MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS
TRIBAL COURT

ALYSSA BAILEY, *et al.*,

Plaintiffs,

Case No. Civ-2011-027

Michael Petoskey, Chief Judge

v.

MATCH-E-BE-NASH-SHE-WISH BAND
OF POTTWATOMI INDIANS, *et al.*,

Defendants.
_____/

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DECISION ON DEFENDANTS' MOTION TO DISMISS

This matter arises upon a motion filed by Defendants to dismiss a civil complaint filed by Plaintiffs based upon sovereign immunity of both the Tribe and its officials. Plaintiffs complain that they have been denied equal protection of the law in violation of both federal and tribal law. They allege that they were denied an opportunity afforded to some others to apply for tribal

membership. Plaintiffs' Complaint avers that the tribal officials were acting within the scope of their official duties. Both parties have filed written arguments in this matter and this Court conducted oral argument on the motion on February 13, 2012. Thus, the Court, being fully informed and apprised, renders its decision on the Defendants' motion as follows.

ISSUE PRESENTED:

Whether this Court has jurisdiction (the authority) to adjudicate an equal protection of the law complaint against the Tribe and two of its officials, who were acting in their official capacities, by non-Tribal member Plaintiffs?

DECISION DISCUSSION AND REASONING:

A. This Court begins its analysis and discussion with the *Indian Civil Rights Act* (ICRA). See 25 USC 1301 *et. seq.* It is a federal statute that was passed in 1968 during the birth of a race civil rights consciousness in this country. It was enacted because the Bill of Rights contained in the Constitution of the United States does not apply to Indian tribes and nowhere else in the law were there protections for people against an overly-intrusive tribal government. See *Talton v. Mayes*, 163 U.S. 376 (1896).

The seminal case in the federal common law regarding the ICRA and its guarantees is *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The opinion in that case stands for the general proposition that the only federal cause of action based upon the ICRA is conditioned upon a writ of habeas corpus. The *Martinez* court found that the United States Congress did not broadly waive the sovereign immunity of Indian tribes when it enacted the ICRA. That case involved the tribally-sensitive issue of tribal membership. The federal court opined that issues regarding tribal membership should be decided in the tribal courts, not federal ones. That court held that suit in federal courts by Martinez was barred by tribal sovereign immunity. The dicta

in the opinion that membership cases should be heard in tribal forums is a challenge to tribes to provide such forums. It is merely a challenge because the *Martinez* opinion does not hold that tribal immunity is waived for such suits.

B. If tribal immunity from suit has not been waived by the United States Congress, the question turns to whether the Tribe's immunity from suit has been waived by the Tribe itself **because the black letter law is that Indian tribes, its officers and subordinate entities have sovereign immunity unless it has expressly and unequivocally been waived by Congress or the tribe itself.** See *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 at 754-756 (1998) and *Santa Clara Pueblo*, at 58-59.

1. Tribal Constitution. Article III of the Tribal Constitution provides a Bill of Rights for tribal members. The Constitution is the organic governing document of the Tribe. It is a delegation of power from people to government and the consent of the people to be governed. It is the foundation for government and framework for all that follows. That which does indeed follow is secondary to that foundation and framework.

This Article of guarantees provides that *"[t]he judicial process of the MBPI shall be open to every member of the Tribe."* See *The Constitution of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan*, Article III. This waiver of immunity by the people is limited. It is limited to tribal members. Plaintiffs are not tribal members. **Thus, the limited waiver provided by the people themselves does not apply to this suit filed by Plaintiffs.**

This Court finds no other waiver of tribal sovereign immunity in the Tribal Constitution. There is not even a separate article on sovereign immunity like many Michigan Indian tribal constitutions have. The Tribal Constitution is completely devoid of any waiver of sovereign immunity provisions.

2. Tribal Legislation.

a. Judicial Ordinance. In addition to the limited waiver of sovereign immunity and grant of jurisdiction to the courts of the Tribe by the people of the Tribe to hear suits by Tribal members regarding the Bill of Rights contained in the Tribal Constitution, the *Judicial Ordinance* provides the primary contours of judicial jurisdiction. Such is the grant of authority by the Tribal Council. It expressly provides that *"[n]othing ... in this Judicial Ordinance shall be construed as a waiver of the sovereign immunity of the Tribe or its officers..."*. See *Judicial Ordinance*, Chapter II, Section 1, (e) (2). It is unmistakably clear that there is no waiver of tribal immunity by the *Judicial Ordinance* itself. However, the *Ordinance* provides a mechanism for waivers of immunity by formal resolutions when such waivers are deemed wise by the Tribe.

b. Tribal Enrollment Ordinance. The *Tribal Enrollment Ordinance* does not provide any cause of action in the courts of the Tribe. There is no waiver of the immunity of the Tribe anywhere in the plain text of the *Ordinance*.

WHEREFORE, BASED UPON ALL OF THE FOREGOING THE DEFENDANTS' MOTION TO DISMISS IS GRANTED.

FURTHERMORE, IT IS ORDERED THAT PLAINTIFFS' COMPLAINT AGAINST ALL DEFENDANTS IS HEREBY DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

03/17/12
Date

Michael Petoskey
Chief Judge