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October 25, 2017

Via Electronic Mail and Federal Express

Todd Anthony Bianco, PhD, EFSB Coordinator
RI Energy Facility Siting Board
89 Jefferson Boulevard
Warwick, RI 02888

Re: Invenergy Thermal Development LLC's Application to Construct and Operate the Clear River Energy Center in Burrillville, Rhode Island
Docket No.: SB-2015-16

Dear Dr. Bianco:

On behalf of Invenergy Thermal Development LLC and the Clear River Energy Center Project ("Invenergy"), please find enclosed an original and three (3) copies of Invenergy's Objection to the October 20, 2017 Intervention Motion.

Please let me know if you have any questions.

Very truly yours,

ALAN M. SHOER
ashoer@apslaw.com

Enclosures

cc: Service List

875875.v1-10/25/17

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

In Re: INVENERGY THERMAL DEVELOPMENT LLC'S APPLICATION TO CONSTRUCT THE CLEAR RIVER ENERGY CENTER IN BURRILLVILLE, RHODE ISLAND	**)** **)** **)** **)**	**Docket No. SB-2015-06**

OBJECTION OF INVENERGY THERMAL DEVELOPMENT LLC
TO THE OCTOBER 20, 2017 MOTION FOR INTERVENTION

Now comes Invenergy Thermal Development LLC ("Invenergy") and hereby objects to the Motion for Intervention, filed with the Rhode Island Energy Facility Siting Board ("EFSB" or "Board") on October 20, 2017 ("Intervention Motion" or "Motion") on behalf individuals that purport to be members of the Tribal Council of the Narragansett Indian Tribe (the "NIT").

The authority of these individuals to file this Motion and claim that they speak on behalf of the Tribal Council is under immediate challenge, in the form of a *Petition for Restraining Order, Declaratory and Injunctive Relief*, filed by legal counsel for the NIT in the NIT's Tribal Court on October 24, 2017. *See* **Exhibit 1** ("NIT Petition").

On October 25, 2017, in response to the NIT's Petition, the Tribal Court issued an Order that the individuals purporting to be members of the Tribal Council and their named attorney are "temporarily and immediately enjoined from (a) identifying itself and therefore themselves as the 'Tribal Council of the Narragansett Indian Tribe' and (b) pursuing a Motion to Intervene before the Rhode Island Energy Facility Siting Board." *See* **Exhibit 2**, Tribal Court Order, dated Oct. 25, 2017; *see also* **Exhibit 3**, at 4, Letter from the NIT to the EFSB, dated and filed with the Board on Oct. 25, 2017.

The Order goes on to advise this Board that "[t]he Rhode Island Energy Facility Siting Board is hereby advised that the so-called 'Tribal Council of the Narragansett Indian Tribe' cited in the filed EFSB [Intervention] Motion is not the lawful representative of the Narragansett

Indian Tribe and was not elected by a duly authorized Tribal Election." *See* **Exhibit 2**, at 4.

Because the individuals that filed the Intervention Motion do not have the authority of the NIT to file any sort of motion or represent the NIT in any way and are not duly authorized elected members of the NIT Tribal Council, a decision by this Board on the Intervention Motion would unnecessarily embroil the Board in a Tribal legal proceeding and would be contrary to the Tribal Court's recent decision.[1] *See* **Exhibit 2**.

Accordingly, Invenergy respectfully requests that the Intervention Motion be denied.

Respectfully submitted,

INVENERGY THERMAL DEVELOPMENT, LLC

By Its Attorneys:

/s/ Alan M. Shoer

Alan M. Shoer, Esq. (#3248)
Richard R. Beretta, Jr. Esq. (#4313)
Elizabeth M. Noonan, Esq. (#4226)
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Dated: October 25, 2017

[1] It is unfortunate that neither the Conservation Law Foundation nor the Town of Burrillville confirmed the authority of the purported intervenors before submitting filings in support of the Intervention Motion.

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2017, I delivered a true copy of the foregoing document via electronic mail to the parties on the attached service list.

/s/ Alan M. Shoer

EXHIBIT 1

NARRAGANSETT INDIAN TRIBE
TRIBAL COURT

NARRAGANSETT INDIAN TRIBE, *Plaintiff,* v. TRIBAL COUNCIL OF THE NARRAGANSETT INDIAN TRIBE, as identified in the Motion to Intervene filed before the Energy Facility Siting Board by Attorney Shannah Kurland *Defendant.*	: : : : : : : : : : : :	CA No. _____

PLAINTIFF'S PETITION FOR RESTRAINING ORDER, DECLARATORY RELIEF AND INJUNCTIVE RELIEF

Plaintiff Narragansett Indian Tribe ("Plaintiff") hereby petitions this Court for injunctive and declaratory relief to restrain and enjoin Defendant, the "Tribal Council of the Narragansett Indian Tribe" as identified in a Motion to Intervene filed before the Rhode Island Energy Facility Siting Board by Attorney Shannah Kurland, from falsely representing that Defendant is the properly constituted NIT Tribal Council or has authority to act on behalf of the Tribal Council or the Narragansett Indian Tribe. Defendant, through its counsel, has falsely represented to the Rhode Island Energy Facility Siting Board that it is the "Tribal Council of the Narragansett Indian Tribe" and that it has the authority to intervene before the Rhode Island Energy Facility Siting Board. In actuality, the Defendant has no such authority, and the motion filed by the Defendant before the Rhode Island Energy Facility Siting Board was not authorized by the properly constituted Narragansett Indian Tribal Council.

For the reasons discussed more fully in the Memorandum of Law filed contemporaneously herewith, this Court should grant Plaintiff's Petition for Declaratory and Injunctive Relief.

Dated: October 24, 2017

Respectfully submitted,

/s/ William P. Devereaux

William P. Devereaux (#2241)
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NARRAGANSETT INDIAN TRIBE
TRIBAL COURT

NARRAGANSETT INDIAN TRIBE, *Plaintiff,* v. "TRIBAL COUNCIL OF THE NARRAGANSETT INDIAN TRIBE," as identified in the Motion to Intervene filed before the Rhode Island Energy Facility Siting Board by Attorney Shannah Kurland, Esq. *Defendant.*	:	CA No. _____

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

On October 20, 2017, Defendant, an unnamed group of individuals self-identifying as the "Tribal Council of the Narragansett Indian Tribe" and referred to in a Motion to Intervene filed before the Rhode Island Energy Facility Siting Board by Attorney Shannah Kurland (hereinafter, "Defendant") purported to represent the interests of the Tribal Council of the Narragansett Indian Tribe, attached as **Exhibit A**. Not dissimilar from recent past attempts by certain dissident members, or former members, of the Narragansett Indian Tribe (the "NIT" or "Tribe"), this attempt to claim representation of the NIT is without foundation, legal authority, and constitutes an interference with the Tribe's business relationships. Unfortunately, these representations also serve to disrupt the ability of the NIT to conduct its governmental business and causes unnecessary confusion. Accordingly, Plaintiff requests this Honorable Court to grant Plaintiff's Motion for Declaratory and Injunctive Relief.

BACKGROUND

Tribal History and Governance

The Tribe has been a federally acknowledged and recognized Indian Tribe since 1983, with all the inherent privileges and immunities afforded to it by federal and state statutes. The Tribe pre-existed the colony and State of Rhode Island and has existed as an autonomous government and Tribe from time immemorial as confirmed by the federal recognition process. "Tribal sovereign immunity 'predates the birth of the Republic.'" Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 29 (1st Cir. 2000) (quoting Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir. 1994)). At present, the Tribe has between two thousand four hundred (2,400) and two thousand six hundred (2,600) eligible members.

Pursuant to the Constitution and By-Laws of the Tribe (the "Constitution"), a council of nine elected members (the "Tribal Council") acts as an executive board on matters pertaining to Tribal affairs. The Constitution further provides that the chief executive of the Tribe, also a member of the Tribal Council, is the Chief Sachem. Currently, the Tribal Council consists of Chief Sachem Matthew Thomas, First Councilman Cassius Spears, Jr., Second Councilman John Pompey, Councilman Lonny Brown, Councilwoman Mary Brown, Councilwoman Betty Johnson, and Councilwoman Yvonne Lamphere.

Tribal Court Jurisdiction and Decisions of Precedence

The Tribe has enacted Comprehensive Codes of Justice (the "Code"), and pursuant to the Code, maintains a Tribal Judiciary known as the Narragansett Indian Tribal Court (the "Tribal Court").[1] See Excerpt from Comprehensive Codes of Justice, attached as **Exhibit B**. The Code

[1] It is worth noting that the United States District Court for the District of Rhode Island has recognized on more than one occasion the authority of the Tribal Court. See Luckerman v. Narragansett Indian Tribe, C.A. No. 13-185S (D.R.I. Sept. 30, 2016), attached as **Exhibit F** (analyzing and ultimately approving of the authority of the Tribal Court to determine tribal jurisdiction over breach of contract claim); Narragansett Indian Tribe Tribal Council v.

was enacted at a duly called Tribal Monthly Meeting on August 29, 1992, wherein the Tribe adopted TA-92-082992, which established the Unified Code of Justice (later the Code) that created the Tribal Court and provides its basis under Title 1. Id. Since that time, the Tribal Government has revised the Code twice – once in December 31, 2000 (effective January 1, 2001); and again on August 21, 2001.

The Tribal Court has presided over several internal tribal disputes since its inception as well as adjudicating acts which allegedly violated the Tribal Criminal Code. Since at least 2010, the Tribe has experienced internal dissension over the process employed to elect the Tribal Council and throughout this period of discord, the Tribal Court has adjudicated various disputes relating to election grievances, including decisions issued on November 6, 2014 ("2014 General Election Notice"), and on January 29, 2016 ("Analysis and Decision for Governmental Resolve of the 2014 Election").

In 2016, the Tribal Administrator initiated an action in the Tribal Court entitled Stanton v. Noka, et al, C.A. 2016-01 (the "Tribal Court Action"). The Tribal Administrator initiated the Tribal Court Action against individuals who are, or were, members of the Tribal Election Committee (the "TEC") and whose actions allegedly exceeded the TEC's lawful authority to conduct election business.

On July 21, 2016, the Tribal Court granted a preliminary injunction against those individuals (the "TEC Members"), see July 21, 2016 Tribal Court Decision, attached as **Exhibit C**. No appeal was taken from this Order by the TEC Members.

Thomas, C.A. No. 16-cv-622-M (D.R.I. Dec. 22, 2016), attached as **Exhibit E** (concluding that "elections and related judicial orders [are] the archetypal function of self-governance and declining to exercise jurisdiction where "underlying governance dispute culminat[ed] from a tribal judge's order").

Despite the Court's order, on July 30, 2016, at a VFW hall located off of the Tribe's Lands, the TEC Members, and others, held an unlawful Tribal Council "election". Ultimately, the TEC Members claimed that sixty-eight (68) ballots were cast at the unlawful election, purportedly filling five (5) new Tribal Council seats. Notably, lawfully called Tribal elections have been held for many years at the Four Winds Community Center, located on Tribal Lands. Furthermore, typically between three hundred (300) and three hundred and sixty (360) Tribal members cast ballots in lawfully called Tribal elections, and approximately five hundred (500) members cast ballots in lawfully called elections for Chief Sachem. Due to the Court's knowledge of the history of Tribal elections, the Court can take judicial notice of the appropriate approximations in tribal election voting numbers. The TEC Members who defied the Court and held the election at the VFW were subsequently suspended from the Tribe by the Tribal Council as a result of their actions on July 30, 2016.

Tribal Operations Since the Unlawful Election

In the time since the unlawful July 30th VFW Hall election, no meetings of those persons purportedly elected have been held on the Tribal Lands or in Tribal Council Chambers. The Tribal Administrator does not report to any person claiming to have purportedly been elected to the Tribal Council on July 30, 2016. No person claiming to be elected on July 30, 2016, directs Tribal employees, departments or programs. Further, no person claiming to be elected on July 30, 2016, can execute any agreement or contract on behalf of the Narragansett Tribe or purport to represent the NIT Tribal Council.

December 2016 Memorandum and Decision of the Tribal Court

On December 22, 2016, this Honorable Court permanently enjoined the defendants in that matter from:

> "2. Communicating or publishing any information or entering into any contract in the name of the Narragansett Tribal Election Committee or the Tribe; OR . . .
> 4. Defendants are hereby permanently enjoined from any further action or communications in any form, or use of any governmental resources, to represent themselves, singly or jointly, directly or indirectly, as conducting official or lawful action on behalf of the Narragansett Tribal Government or the Narragansett Tribe."

Moreover, the decision explicitly states that "[t]he purported 2016 election is null and void for noncompliance and misrepresentation of tribal law and policy." See December 22, 2016 Decision, attached as **Exhibit D**.

EFSB Motion to Intervene

The Motion to Intervene recently filed by the Defendant flies in the face of this Court's previous directives contained in its December 2016 decision. Furthermore, the EFSB Motion does not name any members of the purported NIT Tribal Council that now claim to seek intervenor status. Rather, the EFSB Motion merely states that "[a] majority of the current members [of the Tribal Council] have determined to seek intervenor status."[2] The EFSB Motion then adds a footnote to this statement which reads as follows: "There currently exists an internal dispute as to the representation of the elected leadership of the Narragansett Indian Tribe. While some aspects of this dispute have been a matter of public record . . . the Tribal Council will not address additional details of the dispute in this filing, as its goal in this Motion is simply to protect its interest regarding potential impact of any agreements involving the water supply on tribal lands, and not to vet issues of internal governance in this forum."

Presumably, the "internal dispute" to which the EFSB Motion refers, at least in part, is to the purported 2016 election which this Court determined was null and void. The representations that the Defendant does not wish to "vet issues of internal governance in this [the EFSB] forum"

[2] The properly constituted Tribal Council as identified in this memorandum, supra Tribal History and Governance, did not authorize the filing of the EFSB Motion.

is, at best, duplicitous. Notably, Attorney Kurland has chosen not to identify, by name, in her pleadings who her actual clients are. This Court can assume, unless advised otherwise, that this is the same "Tribal Council" that emerged from the VFW Hall election on July 30, 2016, and was aware of this Court's previous order (1) enjoining them from holding such an "election," (2) declaring said "election" null and void", and (3) enjoining them from purporting to act on behalf of the Tribe or Tribal Government.

Clearly, the Defendant was aware that this Court had issued its December 2016 decision invalidating the purported "election," and yet the Defendant, through its attorney, still chose to file the instant EFSB Motion. Such disregard for this Court and its decisions should not be tolerated.

DISCUSSION

Standard for Injunctive Relief

According to the Tribe's Comprehensive Codes of Justice, in order to obtain a preliminary injunction, the moving party bears the burden of showing by clear and convincing evidence, the applicant will suffer irreparable injury if the injunction is not granted; and that the balance of equities favors the applicant over the party sought to be enjoined. Federal courts, by way of comparative analysis, also require a showing that the applicant has a likelihood of success on the merits; and that the public interest (here, Tribal interest) will not be adversely affected by the granting of the injunction. See Textron Fin. Corp. v. Two Rivers, Inc., 2010 U.S. Dist. LEXIS 141082 (D.R.I. Oct. 28, 2010) (citing Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 5 (1st Cir. 1991); and Hasbro, Inc. v. MGA Entm't, Inc., 497 F. Supp. 2d 337, 340 (D.R.I. 2007)); see also Nat'l Org. for Marriage v. McKee, 666 F. Supp. 2d 193, 203 (D. Me. 2009).'" Plaintiff here not only meets the Comprehensive Code test for injunctive relief but also clears, by comparison, the Federal standard by a wide margin as well.

The Tribe has and will suffer immediate irreparable harm absent injunctive and declaratory relief

"Irreparable harm is an injury 'not accurately measurable or adequately compensable by money damages.'" Fairchild Semiconductor Corp. v. Third Dimension (3D) Semiconductor, Inc., 564 F. Supp. 2d 63, 67 (D. Me. 2008) (quoting Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996)). Here, the patent interference of Defendant in the business affairs of the Tribe has and will continue to cause incalculable damage to the Tribe's operations, administration, and reputation. It is well established pursuant to Federal law that where a party "suffers a substantial injury that is ***not accurately measurable or adequately compensable by money damages***, irreparable harm is a natural sequel." Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996) (emphasis added). The uncertainty that is caused by dissident members, or former members, in falsely and publicly purporting to be the NIT Tribal Council, when in fact they hold no authority to do so, causes the NIT irreparable damage. This Court recognized this danger when it crafted its December 2016 decision which permanently forbade the defendants in that action from holding themselves out as representing the NIT Tribal Government. We ask the Court to do the same in this matter.

Returning to the status quo which existed at the time of the unlawful actions of Defendant, will alleviate the harm currently being publicly inflicted on the Tribe. See A.W. Chesterton Co. v. Chesterton, 128 F.3d 1, 5 (1st Cir. 1997) (describing second prong of four-part test for injunctive relief). The status quo simply allows the NIT to continue to conduct needed Tribal activities and it restores order to the process that has been put in place to determine and recognize the properly constituted tribal leadership. Moreover, it eradicates unnecessary public confusion that is created when dissident members attempt to claim leadership positions without any basis in law or fact.

Finally, it will prevent an unrecognized group from being allowed to appear before a State Board and label themselves as the lawful representatives of a Federally recognized Indian Tribe.

The Tribe is likely to succeed on the merits of its claim

While not a specific Tribal requirement for injunctive relief, but for purposes of comparative analysis, the Tribe is very likely to succeed in proving that the actions of the Defendant were not authorized by the Tribe. This unauthorized act—purporting to represent the NIT Tribal Council—was ultra vires and Plaintiff is likely to succeed on the merits of this claim. In ***Narragansett Indian Tribal Council v. Matthew Thomas, C.A. No. 16 cv 622-M***, U.S. District Court Judge McConnell found that there was no Federal jurisdiction to reconsider a Tribal Court's ruling concerning a tribal governance dispute and held that tribal elections and related judicial orders are "the archetypal function of self-governance." See id., attached as **Exhibit E**. The 2016 election—which Defendant, upon information and belief, claim is the basis of their ability to assert representation of the NIT Tribal Council—was declared null and void by this very Court. Accordingly, Defendant has no basis to assert that they are representing the interests of the NIT Tribal Council, as they attempt to do in the EFSB Motion to Intervene.

"Public interest" is not adversely affected by granting the injunctive relief in this case

Generally, the fourth factor required in Federal Courts for injunctive relief requires a showing that "the public interest will not be adversely affected by the granting of the injunction." Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981). The public interest that is referred to in Federal cases means the general public's interest in the issuance of the injunction itself. Braintree Laboratories, Inc. v. Citigroup Global Markets Inc., 622 F.3d 36, 45 n. 8 (1st Cir. 2010). Here, the "public interest" is the Tribe's interest as a whole – not the interests of a splinter group. On the contrary, the Tribe's interests would best be served by the granting of the requested relief to allow the Tribe to conduct its business without interference, without a false

cloud of uncertainty as to tribal leadership, and without blatant disregard of lawful Tribal Court orders and decisions.

CONCLUSION

WHEREFORE, the Tribe hereby moves this honorable Court for Injunctive and Declaratory Relief to:

1. to temporarily and immediately enjoin the Defendant and its named counsel from identifying as the "Tribal Council of the Narragansett Indian Tribe" and from pursuing its Motion to Intervene before the EFSB;
2. to indicate to the EFSB, and others doing business with the Tribe, that the so called Defendant, the "Tribal Council of the Narragansett Indian Tribe" is not the lawful representative of the Tribe and was not elected by a duly authorized Tribal Election; and
3. to set further dates, as appropriate, for further briefing, argument, and permanent relief.

Respectfully submitted,

/s/ William P. Devereaux

William P. Devereaux (#2241)
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Exhibit A

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

IN RE: Application of	:	**Docket No. SB 20 15-06**
Invenergy Thermal Development LLC 's	:	
Proposal for Clear River Energy Center	:	

MOTION FOR INTERVENTION OF THE TRIBAL COUNCIL OF THE NARRAGANSETT INDIAN TRIBE

I. INTRODUCTION

Now comes the Tribal Council of the Narragansett Indian Tribe (hereafter "Tribal Council") and pursuant to Rule 1.10(b)(2) of the Rules of Practice and Procedure of the Energy Facilities Siting Board (hereafter "EFSB"), respectfully files this Motion for Intervention in the above-captioned docket. This Docket was opened in November, 2015, yet the directly affected interest of the Tribal Council was only revealed when media outlets reported on September 28, 2017 that Invenergy Thermal Development LLC had reached an agreement to purchase water from the Narragansett Indian Tribe (hereafter "NIT").

Thus, after due dilligence in its attempt to evaluate this purported agreement, and only after those efforts have proven insufficient in meeting its goal and duty to protect its interest, the Tribal Council has determined that its only recourse is to file this motion. Should the EFSB determine it appropriate, the Tribal Council is amenable to being granted intervenor status that limits its participation to the issue of the Water Supply Plan for the proposed facility.

II. THE INTERVENOR

The Tribal Council is a body of nine (9) members empowered by the NIT Constitution to

"act as an executive board on matters pertaining to tribal affairs." A majority of the current members have determined to seek intervenor status.[1]

The Narragansett Indian Tribe holds lands encompassing more than 1,900 acres surrounded by the Town of Charlestown, Rhode Island, and codified under the Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701-1716. These lands, often referred to as "the reservation" by tribal members in conversation, are nourished by a body of water known as the Lower Wood River Aquifer, which is part of the Pawcatuck River Basin.

While Tribal Council members have not received a copy of the purported agreement between Invenergy and the Tribe, generally speaking formal contracts that may be implied or expressly created in this type of agreement require a tribal resolution, signed by the Chief or First Councilman. Such a resolution requires a special tribal meeting and a vote by the body. No tribal meeting or vote has occurred regarding a proposed agreement to sell tribal water to Invenergy.

III. STANDARD FOR DETERMINING INTERVENTION

Rule 1.10 of the Rules of Practice and Procedure of the Energy Facilities Siting Board governs the standard for determining intervenor status. Intervention is "necessary or appropriate" if a party's interest is "directly affected" and "not adequately represented by existing parties and as to which petitioners may be bound by the Board's action in the proceeding." Rules of Practice and Procedure, 1.10(b)(2).

1 There currently exists an internal dispute as to the respresentation of the elected leadership of the Narragansett Indian Tribe. While some aspects of this dispute have been a matter of public record (see e.g. http://www.providencejournal.com/news/20161227/its-over-occupiers-of-narragansett-building-claim-victory (last viewed 10.20.17)), the Tribal Council will not address additional details of the dispute in this filing, as its goal in this Motion is simply to protect its interest regarding the potential impact of any agreements involving the water supply on tribal lands, and not to vet issues of internal governance in this forum.

IV. THE INTEREST OF THE NARRAGANSETT INDIAN TRIBE TRIBAL COUNCIL

Intervention by the Tribal Council more than meets the prescribed criteria, as its interest is directly affected at a fundamental level, that of the most precious resource available to its future generations, i.e. the water supply of the Narragansett people on Narragansett land. Furthermore, no existing intervenor even purports to represent much less is capable of adequately representing the interests of the Tribal Council.

A. The Tribal Council's Interest in Protecting the Water Supply is Directly Affected by the Proposed Clear River Energy Center.

"Water is life" has become a familiar maxim to Native and non-Native peoples throughout the Americas in recent times, much of it due to concerns regarding the impact of contested development projects on water supply in Indian Country. Here, the actual site proposed for the Clear River Energy Center in Burrillville is roughly fifty miles from Narragansett tribal lands, a distance considered "far" by Rhode Island standards. Yet the proposed purchase by Invenergy of water from tribal lands brings the issue as close to home physically, economically, and culturally as possible. The effort by many, many people over the years to secure a tribal homeland for the Narragansett Indian Tribe is far too complex to summarize within the pages of this motion. *See generally, Narragansett Indian Tribe v. State of Rhode Island* 449 F.3d 16, 18-20 (1st Cir., 2006). What is clear is that the members of the Tribe have a profoundly important interest in protecting and preserving the water that belongs to the Tribe. Members of the Tribal Council, beyond an interest, have a Constituional obligation as elected representatives of the tribal membership to protect their water supply.

The *Water Supply Plan - Supplement* submitted by Invenergy and dated September 28,

2017 states that "CREC has also secured a commitment from the Narragansett Indian Tribe ("the Tribe") to supply process makeup water to the Facility as an additional back-up or contingent water supply." Without having direct knowledge of the specific content of the agreement (since the Appendix I referenced in the document is fully redacted) the text of this supplemental plan makes it clear that Invenergy plans to draw water from the Lower Wood River Aquifer, ostensibly using existing tribal well infrastructure. This water source and supply system, as the report acknowledges, provides the public water supply needs associated with tribal land. The outcome of the EFSB's decision, should it precipitate or allow for the sale of any of the Tribe's water, even on a contingent basis, could potentially bind Narragansett Tribal Members and the Tribal Council charged with representing them, for generations to come.

B. The Tribal Council's Interest in Protecting the Water Supply is Not Adequately Represented by Existing Parties.

None of the current intervenors is capable of representing the interests of the Tribal Council in this docket, even should they be so inclined. Other parties are charged with representing a specific population and geographic area (e.g. Town of Burrillville), a broad environmental perspective (e.g. Conservation Law Foundation) or the specific interest of their membership in securing employment (e.g. Rhode Island Building and Construction Trades Council).

Although the Town of Charlestown was recently granted status as an Intervenor, the Petitioner submits that the Town of Charlestown is wholly incapable of representing the interests of the Tribal Council, and to expect it to do so would be patently unfair to both the Tribal Council and the Town. That the Town and the NIT share a single sole-source aquifer

does not bind their interest in this matter; instead it creates the potential for them to be adverse actors competing for the same limited resource. Charlestown must represent the interests of a specific population: its residents. The Tribal Council must represent the interests of a *distinct* population: its members. While there may be and one can certainly hope for occasions where these interests align, it would be foolish and short-sighted for anyone to assume that the Town of Charlestown can represent the interests of the Tribal Council. This divergence of interests is clear without even beginning to recount any of the historic and sometimes recurring tensions that arise between the municipality and the Tribe.

V. THIS MOTION IS TIMELY

Any perceived delay in the timing of this Motion cannot be attributed to the Tribal Council. The purported agreement between Invenergy and the Narragansett Indian Tribe was only revealed to the Tribal Council through media reports after the proposal was announced in the Water Supply Plan – Supplement submitted by Invenergy on September 28, 2017. Before that time, the Tribal Council was simply a disinterested party with no reason to consider seeking intervenor status.

When media reports revealed the proposed sale of water belonging to the Narragansett Indian Tribe, Tribal Council members immediately sought to learn more about the proposal and to discuss possible responses. Members attempted to learn about the completely new terrain of the EFSB and its permitting process, reviewed what background information they could quickly find about the project, and explored the possibility of retaining counsel to represent them. Even as late as October 19, the Tribal Council, through its attorney, attempted

to communicate with Invergy through its attorneys to obtain a copy of the purported agreement. Invenergy's attorneys declined to provide one.

VI. CONCLUSION

WHEREFORE, for the aforementioned reasons, the Tribal Council respectfully requests that it be granted intervenor status in this docket.

Respectfully submitted,

TRIBAL COUNCIL OF THE NARRAGANSETT INDIAN TRIBE
By and Through Its Attorney,

/s/ Shannah Kurland
Shannah Kurland, Esq. (#9186)
149 Lenox Avenue
Providence, RI 02907
401-439-0518
skurland.esq@gmail.com

Dated: October 20, 2017

CERTIFICATION
I, the undersigned, do hereby certify that I did forward a copy of the within Motion to Intervene via e-mail to all on the following service list on the 20th day of October, 2017.

/s/ Shannah Kurland

SB-2015-06 Invenergy CREC Service List as of 10/12/2017

Name/Address	E-mail	Phone/FAX
File an original and 10 copies with EFSB: Todd Bianco, Coordinator Energy Facility Siting Board 89 Jefferson Boulevard Warwick, RI 02888 Margaret Curran, Chairperson Janet Coit, Board Member Assoc. Dir., Div. of Planning Parag Agrawal Patti Lucarelli Esq., Board Counsel Susan Forcier Esq., Counsel Rayna Maguire, Asst. to the Director DEM Catherine Pitassi, Asst. to. Assoc. Dir. Plann. Margaret Hogan, Sr. Legal Counsel	Todd.Bianco@puc.ri.gov; Kathleen.Mignanelli@puc.ri.gov; Patricia.lucarelli@puc.ri.gov; Margaret.Curran@puc.ri.gov; janet.coit@dem.ri.gov; Catherine.Pitassi@doa.ri.gov; Margaret.hogan@puc.ri.gov; susan.forcier@dem.ri.gov; rayna.maguire@dem.ri.gov; Parag.Agrawal@doa.ri.gov;	401-780-2106
Parties (Electronic Service Only, Unless by Request)		
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Exhibit B

Narragansett Indian Tribal Resolution

No. TA 92-082992 Unified Justice Code

WHEREAS: The Narragansett Indian Tribe is a Federally Recognized and Acknowledged Indian Tribe; and

WHEREAS: The Narragansett Indian Tribal Council is the governing body of the Tribe; and

WHEREAS: The Tribal Assembly recognizes and acknowledges the need of protecting the Narragansett Community from unlawful acts, lawlessness and harm, and

WHEREAS: The Tribal Council is sworn to uphold the rights of the Tribal people and community, in the areas of general health, education, welfare, and is also sworn to keep the peace and maintain harmony within the tribe.

NOW THEREFORE BE IT RESOLVED, By the Narragansett Indian Tribal Assembly hereby create, establish and enact the Narragansett Indian Unified Code of Justice Titles I through VII of Title 2, (see attached codes)

BE IT FURTHER RESOLVED, That said Code of Justice is hereby by enacted on a provisional basis, subject to further review, from the pertinent committees and commissions of the Tribe, but shall have the full force and effect of law.

BE IT FURTHER RESOLVED, that these laws in no way shall be construed or meant to be construed to infract upon and/or abrogate the Oral and Traditional Organic Laws of the Narragansett Indian Tribe.

CERTIFICATION

I, the Undersigned hereby certify that the above resolution was officially adopted by the Tribal Assembly and is a true and accurate account of the happenings at the duly called Tribal Monthly meeting of August 29th, 1992

Attest:

Tribal Secretary

Chief-Sachem/First Councilman

TITLE I of TITLE 2

CHAPTER 1. UPGRADE OF OPERATION OF NARRAGANSETT TRIBAL COURT

Sect 101. Upgrade of Operations of Narragansett Tribal Court

This Law hereby upgrades, replaces and supersedes those non-traditional organic Tribal Laws relating to Tribal Court, as a Court of Record.

Sect 102. Composition of the Courts.

There shall be a Tribal Court consisting of a Chief Judge, and several other justices, who shall be appointed by the Tribal Council. In the event the Chief Judge is unable for any reason to preform his duties as a Chief Justice the Tribal Council shall appoint a Special Judge to serve in his or her stead

Sect 103. Records of the Court.

The Court shall keep a record of all proceedings of the Court, showing the title of the case, the names and addresses of the parties, attorneys, lay counselors and witnesses; the substance of the complaint; the dates of all hearings or trials; the name of the judge; the findings of the Court or the verdict of the jury and judgement; the preservation of testimony for perpetual memory by electronic recording, or otherwise; together with any other facts circumstances deemed of importance to the case. A record of all proceedings leading to incarceration will be submitted, when necessary to the Eastern Area Director to be made part of the records of the Eastern Area Office in keeping with 25 U.S.C. Sec. 200*** Unless specifically excepted by this Code, the records of the Court shall be public.

Sect 104. Rules of Court

The Chief Judge may prescribe written rules of court, consistent with the provisions of this Code, including rules establishing the time and place of court sessions. The rules shall be approved by the Tribal Council before coming effective.

Sect 105. Services to Court by tribal or federal employees.

The Court may request and utilize social service, health, education or other professional services of tribal employees as requested, and or federal employees as authorized by the Secretary of the Interior or his authorized representative.

Sect 106. Criminal jurisdiction of the Court.

The Court shall have jurisdiction over all offenses by an Indian committed within the boundaries of the Narragansett Indian Reservation against the law of the Tribe as established by duly enacted ordnances of the Tribal Council.

Sect 107. Civil jurisdiction of the Court.

The Court shall have jurisdiction over any action where one party to the action shall be an Indian, or a corporation or entity owned in whole or in substantial part by an Indian or the Tribe or a corporation or entity chartered by the Tribe; an:

(a) The cause of action arises under the Constitution or laws of the Tribe; or

(b) An Indian party to the action resides on the Narragansett Reservation.

Sect 108. Jurisdiction over persons outside Reservation.

In a case where it otherwise has jurisdiction, the Court may exercise personal jurisdiction over any person who does not reside on the Narragansett Reservation if such person, personally or through an agent:

(a) Transacts any business on the Reservation, or contracts or agrees anywhere to supply goods or services to persons or corporations on the Reservation; or

(b) Commits an act on the Reservation that causes injury.

Sect 109. Jurisdiction over suits commenced by Tribe.

Notwithstanding any other provision of this Code, the

Tribal Court shall have jurisdiction of all civil actions commenced by the Narragansett Tribe, or by any agency or officer thereof expressly authorized to file suit by the Tribal Council.

Sect 110. Tribe immune from suit.

The Tribe shall be immune form suit. Nothing in the Code shall be construed as consent of the Tribe to be sued.

CHAPTER 2. ESTABLISHMENT AND OPERATION OF COURT OF APPEALS

Section 201. Upgrade of Court of Appeals.

This Law hereby upgrades, supercedes and replaces those non-traditional laws relating to the Tribal Court of Appeals.

Section 202 Jurisdiction of Court of Appeals.

The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court. The Court of Appeals shall review de nova all determinations of the Tribal Court on matters of law, but shall not set aside any factual determination of the Tribal Court if such determinations are supported by substantial evidence.

Section 203 Composition of Court of Appeals.

From time to time as the need arises the Tribal Council shall appoint a Chief Judge and two Associate Judges, none of whom shall be Judges of the Tribal Court. Appointment shall be a two-thirds vote, of those members present at a meeting of the Tribal Council at which a quorum is present. The Council shall set the term of each appointment and the composition of each Judge, which shall not be valid unless affirmed and ratified by the Tribal Assembly.

Section 204 Records of Court of Appeals.

The Court of Appeals shall keep a record of all proceedings of the Court, showing the title of the case, the name and addresses of all parties and attorneys, the briefs, the date of any oral agreement, the names of the Judges who

Exhibit C

	NARRAGANSETT INDIAN TRIBAL COURT **Hearing Address: Longhouse, 4425 South County Trail** **Charlestown, RI** **Telephonic Contact through 401-364-1107**	*FOR COURT /TRIBUNAL USE ONLY*
PLAINTIFFS:	**Dean Stanton et al. and Mary S. Brown**	CALL NUMBER: CASE NUMBER: CA-2016-01
DEFENDANTS:	**Bella Noka (TEC chair), Shaena Soares (vice chair), Darlene E. Monroe (secretary), and Ollie Best, Chali Machado, Harold Northup, and Anthony Soares**	

The above named Plaintiffs have petitioned the Court for a *Preliminary Injunction* against the named Defendants. A court ordered *Preliminary Injunction* requires (1) specific evidence clearly and convincing proves that the applicant(s) will suffer irreparable harm during the pendency of the litigation unless a preliminary injunction is issued and (2) that the balance of equities favors the applicant(s) over the party sought to the enjoined. NICCJ at IV-4-401.

Evidence submitted clearly and convincing proves that Plaintiffs meet their burden of production. The Court grants a *Preliminary Injunction*. It has determined that the current circumstances require immediate court intervention because irreparable harm will be suffered if activities by the self-titled TEC members touching Tribal elections are not enjoined and that applicants asserted Tribal interests greatly outweigh the interests of the parties enjoined.

1. To defendants: Bella Noka, Shaena Soares, Darlene E. Monroe, Ollie Best, Chali Machado, Harold Northup and Anthony Soares

2. A court hearing has been set at the time and place indicated below:

   Time: 11:00 AM Location: LONGHOUSE Date: Wednesday, August 17, 2016

3. NOTICE OF DEFAULT JUDGMENT:

   a. To Defendants: Notice of a preliminary injunction against you and a hearing date has been served through your internally appointed secretary. If you fail to appear at the hearing (whether in person or through a representative) or otherwise to defend the case, the Court may enter a default judgment permanently granting the relief sought in the complaint upon such showing of proof by the plaintiffs as the Court deems appropriate.

   b. To Plaintiffs: You have been notified of the hearing time and place, if you fail to appear at the hearing (whether in person or through a representative) or otherwise to prosecute the case, the Court may dismiss the case for failure to prosecute.

   c. The Court may, for good cause shown, set aside entry of a default judgment or dismissal for failure to prosecute.

PRELIMINARY INJUNCTION

THE COURT FINDS

4. a. The defendants are: Bella Noka, Shaena Soares, Darlene E. Monroe, Ollie Best, Chali Machado, Harold Northup and Anthony Soares

   b. The protected person and entity are: Dean Stanton et al., Mary S. Brown and the Narragansett Indian Tribe

5. THE COURT ORDERS that the enjoined persons must not interfere with the protected parties, or their right to assemble with others, by:

   a. Conducting any business, meeting, rally, election or any other gathering on tribal property that concerns election matters or interferes through collective or individual conduct by the enjoined persons with same;

   b. Communicating or publishing any information or entering into any contract in the name of the Narragansett Indian Tribal Election Committee; OR

   c. Using names gathered from the official tribal mailing list to broadcast into or spam tribal email or snail mailboxes as a means to circulate privately authored communications, personal opinions or for any other private or unofficial purpose.

   d. The 2016 general election for tribal council seats is stayed. This PRELIMINARY INJUNCTION remains in effect until the Hearing or the Court receives verified notice the Tribal Government and Tribe have vetted TEC matters, which in turn may require the Court to dissolve or modify the preliminary injunction, as the interests of justice require.

Violations of this ORDER are subject to penalties.

Date: 7/21/2016 Time: 5:20 PM

Judge D. Ravdell

Signature: Tribal Court Judge / Clerk

I. Jurisdiction Statement

At a duly called Tribal Monthly Meeting on August 29, 1992, the Tribe adopted TA 92-082992, which established the UNIFIED JUSTICE CODE that creates the Tribal Court and provides its legal basis under Title 1. This resolution informs that "said Code of Justice is hereby enacted on a provisional basis, subject to further review from the pertinent committees and commissions of the Tribe, but *shall have the full force and effect of law.*" (Emphasis added.)

This resolution also formally identified the Tribe's expectation for its government and sworn duties its council should uphold.

> WHEREAS: The Tribal Assembly recognizes and acknowledges the need of protecting the Narragansett community from unlawful acts, lawlessness and harm, and
>
> WHEREAS: The Tribal Council is sworn to uphold the rights of the Tribal people and community, in the areas of general health, education, welfare, and is also sworn to keep the peace and maintain harmony within the tribe.

Since that time, it is of record that the Tribal Government revised the Code twice through expansion. The first time was December 31, 2000, made effective January 1, 2001. This document reflects a major change in the title, from the UNIFIED JUSTICE CODE to the COMPREHENSIVE CODES OF JUSTICE, as well as other content changes that do affect jurisdiction, and again on August 21, 2001 through notice of added sections.

Tribal Meeting Minutes, previously reviewed for the *2010 Election Decision* released on August 10, 2010, reveal that the Tribe was primed to make a concentrated, fresh start at the beginning of a new century. This fresh start began with the *Tribal Profile of 1998*, which revises the 1989 version, followed by revision of the CODE at the close of 2000, as well as establishment of a revised process to seat Council, via staggered terms under TA-123000-01. The Tribe created the stagger as a means to create stability and continuity within the government; however, it did not apply the stagger process systematically under the terms originally adopted. What results have been obtained bring the Tribe to reconsider its election process today. *See, for example, Tribal Council Memorandum, re Narragansett Indian Tribal Constitution Bylaws* dated November 2, 20002. This document, attached to the *2014 General Election Notice* (November 6, 2014), hereinafter the *2014 Notice*, provides notice and a copy of the Tribe's ratified resolutions between 1997 and 2000, which amend the NIT CONSTITUTION AND BY-LAWS.

Over the years, the court system has received sporadic attention and fewer resources. Between 2002 and 2003, Council brought in a consultant to look at and plan for the court's development. The consultant identified individuals to sit as an advisory board based upon their combined experience and knowledge of the community, federal Indian law, customary practices and traditions. Through consultation and dialogue, the seed of a proposed Tribunal grew, which received positive reception from Council under TC-01-20-05, *Establishment of a Tribunal*, on January 20, 20005 and a seed budget from the Sachem. The Government's resolution states, in part:

> Whereas: The Infrastructure envisioned to establish a formal tribal court system as ratified under the Narragansett Comprehensive Codes of Justice is not in place nor are the necessary resources at hand, and

Whereas: The complaints processed by the tribal police and the internal personal/civil disputes require timely resolution by a systematic adjudicator body.

The Tribunal heard cases from 2005 to 2008. Then active support dried up. A subsequent search for individuals who were willing and able to serve had fruitless result. The Tribe also attempted a search by nominating candidates to sit and had the same result.

Even though the Tribunal was defunct, the Court remained a legally established and separate government-level, adjudicatory body duly, created by the Tribe through customary and constitutional process. In both 2008 and 2010, the Court received complaints from government officials regarding election challenges that included complaint about the election grievance procedures. These procedures, found within the Tribe's *Election Rules and Procedures* (the ERP) rely upon the use and exhaustion of traditional channels and entities for remedy; however, once exhausted and if legal issue remains, the Tribe's statutory law provides the Court with jurisdiction.

The *2010 Election Decision* (August 10, 2010) was the first instance where judicial review concentrated on the Tribe's application of the staggered terms. The *Decision* was critical of the Tribe's implementation of constitutional law, which strayed from using the established procedure to revise or change the election process. Personalities without focused regard for election policy rose to undercut the Court's jurisdiction and Chief Judge around this time. A lesson rising from this approach is tribal law and policies are not self-enforcing.

On June 28, 2014, by Council resolve, the Judge resumed hearing argument about the election matters' legal aspects and applying tribal law and policy to them, politically unfettered by further intrusion of personalities. The CODE at Title 1 provides Council with the authority to appointment a Special Judge in the event that the Chief Judge is unable for any reason to hear a case. Consequently, arguing that the judge's term has expired as a means for removal is irrelevant and immaterial when Council, by resolve, made a specific judicial appointment.

That Defendants reference a vote of no confidence made by the tribal assembly, which also does not affect the legal standing of a duly appointed judge, has no merit; because, a judge's removal requires specific process that includes adherence to an explicit review standard and statutory process. See the NICCJ at Title 1-3-305, which establishes no right or authority in law to displace the Court or remove a judge summarily. That discussion took place in a special or assembly meeting does not change the legal requirements the CODE provides to protect the Court and sitting judges from personalities or personal displeasure that can result from a judge fulfilling the obligations of Office.

II. Summary of Facts and Procedural History

Issues with the election process fully bloomed before the Tribe in 2014. Members of the Tribal Government and Tribe submitted complaints to the Court. On November 6, 2014, the Court provided notice of submitted complaints about the 2014 election in the *2014 Election Notice.* Allegations challenged constitutional and rule interpretations to support decisions made, subsequent actions taken, as well as lines of authority and

responsibility. Plaintiffs also complained about the disregard of protocols and generally known understandings regarding customary practices embedded in tribal law. They further alleged that these omissions placed hurdles around direct input from the Tribe. Specific, reoccurring challenges have concerned the law and policy relied upon by the Tribal Election Committee (the TEC) to conduct the 2014 election. These issues range across the various methods that committee members have used to conduct the Tribe's election business and itself, which plaintiffs submit will bring irreparable harm if allowed to continue unabated and that the balance of equities favors the Tribe.

The *2014 Election Notice* stated, in part,

> The fact that there is deadlock over the legitimacy of the election within the tribal government deserves further examination for its cause. Multiple opinions and explanations arise to validate challenged rules and ad hoc actions, which reveal that the rules still do not uniformly instruct, important issues remain unresolved, and designated responsibilities and accountabilities [are] misconstrued. Bottom line, the processes and procedures used to conduct the 2014 election and seat Council do not meet what the Tribe and candidates required from the start—clarity and the application of standing tribal law.

The Tribe still has not had this information need met. Under Next Steps in the *Notice*, at page 6, the Court further provided:

> Finding a path to resolution has become a contest of political power and personal will. The main issue is not should the election be overturned, should new council members step down, should the election process be corrected now or later or should the TEC oversee deliberations by the Tribe.

> Tribal law and policy already provides the answers to these questions by defining rights and responsibilities. Law and policy can further serve to arbitrate.

In December 2014, complaint arose through traditional channels against the TEC Chair for her disrespectful conduct at the December 2014 Special Meeting facilitated by the TEC. At the January end of month meeting, the Chair was involved in another incident that involved violent conduct, which in turn spurred additional violent acts by members of the challenged 2014 council-elect. Without further detailing, the cumulative record provides example that the Tribe's complaints against the conduct of TEC members and their application of law and policy have been under continuing legal challenge—without definitive and final tribal resolve—for some time.

On July 8, 2016, specific request for a Preliminary Injunction came through the Tribal Police, who received complaints on July 7, and 8, 2016 for submission to the court from Dean Stanton et al. and Mary Brown respectively. Since the subject matter and relief sought overlaps in the complaints, the Court consolidated the plaintiffs' petitions.

Prior to seeking injunction, Plaintiffs sought and received a TRO without notice. *See Petition and Grant to place a Temporary Restraining Order without Notice to Restrict the TEC from further interference with the Reserved Right of the Tribe to determine how it shall seat Council in the Next General Election for Tribal Council Seats* (June 30, 2016), hereinafter the TRO. The Court granted the TRO because the presented evidence supported that the TEC was acting beyond its lawful authority by dictating to the Tribe what the election process and council terms shall be when a motion for tribal deliberation about this matter remains on the table. In addition, the presented evidence verified that TEC committee members ignore preparatory election requirements under the ERP. These

requirements relate to the committee's composition and seating as well as ensuring that the ERP reflects the Tribe's determinations regarding the election process and procedural updates or corrections for the 2016 election.

The Court's TRO findings stated, "[T]hese actions constitute imminent harm to the Plaintiffs and Tribe because the TEC undercuts a customary, reserved right. Furthermore, these actions set obstacles between the government and Tribe and interferes with the creation of consensus about how to move the election process forward in an orderly, legitimate and transparent manner." The TRO restrained the Defendants from publishing or pursuing any activities to promote or conduct a general election for tribal council seats on July 30, 2016.

Plaintiffs now seek a preliminary injunction against Defendants and allege that these individuals persist in advancing purported authority to conduct a general election. As evidence of this intent, Plaintiffs submitted copies of additional communications received to demonstrate Defendants continuing activities and statements of intended action(s). Plaintiffs meet their burden of production within the cited time constraints and considerations. The Court, through instruction in the TRO, provided a communication channel for document submission that specified delivery through the Tribal Police.

The Court provides judicial notice that Plaintiffs attended and adhered to legal requirements and that the Defendants continued actions under purported right to conduct a general election and to determine the Tribe's election process, date and number of open seats. Broadcasted communications also continue to assert the right of Defendants to defy a court Order with claim that the Court and Judge lack constitutional underpinning. This claim overlooks the interconnections and structure of

tribal law. In addition, there has been claim federal law demands adherence to Defendants' election plan. *See TRO* at pp. 8-9 (discussing the irrelevancy of citation to 25 CFR 81.8 because the Tribe does not hold secretarial elections and that reliance on CFR Part 81 requires reading the statute's purpose, which is found at 25 CFR 81.2).

While making these various arguments and accepting no contrary response, Defendants attempt the assumption of authority to make and implement tribal-wide, governmental level decisions about tribal law, policy, process and procedures. Under this ill-advised and illegal assertion, they continue to attempt action that the Tribe protests through germane, legal argumentation. The Court has not received any documentation from Defendants that uses the Court communication channel specified and directly responds to legal challenges made by Plaintiffs.

III. Analysis

A. Preliminary Injunctions

A preliminary injunction restrains activities of a defendant until the case can be determined on the merits. Plaintiffs continue to dispute Defendants' claim regarding automatous authority a TEC to predetermine the election process, procedures, date rand ignore standing obligations and rules within the ERP. Plaintiffs seek further restraint on Defendants from any more publication about or action geared towards conducting a general election.

As obliged per notice in the TRO, Plaintiffs submitted formal applications through the Tribal Police for a preliminary injunction within 10 days' time of the TRO

and provided two days' notice to the adverse party of their intent to pursue additional remedy pursuant to the NICCJ, Title IV-4-402. Tribal Police delivered a verified copy of the complaints received within the deadline to Darlene Monroe, acting TEC secretary, at 10:30 AM on Friday July 8, 2016.

Since then, Plaintiffs submit that Defendants have continued to broadcast publications to the tribal community indicating intent to hold an election, seeking the involvement or attention of federal agents, while ignoring their own obligation to obey tribal law and arguing against Plaintiffs' right to seek remedies provided under tribal law. The Court provides judicial notice that it too has been the recipient of various emails from the secretary, who continues broadcast publishing and assertion that the defendants must conduct an election despite ample evidence to the contrary.

B. Standard of Review

> No preliminary injunction shall be issued (1) absent clear and convincing proof by specific evidence that the applicant will suffer irreparable harm during the pendency of the litigation unless a preliminary injunction is issued and (2) that the balance of equities favors the applicant over the party sought to the enjoined.

Defendants' announcement of a general election, its date and the process to be used was not released under the terms of the Constitution at Article I, §I. It is of record that a partial budget was released and that Defendants rely on this fact to promote authority to *conduct* the election. It does not; because, an election committee has specific obligations and preparatory steps that it must complete before conducting an election. Defendants have not met this threshold and the fact remains that they are obligated to provide the legal basis for assuming autonomous authority over the Tribe and Tribal

Government as well as answer the formal complaints and challenges about their actions and conduct.

(1) Under the first element, email communication from the acting secretary—sent before, during and since the TRO—provide evidence that neither the Chair nor other defendants oppose the conduct that shows intent to allow continued frustration and interference with any challenge to holding their election. Assigning ownership of the purported election is purposeful because to date, no legal argument—despite incessant communications—supports the right of any TEC to determine <u>independently</u>:

- What conduct the Tribe should expect and must accept when committee members engage in official business on behalf of the Tribe,
- How and when to fill expired TEC seats,
- When the next election should and shall take place,
- What process the Tribe will use to determine how a council is seated in the next general election, and
- The number of seats opened.

Arguments, sowed within the community, provide no legal or persuasive basis to justify the actions and conduct of the Defendants. Argumentation relies on appeals to emotion, personal attack buttressed by illogical reasoning to shift focus and overlooking change. For example, the flyer appeals to emotion by rallying the Tribe to assert its right to get out and vote. Yet, Defendants ignore that very right by interfering with the Tribe's right to vote on the fundamental issues it has previously raised about the election process and procedures. No broadcasted communication cogently explains

why the Tribe must forfeit this right and begin with the predetermined choices advanced by the Defendants.

Argumentation seeks to inflame and delay dialogue through use of institutional and personal attack. In addition to not addressing Plaintiffs' pointed issues, the content of the broadcasted communications contain randomly introduced, wide-ranging criticisms of others, which does not distract from Defendants failure to fulfill the designated obligations and responsibilities of a TEC. More importantly, acts and actions undertaken obstruct the Tribe from creating a pathway to resolve. By introducing subjects irrelevant to *the Tribe's resolution of the matter at hand,* Defendants use conduct and methods they accuse or infer in others.

A reoccurring argument advances two wrongs make a right. First, this approach entangles then compresses separate issues. Since 2014, the Tribe has indicated repeatedly that it wants to examine *the election process* and indicated dissatisfied with the conduct and decisions of elected, public officials.

One issue involves the application of tribal law regarding election protocols and customary practices. Protocols and enduring customary practices reduce to expected standards of public behavior, which includes the deportment of public officials, which includes committee members, while holding office as well as each individual's responsibility to be responsible for their own conduct in assembly. A major protocol under deportment of public officials is to honor (respect) the reserved right of the Tribe to assemble and discuss its internal matters without threat of violence. Once assembled, whether for social interaction or to conduct business, there is an equal expectation about the behavior of community member participants. It does not serve the collective rights of the Tribe when public behaviors by tribal officials or individuals denigrates. The use

or threat of violence now becomes commonplace, exemplified by hostile acrimonious conduct during assemblies. The use of "fighting words," physical attacks and disregard for rules of law and public deportment is a non-productive way to conduct assembly business or an election. TEC members do not stand outside or above these behaviors.

Another attempted shield is using 'Others' as in other's misuse or abuse of tribal resources and property. Here the public release of business confidential documents through the TEC opens discussion about public officials' adherence to (1) the confidentially of internal, business matters and (2) the protocols and authority needed for release. Moreover, there is gathering and distribution of public, legal documents with interpretations are misleads the community or is outright incorrect.

Reiterating example of the latter, faulty reliance on a federal statute, based upon an incorrect reading of the statute's purpose, to contend that the federal government demands the Tribe follow Defendants leads into a deeper election quagmire. This argument demonstrates shallow reading without attention to context and content or an understanding of the legal concepts and policy found within federal Indian law or vetted research findings, which validate the superior results obtained when a tribe resolves political, internal tribal matters through judicious use of its own law, policy and customary practices. Ensuring that the interconnections between these sources ring true for the future well-being of Tribe is no easy task; yet, this task belongs to the contemporary Tribe. While it has historically designated and distributed authority and responsibility to handle the roles and tasks of running the government, the Tribe has not released the right to assemble peaceably or determine how to seat its government.

The Tribal Government and Tribe stand at a crossroads. Today's focus does not omit how we got here nor dismiss missteps that may yet need correction or procedural

resolve. Nonetheless, the intent remains to produce consistency and stability within the tribal government by setting a consensual course for fair and efficient resolution of election issues. Considering the number of people involved and the tribal-wide impact, there is a need for prioritization, methodical analysis and deliberation to resolve outstanding issues.

The Defendants' actions do not contribute to resolution because they act without legal standing, authority and tribal consent. Yet, broadcasted publications skip over these facts, which ignore the standing law, policy and issues on the election discussion table. Plaintiffs accurately distinguish that Defendants' conduct and actions do not represent the letter or spirit of Narragansett tribal law. By its response and repeated requests following customary practices, the Tribe has made it plain that it wishes to have a forum dedicated to discussion and resolve of named election issues. Defendants do not contribute to resolve. By not correcting internal abuse of resources and position or renouncing this conduct, the individual defendants associate themselves as whole with these behaviors and demonstrate an inability to correct themselves.

The ERP, under Obligations at Article II§1(B)(5) states "In the event a member of the TEC becomes rude, vulgar, combative and/or is the cause of unavoidable conflict, he or she can be removed by a 2/3 vote of the committee." This obligation to control itself is not limited to the day of an election. The list covers general duties like TEC meeting attendance and adherence to privileged business confidentially.

For example, there is nothing in the ERP that specifically designates the TEC shall facilitate special meetings for ERP review. This is a task that the Tribe has either requested or allowed over the last few elections. Consequently, proper deportment of the committee and its members under §1(B)(5) broadens in fulfillment of expanded

tasks. Yet, neither the chairs nor individuals provide example that demonstrates fidelity to written law and rules, customary practices or protocol. The internal secretary uses the official mailing list as a personal soapbox to spam email mailboxes with incessant and derogatory tirades that lack cogent legal argumentation and analysis. Defendant committee members are well aware that the Chair's past conduct has been combative as well as harmful to tribal members and yet the members, as a committee, have ignored its affirmative obligation to disapprove this type of conduct and done nothing. In addition, public announcement for a purported election rally was made on the same date reserved for a special meeting. This knowingly set the stage for unavoidable conflict between tribal members and the Defendants and their election candidates who walk, whether naïvely or defiantly, into a cycle of conflict and lawlessness perpetuated by defendants.

(2) Since the 2014 election, tribal members have sought to convene a forum that would allow deliberation about outstanding issues within their election process. Out of the entities and opinions that previously sought to command, persuade against, redirect or otherwise subvert the right of the Tribe to reject the methods used to conduct the election and its grievance procedures, and consequent invalidated results, only one—the Defendants acting as a self-titled TEC—remains discernably obstructionist.

First, evidence shows that Defendants have used tribal resources and public office as a personal platform to effect outcomes that show no redeeming benefit for the Tribe. They also allow one person to seek and then broadcast non-sequential, old news, dated issues and irrelevant facts and argumentation without sanctioned purpose or legal standing. No authority and individual right allows a TEC or any of its members the freedom to take precedence over other community members—and by implication

tribal-wide reserved—rights or that the official mailing list may be used to bombard promotion of personal opinion. This conduct also presumes that a purported individual right asserted by any one tribal member supersedes the right of other community members to entertain and participate in dialogue about tribal-wide issues. There is misassumption of a personal right to override other community member's voices, and opportunity to listen to other points of view, as a means to prevent building any consensus that does not follow the direction and steps charted by Defendants about election issues.

Second, recent communications take aim to foreclose the tribal community's access to the Court by misrepresenting its legal foundation and jurisdiction in a multi-pronged attempt to dismantle the governmental infrastructure that (1) the Tribe has established under constitutional process and (2) the government rises to protect. These communications express raw personal desire through insistence on continuing acts that demonstrate intent to waylay and prevent others, who do not embrace this methodology or intent, from seeking relief in the Tribal Court. Council's resolve removed all political question of the Court's jurisdiction over the election. Reviving or manipulating past politics, which are off the table, in an attempt to obstruct the Tribe's right to use an institution it has created, offers no defense, rationale or mitigating circumstance when this stance unabashedly seeks to perpetuate unresolvable conflict. This begs the question: if one stands apart from the Tribe and disregards its well-being and future, what is the purpose and underlying intent?

Third, the broadcasted communications attempt to obstruct customary pathways and publically embarrass the Tribe by shinning a strobe light on known past, narrowly focused and poor decision-making. In the meantime, Defendants' conduct continues to obstruct tribal resolve, extends to misrepresentation or release of internal

matters-at-will to federal agencies, and enticing tribal members to partake in activities that offer no individual honor or merit or benefit to the tribal community; because, these actions prolong confusion, waste and ill will within the Tribe.

IV. Findings and Procedural Next Steps

Many of the arguments presented to the community in personal communications using the official mailing lists relies on justifying the Defendants' conduct challenges and illegal action by pointing to or inferring that others are guilty of other wrongs. This is Red Herring reasoning, which does not constitute a cogent argument. The reasoning is not persuasive because it attempts to shift the Defendants' burden to answer for their own actions by creation of a slippery slope that assumes there is always some another wrong to point to and that it can be used as defense. If this were true, anything could be justified. Not only is this assertion legally unsustainable, the communications broadcasted contain non-sequential fact development linked to argument that is immaterial and contradictory. It does not account for the decisions and the long the steps that Defendants make. Argumentation self-centers on political and social degradation of the Tribe through a piecemeal attempt to dismantle governmental structures and entities the Tribe has legally established that other tribal members, if not defendants, wish to maintain and correct, if necessary, but not destroy.

Under tribal law, the Court is duty-bound to respond to Plaintiffs' plea for Extraordinary Writ. Addressing this matter under the standing law, policy, procedures and traditional practices demonstrates a key attribute of sovereignty and self-determination, the right to create tribal law and subsequent obligation to live by it.

Moreover, allowing the Tribe to deliberate about these matters in turn without further committee or ancillary interference, creates pathways to understanding and knowing (a) as much as possible about the election process's legal impediments, (b) the implications of options for corrective change and (c) any foreseeable consequences. All of which will go a long way in avoiding similar debacle in the future.

To that end, the approach and resolve asserted by Defendants does not lead the Tribe to consensual or peaceful resolution. Defendants' resolve promotes more conflict because they self-select the same election process, procedures and conduct that have been under widening and active legal challenge since 2014. Their approach uses aggressive behaviors, which have transgressed into physical violence, the use of intimidation and hogging the floor with singular focus to push for right-of-way or crude confrontations. These methods prevent focused deliberation when the Tribe has been in assembly and filled the tribal community's email and snail mailboxes with innuendo, incorrect or misleading information and reasoning. These acts and methods are unconscionable behaviors.

Holding: The Court finds the evidence presented shows clear and convincing proof that the applicants will suffer irreparable harm during the pendency of the litigation. Defendants, as a group or as individuals, have used and continue to use aggressive or violent conduct that serves no redeeming or sanctioned purpose and undercuts basic and customary reserved rights of the Plaintiffs. The balance of equities favors Plaintiffs over the individuals enjoined because the Defendants' communications and actions derail forthright and legal deliberation about tribal-wide issues and fails to provide sincere, constructive contribution towards resolution of election issues.

The Court stays the general Election until the Tribe has examined and determined the election process, set a date and resolved any other outstanding election issues, including those associated with the TEC. Actions taken by Defendants are not, cannot and will not be legal until the committee sits properly under tribal law, process and approval. The Court prohibits Defendants from any further action in election business. This prohibition includes:

> Conducting any business, meeting, rally, election or any other gathering on tribal property that concerns election matters or interferes via collective or individual conduct by the enjoined persons with same;
>
> Communicating or publishing any information or entering into any contract in the name of the Narragansett Indian Tribal Election Committee; OR
>
> Using names gathered from the official tribal mailing list to broadcast into or spam tribal email or snail mailboxes as a means to circulate privately authored communications, personal opinions or for any other private or unofficial purpose.

All actions taken or attempted by Defendants are void.

Process Due: At noted on the Summons, the Court sets a hearing date for 11:00 AM on Wednesday, August 17, 2016 at the Longhouse. Should any intervening events take place before this date, where the government and Tribe are able to meet and begin addressing next steps and election matters directly, without further obstructionist behaviors or conduct, then the Court will dissolve or modify this preliminary injunction, as the interests of justice require.

If not, then at the hearing, the Court will ascertain

1. Whether defendants have any defenses to claim or wish to present any counterclaim against the plaintiffs or cross-claim against any other party or person concerning the same occurrences in the complaints *that the Court has not already set aside as irrelevant or immaterial;*

2. Whether any party wishes to present evidence to the Court concerning the facts of the challenged TEC's actions, publications and assertions;

3. Whether the interests of justice require any party to answer written interrogatories, make or answer requests for admissions, produce any documents or other evidence, or otherwise engage in pre-trial discovery considered proper by the Judge;

4. Whether some or all of the issues in dispute can be settled without a formal adjudication.

IT IS SO ORDERED.

Judge D'Daddio

July 21, 2016

Exhibit D

TEC Permanent Injunction: Memorandum and Decision

Proceedings Below

For nearly a year, Defendants in this matter have, among other actions, represented themselves as constituting the Tribal Election Committee, when they are not the Tribal Election Committee. On June 30, 2016, the Tribal Court granted a *Temporary Restraining Order without Notice* that restricted the named Defendants from "any further action or communications in any form or use of any governmental resources to represent official action on behalf of the Tribal Government or Tribe." Thereafter, Plaintiffs petitioned for a preliminary injunction, using the procedure and standards required under the NARRAGANSETT INDIAN COMPREHENSIVE CODES OF JUSTICE [the NICCJ, Title IV-4-402, Preliminary Injunctions, and within the mandated time frame submitted their petition, which included two days' notice to Defendants.

Particularly confusing has been Defendants refusal to accept that they do have a right in the Tribal Court to independently resolve foundational election challenges and determine critical points of information and law.

At the hearing held on August 17, 2016, Defendant Darlene Monroe plead a right to silence under the 5th Amendment and repeatedly protested continuance of the hearing until she was allowed representation by counsel under the INDIAN CIVIL RIGHTS

ACT [ICRA]. This posturing impaired presentation of plaintiffs' case and resolution of important issues besieging the Tribe.

Notice of Service

Ms. Monroe also complained that the Court had not accepted a document submitted via registered mail. Ms. Monroe was reminded that the T*emporary Restraining Order without Notice* contained specific instruction for document submission to the Court. Ms. Monroe denied receipt of that order. Because the responding Officer was not present at the hearing, service of the order required verification before continuance. The Court adjourned the hearing. Thereafter Tribal Police records were obtained, which documented that, on July 1, 2016, Tribal Police Chief Monroe provided personal service of the TRO to Darlene Monroe, individually and as secretary for the election committee. In addition, Officer Hazard submitted a Report detailing service of the Preliminary Injunction to Bella Noka in the parking of the Four Winds on July 23, 2016.

Verification of personal service by the Tribal Police closes further dispute of notice of the Court's order and the method stated for submitting filings to the Tribal Court.

Right to Counsel in a civil matter under the Indian Civil Rights Act

The Court denies Defendants' demand for personal representation by counsel before the Court as a condition of moving this proceeding forward. ICRA does not provide a right to halt or prolong court proceedings in a civil proceeding so a party may obtain representation by legal counsel before a court. Ms. Monroe has had many

opportunities to seek advice concerning previous submissions and communications broadcasted throughout the Tribe. Ms. Monroe has never informed the Court that she has engaged counsel to represent her in this matter.

DISCUSSION

Prima facie case established for a Permanent Injunction

Plaintiffs have established success on the merits and presented a prima facie case for a Permanent Injunction. The enjoined Defendants were given a final opportunity, detailed in the Court's *Show Cause Order* delivered by personal service to Darlene Monroe, the acting TEC Secretary, to submit with 15 days any relevant documentation or additional matters showing cause why a final injunction should not be issued.

Defendants failed to submit any additional documentation or respond to the original questions posed regarding the legal authority of the 2014 Tribal Election Committee to hold an election in 2016. Consequently, Defendants have failed to demonstrate any legal basis under tribal law that provides any authority to conduct a general election in 2016 or displace the Tribe's right to determine the election process, the voting date and number of open seats in the next Tribal Council election.

There is no genuine, factual issue in dispute. The self-proclaimed election committee does not have an autonomous right or responsibility to determine how the Tribe shall seat an executive board. Despite multitudinous protestations and means, Defendants have yet to provide an argument that demonstrates or persuades otherwise. It is of record that they have employed disruptive behaviors during tribal assemblies

and gatherings, used undisclosed means to decide voter and candidate eligibility, made appointments, and held an independent election to seat a faux executive board. Then thereafter, they began a campaign to claim legitimacy by dubious citations to inapplicable tribal and federal law that were sent to federal agents. At the same time, they created derogatory and nuisance stories to besmear the Tribe in the press.

The purported 2016 election is null and void for noncompliance with and misrepresentation of tribal law and policy.

Non-compliance with Tribal Law

In a Letter to Bruce Maytubby, BIA-Eastern Regional Director dated August 17, 2016, the election committee claimed legal compliance based upon "TEC rules and regulation with 25 CFR USC 81.8, Constitution and By-Laws staggered terms, 1965 Voting Rights Act and in conjunction with the Rhode Island State Board of Canvassers."

On its face, this declaration is specious. The failure to adhere to tribal law and the continuation of an unauthorized election deepens the harm to Tribe because the committee's faulty legal reliance provides no basis for recognition of the body it seated. This body now purports to act as a legitimate council and attempts to conduct business on behalf of the Tribe. The individuals who participated in that unauthorized election and now claim executive authority over the Tribe are Domingo Talldog Monroe, Adam Jennings, Tammy Monroe, Chandra Machado, Jazmin Jones, Randy Noka, Wanda Hopkins, and Chastity Machado.

Misstatement / Misrepresentation of Tribal Law and Policy

The legal basis of the election committee's certification to the BIA demonstrates why assertions of "duly elected" by the members of election committee and faux council carry no weight under tribal law. It also explains why these individuals do not receive the acceptance and recognition from the Tribe that they seek.

First, the election committee conducted its 2016 election under the federal standard set for secretarial elections. A *Tribal Court Community Briefing and Notice* titled "No Assembly Meeting October 1, 2016" informed that the Narragansett do not conduct Secretarial elections and that the committee was in error. Tribal law governs and determines Narragansett elections. The TEC's reliance on "25 USC 81.8" does not determine anything about the NARRAGANSETT INDIAN CONSTITUTION AND BY-LAWS or its amendments. This citation to the UNITED STATES CODE refers to 25 C.F.R. Part 81, which relates to tribes that hold secretarial elections. This statute does not provide a federal foundation that supports the asserted authority of the election committee. Moreover, the TEC's reliance on the U.S CONSTITUTION is misplaced and demonstrates a lack of understanding about the political standing of Tribes, which are pre-constitutional as well as extra-constitutional and a lack of knowledge of tribal election law. Citation to the 15th Amendment[1], Bill of Rights (first and fifth amendments) are immaterial and irrelevant assertions to rationalize the decisions made or the actions undertaken

[1] This Amendment states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Narragansett tribal elections are for tribal members. Even so, out of the multitude of complaints regarding the 2014 or the 2016 election process, no petition raises complaint that race, color or previous condition of servitude factored into denying or abridging a tribal member's right to vote. Nor are these elements found within the INDIAN CIVIL RIGHTS ACT.

regarding the established and customary procedures that the TEC is expected to use when conducting an election.

In protest, Darlene Monroe has broadcasted publications that claim violations of the Narragansett Indian Constitution, due process, equal protection under the law, civil rights and liberties, defamation of character, right to vote, discrimination and infringement of tribal rights. Their actions with those of their council constitute a splinter group acting outside of tribal law and without recognition that their actions interfere with the rights and privileges of the Tribe; for example, the reserved right of the Tribe to determine how it wishes to seat its next council. The Tribe has not had the opportunity to finish the voting process to fill vacant TEC seats, determine whether or how to maintain the stagger, or receive sufficient information to understand why the process did provide the intended results. By defendants' actions, the basic right to participate in and have a voice in the election process has been denied to the tribal community. Moreover, abridgement of tribal assemblies' civil liberties has taken place repeatedly because defendants' disruptive tactics have not allowed orderly meetings or the opportunity to speak and participate without interruption, harassment or threat of harm. Defendants' conduct has curtailed the ability of the Assembly to work out problems through traditional consensus and to conduct tribal business.

Establishment of Tribal Codified Law and the Tribal Court

Jurisdiction of the Tribal Court

On June 28, 2014, the Tribal Council provided notice to the Court that it had given jurisdiction over issues arising from the 2014 Council Election to the Tribal Court and the Tribal Court accepted. Nonetheless, the Defendants have dismissed the Court's

application of tribal law and policy through innuendo, rhetoric and reliance on political maneuvers devoid of standing law.

To date, neither the 2014 TEC and its officers or the members of their 2016 executive board have provided any legal or policy arguments that support their actions. There is repeated reference and reliance on a vote of no confidence made by the tribal assembly about the Tribal Court in 2010, which coincides with the Court's criticism of the staggered terms implementation and its oversight. This political statement, by an assembly gathering, does not affect the legal standing of a duly appointed judge because a judge's removal has due process requirements, which include adherence to explicit procedures and standard of review under the NICCJ. There is no right or authority in law or policy to remove the Court or a judge summarily. That discussions took place in special or assembly meetings does not change legal requirements that the CODE provides to protect the Court and sitting judges from political displeasure that might result from a judge fulfilling the obligations of the Office.

The Law and Order Code

Bella Noka and Darlene Monroe have presented argument that citation to the 2000 promulgation of the NICCJ defeats the Court's jurisdiction. In affidavits before the federal court, they have stated that

> The constitution of the Tribe makes no provision for a tribal court and it has never been amended to create such a court. ... Any action the Council may have taken to adopt [the NICCJ] was unauthorized and ineffective. Only the assembled members of the Tribe could have enacted such a sweeping legislative initiative, one that purported for the first time to establish a tribal court, enact a comprehensive set of criminal offenses, procedures, and penalties, and establish rules for civil procedure, among other things.

> In short, the tribal court could only have been created by the tribal constitution, an amendment to that constitution, or the vote of the tribal assembly. Since none of those steps was taken here, the Narragansett tribal court was never property constituted.

Noka and Monroe's protestations undercut their own self-assertions of familiarity with the Tribe and interpretations of tribal and federal law. Citation to a legal statute requires reference to the most recent enactment. The establishment of a tribal court does not require constitutional enactment. Historically, many tribes adopted constitutions that use the unique style of constitutional writing and characteristics of IRA-styled constitutions from the 1930s.

Moreover, their statement omits the legislative history of the Code. The Court has provided the legislative history of the Code and now reiterates that a duly called Tribal Monthly Meeting on August 29, 1992, the Tribe adopted TA 92-082992, which established the UNIFIED JUSTICE CODE that creates the Tribal Court and provides its legal basis under Title 1. This resolution informs that "said Code of Justice is hereby enacted on a provisional basis, subject to further review from the pertinent committees and commissions of the Tribe, but shall have the full force and effect of law."

This resolution also formally identified the Tribe's expectation for its government and sworn duties its council should uphold.

> WHEREAS: The Tribal Assembly recognizes and acknowledges the need of protecting the Narragansett community from unlawful acts, lawlessness and harm, and
>
> WHEREAS: The Tribal Council is sworn to uphold the rights of the Tribal people and community, in the areas of general health, education, welfare, and is also sworn to keep the peace and maintain harmony within the tribe.

Since that time, it is of record that the Tribal Government revised the Code twice through expansion. The first time was December 31, 2000, made effective January 1, 2001. This document reflects a change in the title, from the Unified Justice Code to the Comprehensive Codes of Justice, as well as other content changes that do not affect the court's jurisdiction. The second time, on August 21, 2001, the Code was revised by notice of added sections as reported by Randy Noka.

Ill Will

In particular, the former 2014 TEC Chair and Secretary have perpetuated egregious harm by manifesting ill will throughout the Tribe. Both individuals have acted and encouraged others to insert themselves into tribal affairs far beyond the scope of their standing or demonstrated understanding. For example, their aforementioned affidavits into a federal civil matter that concerns a contract dispute, which the federal District Court had referred to the Tribal Court under the tribal exhaustion doctrine per National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

Falsely empowered by Noka and Monroe's actions, the faux 2016 Council has attempted to assert authority, create other legal disputes that drain tribal resources, and divert attention and focus from the issues and challenges that await the Tribe within its election process. Most recently, this Court has been informed that this group misrepresented itself to order checks from the Tribe's bank account and changed the locks to the Administration Building to gain entrance in the building under a false theory of legitimate right.

Tribal Election Issues

The election process, which has been a recurring issue before the Court since 2010, has tested understandings and the application of tribal election law and policy. These include–though not limited to–matters associated with the implementation of a constitutional process and its policy dictates, conflicting interpretations of election rules and procedures, separation of powers issues, and conflict management styles and skills. However, recent challenges have brought tradition protocols and customary practices to the forefront.

Decisive resolution to conduct the next general election for tribal council seats remains a political question. However, the steps to begin that process are set as a matter of law, which still requires a long awaited and fundamental tribal discussion ending with a tribal-wide vote if the process is changed.

In sum, the 2014 Election inherited and created problems. First, it inherited a faulty application of a major, constitution-based process with mandated procedures for amendment. Knowledge about this aspect of the election process initially received limited attention from the Tribe. Next, interpretations of the Tribe's election grievance regulations, and the process used to announce and transition the 2014 candidates-elect into council seats, received challenge because standing election protocols and customary practices were not given recognition. These grievances created disputes, which rose through adjudicatory and assembly challenges about the validity of the 2014 Election.

Earnest conservations began within the tribal community about the election process and its procedures. For a while, some tribal members regularly met to discuss rules of conduct for the assembly and government officials. While in assembly, the Tribe accepted a motion to review the election process, which is currently set as staggered terms.

Throughout this process, issues brought before the Tribal Court received review and determinations. *See* Narragansett Indian Tribal Court, *2014 General Election Notice* (11/06/2014). *See also*, *Analysis and Decision for Governmental Resolve of the 2014 Election* (01/29/2016). In addition, the Tribal Court specifically addressed the TEC's standing obligations under election rules and procedures as well as the special roles of TEC officers. *Temporary Restraining Order without Notice* (6/30/2016) (requesting formal submission of means to prevent further interference with the reserved right of the Tribe to determine how it shall seat Council in the next general election).

The Tribe's issues with the TEC concern the various methods used to conduct election business and itself. Spikes of confrontations regarding committee and personal conduct have included acts of violence and repeated demonstrations of ill-tempered interactions that have disrupted tribal forums and prevented civil dialogue. These hostile tactics have served to commandeer tribal forums in an attempt to impose decisions about issues requiring tribal-wide deliberation. As a result, the Tribe has been unable to dialogue or undertake deliberative analysis about the authentic, designated seating method and its objectives or the implementation problem(s) that the policy behind the Staggered Terms was supposed to resolve.

Tribal law, policy, protocols and customary practices are interconnected and tribal elections depend upon each one of these elements. When one element is changed or not fully implemented it can and does affect others. Over time, gaps created and left uncorrected or revisions not reviewed for consistency have created a hodge-podge that spoils a unified whole.

Politics without policy has resulted in trampling the 2014 and 2016 Plaintiffs' and general tribal community members' right to participate in a sought and mandated, tribal-wide decision-making process. This exclusion has been an ongoing process travelling deeper into the community with each election since 2010. Tribal values

embed within this debacle because discussions about law and policy inevitably put social norms and values on the table. Norms and values affect implementation of law and policy, which generate processes and procedures that become the pathways to achieve policy goals and the steps to apply and enforce laws. *See, 2014 Election Decision Summary: the 2016 Focus* (2/22/2016) (discussing the responsibility of the Interim Council and the Tribe to move election deliberations forward and raising consideration of values, "Values direct choices and choices have consequence").

Conclusion

The Defendants' approach hobbles the Tribe because they seek a measure that is not theirs to take for themselves. A reading of the defendants' arguments presented in broadcasted communications shows a manipulation of the Tribe's political infrastructure without positive regard for its structure and legal foundation, or the reality of maintaining a recognizable site of government. Defendants have attacked the Tribe, without proposing a cogent legal argument or providing a consensual alternative that is free of the impediments about which they complain and further increase.

In tribal assemblies, defendants began by chanting, hollering, monopolizing the floor, and interrupting others when speaking. Thereafter, they sought to legitimize their election to fill council seats, which took place without full governmental sanction or the Tribe's consent. Their election took place in a local bar located off the reservation. It used election rules and procedures that the Tribe had not accepted or validated for use. It created records of a purported legitimate, tribal-wide election with a voter turnout of less than 60 people. The faction led by Defendants has yet to legitimize the power they are have attempted to assert (1) over the standing laws of the

Tribe and (2) the decision-making authority that *the Tribe reserves* to determine how to seat its governing body.

During the negotiations to seat the interim council, members of the 2014 Council-elect rejected opportunities offered to find common ground and by their own actions removed themselves from participating in that body. They chose, instead, to splinter themselves off and then ignite a sensationalist campaign, through broadcasted publications, social media and the press, to demand compliance with their will.

HOLDING

Without a legal foundation, all actions taken by the 2014 TEC and its council members are null and void. The record provides evidence that their actions fall outside of and without merit under tribal law and policy. This evidence now includes their attempt to impeachment the Chief Sachem at an unauthorized gathering in the parking lot of the Four Winds, to embroil the Tribe in federal court action without their purported legal standing, to access tribal funds by misrepresentation to order tribal checks and their trespass on tribal property. The professed 2016 TEC and its elected body have no legal or vested right to autonomously speak for or act on behalf of the Tribe.

Defendants are hereby permanently enjoined from any further action or communications in any form, or use of any governmental resources, to represent themselves, singly or jointly, directly or indirectly, as conducting official or lawful action on behalf of the Narragansett Tribal Government or the Narragansett Tribe.

THE COURT ORDERS that the enjoined persons must not interfere with the protected parties, their right to peacefully assemble or to conduct and maintain the daily operations of the Tribe, by:

1. **Conducting any business, meeting, rally, election or any other gathering on tribal property that concerns election matters or interferes with the conduct of daily tribal business through collective or individual conduct by the enjoined persons with same;**
2. **Communicating or publishing any information or entering into any contract in the name of the Narragansett Tribal Election Committee or the Tribe; OR**
3. **Using names gathered from the official tribal mailing list to broadcast into or spam tribal email or snail mailboxes as a means to circulate privately authored communications, personal opinions or for any other private or unofficial purpose.**
4. **Defendants are hereby permanently enjoined from any further action or communications in any form, or use of any governmental resources, to represent themselves, singly or jointly, directly or indirectly, as conducting official or lawful action on behalf of the Narragansett Tribal Government or the Narragansett Tribe.**

IT IS SO ORDERED.

_____

/s/Judge D. Dowdell

December 22, 2016

Exhibit E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

NARRAGANSETT INDIAN TRIBE TRIBAL COUNCIL Plaintiff,	)	
v.	)	C.A. No. 16-cv-622-M
MATTHEW THOMAS, Defendant.	)	

ORDER DENYING REQUESTS FOR
TEMPORARY RESTRAINING ORDERS

The principals of tribal sovereignty and right to self-determination guide this Court.

As a federal district court, this court is a court of limited jurisdiction, and it has a sua sponte duty to ensure the existence of jurisdiction. *United States v. Univ. of Massachusetts, Worcester*, 812 F.3d 35, 44 (1st Cir. 2016). Now, "[t]ribal sovereign immunity 'predates the birth of the Republic.'" *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) (quoting *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994)). "[This] immunity rests on the status of Indian tribes as autonomous political entities, retaining their original natural rights with regard to self-governance." *Id.* "An Indian tribe's sovereign immunity may be limited by either tribal conduct (i.e., waiver or consent) or congressional enactment (i.e., abrogation)." *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006).

The Narragansett Indian Tribe cites the Rhode Island Indian Claims Settlement Act as the jurisdictional hook for the instant action. Section 1708(a) of the Rhode Island Indian Claims Settlement Act subjects the settlement lands to the criminal and civil laws of Rhode Island and bestows jurisdiction to the State of Rhode Island. 25 U.S.C. § 1708(a). Section 1711 confers

jurisdiction to the District Court for the District of Rhode Island for constitutional challenges to the Act. Neither of these provisions is relevant to the underlying governance dispute culminating from a tribal judge's order. Furthermore, the First Circuit, in interpreting the jurisdictional scope of the Rhode Island Indian Claims Settlement Act, stated, "We recognize that the Tribe may continue to possess some degree of autonomy 'in matters of local governance,' including . . . the regulation of domestic relations." *Narragansett Indian Tribe*, 449 F.3d at 26. This Court finds elections and related judicial orders the archetypal function of self-governance.

Consequently, the Court lacks jurisdiction and, therefore, DENIES both requests for Temporary Restraining Orders (ECF Nos. 2 and 8). The parties shall show cause why this matter should not be dismissed for lack of subject matter jurisdiction on or before January 13, 2017.

IT IS SO ORDERED.

John J. McConnell, Jr.
United States District Judge
December 22, 2016

Exhibit F

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

DOUGLAS J. LUCKERMAN	:	
	:	
v.	:	C.A. No. 13-185S
	:	
NARRAGANSETT INDIAN TRIBE	:	

MEMORANDUM AND ORDER

Plaintiff Douglas Luckerman is an attorney who previously represented Defendant Narragansett Indian Tribe. In 2013, Plaintiff sued the Tribe in State Court for breach of contract, alleging that the Tribe failed to fully compensate him for his legal services. The Tribe removed the case to this Court and moved to dismiss arguing that (1) it is immune from suit under the doctrine of Tribal Sovereign Immunity; (2) the dispute is within the exclusive jurisdiction of its Tribal Court; and (3) Plaintiff failed to exhaust Tribal Court remedies. (Document No. 8-1 at pp. 2-3). On August 29, 2013, Chief Judge Smith denied the Tribe's Motion to Dismiss. (Document No. 16). He held that the Tribe had expressly waived its sovereign immunity in its 2003 and 2007 agreements with Plaintiff. Id. at p. 5. However, he also concluded that the Tribal Court had "at least a colorable claim" of Tribal jurisdiction over this suit and deferred to it to conduct the jurisdictional analysis "in the first instance" "subject to review by this Court." Id. at pp. 11-13. Accordingly, he exercised his discretion to stay this action pending Tribal exhaustion.[1] Id. at pp. 13-14.

[1] Chief Judge Smith made clear in his decision that "[s]hould the tribal court assert jurisdiction and adjudicate the merits of the case, Plaintiff may return to this Court for review of the jurisdictional issues." (Document No. 16 at p. 14).

Discussion

Plaintiff now moves to vacate the stay. (Document No. 45). He argues that "[i]t has now become clear that the Tribe does not have a properly constituted and functioning tribal court, and that its representations to the contrary were made in bad faith." Id. at p. 1. He asks that this Court vacate the stay and, after appropriate briefing and argument, address the Tribe's contention that Plaintiff's claims are within the exclusive jurisdiction of the Tribal Court. Id. The Tribe objects and points to the activities of the Tribal Court as evidence that it is properly constituted and functioning. (Document No. 49).

While the stay was entered over three years ago, some of the delay in this matter is attributable to the Tribe's unsuccessful interlocutory appeal to the First Circuit Court of Appeals. The Tribe filed its Notice of Appeal on January 17, 2014. (Document No. 24). The Appeal was dismissed for lack of jurisdiction on May 29, 2015. (Document No. 38). On February 28, 2014, Judge Dowdell of the Tribal Court granted, in a five-page Memorandum, the Tribe's request to stay Tribal Court proceedings pending outcome of the appeal. (Document No. 46-8 at pp. 3-7). On June 25, 2015, Judge Dowdell issued a one-page Order granting Plaintiff's Motion to Vacate the stay due to the dismissal of the Tribe's appeal. (Document No. 46-10 at p. 2). She also called for suggested dates from the parties to hold a conference.[2] Id. Ultimately, a briefing schedule was established and, in October of 2015, the parties submitted briefs to Judge Dowdell on the issue of Tribal Court jurisdiction. (Document No. 46 at p. 8). Judge Dowdell acknowledged receipt on October 30, 2015. Id. On December 2, 2015, Plaintiff submitted a supplemental filing to bring a recent Seventh Circuit

[2] On April 4, 2014, Judge Dowdell held an initial conference with counsel to discuss "housekeeping and procedural matters." (Document No. 46 at p. 7).

decision to Judge Dowdell's attention. Id. at p. 9. On January 26, 2016, Plaintiff's counsel wrote to Judge Dowdell on the status of the matter. (Document No. 46-11). The Tribal Court did not respond to the writing and, to date, has not held any further proceedings or issued any rulings on this matter. However, on July 21, 2016, the Tribal Court issued a Preliminary Injunction in an unrelated case and scheduled a court hearing for August 17, 2016. (Document No. 49-6).

In Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 n.21 (1985), the Supreme Court enumerated three exceptions to the so-called tribal exhaustion doctrine. It recognized, inter alia, that tribal exhaustion is not required "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." Id.

Plaintiff here contends that it should be excused from exhaustion as futile because the Tribe does not have a properly constituted or functioning Tribal Court.[3] Plaintiff has not presently made a sufficient showing of futility to warrant vacating the stay. As noted by Judge Smith in his 2013 ruling, the Tribal exhaustion doctrine is rooted in principles of tribal autonomy and comity. (Document No. 16 at pp. 7-8). When boiled down, Plaintiff's argument is primarily based on the Tribal Court's several-month delay in ruling on the issue of tribal jurisdiction. However, it has been held that "[d]elay alone is not ordinarily sufficient to show that pursuing tribal remedies is futile." Johnson v. Gila River Indian Cmty., 174 F.3d 1032, 1036 (9th Cir. 1999). See also Basil Cook Enter., Inc. v. St. Regis Mohawk Tribe, 26 F. Supp. 2d 446, (N.D.N.Y. 1998) (rejecting attempt to

[3] Plaintiff relies in part on an Affidavit of the Tribe's Chief Sachem Matthew Thomas dated December 2, 2014. (Document No. 46-15 at p. 5-6). Plaintiff contends that Chief Thomas "advised the appellate arm of the Bureau of Indian Affairs...that the Tribe's court had been 'suspended.'" (Document No. 46 at p. 5). Plaintiff neglects to point out that the indication of suspension was qualified by the statement "except for a singular and unrelated issue" which presumably refers to this pending matter.

divest Tribal Court of jurisdiction as a non-functioning entity in part because the Tribal Court had rendered decisions in two separate matters within the last six months).

While an extreme and inordinate delay in adjudication may ultimately support a futility argument, we are not there yet. The issue of tribal jurisdiction is complex and likely not frequently litigated in a Tribal Court. Further, the Supreme Court in Nat'l Farmers held that the Tribal Court must determine the scope of its jurisdiction in light of federal law and must conduct "a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." 471 U.S. at 855-856. Moreover, Chief Judge Smith cautioned that "[t]he care with which the tribal court conducts its jurisdictional analysis as well as the conclusions reached are, of course, subject to [his] review." (Document No. 16 at p. 13) (emphasis added).[4] Thus, it is not surprising that the Tribal Court took the matter under advisement and has not rushed to judgment on the issue.

Conclusion

For the foregoing reasons, Plaintiff's Motion to Vacate Stay (Document No. 45) is DENIED without prejudice.

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
September 30, 2016

[4] When the issue of tribal exhaustion was litigated before Chief Judge Smith in 2013, it does not appear that Plaintiff claimed that the Tribe did not have a properly constituted and functioning Tribal Court or sought discovery on that issue.

Original decision by Chief Justice William Smith in Luckerman v. Narragansett Indian Tribe, C.A. No. 13-185 S

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DOUGLAS J. LUCKERMAN,	)	
Plaintiff,	)	
v.	)	C.A. No. 13-185 S
NARRAGANSETT INDIAN TRIBE,	)	
Defendant.	)	

OPINION AND ORDER

WILLIAM E. SMITH, United States District Judge.

Plaintiff Douglas Luckerman, an attorney who formerly represented Defendant Narragansett Indian Tribe ("Tribe"), brought suit against the Tribe in state court for breach of contract, alleging that the Tribe failed to fully compensate him for his services. The Tribe removed the case to federal court and filed the instant motion to dismiss, arguing, among other things, that the case falls within the jurisdiction of its tribal court. (ECF No. 8.) Luckerman filed an opposition to the Tribe's motion (ECF No. 10), as well as his own motion to remand the matter to state court (ECF No. 11). For the reasons set forth below, both motions are DENIED, and the case shall be stayed pending adjudication in the tribal court.

I. Facts

Luckerman, a Massachusetts attorney and non-member of the Tribe, began representing the Tribe in 2002. In March 2003, Luckerman prepared and directed to the Tribe's Chief Sachem Matthew Thomas, a letter memorializing the terms of the engagement ("2003 agreement"). The 2003 agreement provides, in pertinent part: "The Tribe agrees to waive any defense of sovereign immunity solely for claims or actions arising from this Agreement that are brought in state or federal courts." (Ex. to Stipulation 8, ECF No. 4-1.) While the agreement is not signed by any representative of the Tribe, the complaint alleges that the Tribe accepted its terms. A note at the end of document states: "**THIS IS YOUR AGREEMENT. . . . IF YOU DO NOT UNDERSTAND IT OR IF IT DOES NOT CONTAIN ALL THE AGREEMENTS WE DISCUSSED, PLEASE NOTIFY ME.**" (Id. at 9.)

In February 2007, Luckerman was again engaged by the Tribe to act as counsel to one of its offices, the Narragansett Indian Tribal Historic Preservation Office ("NITHPO"). Luckerman and NITHPO entered into an agreement setting forth the terms of the engagement ("2007 agreement"). The agreement provides, in pertinent part: "The NITHPO agrees to a limited waiver of Tribal sovereign immunity in Tribal, federal and state courts, solely for claims arising under this Agreement." (Id. at 11.) The 2007 agreement is signed by John Brown, the Narragansett

Indian Tribal Historic Preservation Officer. Like the 2003 agreement, it directs the recipient to notify Luckerman if there is any problem with the terms.[1]

The Tribe made some payments to Luckerman, but those payments allegedly were not sufficient to meet the Tribe's obligations under the 2003 and 2007 agreements. Luckerman claims that the Tribe is currently indebted to him in an amount of over $1.1 million.

II. Discussion

"The question whether an Indian tribe retains the power to compel a non-Indian . . . to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law . . . ." Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 27-28 (1st Cir. 2000) (quoting Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 852 (1985)). Thus, in the present case, this Court has federal question jurisdiction to determine "(1) the extent of the tribal court's jurisdiction over the plaintiff's claims, and (2) the defendant's assertion that, as an arm of a federally recognized Indian tribe, the impervious shield of tribal

[1] Both the 2003 and 2007 agreements were attached to Luckerman's state court complaint. In any event, the Court may consider matters outside the pleadings in ruling on Defendant's Rule 12(b)(1) argument. See 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (3d ed. 2004).

sovereign immunity protected it from suit."[2] Id. at 25. The First Circuit has indicated that the latter issue should be addressed first. See id. at 28.

A. Sovereign Immunity

"Generally speaking, the doctrine of tribal sovereign immunity precludes a suit against an Indian tribe except in instances in which Congress has abrogated that immunity or the tribe has foregone it." Id. at 29. Here, the Tribe argues that the complaint must be dismissed on sovereign immunity grounds pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Luckerman counters that the Tribe waived its immunity in the 2003 and 2007 agreements.

With regard to the 2003 agreement, the Tribe responds that the document was not signed by any of its representatives. However, the complaint alleges that Luckerman sent the agreement to Chief Thomas and that the Tribe accepted the terms of the agreement through its conduct. Indeed, the Tribe does not dispute the fact that it received the letter and continued to accept Luckerman's legal services. While it is true that "a waiver of sovereign immunity cannot be implied," Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (internal citation and quotation marks omitted), the Tribe's conduct here cannot

[2] The Tribe's other arguments for dismissal must be addressed, in the first instance, by the tribal court if it decides to exercise jurisdiction over this case.

fairly be characterized as an implied waiver. By receiving a proposed agreement that unequivocally purported to waive the Tribe's sovereign immunity, and treating that agreement as valid, the Tribe expressly waived its immunity. The cases cited by the Tribe are not to the contrary. See id. at 58-59 (holding that a statute making habeas corpus available to individuals detained by Indian tribes did not constitute a general waiver of sovereign immunity); Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1066 (1st Cir. 1979) ("[T]he Tribe's mere acceptance of benefits conferred upon it by the state cannot be considered a voluntary abandonment of its sovereignty and its attendant immunity from suit."); Federico v. Capital Gaming Int'l, Inc., 888 F. Supp. 354, 356 (D.R.I. 1995) (holding that "a waiver of sovereign immunity cannot be inferred from [an Indian] Nation's engagement in commercial activity" (internal citation and quotation marks omitted) (alteration in original)).

The 2007 agreement, unlike the 2003 agreement, is signed by a representative of NITHPO. The Tribe, however, contends that this organization is "an entity of the Tribe," which lacked the authority to waive the Tribe's sovereign immunity. (Def. Narragansett Indian Tribe's Mem. in Supp. of its Mot. to Dismiss 6, ECF No. 8-1.) However, three federal courts of appeals, including the First Circuit, have reached the opposite conclusion on similar facts. See Ninigret, 207 F.3d at 29-31

(holding that the Narragansett Indian Wetuomuck Housing Authority, which the court characterized as "an arm of the Tribe," acting pursuant to a tribal ordinance, waived sovereign immunity by contract); Confederated Tribes of the Colville Reservation Tribal Court v. White, (In re White), 139 F.3d 1268, 1269, 1271 (9th Cir. 1998) (holding that Colville Tribal Credit, "an agency of the Confederated Tribes of the Colville Reservation," waived sovereign immunity by participating in a Chapter 11 bankruptcy proceeding); Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 806, 812 (7th Cir. 1993) (holding that "a wholly-owned tribal corporation and governmental subdivision" waived sovereign immunity in a letter of intent).

Further, the fact that the Tribe, not NITHPO, is named as the sole defendant is immaterial. The Tribe has presented no evidence that NITHPO has any independent legal existence. In fact, to the contrary, the Tribe acknowledges that NITHPO is an office of the Tribe. Indeed, in 2002, the Tribe filed a complaint in this Court, listing as the single plaintiff, "Narragansett Indian Tribe of Rhode Island, by and through the Narragansett Indian Tribe Historic Preservation Office." (Attach. 2 to Pl. Douglas J. Luckerman's Objection to Def. Narragansett Indian Tribe's Mot. to Dismiss 12, ECF No. 10-2.) Because NITHPO lacks an independent legal existence, its sovereign immunity and the Tribe's sovereign immunity are one

and the same. See Ninigret, 207 F.3d at 29 ("[W]e shall not distinguish between the Tribe and the Authority in discussing concepts such as tribal immunity and tribal exhaustion.").

B. Tribal Exhaustion

The Tribe's second argument in support of dismissal is predicated upon the tribal exhaustion doctrine. Under this doctrine, "when a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims." Id. at 31; see also Rincon Mushroom Corp. v. Mazzetti, 490 F. App'x 11, 13 (9th Cir. 2012) (holding that "[t]ribal jurisdiction need only be 'colorable' or 'plausible'" for exhaustion to apply). Unlike sovereign immunity, "[t]he tribal exhaustion doctrine is not jurisdictional in nature, but, rather, is a product of comity and related considerations." Ninigret, 207 F.3d at 31. Therefore, while the Tribe waived its sovereign immunity in the 2003 and 2007 agreements, this holding has no bearing on the question of whether this Court should defer to the tribal court and require exhaustion. In the present case, the parties disagree on the existence of a colorable claim of tribal court jurisdiction.

As a preliminary matter, "the determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to forum-selection provisions that may be contained within the four corners of an underlying contract." Id. at 33. For this reason, Luckerman's argument that the Tribe waived the exhaustion requirement in the 2003 and 2007 agreements is meritless.

The Supreme Court has made clear that "the sovereignty that the Indian tribes retain is of a unique and limited character. It centers on the land held by the tribe and on tribal members within the reservation." Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 327 (2008) (internal citation and quotation marks omitted). Moreover, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." Id. at 330 (internal citation and quotation marks omitted). Consistent with these limitations, "tribes do not, as a general matter, possess authority over non-Indians who come within their borders." Id. at 328. The Supreme Court has, however, recognized two exceptions to this principle, which allow tribes to:

> exercise civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.[3] First, [a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Second, a tribe may exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 329-30 (quoting Montana v. United States, 450 U.S. 544, 565-66 (1981)) (internal quotation marks and citations omitted) (second alteration in original).

Luckerman argues that the first of these so-called "Montana exceptions" does not apply here because his activities pursuant to the contracts were largely conducted off the reservation. However, he concedes that some of these activities occurred on tribal land. Moreover, both the 2003 and 2007 agreements are addressed to tribal officials and were presumably accepted at the Tribe's offices. See F.T.C. v. Payday Fin., LLC, No. CIV 11-3017-RAL, 2013 WL 1309437, at *10 (D.S.D. Mar. 28, 2013) ("The test of the place of a contract is the place where the last act is done by either of the parties which is necessary to complete the contract and give it validity." (internal citation and quotation marks omitted)). In these circumstances,

[3] The Supreme Court has defined "non-Indian fee land" as "land owned in fee simple by non-Indians." Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 328 (2008).

"treating the nonmember's physical presence as determinative ignores the realities of our modern world that a [non-member], through the internet or phone, can conduct business on the reservation and can affect the Tribe and tribal members without physically entering the reservation." Id. at *11.

Moreover, the First Circuit has suggested, albeit before the Supreme Court's decision in Plains Commerce Bank, that a tribal court may, in some circumstances, have jurisdiction over activities occurring off the reservation. In assessing tribal jurisdiction over an off-reservation dispute, "an inquiring court must make a particularized examination of the facts and circumstances attendant to the dispute in order to determine whether comity suggests a need for exhaustion of tribal remedies as a precursor to federal court adjudication." Ninigret, 207 F.3d at 32 (requiring exhaustion of a claim arising from an agreement for the construction of a housing development "on land purchased by the Tribe but situated outside the reservation"). First, the court must ask whether the claim "impact[s] directly upon tribal affairs." Id. This initial requirement appears satisfied in the present case. See id. ("Courts regularly have held that a contract dispute between a tribe and an entity doing business with it, concerning the disposition of tribal resources, is a tribal affair for purposes of the exhaustion doctrine."). The next step in the analysis is to "measure the

case against the tribal exhaustion doctrine's overarching purposes." Id. These purposes include "supporting tribal self-government," "foster[ing] administrative efficiency," and "provid[ing] other decisionmakers with the benefit of tribal courts' expertise." Id. at 31. Here, the Tribe's act of securing legal representation regarding issues of tribal land and sovereignty constitutes an exercise of the Tribe's governmental functions. Moreover, deferring to the tribal court, which regularly deals with issues of tribal jurisdiction, will foster efficiency and produce a record that will assist other decisionmakers.

In sum, Luckerman reached out to the reservation by entering into a consensual relationship with the Tribe, and, accordingly, the tribal court has at least a colorable claim of jurisdiction over suits arising from that relationship.

In a last ditch effort to avoid the exhaustion requirement, Luckerman points to "a joint memorandum of understanding" executed by the Tribe and the State of Rhode Island in 1978, pursuant to which the Tribe gained control of certain lands. See Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16, 19 (1st Cir. 2006). In exchange, the Tribe agreed that, except for state hunting and fishing regulations, "all laws of the State of Rhode Island shall be in full force and effect on the settlement lands." Id. Congress subsequently passed the Settlement Act,

which stated that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." Id. (quoting 25 U.S.C. § 1708(a)). The First Circuit has held that this provision "largely abrogates the Tribe's sovereign immunity," and that, in light of this abrogation, the state could enforce its criminal laws on settlement lands by executing a search warrant against the Tribe. Id. at 26.

The first problem with Luckerman's argument on this point is that Narragansett was a sovereign immunity case, in which the First Circuit had no occasion to discuss the doctrine of tribal exhaustion. Additionally, the Narragansett court expressly distinguished its prior decision in Maynard v. Narragansett Indian Tribe, 984 F.2d 14 (1st Cir. 1993), which involved "civil suits premised on activities occurring outside the settlement lands." Id. at 29. Because the instant case is civil in nature and involves the tribal exhaustion doctrine, a separate and distinct issue from sovereign immunity as explained above, the implications, if any, of Narragansett are far from clear. Accordingly, an assessment of tribal jurisdiction over this case "will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." Nat'l Farmers, 471

U.S. at 855-56 (footnote omitted). This examination "should be conducted in the first instance in the Tribal Court itself." Id. at 856. The care with which the tribal court conducts its jurisdictional analysis as well as the conclusions reached are, of course, subject to review by this Court.

Where, as here, the doctrine of tribal exhaustion applies, whether to dismiss the complaint or merely stay the proceedings pending exhaustion is a decision left to the discretion of the trial court. See Ninigret, 207 F.3d at 35. However, a stay is preferable where dismissal may cause problems under the applicable statute of limitations. See, e.g., Rincon, 490 F. App'x 13-14. Here, some of the allegations in the complaint date back to 2002. Rhode Island has a ten-year statute of limitations for contract actions. See Martin v. Law Offices Howard Lee Schiff, P.C., C.A. No. 11-484S, 2012 WL 7037743, at *1 (D.R.I. Dec. 10, 2012) (citing R.I. Gen. Laws § 9-1-13(a)), report and recommendation adopted, No. CA 11-484 S, 2013 WL 489655 (D.R.I. Feb. 7, 2013). Thus, if Luckerman was forced to re-file, more of his claims would become time-barred with each passing day. For this reason, the Court finds that a stay is appropriate.

III. Conclusion

For the foregoing reasons, Defendant's motion to dismiss is DENIED, and Plaintiff's motion to remand is DENIED as moot. The

case is stayed pending tribal exhaustion. Should the tribal court assert jurisdiction and adjudicate the merits of the case, Plaintiff may return to this Court for review of the jurisdictional issues.

IT IS SO ORDERED.

/s/ William E. Smith
William E. Smith
United States District Judge
Date: August 29, 2013

EXHIBIT 2

NARRAGANSETT INDIAN TRIBE
TRIBAL COURT

NARRAGANSETT INDIAN TRIBE, *Plaintiff,*	:	
v.	:	CA No. 2017-02
TRIBAL COUNCIL OF THE NARRAGANSETT INDIAN TRIBE, as identified in the Motion to Intervene filed before the Energy Facility Siting Board by Attorney Shannah Kurland *Defendant.*	:	

ORDER

This matter came before the Narragansett Indian Tribal Court on October 24, 2017 through Plaintiff's Petition for a Temporary Restraining Order. After consideration of Plaintiff's Petition, Memorandum of Law, and accompanying Exhibits, the Court determines that Plaintiff has set forth clear and convincing evidence that it will suffer immediate and irreparable injury if an injunction is not granted and that the equities—at this juncture—favor Plaintiff's interests over Defendant's.

Jurisdiction

Title I, Chapter 1 of the NARRAGANSETT INDIAN COMPREHENSIVE CODES OF JUSTICE (the NICCJ) establishes the Court at §101, its civil jurisdiction at §107 and the position of Chief Judge at §102.

Standard of Review for Extraordinary Writs

The NICCJ, at Title IV-4-401 & 402, provides the standard for issuing a TRO without Notice under Extraordinary Writs. Section 401(a) contains three prongs for Court consideration or action.

(a) No temporary restraining order or other injunction without notice shall be granted where the Tribe or a tribal official in his official capacity is a defendant.

(b) [N]o temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by oral testimony, affidavit, or the verified complaint that immediate and irreparable injury will result to the applicant before notice can be served and a hearing had thereon.

(c) Every temporary restraining order granted without notice shall include the date and hour of issuance and shall expire within such time after entry, not to exceed ten (10) days, as provided in the order.

Discussion

Similar complaints about individuals claiming governmental authority been have been formally adjudicated before this Court, which found no evidence that supports any authorized and official Tribal Election taking place since last confronted with this issue in December 2016. Furthermore, Plaintiff presents evidence that the Defendant is, and has been, publicly holding itself out as the "Tribal Council of the Narragansett Indian Tribe" by filing a Motion to Intervene before the Rhode Island Energy Facility Siting Board ("EFSB"), yet the actual sitting Tribal Council never authorized such a filing.

Contrary to the Defendant's elected "Tribal Council" assertion, the presence of previous legal proceedings is relevant as they directly relate to the issue of the unnamed "Tribal Council" members' legal standing to appear before the EFSB in official tribal, intervenor status. Attempts to claim Tribal authority where it does not exist, not only creates confusion amongst Tribal members and the public, these claims seriously disrupt the Tribe's internal and business relations. The Tribal Court, in addition to previously administering tribal law and policy on previous claims, has answered jurisdictional objections, corrected legal misrepresentations or misinterpretations of tribal law and detailed correction of procedural noncompliance. Furthermore, Federal and State proceedings have recognized this Court's jurisdiction over such tribal internal matters. Consequently, neither Defendant nor their attorney may summarily ignore previous legal proceedings to advance appearance before a local administrative body.

Moreover, the Court has also addressed how advancing misleading information to take ad hoc actions in the name or authority of Tribe handicaps the Tribe. It has forewarned that internal or public actions based on legal misrepresentations, which unabashedly ignores adjudicated determinations of tribal law and policy, customary practices and the reserved right(s) of Tribe in an effort to assert political authority, constitutes harm to the Tribe. Consequently, if Defendants were able to proceed with their activities—claiming to be the duly authorized representative body of the Narragansett Indian Tribe—Plaintiff will suffer immediate and irreparable harm because Tribal interests favor examining and upholding tribal law when such claim(s) arise, which supports issuance of a TRO without Notice at this time.

Accordingly, it is hereby:

ORDERED, ADJUDGED AND DECREED that:

1. Defendant, and its named counsel Shannah Kurland, Esq., are temporarily and immediately enjoined from (a) identifying itself and therefore themselves as the "Tribal Council of the Narragansett Indian Tribe" and (b) pursuing a Motion to Intervene before the Rhode Island Energy Facility Siting Board and

2. The Rhode Island Energy Facility Siting Board is hereby advised that the so-called "Tribal Council of the Narragansett Indian Tribe" cited in the filed EFSB Motion is not the lawful representative of the Narragansett Indian Tribe and was not elected by a duly authorized Tribal Election.

Finally, since the Court grants this TRO without Notice, there are additional steps to ensure due process for all affected parties. Every TRO granted without notice must include the date and hour of issuance and expires within such time after entry, not to exceed ten (10) days[1], as provided in the Order.

This TRO begins at 11:00 AM on Wednesday, October 25, 2017 and automatically dissolves on Monday, November 6, 2017 at 11:00 AM unless Plaintiff seeks further relief.

[1] The Tribal Court previously adopted F.R.C.P. Rule 6 for computing and extending Time when dealing with outside attorneys to provide a methodology for computing time with standard cross-jurisdictional application. Under Rule 6(1), this Court excludes the day of the event that triggers the period. It counts every day, including intermediate weekend days and legal holidays (including tribal holidays) and counts the last day of the period; however, if the last day is a weekend day or defined legal holiday, the period continues to run until the next day that is not a Saturday, Sunday, or legal holiday.

If so, then Plaintiff must petition for a preliminary injunction, using the procedure and standards required under the NICCJ, Title IV-4-402, Preliminary Injunctions, within 10 business days, as defined, which shall include two days' notice to Defendant's attorney. The statue directs:

A preliminary injunction restrains activities of a defendant until the case can be determined on the merits. No preliminary injunction shall be issued without notice to the adverse party and an opportunity to be heard. No preliminary injunction shall be issued absent clear and convincing proof by specific evidence that the applicant will suffer irreparable harm during the pendency of the litigation unless a preliminary injunction is issued, that the balance of equities favors the applicant over the party sought to the enjoined. The Court may dissolve or modify a preliminary injunction at any time, as the interests of justice require.

Given past the Determinations and directives, this Court provides notice that it will not entertain any Argument by either Party that fails to include a valid legal basis under tribal law. Document submissions originating from the Parties' attorneys may be submitted electronically to Tribal Court at NarragansettTribalCourt@nitribe.org, which will be certified by received receipt.

Entered as an Order of this Court on October 25, 2017,

Judge D. Barnaby

EXHIBIT 3

PANNONE LOPES
DEVEREAUX & O'GARA LLC
counselors at law

William P. Devereaux
401 824-5106
wdevereaux@pldolaw.com

October 25, 2017

VIA HAND DELIVERY

Rhode Island Energy Facility Siting Board
Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: Narragansett Indian Tribe

Dear Board Members:

I write regarding issues recently brought to the attention of the duly constituted Narragansett Indian Tribal government through the filing of a "Motion for Intervention of the Tribal Council of the Narragansett Indian Tribe" by attorney Shannah Kurland. Please be advised that this filing was not authorized by the Narragansett Indian Tribe Tribal Council or the Tribe's Chief Sachem, and Attorney Kurland does not represent the properly constituted Tribal Council of the Narragansett Indian Tribe. Since Attorney Kurland elected not to identify her clients by name, it is believed that Attorney Kurland represents a dissident group of Tribal members, or former members, that have challenged the authority of the properly constituted Tribal leadership in the past. In fact, the Tribal Court of the Narragansett Indian Tribe has dealt with these individuals as recently as December 22, 2016, and ordered that they cease from holding themselves out as representing or having authority to represent the Tribe. Despite this strong directive from the Tribal Court, it appears as though these same members have once again taken it upon themselves to falsely represent that they hold lawful representative capacity by filing this Motion to Intervene through Attorney Kurland.

By way of background, a recent decision by Mr. Justice McConnell of the U.S. District Court for the District of Rhode Island entitled ***Narragansett Indian Tribe Tribal Council v. Matthew Thomas, C.A. 16-cv-622-M (D.R.I. Dec. 22, 2016)*** (attached as **Exhibit A)** determined that there was no Federal jurisdiction to consider internal Tribal Court decisions regarding Tribal governance disputes. In particular, Judge McConnell noted the 1st Circuit's decision in ***Narragansett Indian Tribe v. Rhode Island, 449 F. 3d 16, 26 (1st Cir. 2006)***, wherein the Court stated, "We recognize that the Tribe may continue to possess some degree of autonomy 'in matters of local governance', including . . . the regulation of domestic relations." ***Id.*** Noting this decision as precedent, Judge McConnell then stated, "This Court finds elections and related judicial orders the archetypal function of self-governance." ***Id. at 2.*** Consequently, the U.S. District Court for the District of Rhode Island has recognized the autonomy of the Narragansett Tribal Court to render decisions regarding internal tribal government matters.

The Tribal Court's jurisdiction over this matter is also clear from the Tribe's Comprehensive Code of Justice. The Code provides for the establishment and maintenance of a Tribal Judiciary, including a Chief Judge. See Excerpted Portions of Comprehensive Code of Justice, attached as **Exhibit B**. Presently, the Chief Judge of the Tribal Court is Denise Dowdell, a graduate of Catholic University and the University of Wisconsin School of Law. Judge Dowdell has rendered decisions for nearly a decade on a number of Tribal matters, including issues related to Tribal elections, and has analyzed, at length, the jurisdiction of the Tribal Court to adjudicate such disputes.

Of equal importance, the United States District Court for the District of Rhode Island has also recognized, on more than one occasion, the authority of the Tribal Court to make determinations related to internal Tribal disputes. See ***Luckerman v. Narragansett Indian Tribe, C.A. No. 13-185S (D.R.I. Sept. 30, 2016)***, attached as **Exhibit C** (analyzing and ultimately approving the authority of the Tribal Court to determine tribal jurisdiction over breach of contract claim); ***Narragansett Indian Tribe Tribal Council, C.A. No. 16-cv-622-M***, previously cited and attached as **Exhibit A** (concluding that "elections and related judicial orders [are] the archetypal function of self-governance and declining to exercise jurisdiction where "underlying governance dispute culminat[ed] from a tribal judge's order"). Consequently, the decisions and orders of the Tribal Court constitute lawful and effective Tribal government decisions.

With this in mind, the relevant Tribal Court decisions on the issue referred to in the Motion as "internal disputes" has actually been adjudicated by the Tribal Court. The Tribal Court has unequivocally ruled that the dissident group of Tribal members (which the Tribal Court refered to as "the TEC Members") were restrained and enjoined on July 21st, 2016 from:

- Conducting any business, meeting, rally, election, or any other gathering on tribal property that concerns election matters or interferes through collective or individual conduct by the enjoined persons with same.

- Communicating or publishing any information or entering any contract in the name of the Narragansett Tribal Election Committee.

- Any further action or communications in any form, or use of any governmental resources, to represent themselves, singly or jointly, directly or indirectly as conducting official or lawful action on behalf of the Narragansett Tribal Government or the Narragansett Tribe (see ***Narragansett Indian Tribal Court decision and order dated July 21, 2016***, attached as **Exhibit D).**

No appeal was taken from this order and therefore the so-called Tribal election that took place on July 30, 2016 at a local VFW hall in Charlestown (in which it is alleged that 68 ballots were cast out of a Tribe of at least 2400 recognized members) was in direct contravention of the Tribal Court's July 16th decision. On December 22nd, 2016, the Tribal Court entered a **permanent injunction** enjoining those individuals from the same conduct and activities the Court specifically noted in its July 16th, 2016 order. (see ***Narragansett Indian Tribal Court***

decision, dated December 22nd, 2016, attached as **Exhibit E**). Furthermore, the December 22, 2016 opinion states that the "purported 2016 election is null and void for noncompliance with and misrepresentation of tribal law and policy." Lastly, the TEC Members were "permanently enjoined from any further action or communications in any form, or use of any governmental resources, to represent themselves, singly or jointly, directly or indirectly, as conducting official or lawful action on behalf of the Narragansett Tribal Government or the Narragansett Tribe."

The group that filed the Motion to Intervene before the EFSB is simply not the properly constituted Tribal Council, as they purport to be in the filing. Rather, upon information and belief, it is made up of either the same TEC Members that were enjoined by Chief Judge Dowdell, or the members that were purportedly "elected" in the 2016 election which Chief Judge Dowdell determined was null and void. Certainly, the lawful Tribal Council, headed by First Councilman Cassius Spears, did not take any action or vote on authorizing the filing of any such Motion to Intervene, and in fact, specifically oppose such a Motion from being filed.

In order to adequately protect the interests of the properly constituted Tribal leadership and government, a temporary restraining order was obtained from the Tribal Court on October 25, 2017 (attached as **Exhibit F**). This restraining order specifically ordered that:

> "1. Defendant, and its named counsel Shannah Kurland, Esq., are temporarily and immediately enjoined from (a) identiftying itself and therefore themselves as the "Tribal Council of the Narragansett Indian Tribe" and (b) pursing a Motion to Intervene before the Rhode Island Energy Facility Siting Board and
> 2. The Rhode Island Energy Facility Siting Board is hereby advised that the so-called "Tribal Council of the Narragansett Indian Tribe" cited in the filed EFSB Motion is not the lawful representative of the Narragansett Indian Tribe and was not elected by a duly authorized Tribal Election."

This order went into effect at 11:00 AM on October 25th and remains in effect until November 6th, or until further order of the Tribal Court. Based on the above, I ask that you disregard and/or dismiss the motion filed by Attorney Kurland, as she does not represent the duly elected Tribal Council of the Narragansett Indian Tribe, and the Tribal Council of the Narragansett Indian Tribe has not authorized such a filing. To recognize this particular group, in any representative capacity, will in my opinion, thrust the EFSB unnecessarily into issues related to Tribal sovereignty.

While the Tribe, is ordinarily reluctant to discuss internal Tribal government matters, the actions of Attorney Kurland and whatever group she represents, require some clarification regarding the authority of the Narragansett Indian Tribal government to enter into a secondary water supply contract with Clear River Energy, LLC ("CRE"). In this regard, the Narragansett Indian Tribe, at tribal assemblies in 1998, 2005 and 2006, passed resolutions relating to the development of its water infrastructure and sources on the trust lands and other property that it owns in fee simple. Specifically the Narragansett Indian Tribal Historic Preservation Office and

the Land and Water Resources Committee of the Tribe were mandated to work on the development of water sources. As you are aware, the contract with CRE simply provides that the Narragansett Indian Tribe will serve as a *secondary* water source for the project in Burrillville. The signatories to that contract—the Chief Sachem and the Tribal Historic Preservation Officer—are authorized to enter into this contract.

As I am sure you are aware the Tribe is a federally recognized Indian Tribe and therefore a recognized "Indian Tribe" within 54 U.S.C. §300309. The Tribe's constitution and by-laws ("Tribal Constitution") provide that the Chief Executive of the Tribe is the Chief Sachem. Section One of the Tribal Constitution provides that the Chief Sachem is the proper party to sign all documents on behalf of the Tribe, and accordingly, the Chief Sachem has the authority to sign any agreement regarding natural resources on tribal land. Furthermore, the NITHPO has the authority to determine if any such agreement would involve construction that could disturb Indian burial grounds or Indian historical artifacts.

Importantly, the Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 *et seq.* (the "Act"), specifically recognized that the transfer of lands pursuant to the Act included "water and water rights." Pursuant to the Act, the State of Rhode Island was to arrange for the transfer of certain "land and natural resources" which constituted the settlement lands. The Act defines "land and natural resources" as "any real property or natural resources, or any interest in or right involving any real property or natural resource, including but not limited to . . . **water and water rights** . . . ." (emphasis added). Accordingly, it is without a doubt that the Tribe has the authority to exercise rights over water located within Tribal lands.

An important and inherent power of any sovereign is the ability to make and enforce its own laws. United States v. Wheeler, 435 U.S. 313, 324 (1978) (enforcing laws is an exercise of retained tribal sovereignty); Williams v. Lee, 358 US 217, 220 (1959) (a state may not infringe on a tribe's rights to "make their own laws and be ruled by them.") The Indian Tribal Justice Act, 25 U.S.C. §3601(5)(200) indicates that "tribal justice systems are an essential part of tribal governments and serve as important forums for insuring public health and safety and the political integrity of tribal governments." See also Montana v. Gilham, 133 F.3rd 1133, 1140 (9th Cir. 1998) ("development of tribal court systems is a critical component of tribal self-government, one which courts have encouraged"). Indian tribes are free to set up their courts however they feel appropriate, save for the restrictions found in the ICRA. See Stephen L. Pevar, The Rights of Indians and Tribes: The Authoritative ACLU Guide to Indian and Tribal Rights 103 (3rd ed. 2004). Subsequent congressional legislation has also affirmed the position that tribal customs are an important tool for tribal courts. See Indian Tribal Justice Act, 25 U.S.C. §3601-02, 3611-14, 3621, 3631 (2000) ("the congress finds and declares that . . . traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes. . .) Id. §3601(7).

Closely related to self-determination is the doctrine of inherent sovereignty. See Burrell v Armijo, 456 F.3d 1159 (10th Cir. 2006) (the role of comity in Federal Court review of tribal court judgments). Thus, while the federal government can divest tribes of some of their

authority, that which remains is not delegated, it is inherent. United States v. Wheeler 435 U.S. at 322-23. A tribe's right to self-determination does not exist because of a federal policy of self-determination; rather, a tribe's right to self-determination exists because it has always existed. Federal policy, then, can be seen as recognition, not a delegation of this authority.

In summary, the Narragansett Indian Tribe is a sovereign government. It objects to any characterization by the petitioners that they are the "Tribal Council of the Narragansett Indian Tribe" or are representative of any lawful Narragansett Indian Tribal government entity. On behalf of the Tribe, I sincerely hope that the EFSB will recognize the doctrine of tribal sovereignty and the inherent right of Indian Tribes to self-governance and therefore this petition to intervene should either be disregarded or dismissed.

Please contact me with any additional questions or concerns regarding this matter.

Very truly yours,

PANNONE LOPES DEVEREAUX & O'GARA LLC

William P. Devereaux

WPD

cc: Shannah Kurland, Esq. (skurland.esq@gmail.com)
Alan Shoer, Esq. (ashoer@apslaw.com)
Patricia S. Lucarelli, Esq. (patricia.lucarelli@puc.ri.gov)

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

NARRAGANSETT INDIAN TRIBE TRIBAL COUNCIL Plaintiff,	)	
v.	)	C.A. No. 16-cv-622-M
MATTHEW THOMAS, Defendant.	)	

ORDER DENYING REQUESTS FOR
TEMPORARY RESTRAINING ORDERS

The principals of tribal sovereignty and right to self-determination guide this Court.

As a federal district court, this court is a court of limited jurisdiction, and it has a sua sponte duty to ensure the existence of jurisdiction. *United States v. Univ. of Massachusetts, Worcester*, 812 F.3d 35, 44 (1st Cir. 2016). Now, "[t]ribal sovereign immunity 'predates the birth of the Republic.'" *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) (quoting *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994)). "[This] immunity rests on the status of Indian tribes as autonomous political entities, retaining their original natural rights with regard to self-governance." *Id.* "An Indian tribe's sovereign immunity may be limited by either tribal conduct (i.e., waiver or consent) or congressional enactment (i.e., abrogation)." *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006).

The Narragansett Indian Tribe cites the Rhode Island Indian Claims Settlement Act as the jurisdictional hook for the instant action. Section 1708(a) of the Rhode Island Indian Claims Settlement Act subjects the settlement lands to the criminal and civil laws of Rhode Island and bestows jurisdiction to the State of Rhode Island. 25 U.S.C. § 1708(a). Section 1711 confers

jurisdiction to the District Court for the District of Rhode Island for constitutional challenges to the Act. Neither of these provisions is relevant to the underlying governance dispute culminating from a tribal judge's order. Furthermore, the First Circuit, in interpreting the jurisdictional scope of the Rhode Island Indian Claims Settlement Act, stated, "We recognize that the Tribe may continue to possess some degree of autonomy 'in matters of local governance,' including . . . the regulation of domestic relations." *Narragansett Indian Tribe*, 449 F.3d at 26. This Court finds elections and related judicial orders the archetypal function of self-governance.

Consequently, the Court lacks jurisdiction and, therefore, DENIES both requests for Temporary Restraining Orders (ECF Nos. 2 and 8). The parties shall show cause why this matter should not be dismissed for lack of subject matter jurisdiction on or before January 13, 2017.

IT IS SO ORDERED.

John J. McConnell, Jr.
United States District Judge
December 22, 2016

Exhibit B

Narragansett Indian Tribal Resolution

No. TA 92-08-2092 Unified Justice Code

WHEREAS: The Narragansett Indian Tribe is a Federally Recognized and Acknowledged Indian Tribe; and

WHEREAS: The Narragansett Indian Tribal Council is the governing body of the Tribe; and

WHEREAS: The Tribal Assembly recognizes and acknowledges the need of protecting the Narragansett Community from unlawful acts, lawlessness and harm, and

WHEREAS: The Tribal Council is sworn to uphold the rights of the Tribal people and community, in the areas of general health, education, welfare, and is also sworn to keep the peace and maintain harmony within the tribe.

NOW THEREFORE BE IT RESOLVED, By the Narragansett Indian Tribal Assembly hereby create, establish and enact the Narragansett Indian Unified Code of Justice Titles I through VII of Title 2, (see attached codes)

BE IT FURTHER RESOLVED, That said Code of Justice is hereby by enacted on a provisional basis, subject to further review, from the pertinent committees and commissions of the Tribe, but shall have the full force and effect of law.

BE IT FURTHER RESOLVED, that these laws in no way shall be construed or meant to be construed to infract upon and/or abrogate the Oral and Traditional Organic Laws of the Narragansett Indian Tribe.

CERTIFICATION

I, the Undersigned hereby certify that the above resolution was officially adopted by the Tribal Assembly and is a true and accurate account of the happenings at the duly called Tribal Monthly meeting of August 29th, 1992

Attest:

Tribal Secretary

Chief-Sachem/First Councilman

TITLE I of TITLE 2

CHAPTER 1. UPGRADE OF OPERATION OF NARRAGANSETT TRIBAL COURT

Sect 101. Upgrade of Operations of Narragansett Tribal Court

This Law hereby upgrades, replaces and supersedes those non-traditional organic Tribal Laws relating to Tribal Court, as a Court of Record.

Sect 102. Composition of the Courts.

There shall be a Tribal Court consisting of a Chief Judge, and several other justices, who shall be appointed by the Tribal Council. In the event the Chief Judge is unable for any reason to preform his duties as a Chief Justice the Tribal Council shall appoint a Special Judge to serve in his or her stead

Sect 103. Records of the Court.

The Court shall keep a record of all proceedings of the Court, showing the title of the case, the names and addresses of the parties, attorneys, lay counselors and witnesses; the substance of the complaint; the dates of all hearings or trials; the name of the judge; the findings of the Court or the verdict of the jury and judgement; the preservation of testimony for perpetual memory by electronic recording, or otherwise; together with any other facts circumstances deemed of importance to the case. A record of all proceedings leading to incarceration will be submitted, when necessary to the Eastern Area Director, to be made part of the records of the Eastern Area Office in keeping with 25 U.S.C. Sec. 200*** Unless specifically excepted by this Code, the records of the Court shall be public.

Sect 104. Rules of Court

The Chief Judge may prescribe written rules of court, consistent with the provisions of this Code, including rules establishing the time and place of court sessions. The rules shall be approved by the Tribal Council before coming effective.

Sect 105. Services to Court by tribal or federal employees.

The Court may request and utilize social service, health, education or other professional services of tribal employees as requested, and or federal employees as authorized by the Secretary of the Interior or his authorized representative.

Sect 106. Criminal jurisdiction of the Court.

The Court shall have jurisdiction over all offenses by an Indian committed within the boundaries of the Narragansett Indian Reservation against the law of the Tribe as established by duly enacted ordnances of the Tribal Council.

Sect 107. Civil jurisdiction of the Court.

The Court shall have jurisdiction over any action where one party to the action shall be an Indian, or a corporation or entity owned in whole or in substantial part by an Indian or the Tribe or a corporation or entity chartered by the Tribe; an:

(a) The cause of action arises under the Constitution or laws of the Tribe; or

(b) An Indian party to the action resides on the Narragansett Reservation.

Sect 108. Jurisdiction over persons outside Reservation.

In a case where it otherwise has jurisdiction, the Court may exercise personal jurisdiction over any person who does not reside on the Narragansett Reservation if such person, personally or through an agent:

(a) Transacts any business on the Reservation, or contracts or agrees anywhere to supply goods or services to persons or corporations on the Reservation; or

(b) Commits an act on the Reservation that causes injury.

Sect 109. Jurisdiction over suits commenced by Tribe.

Notwithstanding any other provision of this Code, the

Tribal Court shall have jurisdiction of all civil actions commenced by the Narragansett Tribe, or by any agency or officer thereof expressly authorized to file suit by the Tribal Council.

Sect 110. Tribe immune from suit.

The Tribe shall be immune form suit. Nothing in the Code shall be construed as consent of the Tribe to be sued.

CHAPTER 2. ESTABLISHMENT AND OPERATION OF COURT OF APPEALS

Section 201. Upgrade of Court of Appeals.

This Law hereby upgrades, supercedes and replaces those non-traditional laws relating to the Tribal Court of Appeals.

Section 202 Jurisdiction of Court of Appeals.

The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court. The Court of Appeals shall review de nova all determinations of the Tribal Court on matters of law, but shall not set aside any factual determination of the Tribal Court if such determinations are supported by substantial evidence.

Section 203 Composition of Court of Appeals.

From time to time as the need arises the Tribal Council shall appoint a Chief Judge and two Associate Judges, none of whom shall be Judges of the Tribal Court. Appointment shall be a two-thirds vote, of those members present at a meeting of the Tribal Council at which a quorum is present. The Council shall set the term of each appointment and the composition of each Judge, which shall not be valid unless affirmed and ratified by the Tribal Assembly.

Section 204 Records of Court of Appeals.

The Court of Appeals shall keep a record of all proceedings of the Court, showing the title of the case, the name and addresses of all parties and attorneys, the briefs, the date of any oral agreement, the names of the Judges who

Exhibit C

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

DOUGLAS J. LUCKERMAN	:	
	:	
v.	:	C.A. No. 13-185S
	:	
NARRAGANSETT INDIAN TRIBE	:	

MEMORANDUM AND ORDER

Plaintiff Douglas Luckerman is an attorney who previously represented Defendant Narragansett Indian Tribe. In 2013, Plaintiff sued the Tribe in State Court for breach of contract, alleging that the Tribe failed to fully compensate him for his legal services. The Tribe removed the case to this Court and moved to dismiss arguing that (1) it is immune from suit under the doctrine of Tribal Sovereign Immunity; (2) the dispute is within the exclusive jurisdiction of its Tribal Court; and (3) Plaintiff failed to exhaust Tribal Court remedies. (Document No. 8-1 at pp. 2-3). On August 29, 2013, Chief Judge Smith denied the Tribe's Motion to Dismiss. (Document No. 16). He held that the Tribe had expressly waived its sovereign immunity in its 2003 and 2007 agreements with Plaintiff. Id. at p. 5. However, he also concluded that the Tribal Court had "at least a colorable claim" of Tribal jurisdiction over this suit and deferred to it to conduct the jurisdictional analysis "in the first instance" "subject to review by this Court." Id. at pp. 11-13. Accordingly, he exercised his discretion to stay this action pending Tribal exhaustion.[1] Id. at pp. 13-14.

[1] Chief Judge Smith made clear in his decision that "[s]hould the tribal court assert jurisdiction and adjudicate the merits of the case, Plaintiff may return to this Court for review of the jurisdictional issues." (Document No. 16 at p. 14).

Discussion

Plaintiff now moves to vacate the stay. (Document No. 45). He argues that "[i]t has now become clear that the Tribe does not have a properly constituted and functioning tribal court, and that its representations to the contrary were made in bad faith." Id. at p. 1. He asks that this Court vacate the stay and, after appropriate briefing and argument, address the Tribe's contention that Plaintiff's claims are within the exclusive jurisdiction of the Tribal Court. Id. The Tribe objects and points to the activities of the Tribal Court as evidence that it is properly constituted and functioning. (Document No. 49).

While the stay was entered over three years ago, some of the delay in this matter is attributable to the Tribe's unsuccessful interlocutory appeal to the First Circuit Court of Appeals. The Tribe filed its Notice of Appeal on January 17, 2014. (Document No. 24). The Appeal was dismissed for lack of jurisdiction on May 29, 2015. (Document No. 38). On February 28, 2014, Judge Dowdell of the Tribal Court granted, in a five-page Memorandum, the Tribe's request to stay Tribal Court proceedings pending outcome of the appeal. (Document No. 46-8 at pp. 3-7). On June 25, 2015, Judge Dowdell issued a one-page Order granting Plaintiff's Motion to Vacate the stay due to the dismissal of the Tribe's appeal. (Document No. 46-10 at p. 2). She also called for suggested dates from the parties to hold a conference.[2] Id. Ultimately, a briefing schedule was established and, in October of 2015, the parties submitted briefs to Judge Dowdell on the issue of Tribal Court jurisdiction. (Document No. 46 at p. 8). Judge Dowdell acknowledged receipt on October 30, 2015. Id. On December 2, 2015, Plaintiff submitted a supplemental filing to bring a recent Seventh Circuit

[2] On April 4, 2014, Judge Dowdell held an initial conference with counsel to discuss "housekeeping and procedural matters." (Document No. 46 at p. 7).

decision to Judge Dowdell's attention. Id. at p. 9. On January 26, 2016, Plaintiff's counsel wrote to Judge Dowdell on the status of the matter. (Document No. 46-11). The Tribal Court did not respond to the writing and, to date, has not held any further proceedings or issued any rulings on this matter. However, on July 21, 2016, the Tribal Court issued a Preliminary Injunction in an unrelated case and scheduled a court hearing for August 17, 2016. (Document No. 49-6).

In Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 n.21 (1985), the Supreme Court enumerated three exceptions to the so-called tribal exhaustion doctrine. It recognized, inter alia, that tribal exhaustion is not required "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." Id.

Plaintiff here contends that it should be excused from exhaustion as futile because the Tribe does not have a properly constituted or functioning Tribal Court.[3] Plaintiff has not presently made a sufficient showing of futility to warrant vacating the stay. As noted by Judge Smith in his 2013 ruling, the Tribal exhaustion doctrine is rooted in principles of tribal autonomy and comity. (Document No. 16 at pp. 7-8). When boiled down, Plaintiff's argument is primarily based on the Tribal Court's several-month delay in ruling on the issue of tribal jurisdiction. However, it has been held that "[d]elay alone is not ordinarily sufficient to show that pursuing tribal remedies is futile." Johnson v. Gila River Indian Cmty., 174 F.3d 1032, 1036 (9th Cir. 1999). See also Basil Cook Enter., Inc. v. St. Regis Mohawk Tribe, 26 F. Supp. 2d 446, (N.D.N.Y. 1998) (rejecting attempt to

[3] Plaintiff relies in part on an Affidavit of the Tribe's Chief Sachem Matthew Thomas dated December 2, 2014. (Document No. 46-15 at p. 5-6). Plaintiff contends that Chief Thomas "advised the appellate arm of the Bureau of Indian Affairs...that the Tribe's court had been 'suspended.'" (Document No. 46 at p. 5). Plaintiff neglects to point out that the indication of suspension was qualified by the statement "except for a singular and unrelated issue" which presumably refers to this pending matter.

divest Tribal Court of jurisdiction as a non-functioning entity in part because the Tribal Court had rendered decisions in two separate matters within the last six months).

While an extreme and inordinate delay in adjudication may ultimately support a futility argument, we are not there yet. The issue of tribal jurisdiction is complex and likely not frequently litigated in a Tribal Court. Further, the Supreme Court in Nat'l Farmers held that the Tribal Court must determine the scope of its jurisdiction in light of federal law and must conduct "a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." 471 U.S. at 855-856. Moreover, Chief Judge Smith cautioned that "[t]he care with which the tribal court conducts its jurisdictional analysis as well as the conclusions reached are, of course, subject to [his] review." (Document No. 16 at p. 13) (emphasis added).[4] Thus, it is not surprising that the Tribal Court took the matter under advisement and has not rushed to judgment on the issue.

Conclusion

For the foregoing reasons, Plaintiff's Motion to Vacate Stay (Document No. 45) is DENIED without prejudice.

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
September 30, 2016

[4] When the issue of tribal exhaustion was litigated before Chief Judge Smith in 2013, it does not appear that Plaintiff claimed that the Tribe did not have a properly constituted and functioning Tribal Court or sought discovery on that issue.

Original decision by Chief Justice William Smith in Luckerman v. Narragansett Indian Tribe, C.A. No. 13-185 S

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DOUGLAS J. LUCKERMAN, Plaintiff,	)	
v.	)	C.A. No. 13-185 S
NARRAGANSETT INDIAN TRIBE, Defendant.	)	

OPINION AND ORDER

WILLIAM E. SMITH, United States District Judge.

Plaintiff Douglas Luckerman, an attorney who formerly represented Defendant Narragansett Indian Tribe ("Tribe"), brought suit against the Tribe in state court for breach of contract, alleging that the Tribe failed to fully compensate him for his services. The Tribe removed the case to federal court and filed the instant motion to dismiss, arguing, among other things, that the case falls within the jurisdiction of its tribal court. (ECF No. 8.) Luckerman filed an opposition to the Tribe's motion (ECF No. 10), as well as his own motion to remand the matter to state court (ECF No. 11). For the reasons set forth below, both motions are DENIED, and the case shall be stayed pending adjudication in the tribal court.

I. Facts

Luckerman, a Massachusetts attorney and non-member of the Tribe, began representing the Tribe in 2002. In March 2003, Luckerman prepared and directed to the Tribe's Chief Sachem Matthew Thomas, a letter memorializing the terms of the engagement ("2003 agreement"). The 2003 agreement provides, in pertinent part: "The Tribe agrees to waive any defense of sovereign immunity solely for claims or actions arising from this Agreement that are brought in state or federal courts." (Ex. to Stipulation 8, ECF No. 4-1.) While the agreement is not signed by any representative of the Tribe, the complaint alleges that the Tribe accepted its terms. A note at the end of document states: **"THIS IS YOUR AGREEMENT. . . . IF YOU DO NOT UNDERSTAND IT OR IF IT DOES NOT CONTAIN ALL THE AGREEMENTS WE DISCUSSED, PLEASE NOTIFY ME."** (Id. at 9.)

In February 2007, Luckerman was again engaged by the Tribe to act as counsel to one of its offices, the Narragansett Indian Tribal Historic Preservation Office ("NITHPO"). Luckerman and NITHPO entered into an agreement setting forth the terms of the engagement ("2007 agreement"). The agreement provides, in pertinent part: "The NITHPO agrees to a limited waiver of Tribal sovereign immunity in Tribal, federal and state courts, solely for claims arising under this Agreement." (Id. at 11.) The 2007 agreement is signed by John Brown, the Narragansett

Indian Tribal Historic Preservation Officer. Like the 2003 agreement, it directs the recipient to notify Luckerman if there is any problem with the terms.[1]

The Tribe made some payments to Luckerman, but those payments allegedly were not sufficient to meet the Tribe's obligations under the 2003 and 2007 agreements. Luckerman claims that the Tribe is currently indebted to him in an amount of over $1.1 million.

II. Discussion

"The question whether an Indian tribe retains the power to compel a non-Indian . . . to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law . . . ." Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 27-28 (1st Cir. 2000) (quoting Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 852 (1985)). Thus, in the present case, this Court has federal question jurisdiction to determine "(1) the extent of the tribal court's jurisdiction over the plaintiff's claims, and (2) the defendant's assertion that, as an arm of a federally recognized Indian tribe, the impervious shield of tribal

[1] Both the 2003 and 2007 agreements were attached to Luckerman's state court complaint. In any event, the Court may consider matters outside the pleadings in ruling on Defendant's Rule 12(b)(1) argument. See 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (3d ed. 2004).

sovereign immunity protected it from suit."[2] Id. at 25. The First Circuit has indicated that the latter issue should be addressed first. See id. at 28.

A. Sovereign Immunity

"Generally speaking, the doctrine of tribal sovereign immunity precludes a suit against an Indian tribe except in instances in which Congress has abrogated that immunity or the tribe has foregone it." Id. at 29. Here, the Tribe argues that the complaint must be dismissed on sovereign immunity grounds pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Luckerman counters that the Tribe waived its immunity in the 2003 and 2007 agreements.

With regard to the 2003 agreement, the Tribe responds that the document was not signed by any of its representatives. However, the complaint alleges that Luckerman sent the agreement to Chief Thomas and that the Tribe accepted the terms of the agreement through its conduct. Indeed, the Tribe does not dispute the fact that it received the letter and continued to accept Luckerman's legal services. While it is true that "a waiver of sovereign immunity cannot be implied," Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (internal citation and quotation marks omitted), the Tribe's conduct here cannot

[2] The Tribe's other arguments for dismissal must be addressed, in the first instance, by the tribal court if it decides to exercise jurisdiction over this case.

fairly be characterized as an implied waiver. By receiving a proposed agreement that unequivocally purported to waive the Tribe's sovereign immunity, and treating that agreement as valid, the Tribe expressly waived its immunity. The cases cited by the Tribe are not to the contrary. See id. at 58-59 (holding that a statute making habeas corpus available to individuals detained by Indian tribes did not constitute a general waiver of sovereign immunity); Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1066 (1st Cir. 1979) ("[T]he Tribe's mere acceptance of benefits conferred upon it by the state cannot be considered a voluntary abandonment of its sovereignty and its attendant immunity from suit."); Federico v. Capital Gaming Int'l, Inc., 888 F. Supp. 354, 356 (D.R.I. 1995) (holding that "a waiver of sovereign immunity cannot be inferred from [an Indian] Nation's engagement in commercial activity" (internal citation and quotation marks omitted) (alteration in original)).

The 2007 agreement, unlike the 2003 agreement, is signed by a representative of NITHPO. The Tribe, however, contends that this organization is "an entity of the Tribe," which lacked the authority to waive the Tribe's sovereign immunity. (Def. Narragansett Indian Tribe's Mem. in Supp. of its Mot. to Dismiss 6, ECF No. 8-1.) However, three federal courts of appeals, including the First Circuit, have reached the opposite conclusion on similar facts. See Ninigret, 207 F.3d at 29-31

(holding that the Narragansett Indian Wetuomuck Housing Authority, which the court characterized as "an arm of the Tribe," acting pursuant to a tribal ordinance, waived sovereign immunity by contract); Confederated Tribes of the Colville Reservation Tribal Court v. White, (In re White), 139 F.3d 1268, 1269, 1271 (9th Cir. 1998) (holding that Colville Tribal Credit, "an agency of the Confederated Tribes of the Colville Reservation," waived sovereign immunity by participating in a Chapter 11 bankruptcy proceeding); Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 806, 812 (7th Cir. 1993) (holding that "a wholly-owned tribal corporation and governmental subdivision" waived sovereign immunity in a letter of intent).

Further, the fact that the Tribe, not NITHPO, is named as the sole defendant is immaterial. The Tribe has presented no evidence that NITHPO has any independent legal existence. In fact, to the contrary, the Tribe acknowledges that NITHPO is an office of the Tribe. Indeed, in 2002, the Tribe filed a complaint in this Court, listing as the single plaintiff, "Narragansett Indian Tribe of Rhode Island, by and through the Narragansett Indian Tribe Historic Preservation Office." (Attach. 2 to Pl. Douglas J. Luckerman's Objection to Def. Narragansett Indian Tribe's Mot. to Dismiss 12, ECF No. 10-2.) Because NITHPO lacks an independent legal existence, its sovereign immunity and the Tribe's sovereign immunity are one

and the same. See Ninigret, 207 F.3d at 29 ("[W]e shall not distinguish between the Tribe and the Authority in discussing concepts such as tribal immunity and tribal exhaustion.").

B. Tribal Exhaustion

The Tribe's second argument in support of dismissal is predicated upon the tribal exhaustion doctrine. Under this doctrine, "when a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims." Id. at 31; see also Rincon Mushroom Corp. v. Mazzetti, 490 F. App'x 11, 13 (9th Cir. 2012) (holding that "[t]ribal jurisdiction need only be 'colorable' or 'plausible'" for exhaustion to apply). Unlike sovereign immunity, "[t]he tribal exhaustion doctrine is not jurisdictional in nature, but, rather, is a product of comity and related considerations." Ninigret, 207 F.3d at 31. Therefore, while the Tribe waived its sovereign immunity in the 2003 and 2007 agreements, this holding has no bearing on the question of whether this Court should defer to the tribal court and require exhaustion. In the present case, the parties disagree on the existence of a colorable claim of tribal court jurisdiction.

As a preliminary matter, "the determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to forum-selection provisions that may be contained within the four corners of an underlying contract." Id. at 33. For this reason, Luckerman's argument that the Tribe waived the exhaustion requirement in the 2003 and 2007 agreements is meritless.

The Supreme Court has made clear that "the sovereignty that the Indian tribes retain is of a unique and limited character. It centers on the land held by the tribe and on tribal members within the reservation." Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 327 (2008) (internal citation and quotation marks omitted). Moreover, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." Id. at 330 (internal citation and quotation marks omitted). Consistent with these limitations, "tribes do not, as a general matter, possess authority over non-Indians who come within their borders." Id. at 328. The Supreme Court has, however, recognized two exceptions to this principle, which allow tribes to:

> exercise civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.[3] First, [a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Second, a tribe may exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 329-30 (quoting Montana v. United States, 450 U.S. 544, 565-66 (1981)) (internal quotation marks and citations omitted) (second alteration in original).

Luckerman argues that the first of these so-called "Montana exceptions" does not apply here because his activities pursuant to the contracts were largely conducted off the reservation. However, he concedes that some of these activities occurred on tribal land. Moreover, both the 2003 and 2007 agreements are addressed to tribal officials and were presumably accepted at the Tribe's offices. See F.T.C. v. Payday Fin., LLC, No. CIV 11-3017-RAL, 2013 WL 1309437, at *10 (D.S.D. Mar. 28, 2013) ("The test of the place of a contract is the place where the last act is done by either of the parties which is necessary to complete the contract and give it validity." (internal citation and quotation marks omitted)). In these circumstances,

[3] The Supreme Court has defined "non-Indian fee land" as "land owned in fee simple by non-Indians." Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 328 (2008).

"treating the nonmember's physical presence as determinative ignores the realities of our modern world that a [non-member], through the internet or phone, can conduct business on the reservation and can affect the Tribe and tribal members without physically entering the reservation." Id. at *11.

Moreover, the First Circuit has suggested, albeit before the Supreme Court's decision in Plains Commerce Bank, that a tribal court may, in some circumstances, have jurisdiction over activities occurring off the reservation. In assessing tribal jurisdiction over an off-reservation dispute, "an inquiring court must make a particularized examination of the facts and circumstances attendant to the dispute in order to determine whether comity suggests a need for exhaustion of tribal remedies as a precursor to federal court adjudication." Ninigret, 207 F.3d at 32 (requiring exhaustion of a claim arising from an agreement for the construction of a housing development "on land purchased by the Tribe but situated outside the reservation"). First, the court must ask whether the claim "impact[s] directly upon tribal affairs." Id. This initial requirement appears satisfied in the present case. See id. ("Courts regularly have held that a contract dispute between a tribe and an entity doing business with it, concerning the disposition of tribal resources, is a tribal affair for purposes of the exhaustion doctrine."). The next step in the analysis is to "measure the

case against the tribal exhaustion doctrine's overarching purposes." Id. These purposes include "supporting tribal self-government," "foster[ing] administrative efficiency," and "provid[ing] other decisionmakers with the benefit of tribal courts' expertise." Id. at 31. Here, the Tribe's act of securing legal representation regarding issues of tribal land and sovereignty constitutes an exercise of the Tribe's governmental functions. Moreover, deferring to the tribal court, which regularly deals with issues of tribal jurisdiction, will foster efficiency and produce a record that will assist other decisionmakers.

In sum, Luckerman reached out to the reservation by entering into a consensual relationship with the Tribe, and, accordingly, the tribal court has at least a colorable claim of jurisdiction over suits arising from that relationship.

In a last ditch effort to avoid the exhaustion requirement, Luckerman points to "a joint memorandum of understanding" executed by the Tribe and the State of Rhode Island in 1978, pursuant to which the Tribe gained control of certain lands. See Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16, 19 (1st Cir. 2006). In exchange, the Tribe agreed that, except for state hunting and fishing regulations, "all laws of the State of Rhode Island shall be in full force and effect on the settlement lands." Id. Congress subsequently passed the Settlement Act,

which stated that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." Id. (quoting 25 U.S.C. § 1708(a)). The First Circuit has held that this provision "largely abrogates the Tribe's sovereign immunity," and that, in light of this abrogation, the state could enforce its criminal laws on settlement lands by executing a search warrant against the Tribe. Id. at 26.

The first problem with Luckerman's argument on this point is that Narragansett was a sovereign immunity case, in which the First Circuit had no occasion to discuss the doctrine of tribal exhaustion. Additionally, the Narragansett court expressly distinguished its prior decision in Maynard v. Narragansett Indian Tribe, 984 F.2d 14 (1st Cir. 1993), which involved "civil suits premised on activities occurring outside the settlement lands." Id. at 29. Because the instant case is civil in nature and involves the tribal exhaustion doctrine, a separate and distinct issue from sovereign immunity as explained above, the implications, if any, of Narragansett are far from clear. Accordingly, an assessment of tribal jurisdiction over this case "will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." Nat'l Farmers, 471

U.S. at 855-56 (footnote omitted). This examination "should be conducted in the first instance in the Tribal Court itself." Id. at 856. The care with which the tribal court conducts its jurisdictional analysis as well as the conclusions reached are, of course, subject to review by this Court.

Where, as here, the doctrine of tribal exhaustion applies, whether to dismiss the complaint or merely stay the proceedings pending exhaustion is a decision left to the discretion of the trial court. See Ninigret, 207 F.3d at 35. However, a stay is preferable where dismissal may cause problems under the applicable statute of limitations. See, e.g., Rincon, 490 F. App'x 13-14. Here, some of the allegations in the complaint date back to 2002. Rhode Island has a ten-year statute of limitations for contract actions. See Martin v. Law Offices Howard Lee Schiff, P.C., C.A. No. 11-484S, 2012 WL 7037743, at *1 (D.R.I. Dec. 10, 2012) (citing R.I. Gen. Laws § 9-1-13(a)), report and recommendation adopted, No. CA 11-484 S, 2013 WL 489655 (D.R.I. Feb. 7, 2013). Thus, if Luckerman was forced to re-file, more of his claims would become time-barred with each passing day. For this reason, the Court finds that a stay is appropriate.

III. Conclusion

For the foregoing reasons, Defendant's motion to dismiss is DENIED, and Plaintiff's motion to remand is DENIED as moot. The

case is stayed pending tribal exhaustion. Should the tribal court assert jurisdiction and adjudicate the merits of the case, Plaintiff may return to this Court for review of the jurisdictional issues.

IT IS SO ORDERED.

/s/ William E. Smith
William E. Smith
United States District Judge
Date: August 29, 2013

Exhibit D

	NARRAGANSETT INDIAN TRIBAL COURT **Hearing Address: Longhouse, 4425 South County Trail** **Charlestown, RI** **Telephonic Contact through 401-364-1107**	*FOR COURT /TRIBUNAL USE ONLY*
PLAINTIFFS:	**Dean Stanton et al. and Mary S. Brown**	CALL NUMBER: CASE NUMBER: CA-2016-01
DEFENDANTS:	**Bella Noka (TEC chair), Shaena Soares (vice chair), Darlene E. Monroe (secretary), and Ollie Best, Chali Machado, Harold Northup, and Anthony Soares**	

The above named Plaintiffs have petitioned the Court for a *Preliminary Injunction* against the named Defendants. A court ordered *Preliminary Injunction* requires (1) specific evidence clearly and convincing proves that the applicant(s) will suffer irreparable harm during the pendency of the litigation unless a preliminary injunction is issued and (2) that the balance of equities favors the applicant(s) over the party sought to the enjoined. NICCJ at IV-4-401.

Evidence submitted clearly and convincing proves that Plaintiffs meet their burden of production. The Court grants a *Preliminary Injunction*. It has determined that the current circumstances require immediate court intervention because irreparable harm will be suffered if activities by the self-titled TEC members touching Tribal elections are not enjoined and that applicants asserted Tribal interests greatly outweigh the interests of the parties enjoined.

1. To defendants: Bella Noka, Shaena Soares, Darlene E. Monroe, Ollie Best, Chali Machado, Harold Northup and Anthony Soares

2. A court hearing has been set at the time and place indicated below:

   Time: 11:00 AM Location: LONGHOUSE Date: Wednesday, August 17, 2016

3. NOTICE OF DEFAULT JUDGMENT:

   a. To Defendants: Notice of a preliminary injunction against you and a hearing date has been served through your internally appointed secretary. If you fail to appear at the hearing (whether in person or through a representative) or otherwise to defend the case, the Court may enter a default judgment permanently granting the relief sought in the complaint upon such showing of proof by the plaintiffs as the Court deems appropriate.

   b. To Plaintiffs: You have been notified of the hearing time and place, if you fail to appear at the hearing (whether in person or through a representative) or otherwise to prosecute the case, the Court may dismiss the case for failure to prosecute.

   c. The Court may, for good cause shown, set aside entry of a default judgment or dismissal for failure to prosecute.

PRELIMINARY INJUNCTION

THE COURT FINDS

4. a. The defendants are: Bella Noka, Shaena Soares, Darlene E. Monroe, Ollie Best, Chali Machado, Harold Northup and Anthony Soares

   b. The protected person and entity are: Dean Stanton et al., Mary S. Brown and the Narragansett Indian Tribe

5. THE COURT ORDERS that the enjoined persons must not interfere with the protected parties, or their right to assemble with others, by:

   a. Conducting any business, meeting, rally, election or any other gathering on tribal property that concerns election matters or interferes through collective or individual conduct by the enjoined persons with same;

   b. Communicating or publishing any information or entering into any contract in the name of the Narragansett Indian Tribal Election Committee; OR

   c. Using names gathered from the official tribal mailing list to broadcast into or spam tribal email or snail mailboxes as a means to circulate privately authored communications, personal opinions or for any other private or unofficial purpose.

   d. The 2016 general election for tribal council seats is stayed. This PRELIMINARY INJUNCTION remains in effect until the Hearing or the Court receives verified notice the Tribal Government and Tribe have vetted TEC matters, which in turn may require the Court to dissolve or modify the preliminary injunction, as the interests of justice require.

Violations of this ORDER are subject to penalties.

Date: 7/21/2016 Time: 5:20 PM

Judge D. Dardell

Signature: Tribal Court Judge / Clerk

I. Jurisdiction Statement

At a duly called Tribal Monthly Meeting on August 29, 1992, the Tribe adopted TA 92-082992, which established the UNIFIED JUSTICE CODE that creates the Tribal Court and provides its legal basis under Title 1. This resolution informs that "said Code of Justice is hereby enacted on a provisional basis, subject to further review from the pertinent committees and commissions of the Tribe, but *shall have the full force and effect of law.*" (Emphasis added.)

This resolution also formally identified the Tribe's expectation for its government and sworn duties its council should uphold.

> WHEREAS: The Tribal Assembly recognizes and acknowledges the need of protecting the Narragansett community from unlawful acts, lawlessness and harm, and
>
> WHEREAS: The Tribal Council is sworn to uphold the rights of the Tribal people and community, in the areas of general health, education, welfare, and is also sworn to keep the peace and maintain harmony within the tribe.

Since that time, it is of record that the Tribal Government revised the Code twice through expansion. The first time was December 31, 2000, made effective January 1, 2001. This document reflects a major change in the title, from the UNIFIED JUSTICE CODE to the COMPREHENSIVE CODES OF JUSTICE, as well as other content changes that do affect jurisdiction, and again on August 21, 2001 through notice of added sections.

Tribal Meeting Minutes, previously reviewed for the *2010 Election Decision* released on August 10, 2010, reveal that the Tribe was primed to make a concentrated, fresh start at the beginning of a new century. This fresh start began with the *Tribal Profile of 1998*, which revises the 1989 version, followed by revision of the CODE at the close of 2000, as well as establishment of a revised process to seat Council, via staggered terms under TA-123000-01. The Tribe created the stagger as a means to create stability and continuity within the government; however, it did not apply the stagger process systematically under the terms originally adopted. What results have been obtained bring the Tribe to reconsider its election process today. *See, for example,* Tribal Council *Memorandum, re Narragansett Indian Tribal Constitution Bylaws* dated November 2, 20002. This document, attached to the *2014 General Election Notice* (November 6, 2014), hereinafter the *2014 Notice*, provides notice and a copy of the Tribe's ratified resolutions between 1997 and 2000, which amend the NIT CONSTITUTION AND BY-LAWS.

Over the years, the court system has received sporadic attention and fewer resources. Between 2002 and 2003, Council brought in a consultant to look at and plan for the court's development. The consultant identified individuals to sit as an advisory board based upon their combined experience and knowledge of the community, federal Indian law, customary practices and traditions. Through consultation and dialogue, the seed of a proposed Tribunal grew, which received positive reception from Council under TC-01-20-05, *Establishment of a Tribunal*, on January 20, 20005 and a seed budget from the Sachem. The Government's resolution states, in part:

> Whereas: The Infrastructure envisioned to establish a formal tribal court system as ratified under the Narragansett Comprehensive Codes of Justice is not in place nor are the necessary resources at hand, and

Whereas: The complaints processed by the tribal police and the internal personal/civil disputes require timely resolution by a systematic adjudicator body.

The Tribunal heard cases from 2005 to 2008. Then active support dried up. A subsequent search for individuals who were willing and able to serve had fruitless result. The Tribe also attempted a search by nominating candidates to sit and had the same result.

Even though the Tribunal was defunct, the Court remained a legally established and separate government-level, adjudicatory body duly, created by the Tribe through customary and constitutional process. In both 2008 and 2010, the Court received complaints from government officials regarding election challenges that included complaint about the election grievance procedures. These procedures, found within the Tribe's *Election Rules and Procedures* (the ERP) rely upon the use and exhaustion of traditional channels and entities for remedy; however, once exhausted and if legal issue remains, the Tribe's statutory law provides the Court with jurisdiction.

The *2010 Election Decision* (August 10, 2010) was the first instance where judicial review concentrated on the Tribe's application of the staggered terms. The *Decision* was critical of the Tribe's implementation of constitutional law, which strayed from using the established procedure to revise or change the election process. Personalities without focused regard for election policy rose to undercut the Court's jurisdiction and Chief Judge around this time. A lesson rising from this approach is tribal law and policies are not self-enforcing.

On June 28, 2014, by Council resolve, the Judge resumed hearing argument about the election matters' legal aspects and applying tribal law and policy to them, politically unfettered by further intrusion of personalities. The CODE at Title 1 provides Council with the authority to appointment a Special Judge in the event that the Chief Judge is unable for any reason to hear a case. Consequently, arguing that the judge's term has expired as a means for removal is irrelevant and immaterial when Council, by resolve, made a specific judicial appointment.

That Defendants reference a vote of no confidence made by the tribal assembly, which also does not affect the legal standing of a duly appointed judge, has no merit; because, a judge's removal requires specific process that includes adherence to an explicit review standard and statutory process. See the NICCJ at Title 1-3-305, which establishes no right or authority in law to displace the Court or remove a judge summarily. That discussion took place in a special or assembly meeting does not change the legal requirements the CODE provides to protect the Court and sitting judges from personalities or personal displeasure that can result from a judge fulfilling the obligations of Office.

II. Summary of Facts and Procedural History

Issues with the election process fully bloomed before the Tribe in 2014. Members of the Tribal Government and Tribe submitted complaints to the Court. On November 6, 2014, the Court provided notice of submitted complaints about the 2014 election in the *2014 Election Notice*. Allegations challenged constitutional and rule interpretations to support decisions made, subsequent actions taken, as well as lines of authority and

responsibility. Plaintiffs also complained about the disregard of protocols and generally known understandings regarding customary practices embedded in tribal law. They further alleged that these omissions placed hurdles around direct input from the Tribe. Specific, reoccurring challenges have concerned the law and policy relied upon by the Tribal Election Committee (the TEC) to conduct the 2014 election. These issues range across the various methods that committee members have used to conduct the Tribe's election business and itself, which plaintiffs submit will bring irreparable harm if allowed to continue unabated and that the balance of equities favors the Tribe.

The *2014 Election Notice* stated, in part,

> The fact that there is deadlock over the legitimacy of the election within the tribal government deserves further examination for its cause. Multiple opinions and explanations arise to validate challenged rules and ad hoc actions, which reveal that the rules still do not uniformly instruct, important issues remain unresolved, and designated responsibilities and accountabilities [are] misconstrued. Bottom line, the processes and procedures used to conduct the 2014 election and seat Council do not meet what the Tribe and candidates required from the start—clarity and the application of standing tribal law.

The Tribe still has not had this information need met. Under Next Steps in the *Notice*, at page 6, the Court further provided:

> Finding a path to resolution has become a contest of political power and personal will. The main issue is not should the election be overturned, should new council members step down, should the election process be corrected now or later or should the TEC oversee deliberations by the Tribe.

> Tribal law and policy already provides the answers to these questions by defining rights and responsibilities. Law and policy can further serve to arbitrate.

In December 2014, complaint arose through traditional channels against the TEC Chair for her disrespectful conduct at the December 2014 Special Meeting facilitated by the TEC. At the January end of month meeting, the Chair was involved in another incident that involved violent conduct, which in turn spurred additional violent acts by members of the challenged 2014 council-elect. Without further detailing, the cumulative record provides example that the Tribe's complaints against the conduct of TEC members and their application of law and policy have been under continuing legal challenge—without definitive and final tribal resolve—for some time.

On July 8, 2016, specific request for a Preliminary Injunction came through the Tribal Police, who received complaints on July 7, and 8, 2016 for submission to the court from Dean Stanton et al. and Mary Brown respectively. Since the subject matter and relief sought overlaps in the complaints, the Court consolidated the plaintiffs' petitions.

Prior to seeking injunction, Plaintiffs sought and received a TRO without notice. *See Petition and Grant to place a Temporary Restraining Order without Notice to Restrict the TEC from further interference with the Reserved Right of the Tribe to determine how it shall seat Council in the Next General Election for Tribal Council Seats* (June 30, 2016), hereinafter the TRO. The Court granted the TRO because the presented evidence supported that the TEC was acting beyond its lawful authority by dictating to the Tribe what the election process and council terms shall be when a motion for tribal deliberation about this matter remains on the table. In addition, the presented evidence verified that TEC committee members ignore preparatory election requirements under the ERP. These

requirements relate to the committee's composition and seating as well as ensuring that the ERP reflects the Tribe's determinations regarding the election process and procedural updates or corrections for the 2016 election.

The Court's TRO findings stated, "[T]hese actions constitute imminent harm to the Plaintiffs and Tribe because the TEC undercuts a customary, reserved right. Furthermore, these actions set obstacles between the government and Tribe and interferes with the creation of consensus about how to move the election process forward in an orderly, legitimate and transparent manner." The TRO restrained the Defendants from publishing or pursuing any activities to promote or conduct a general election for tribal council seats on July 30, 2016.

Plaintiffs now seek a preliminary injunction against Defendants and allege that these individuals persist in advancing purported authority to conduct a general election. As evidence of this intent, Plaintiffs submitted copies of additional communications received to demonstrate Defendants continuing activities and statements of intended action(s). Plaintiffs meet their burden of production within the cited time constraints and considerations. The Court, through instruction in the TRO, provided a communication channel for document submission that specified delivery through the Tribal Police.

The Court provides judicial notice that Plaintiffs attended and adhered to legal requirements and that the Defendants continued actions under purported right to conduct a general election and to determine the Tribe's election process, date and number of open seats. Broadcasted communications also continue to assert the right of Defendants to defy a court Order with claim that the Court and Judge lack constitutional underpinning. This claim overlooks the interconnections and structure of

tribal law. In addition, there has been claim federal law demands adherence to Defendants' election plan. *See TRO* at pp. 8-9 (discussing the irrelevancy of citation to 25 CFR 81.8 because the Tribe does not hold secretarial elections and that reliance on CFR Part 81 requires reading the statute's purpose, which is found at 25 CFR 81.2).

While making these various arguments and accepting no contrary response, Defendants attempt the assumption of authority to make and implement tribal-wide, governmental level decisions about tribal law, policy, process and procedures. Under this ill-advised and illegal assertion, they continue to attempt action that the Tribe protests through germane, legal argumentation. The Court has not received any documentation from Defendants that uses the Court communication channel specified and directly responds to legal challenges made by Plaintiffs.

III. Analysis

A. Preliminary Injunctions

A preliminary injunction restrains activities of a defendant until the case can be determined on the merits. Plaintiffs continue to dispute Defendants' claim regarding automatous authority a TEC to predetermine the election process, procedures, date rand ignore standing obligations and rules within the ERP. Plaintiffs seek further restraint on Defendants from any more publication about or action geared towards conducting a general election.

As obliged per notice in the TRO, Plaintiffs submitted formal applications through the Tribal Police for a preliminary injunction within 10 days' time of the TRO

and provided two days' notice to the adverse party of their intent to pursue additional remedy pursuant to the NICCJ, Title IV-4-402. Tribal Police delivered a verified copy of the complaints received within the deadline to Darlene Monroe, acting TEC secretary, at 10:30 AM on Friday July 8, 2016.

Since then, Plaintiffs submit that Defendants have continued to broadcast publications to the tribal community indicating intent to hold an election, seeking the involvement or attention of federal agents, while ignoring their own obligation to obey tribal law and arguing against Plaintiffs' right to seek remedies provided under tribal law. The Court provides judicial notice that it too has been the recipient of various emails from the secretary, who continues broadcast publishing and assertion that the defendants must conduct an election despite ample evidence to the contrary.

B. Standard of Review

> No preliminary injunction shall be issued (1) absent clear and convincing proof by specific evidence that the applicant will suffer irreparable harm during the pendency of the litigation unless a preliminary injunction is issued and (2) that the balance of equities favors the applicant over the party sought to the enjoined.

Defendants' announcement of a general election, its date and the process to be used was not released under the terms of the Constitution at Article I, §I. It is of record that a partial budget was released and that Defendants rely on this fact to promote authority to *conduct* the election. It does not; because, an election committee has specific obligations and preparatory steps that it must complete before conducting an election. Defendants have not met this threshold and the fact remains that they are obligated to provide the legal basis for assuming autonomous authority over the Tribe and Tribal

Government as well as answer the formal complaints and challenges about their actions and conduct.

(1) Under the first element, email communication from the acting secretary—sent before, during and since the TRO—provide evidence that neither the Chair nor other defendants oppose the conduct that shows intent to allow continued frustration and interference with any challenge to holding their election. Assigning ownership of the purported election is purposeful because to date, no legal argument—despite incessant communications—supports the right of any TEC to determine independently:

- What conduct the Tribe should expect and must accept when committee members engage in official business on behalf of the Tribe,
- How and when to fill expired TEC seats,
- When the next election should and shall take place,
- What process the Tribe will use to determine how a council is seated in the next general election, and
- The number of seats opened.

Arguments, sowed within the community, provide no legal or persuasive basis to justify the actions and conduct of the Defendants. Argumentation relies on appeals to emotion, personal attack buttressed by illogical reasoning to shift focus and overlooking change. For example, the flyer appeals to emotion by rallying the Tribe to assert its right to get out and vote. Yet, Defendants ignore that very right by interfering with the Tribe's right to vote on the fundamental issues it has previously raised about the election process and procedures. No broadcasted communication cogently explains

why the Tribe must forfeit this right and begin with the predetermined choices advanced by the Defendants.

Argumentation seeks to inflame and delay dialogue through use of institutional and personal attack. In addition to not addressing Plaintiffs' pointed issues, the content of the broadcasted communications contain randomly introduced, wide-ranging criticisms of others, which does not distract from Defendants failure to fulfill the designated obligations and responsibilities of a TEC. More importantly, acts and actions undertaken obstruct the Tribe from creating a pathway to resolve. By introducing subjects irrelevant to *the Tribe's resolution of the matter at hand*, Defendants use conduct and methods they accuse or infer in others.

A reoccurring argument advances two wrongs make a right. First, this approach entangles then compresses separate issues. Since 2014, the Tribe has indicated repeatedly that it wants to examine *the election process* and indicated dissatisfied with the conduct and decisions of elected, public officials.

One issue involves the application of tribal law regarding election protocols and customary practices. Protocols and enduring customary practices reduce to expected standards of public behavior, which includes the deportment of public officials, which includes committee members, while holding office as well as each individual's responsibility to be responsible for their own conduct in assembly. A major protocol under deportment of public officials is to honor (respect) the reserved right of the Tribe to assemble and discuss its internal matters without threat of violence. Once assembled, whether for social interaction or to conduct business, there is an equal expectation about the behavior of community member participants. It does not serve the collective rights of the Tribe when public behaviors by tribal officials or individuals denigrates. The use

or threat of violence now becomes commonplace, exemplified by hostile acrimonious conduct during assemblies. The use of "fighting words," physical attacks and disregard for rules of law and public deportment is a non-productive way to conduct assembly business or an election. TEC members do not stand outside or above these behaviors.

Another attempted shield is using 'Others' as in other's misuse or abuse of tribal resources and property. Here the public release of business confidential documents through the TEC opens discussion about public officials' adherence to (1) the confidentially of internal, business matters and (2) the protocols and authority needed for release. Moreover, there is gathering and distribution of public, legal documents with interpretations are misleads the community or is outright incorrect.

Reiterating example of the latter, faulty reliance on a federal statute, based upon an incorrect reading of the statute's purpose, to contend that the federal government demands the Tribe follow Defendants leads into a deeper election quagmire. This argument demonstrates shallow reading without attention to context and content or an understanding of the legal concepts and policy found within federal Indian law or vetted research findings, which validate the superior results obtained when a tribe resolves political, internal tribal matters through judicious use of its own law, policy and customary practices. Ensuring that the interconnections between these sources ring true for the future well-being of Tribe is no easy task; yet, this task belongs to the contemporary Tribe. While it has historically designated and distributed authority and responsibility to handle the roles and tasks of running the government, the Tribe has not released the right to assemble peaceably or determine how to seat its government.

The Tribal Government and Tribe stand at a crossroads. Today's focus does not omit how we got here nor dismiss missteps that may yet need correction or procedural

resolve. Nonetheless, the intent remains to produce consistency and stability within the tribal government by setting a consensual course for fair and efficient resolution of election issues. Considering the number of people involved and the tribal-wide impact, there is a need for prioritization, methodical analysis and deliberation to resolve outstanding issues.

The Defendants' actions do not contribute to resolution because they act without legal standing, authority and tribal consent. Yet, broadcasted publications skip over these facts, which ignore the standing law, policy and issues on the election discussion table. Plaintiffs accurately distinguish that Defendants' conduct and actions do not represent the letter or spirit of Narragansett tribal law. By its response and repeated requests following customary practices, the Tribe has made it plain that it wishes to have a forum dedicated to discussion and resolve of named election issues. Defendants do not contribute to resolve. By not correcting internal abuse of resources and position or renouncing this conduct, the individual defendants associate themselves as whole with these behaviors and demonstrate an inability to correct themselves.

The ERP, under Obligations at Article II§1(B)(5) states "In the event a member of the TEC becomes rude, vulgar, combative and/or is the cause of unavoidable conflict, he or she can be removed by a 2/3 vote of the committee." This obligation to control itself is not limited to the day of an election. The list covers general duties like TEC meeting attendance and adherence to privileged business confidentially.

For example, there is nothing in the ERP that specifically designates the TEC shall facilitate special meetings for ERP review. This is a task that the Tribe has either requested or allowed over the last few elections. Consequently, proper deportment of the committee and its members under §1(B)(5) broadens in fulfillment of expanded

tasks. Yet, neither the chairs nor individuals provide example that demonstrates fidelity to written law and rules, customary practices or protocol. The internal secretary uses the official mailing list as a personal soapbox to spam email mailboxes with incessant and derogatory tirades that lack cogent legal argumentation and analysis. Defendant committee members are well aware that the Chair's past conduct has been combative as well as harmful to tribal members and yet the members, as a committee, have ignored its affirmative obligation to disapprove this type of conduct and done nothing. In addition, public announcement for a purported election rally was made on the same date reserved for a special meeting. This knowingly set the stage for unavoidable conflict between tribal members and the Defendants and their election candidates who walk, whether naïvely or defiantly, into a cycle of conflict and lawlessness perpetuated by defendants.

(2) Since the 2014 election, tribal members have sought to convene a forum that would allow deliberation about outstanding issues within their election process. Out of the entities and opinions that previously sought to command, persuade against, redirect or otherwise subvert the right of the Tribe to reject the methods used to conduct the election and its grievance procedures, and consequent invalidated results, only one—the Defendants acting as a self-titled TEC—remains discernably obstructionist.

First, evidence shows that Defendants have used tribal resources and public office as a personal platform to effect outcomes that show no redeeming benefit for the Tribe. They also allow one person to seek and then broadcast non-sequential, old news, dated issues and irrelevant facts and argumentation without sanctioned purpose or legal standing. No authority and individual right allows a TEC or any of its members the freedom to take precedence over other community members—and by implication

tribal-wide reserved—rights or that the official mailing list may be used to bombard promotion of personal opinion. This conduct also presumes that a purported individual right asserted by any one tribal member supersedes the right of other community members to entertain and participate in dialogue about tribal-wide issues. There is misassumption of a personal right to override other community member's voices, and opportunity to listen to other points of view, as a means to prevent building any consensus that does not follow the direction and steps charted by Defendants about election issues.

Second, recent communications take aim to foreclose the tribal community's access to the Court by misrepresenting its legal foundation and jurisdiction in a multi-pronged attempt to dismantle the governmental infrastructure that (1) the Tribe has established under constitutional process and (2) the government rises to protect. These communications express raw personal desire through insistence on continuing acts that demonstrate intent to waylay and prevent others, who do not embrace this methodology or intent, from seeking relief in the Tribal Court. Council's resolve removed all political question of the Court's jurisdiction over the election. Reviving or manipulating past politics, which are off the table, in an attempt to obstruct the Tribe's right to use an institution it has created, offers no defense, rationale or mitigating circumstance when this stance unabashedly seeks to perpetuate unresolvable conflict. This begs the question: if one stands apart from the Tribe and disregards its well-being and future, what is the purpose and underlying intent?

Third, the broadcasted communications attempt to obstruct customary pathways and publically embarrass the Tribe by shinning a strobe light on known past, narrowly focused and poor decision-making. In the meantime, Defendants' conduct continues to obstruct tribal resolve, extends to misrepresentation or release of internal

matters-at-will to federal agencies, and enticing tribal members to partake in activities that offer no individual honor or merit or benefit to the tribal community; because, these actions prolong confusion, waste and ill will within the Tribe.

IV. Findings and Procedural Next Steps

Many of the arguments presented to the community in personal communications using the official mailing lists relies on justifying the Defendants' conduct challenges and illegal action by pointing to or inferring that others are guilty of other wrongs. This is Red Herring reasoning, which does not constitute a cogent argument. The reasoning is not persuasive because it attempts to shift the Defendants' burden to answer for their own actions by creation of a slippery slope that assumes there is always some another wrong to point to and that it can be used as defense. If this were true, anything could be justified. Not only is this assertion legally unsustainable, the communications broadcasted contain non-sequential fact development linked to argument that is immaterial and contradictory. It does not account for the decisions and the long the steps that Defendants make. Argumentation self-centers on political and social degradation of the Tribe through a piecemeal attempt to dismantle governmental structures and entities the Tribe has legally established that other tribal members, if not defendants, wish to maintain and correct, if necessary, but not destroy.

Under tribal law, the Court is duty-bound to respond to Plaintiffs' plea for Extraordinary Writ. Addressing this matter under the standing law, policy, procedures and traditional practices demonstrates a key attribute of sovereignty and self-determination, the right to create tribal law and subsequent obligation to live by it.

Moreover, allowing the Tribe to deliberate about these matters in turn without further committee or ancillary interference, creates pathways to understanding and knowing (a) as much as possible about the election process's legal impediments, (b) the implications of options for corrective change and (c) any foreseeable consequences. All of which will go a long way in avoiding similar debacle in the future.

To that end, the approach and resolve asserted by Defendants does not lead the Tribe to consensual or peaceful resolution. Defendants' resolve promotes more conflict because they self-select the same election process, procedures and conduct that have been under widening and active legal challenge since 2014. Their approach uses aggressive behaviors, which have transgressed into physical violence, the use of intimidation and hogging the floor with singular focus to push for right-of-way or crude confrontations. These methods prevent focused deliberation when the Tribe has been in assembly and filled the tribal community's email and snail mailboxes with innuendo, incorrect or misleading information and reasoning. These acts and methods are unconscionable behaviors.

Holding: The Court finds the evidence presented shows clear and convincing proof that the applicants will suffer irreparable harm during the pendency of the litigation. Defendants, as a group or as individuals, have used and continue to use aggressive or violent conduct that serves no redeeming or sanctioned purpose and undercuts basic and customary reserved rights of the Plaintiffs. The balance of equities favors Plaintiffs over the individuals enjoined because the Defendants' communications and actions derail forthright and legal deliberation about tribal-wide issues and fails to provide sincere, constructive contribution towards resolution of election issues.

The Court stays the general Election until the Tribe has examined and determined the election process, set a date and resolved any other outstanding election issues, including those associated with the TEC. Actions taken by Defendants are not, cannot and will not be legal until the committee sits properly under tribal law, process and approval. The Court prohibits Defendants from any further action in election business. This prohibition includes:

> Conducting any business, meeting, rally, election or any other gathering on tribal property that concerns election matters or interferes via collective or individual conduct by the enjoined persons with same;
>
> Communicating or publishing any information or entering into any contract in the name of the Narragansett Indian Tribal Election Committee; OR
>
> Using names gathered from the official tribal mailing list to broadcast into or spam tribal email or snail mailboxes as a means to circulate privately authored communications, personal opinions or for any other private or unofficial purpose.

All actions taken or attempted by Defendants are void.

Process Due: At noted on the Summons, the Court sets a hearing date for 11:00 AM on Wednesday, August 17, 2016 at the Longhouse. Should any intervening events take place before this date, where the government and Tribe are able to meet and begin addressing next steps and election matters directly, without further obstructionist behaviors or conduct, then the Court will dissolve or modify this preliminary injunction, as the interests of justice require.

If not, then at the hearing, the Court will ascertain

1. Whether defendants have any defenses to claim or wish to present any counterclaim against the plaintiffs or cross-claim against any other party or person concerning the same occurrences in the complaints *that the Court has not already set aside as irrelevant or immaterial;*

2. Whether any party wishes to present evidence to the Court concerning the facts of the challenged TEC's actions, publications and assertions;

3. Whether the interests of justice require any party to answer written interrogatories, make or answer requests for admissions, produce any documents or other evidence, or otherwise engage in pre-trial discovery considered proper by the Judge;

4. Whether some or all of the issues in dispute can be settled without a formal adjudication.

IT IS SO ORDERED.

Judge D. Davidle

July 21, 2016

Exhibit E

Narragansett Indian Tribal Court

TEC Permanent Injunction: Memorandum and Decision

Proceedings Below

For nearly a year, Defendants in this matter have, among other actions, represented themselves as constituting the Tribal Election Committee, when they are not the Tribal Election Committee. On June 30, 2016, the Tribal Court granted a *Temporary Restraining Order without Notice* that restricted the named Defendants from "any further action or communications in any form or use of any governmental resources to represent official action on behalf of the Tribal Government or Tribe." Thereafter, Plaintiffs petitioned for a preliminary injunction, using the procedure and standards required under the NARRAGANSETT INDIAN COMPREHENSIVE CODES OF JUSTICE [the NICCJ, Title IV-4-402, Preliminary Injunctions, and within the mandated time frame submitted their petition, which included two days' notice to Defendants.

Particularly confusing has been Defendants refusal to accept that they do have a right in the Tribal Court to independently resolve foundational election challenges and determine critical points of information and law.

At the hearing held on August 17, 2016, Defendant Darlene Monroe plead a right to silence under the 5th Amendment and repeatedly protested continuance of the hearing until she was allowed representation by counsel under the INDIAN CIVIL RIGHTS

ACT [ICRA]. This posturing impaired presentation of plaintiffs' case and resolution of important issues besieging the Tribe.

Notice of Service

Ms. Monroe also complained that the Court had not accepted a document submitted via registered mail. Ms. Monroe was reminded that the T*emporary Restraining Order without Notice* contained specific instruction for document submission to the Court. Ms. Monroe denied receipt of that order. Because the responding Officer was not present at the hearing, service of the order required verification before continuance. The Court adjourned the hearing. Thereafter Tribal Police records were obtained, which documented that, on July 1, 2016, Tribal Police Chief Monroe provided personal service of the TRO to Darlene Monroe, individually and as secretary for the election committee. In addition, Officer Hazard submitted a Report detailing service of the Preliminary Injunction to Bella Noka in the parking of the Four Winds on July 23, 2016.

Verification of personal service by the Tribal Police closes further dispute of notice of the Court's order and the method stated for submitting filings to the Tribal Court.

Right to Counsel in a civil matter under the Indian Civil Rights Act

The Court denies Defendants' demand for personal representation by counsel before the Court as a condition of moving this proceeding forward. ICRA does not provide a right to halt or prolong court proceedings in a civil proceeding so a party may obtain representation by legal counsel before a court. Ms. Monroe has had many

opportunities to seek advice concerning previous submissions and communications broadcasted throughout the Tribe. Ms. Monroe has never informed the Court that she has engaged counsel to represent her in this matter.

DISCUSSION

Prima facie case established for a Permanent Injunction

Plaintiffs have established success on the merits and presented a prima facie case for a Permanent Injunction. The enjoined Defendants were given a final opportunity, detailed in the Court's *Show Cause Order* delivered by personal service to Darlene Monroe, the acting TEC Secretary, to submit with 15 days any relevant documentation or additional matters showing cause why a final injunction should not be issued.

Defendants failed to submit any additional documentation or respond to the original questions posed regarding the legal authority of the 2014 Tribal Election Committee to hold an election in 2016. Consequently, Defendants have failed to demonstrate any legal basis under tribal law that provides any authority to conduct a general election in 2016 or displace the Tribe's right to determine the election process, the voting date and number of open seats in the next Tribal Council election.

There is no genuine, factual issue in dispute. The self-proclaimed election committee does not have an autonomous right or responsibility to determine how the Tribe shall seat an executive board. Despite multitudinous protestations and means, Defendants have yet to provide an argument that demonstrates or persuades otherwise. It is of record that they have employed disruptive behaviors during tribal assemblies

and gatherings, used undisclosed means to decide voter and candidate eligibility, made appointments, and held an independent election to seat a faux executive board. Then thereafter, they began a campaign to claim legitimacy by dubious citations to inapplicable tribal and federal law that were sent to federal agents. At the same time, they created derogatory and nuisance stories to besmear the Tribe in the press.

The purported 2016 election is null and void for noncompliance with and misrepresentation of tribal law and policy.

Non-compliance with Tribal Law

In a Letter to Bruce Maytubby, BIA-Eastern Regional Director dated August 17, 2016, the election committee claimed legal compliance based upon "TEC rules and regulation with 25 CFR USC 81.8, Constitution and By-Laws staggered terms, 1965 Voting Rights Act and in conjunction with the Rhode Island State Board of Canvassers."

On its face, this declaration is specious. The failure to adhere to tribal law and the continuation of an unauthorized election deepens the harm to Tribe because the committee's faulty legal reliance provides no basis for recognition of the body it seated. This body now purports to act as a legitimate council and attempts to conduct business on behalf of the Tribe. The individuals who participated in that unauthorized election and now claim executive authority over the Tribe are Domingo Talldog Monroe, Adam Jennings, Tammy Monroe, Chandra Machado, Jazmin Jones, Randy Noka, Wanda Hopkins, and Chastity Machado.

Misstatement / Misrepresentation of Tribal Law and Policy

The legal basis of the election committee's certification to the BIA demonstrates why assertions of "duly elected" by the members of election committee and faux council carry no weight under tribal law. It also explains why these individuals do not receive the acceptance and recognition from the Tribe that they seek.

First, the election committee conducted its 2016 election under the federal standard set for secretarial elections. A *Tribal Court Community Briefing and Notice* titled "No Assembly Meeting October 1, 2016" informed that the Narragansett do not conduct Secretarial elections and that the committee was in error. Tribal law governs and determines Narragansett elections. The TEC's reliance on "25 USC 81.8" does not determine anything about the NARRAGANSETT INDIAN CONSTITUTION AND BY-LAWS or its amendments. This citation to the UNITED STATES CODE refers to 25 C.F.R. Part 81, which relates to tribes that hold secretarial elections. This statute does not provide a federal foundation that supports the asserted authority of the election committee. Moreover, the TEC's reliance on the U.S CONSTITUTION is misplaced and demonstrates a lack of understanding about the political standing of Tribes, which are pre-constitutional as well as extra-constitutional and a lack of knowledge of tribal election law. Citation to the 15th Amendment[1], Bill of Rights (first and fifth amendments) are immaterial and irrelevant assertions to rationalize the decisions made or the actions undertaken

[1] This Amendment states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Narragansett tribal elections are for tribal members. Even so, out of the multitude of complaints regarding the 2014 or the 2016 election process, no petition raises complaint that race, color or previous condition of servitude factored into denying or abridging a tribal member's right to vote. Nor are these elements found within the INDIAN CIVIL RIGHTS ACT.

regarding the established and customary procedures that the TEC is expected to use when conducting an election.

In protest, Darlene Monroe has broadcasted publications that claim violations of the Narragansett Indian Constitution, due process, equal protection under the law, civil rights and liberties, defamation of character, right to vote, discrimination and infringement of tribal rights. Their actions with those of their council constitute a splinter group acting outside of tribal law and without recognition that their actions interfere with the rights and privileges of the Tribe; for example, the reserved right of the Tribe to determine how it wishes to seat its next council. The Tribe has not had the opportunity to finish the voting process to fill vacant TEC seats, determine whether or how to maintain the stagger, or receive sufficient information to understand why the process did provide the intended results. By defendants' actions, the basic right to participate in and have a voice in the election process has been denied to the tribal community. Moreover, abridgement of tribal assemblies' civil liberties has taken place repeatedly because defendants' disruptive tactics have not allowed orderly meetings or the opportunity to speak and participate without interruption, harassment or threat of harm. Defendants' conduct has curtailed the ability of the Assembly to work out problems through traditional consensus and to conduct tribal business.

Establishment of Tribal Codified Law and the Tribal Court

Jurisdiction of the Tribal Court

On June 28, 2014, the Tribal Council provided notice to the Court that it had given jurisdiction over issues arising from the 2014 Council Election to the Tribal Court and the Tribal Court accepted. Nonetheless, the Defendants have dismissed the Court's

application of tribal law and policy through innuendo, rhetoric and reliance on political maneuvers devoid of standing law.

To date, neither the 2014 TEC and its officers or the members of their 2016 executive board have provided any legal or policy arguments that support their actions. There is repeated reference and reliance on a vote of no confidence made by the tribal assembly about the Tribal Court in 2010, which coincides with the Court's criticism of the staggered terms implementation and its oversight. This political statement, by an assembly gathering, does not affect the legal standing of a duly appointed judge because a judge's removal has due process requirements, which include adherence to explicit procedures and standard of review under the NICCJ. There is no right or authority in law or policy to remove the Court or a judge summarily. That discussions took place in special or assembly meetings does not change legal requirements that the CODE provides to protect the Court and sitting judges from political displeasure that might result from a judge fulfilling the obligations of the Office.

The Law and Order Code

Bella Noka and Darlene Monroe have presented argument that citation to the 2000 promulgation of the NICCJ defeats the Court's jurisdiction. In affidavits before the federal court, they have stated that

> The constitution of the Tribe makes no provision for a tribal court and it has never been amended to create such a court. ... Any action the Council may have taken to adopt [the NICCJ] was unauthorized and ineffective. Only the assembled members of the Tribe could have enacted such a sweeping legislative initiative, one that purported for the first time to establish a tribal court, enact a comprehensive set of criminal offenses, procedures, and penalties, and establish rules for civil procedure, among other things.

> In short, the tribal court could only have been created by the tribal constitution, an amendment to that constitution, or the vote of the tribal assembly. Since none of those steps was taken here, the Narragansett tribal court was never property constituted.

Noka and Monroe's protestations undercut their own self-assertions of familiarity with the Tribe and interpretations of tribal and federal law. Citation to a legal statute requires reference to the most recent enactment. The establishment of a tribal court does not require constitutional enactment. Historically, many tribes adopted constitutions that use the unique style of constitutional writing and characteristics of IRA-styled constitutions from the 1930s.

Moreover, their statement omits the legislative history of the Code. The Court has provided the legislative history of the Code and now reiterates that a duly called Tribal Monthly Meeting on August 29, 1992, the Tribe adopted TA 92-082992, which established the UNIFIED JUSTICE CODE that creates the Tribal Court and provides its legal basis under Title 1. This resolution informs that "said Code of Justice is hereby enacted on a provisional basis, subject to further review from the pertinent committees and commissions of the Tribe, but shall have the full force and effect of law."

This resolution also formally identified the Tribe's expectation for its government and sworn duties its council should uphold.

> WHEREAS: The Tribal Assembly recognizes and acknowledges the need of protecting the Narragansett community from unlawful acts, lawlessness and harm, and
>
> WHEREAS: The Tribal Council is sworn to uphold the rights of the Tribal people and community, in the areas of general health, education, welfare, and is also sworn to keep the peace and maintain harmony within the tribe.

Since that time, it is of record that the Tribal Government revised the Code twice through expansion. The first time was December 31, 2000, made effective January 1, 2001. This document reflects a change in the title, from the Unified Justice Code to the Comprehensive Codes of Justice, as well as other content changes that do not affect the court's jurisdiction. The second time, on August 21, 2001, the Code was revised by notice of added sections as reported by Randy Noka.

Ill Will

In particular, the former 2014 TEC Chair and Secretary have perpetuated egregious harm by manifesting ill will throughout the Tribe. Both individuals have acted and encouraged others to insert themselves into tribal affairs far beyond the scope of their standing or demonstrated understanding. For example, their aforementioned affidavits into a federal civil matter that concerns a contract dispute, which the federal District Court had referred to the Tribal Court under the tribal exhaustion doctrine per National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

Falsely empowered by Noka and Monroe's actions, the faux 2016 Council has attempted to assert authority, create other legal disputes that drain tribal resources, and divert attention and focus from the issues and challenges that await the Tribe within its election process. Most recently, this Court has been informed that this group misrepresented itself to order checks from the Tribe's bank account and changed the locks to the Administration Building to gain entrance in the building under a false theory of legitimate right.

Tribal Election Issues

The election process, which has been a recurring issue before the Court since 2010, has tested understandings and the application of tribal election law and policy. These include–though not limited to–matters associated with the implementation of a constitutional process and its policy dictates, conflicting interpretations of election rules and procedures, separation of powers issues, and conflict management styles and skills. However, recent challenges have brought tradition protocols and customary practices to the forefront.

Decisive resolution to conduct the next general election for tribal council seats remains a political question. However, the steps to begin that process are set as a matter of law, which still requires a long awaited and fundamental tribal discussion ending with a tribal-wide vote if the process is changed.

In sum, the 2014 Election inherited and created problems. First, it inherited a faulty application of a major, constitution-based process with mandated procedures for amendment. Knowledge about this aspect of the election process initially received limited attention from the Tribe. Next, interpretations of the Tribe's election grievance regulations, and the process used to announce and transition the 2014 candidates-elect into council seats, received challenge because standing election protocols and customary practices were not given recognition. These grievances created disputes, which rose through adjudicatory and assembly challenges about the validity of the 2014 Election.

Earnest conservations began within the tribal community about the election process and its procedures. For a while, some tribal members regularly met to discuss rules of conduct for the assembly and government officials. While in assembly, the Tribe accepted a motion to review the election process, which is currently set as staggered terms.

Throughout this process, issues brought before the Tribal Court received review and determinations. *See* Narragansett Indian Tribal Court, *2014 General Election Notice* (11/06/2014). *See also, Analysis and Decision for Governmental Resolve of the 2014 Election* (01/29/2016). In addition, the Tribal Court specifically addressed the TEC's standing obligations under election rules and procedures as well as the special roles of TEC officers. *Temporary Restraining Order without Notice* (6/30/2016) (requesting formal submission of means to prevent further interference with the reserved right of the Tribe to determine how it shall seat Council in the next general election).

The Tribe's issues with the TEC concern the various methods used to conduct election business and itself. Spikes of confrontations regarding committee and personal conduct have included acts of violence and repeated demonstrations of ill-tempered interactions that have disrupted tribal forums and prevented civil dialogue. These hostile tactics have served to commandeer tribal forums in an attempt to impose decisions about issues requiring tribal-wide deliberation. As a result, the Tribe has been unable to dialogue or undertake deliberative analysis about the authentic, designated seating method and its objectives or the implementation problem(s) that the policy behind the Staggered Terms was supposed to resolve.

Tribal law, policy, protocols and customary practices are interconnected and tribal elections depend upon each one of these elements. When one element is changed or not fully implemented it can and does affect others. Over time, gaps created and left uncorrected or revisions not reviewed for consistency have created a hodge-podge that spoils a unified whole.

Politics without policy has resulted in trampling the 2014 and 2016 Plaintiffs' and general tribal community members' right to participate in a sought and mandated, tribal-wide decision-making process. This exclusion has been an ongoing process travelling deeper into the community with each election since 2010. Tribal values

embed within this debacle because discussions about law and policy inevitably put social norms and values on the table. Norms and values affect implementation of law and policy, which generate processes and procedures that become the pathways to achieve policy goals and the steps to apply and enforce laws. *See, 2014 Election Decision Summary: the 2016 Focus* (2/22/2016) (discussing the responsibility of the Interim Council and the Tribe to move election deliberations forward and raising consideration of values, "Values direct choices and choices have consequence").

Conclusion

The Defendants' approach hobbles the Tribe because they seek a measure that is not theirs to take for themselves. A reading of the defendants' arguments presented in broadcasted communications shows a manipulation of the Tribe's political infrastructure without positive regard for its structure and legal foundation, or the reality of maintaining a recognizable site of government. Defendants have attacked the Tribe, without proposing a cogent legal argument or providing a consensual alternative that is free of the impediments about which they complain and further increase.

In tribal assemblies, defendants began by chanting, hollering, monopolizing the floor, and interrupting others when speaking. Thereafter, they sought to legitimize their election to fill council seats, which took place without full governmental sanction or the Tribe's consent. Their election took place in a local bar located off the reservation. It used election rules and procedures that the Tribe had not accepted or validated for use. It created records of a purported legitimate, tribal-wide election with a voter turnout of less than 60 people. The faction led by Defendants has yet to legitimize the power they are have attempted to assert (1) over the standing laws of the

Tribe and (2) the decision-making authority that *the Tribe reserves* to determine how to seat its governing body.

During the negotiations to seat the interim council, members of the 2014 Council-elect rejected opportunities offered to find common ground and by their own actions removed themselves from participating in that body. They chose, instead, to splinter themselves off and then ignite a sensationalist campaign, through broadcasted publications, social media and the press, to demand compliance with their will.

HOLDING

Without a legal foundation, all actions taken by the 2014 TEC and its council members are null and void. The record provides evidence that their actions fall outside of and without merit under tribal law and policy. This evidence now includes their attempt to impeachment the Chief Sachem at an unauthorized gathering in the parking lot of the Four Winds, to embroil the Tribe in federal court action without their purported legal standing, to access tribal funds by misrepresentation to order tribal checks and their trespass on tribal property. The professed 2016 TEC and its elected body have no legal or vested right to autonomously speak for or act on behalf of the Tribe.

Defendants are hereby permanently enjoined from any further action or communications in any form, or use of any governmental resources, to represent themselves, singly or jointly, directly or indirectly, as conducting official or lawful action on behalf of the Narragansett Tribal Government or the Narragansett Tribe.

THE COURT ORDERS that the enjoined persons must not interfere with the protected parties, their right to peacefully assemble or to conduct and maintain the daily operations of the Tribe, by:

1. Conducting any business, meeting, rally, election or any other gathering on tribal property that concerns election matters or interferes with the conduct of daily tribal business through collective or individual conduct by the enjoined persons with same;

2. Communicating or publishing any information or entering into any contract in the name of the Narragansett Tribal Election Committee or the Tribe; OR

3. Using names gathered from the official tribal mailing list to broadcast into or spam tribal email or snail mailboxes as a means to circulate privately authored communications, personal opinions or for any other private or unofficial purpose.

4. Defendants are hereby permanently enjoined from any further action or communications in any form, or use of any governmental resources, to represent themselves, singly or jointly, directly or indirectly, as conducting official or lawful action on behalf of the Narragansett Tribal Government or the Narragansett Tribe.

IT IS SO ORDERED.

/s/Judge D. Dowdell

December 22, 2016

Exhibit F

NARRAGANSETT INDIAN TRIBE
TRIBAL COURT

NARRAGANSETT INDIAN TRIBE, *Plaintiff*,	:	
v.	:	CA No. 2017-02
TRIBAL COUNCIL OF THE NARRAGANSETT INDIAN TRIBE, as identified in the Motion to Intervene filed before the Energy Facility Siting Board by Attorney Shannah Kurland *Defendant*.	:	

ORDER

This matter came before the Narragansett Indian Tribal Court on October 24, 2017 through Plaintiff's Petition for a Temporary Restraining Order. After consideration of Plaintiff's Petition, Memorandum of Law, and accompanying Exhibits, the Court determines that Plaintiff has set forth clear and convincing evidence that it will suffer immediate and irreparable injury if an injunction is not granted and that the equities—at this juncture—favor Plaintiff's interests over Defendant's.

Jurisdiction

Title I, Chapter 1 of the NARRAGANSETT INDIAN COMPREHENSIVE CODES OF JUSTICE (the NICCJ) establishes the Court at §101, its civil jurisdiction at §107 and the position of Chief Judge at §102.

Standard of Review for Extraordinary Writs

The NICCJ, at Title IV-4-401 & 402, provides the standard for issuing a TRO without Notice under Extraordinary Writs. Section 401(a) contains three prongs for Court consideration or action.

(a) No temporary restraining order or other injunction without notice shall be granted where the Tribe or a tribal official in his official capacity is a defendant.

(b) [N]o temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by oral testimony, affidavit, or the verified complaint that immediate and irreparable injury will result to the applicant before notice can be served and a hearing had thereon.

(c) Every temporary restraining order granted without notice shall include the date and hour of issuance and shall expire within such time after entry, not to exceed ten (10) days, as provided in the order.

Discussion

Similar complaints about individuals claiming governmental authority been have been formally adjudicated before this Court, which found no evidence that supports any authorized and official Tribal Election taking place since last confronted with this issue in December 2016. Furthermore, Plaintiff presents evidence that the Defendant is, and has been, publicly holding itself out as the "Tribal Council of the Narragansett Indian Tribe" by filing a Motion to Intervene before the Rhode Island Energy Facility Siting Board ("EFSB"), yet the actual sitting Tribal Council never authorized such a filing.

Contrary to the Defendant's elected "Tribal Council" assertion, the presence of previous legal proceedings is relevant as they directly relate to the issue of the unnamed "Tribal Council" members' legal standing to appear before the EFSB in official tribal, intervenor status. Attempts to claim Tribal authority where it does not exist, not only creates confusion amongst Tribal members and the public, these claims seriously disrupt the Tribe's internal and business relations. The Tribal Court, in addition to previously administering tribal law and policy on previous claims, has answered jurisdictional objections, corrected legal misrepresentations or misinterpretations of tribal law and detailed correction of procedural noncompliance. Furthermore, Federal and State proceedings have recognized this Court's jurisdiction over such tribal internal matters. Consequently, neither Defendant nor their attorney may summarily ignore previous legal proceedings to advance appearance before a local administrative body.

Moreover, the Court has also addressed how advancing misleading information to take ad hoc actions in the name or authority of Tribe handicaps the Tribe. It has forewarned that internal or public actions based on legal misrepresentations, which unabashedly ignores adjudicated determinations of tribal law and policy, customary practices and the reserved right(s) of Tribe in an effort to assert political authority, constitutes harm to the Tribe. Consequently, if Defendants were able to proceed with their activities—claiming to be the duly authorized representative body of the Narragansett Indian Tribe—Plaintiff will suffer immediate and irreparable harm because Tribal interests favor examining and upholding tribal law when such claim(s) arise, which supports issuance of a TRO without Notice at this time.

Accordingly, it is hereby:

ORDERED, ADJUDGED AND DECREED that:

1. Defendant, and its named counsel Shannah Kurland, Esq., are temporarily and immediately enjoined from (a) identifying itself and therefore themselves as the "Tribal Council of the Narragansett Indian Tribe" and (b) pursuing a Motion to Intervene before the Rhode Island Energy Facility Siting Board and

2. The Rhode Island Energy Facility Siting Board is hereby advised that the so-called "Tribal Council of the Narragansett Indian Tribe" cited in the filed EFSB Motion is not the lawful representative of the Narragansett Indian Tribe and was not elected by a duly authorized Tribal Election.

Finally, since the Court grants this TRO without Notice, there are additional steps to ensure due process for all affected parties. Every TRO granted without notice must include the date and hour of issuance and expires within such time after entry, not to exceed ten (10) days[1], as provided in the Order.

This TRO begins at 11:00 AM on Wednesday, October 25, 2017 and automatically dissolves on Monday, November 6, 2017 at 11:00 AM unless Plaintiff seeks further relief.

[1] The Tribal Court previously adopted F.R.C.P. Rule 6 for computing and extending Time when dealing with outside attorneys to provide a methodology for computing time with standard cross-jurisdictional application. Under Rule 6(1), this Court excludes the day of the event that triggers the period. It counts every day, including intermediate weekend days and legal holidays (including tribal holidays) and counts the last day of the period; however, if the last day is a weekend day or defined legal holiday, the period continues to run until the next day that is not a Saturday, Sunday, or legal holiday.

If so, then Plaintiff must petition for a preliminary injunction, using the procedure and standards required under the NICCJ, Title IV-4-402, Preliminary Injunctions, within 10 business days, as defined, which shall include two days' notice to Defendant's attorney. The statue directs:

A preliminary injunction restrains activities of a defendant until the case can be determined on the merits. No preliminary injunction shall be issued without notice to the adverse party and an opportunity to be heard. No preliminary injunction shall be issued absent clear and convincing proof by specific evidence that the applicant will suffer irreparable harm during the pendency of the litigation unless a preliminary injunction is issued, that the balance of equities favors the applicant over the party sought to the enjoined. The Court may dissolve or modify a preliminary injunction at any time, as the interests of justice require.

Given past the Determinations and directives, this Court provides notice that it will not entertain any Argument by either Party that fails to include a valid legal basis under tribal law. Document submissions originating from the Parties' attorneys may be submitted electronically to Tribal Court at NarragansettTribalCourt@nitribe.org, which will be certified by received receipt.

Entered as an Order of this Court on October 25, 2017,

Judge D. Dardeau