occur; and (3) the deprivation must occur without due process. If the process for the deprivation is adequate, then no due process violation has occurred. *See generally Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 541, 105 S.Ct. 1487, 1492, 84 L.Ed.2d 494 (1985); *Board of Regents v. Roth,* 408 U.S. 564, 569–70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972).

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[19] RST Law and Order Code 4-2-8: "Law Applicable to Actions in Tribal Court – the Tribal Court shall apply the applicable laws of the Rosebud Sioux Tribe and the United States in actions before it. Any matter not covered by applicable tribal or federal laws shall be decided according to the customs and usages of the Tribe. Where doubt arises as to customs and usages of the Tribe, the Court may request the advise of persons generally recognized in the community as being familiar with such customs and usages."

The threshold inquiry in any Due Process claim is whether the plaintiff possessed a liberty or property interest in the subject matter at issue. *Baker v. McCollan*, 443 U.S. 137, 140 (1979). Because there is no constitutionally protected liberty or property interest in holding an elected office, there can be no violation of due procress.

In *Valandra v. Rosebud Sioux Tribe, et al.*, CIV 09-183, the Tribal Court found that the right to hold elective office is a property right entitled to ICRA protection. *Id.* at p. 5. To arrive at that conclusion, the Court relied upon the decision in *Loudermill*. However, *Loudermill* involved a terminated employee and not an elected official. More on point, other Supreme Court decisions have long made clear that there is no property or liberty interest in an elected office. *Taylor v. Beckham*, 178 U.S. 548 (1900); *accord Snowden v. Hughes*, 321 U.S. 1, 7 (1944) (holding that "an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause"). In *Snowden,* the Court, reaffirming *Taylor,* again asserted that elected officers cannot constitute "property" within the meaning of the Fourteenth Amendment:

> More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property ... secured by the due process clause. *Taylor and Marshall v. Beckham,* 178 U.S. 548, 20 S.Ct. 1009 [44 L.Ed. 1187]. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, *Cave v. State of Missouri ex rel. Newell,* 246 U.S. 650, 38 S.Ct. 334, 62 L.Ed. 921, *as we reaffirm it now.*

*Snowden,* 321 U.S. at 7, 64 S.Ct. 397.

The Court's pronouncements in *Taylor* and *Snowden* have since been echoed in numerous decisions. *See, e.g., Burks v. Perk,* 470 F.2d 163, 165 (6th Cir.1972) (per curiam) ("Public office is not property within the meaning of the Fourteenth Amendment.") (citing *Taylor* ); *Rabkin v. Dean,* 856 F.Supp. 543, 549 (N.D.Cal.1994) (asserting that elected officials are not "employees" in the traditional sense, and hence do not hold a property interest in their positions); *Sweeney v.*

*Tucker,* 473 Pa. 493, 524, 375 A.2d 698 (1977) (rejecting legislator's property interest claim, and noting that, because an elected official "holds office for the benefit of his constituents and cannot justifiably rely on a private need or expectation in holding office," an elected office "is a public trust, not the private domain of the officeholder."); *Guzman Flores v. College of Optometrists,* 106 F.Supp.2d 212, 214 (D.Puerto Rico 2000) (relying on *Taylor* and *Snowden* to dismiss a property interest claim put forth by a candidate for public office, and stating, "the Supreme Court squarely addressed the issue now before the Court and held that there was no due process right to seek election to public office.... Therefore, Guzman does not have a valid due process claim in the instant case."); *Velez v. Levy,* 401 F.3d 75, 86–87 (2d Cir.2005) (holding plaintiff did not state procedural due process claim because she lacked protected interest in her elected office); *Corn v. City of Oakland City*, 415 N.E.2d 129 (Ind. Ct. App. 1981) (finding no property interest in office based upon nomination); *Lahart v. Thompson*, 118 N.W. 398 (Iowa 1908) ("The nomination at a primary election gives the person receiving it no vested interest in the office for which he is named or in any place upon the official ballot which may not be taken away by the . . . Legislature or [a] . . . body to whom the power has been delegated"); *State ex rel. Pecyk v. Greene*, 114 N.E.2d 922, 927 (Ohio Ct. App. 1953) (finding that because there is no vested right in public office, there can be no vested right in the mere nomination to such office); *Emanuele v. Town of Greeneville*, 143 F. Supp. 2d 325, 333 (S.D.N.Y. 2001) (holding that a candidate has no property or liberty interest in being elected); *Cornett v. Sheldon*, 894 F.Supp. 715, 725 (S.D.N.Y 1995) (holding that candidate for federal office possessed neither property or liberty interest in being placed on the ballot).[20]

[20] Other courts have followed these cases to hold that nomination or election to a public office is not property within the meaning of the Fourteenth Amendment. *Taylor v. Nealon,* 132 Tex. 60,

As the foregoing illustrates, Appellant does not have a property interest in his elected position, and therefore, is not entitled to due process under the ICRA.

## VII. TRIBAL COURT'S "FAILURE" TO ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW DOES NOT CONSTITUTE REVERSIBLE ERROR.

Appellant argues that the Tribal Court's decision must be reversed, because of the Court's failure to issue Findings of Fact and Conclusions of Law consistent with Rule 41(c) of the Rosebud Sioux Tribe's Rules of Civil Procedure. In making this assertion, Appellant clearly overlooked Rule 52(b) of the Tribe's Rules of Civil Procedure that provides:

> Findings of Fact and Conclusions of Law are waived by failing to appear for trial, by consent in writing filed with the Clerk, by oral consent in open Court, or by entering into a stipulation of facts for consideration by the Court. ***Findings of Fact and Conclusions of Law are not necessary and need not be entered*** when granting or denying a temporary restraining order or preliminary in junction in a divorce proceeding or other domestic relations type dispute or ***on decisions on motions under Rule 12 or Rule 56*** or any other motion except under Rule 41 for involuntary dismissal of a lawsuit. (Emphasis added).

As such, Appellant's argument is without merit.

## CONCLUSION

For the foregoing reasons, Appellant's case should be dismissed.

Respectfully Submitted,

June 24, 2015

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120 S.W.2d 586, 587 (Tex.1938); *Rowe ex rel. Schwartz v. Lloyd,* 348 Pa. 545, 36 A.2d 317, 319 (Penn.1944).

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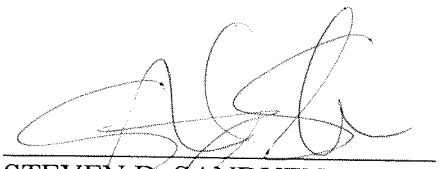
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of June, 2015, a true and correct copy of the foregoing Appellee's Brief was mailed by first-class mail to Gary J. Montana, N12923 North Prairie Road, Osseo WI 54758.



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